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REPORTS OF CASES

DECIDED BETWEEN

JUNE 24, 1967 and MARCH 29, 1968

IN THE

Supreme Court of Nebraska

JANUARY TERM 1967, SEPTEMBER TERM 1967,
and
JANUARY TERM 1968

VOLUME CLXXXII

WILLIAM E. PETERS
OFFICIAL REPORTER

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By William E. Peters, Reporter of the Supreme Court
For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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HARRY A. SPENCER, Associate Justice
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ROBERT L. SMITH, Associate Justice
HALE MCCOWN, Associate Justice
JOHN E. NEWTON, Associate Justice

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1 Died February 18, 1968
2 Appointed March 4, 1968

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Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Pawnee, Nemaha, and Richardson.	William F. Colwell	Pawnee City
Second	Sarpy, Cass, and Otoe.	Victor H. Schmidt Walter H. Smith	Papillion Plattsmouth
Third	Lancaster.	Herbert A. Ronin Elmer M. Scheele Bartlett E. Boyles William C. Hastings	Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas.	Patrick W. Lynch Lawrence C. Krell James P. O'Brien Donald Brodkey John C. Burke Paul J. Garrotto John E. Murphy Rudolph Tesar Donald Hamilton	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders.	H. Emerson Kokjer John D. Zeilinger	Wahoo York
Sixth	Boone, Platte, Colfax, Dodge, Washington, Nance, and Merrick.	Robert L. Flory C. Thomas White	Fremont Columbus
Seventh	Fillmore, Saline, Thayer, and Nuckolls.	Joseph Ach	Friend
Eighth	Thurston, Dakota, Dixon, and Cedar.	Joseph E. Marsh	South Sioux City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, Wayne, and Burt.	Fay H. Pollock George W. Dittrick	Norfolk Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster.	Edmund Nuss Norris Chadderdon	Hastings Holdrege
Eleventh	Hall.	Donald H. Weaver	Grand Island
Twelfth	Sherman and Buffalo.	S. S. Sidner	Kearney
Thirteenth	McPherson, Logan, Lincoln, and Dawson.	Hugh Stuart	North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy.	Victor Westermark	McCook
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Wheeler.	William C. Smith, Jr.	Ainsworth
Sixteenth	Cherry, Sheridan, Dawes, Box Butte, and Sioux.	Robert R. Moran	Alliance
Seventeenth	Scotts Bluff.	Ted R. Feidler	Scottsbluff
Eighteenth	Jefferson and Gage.	Ernest A. Hubka	Beatrice
Nineteenth	Banner, Kimball, Morrill, Cheyenne, Garden, Deuel, Arthur, and Keith.	John H. Kuns	Kimball
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TABLE OF CASES REPORTED

Abel v. Southwest Cas. Ins. Co. ---- 605
Aetna Cas. & Sur. Co.; Paramount Paper Products Co., Inc. v. 828
Agricultural Extension Service, State ex rel., v. Miller ---- 285
Allied Mut. Ins. Co.; Stephens v. ---- 562
Alvarez; State v. ---- 358
American Oil Co. v. City of Omaha ---- 532
Anderson v. Tiemann ---- 393
Applegate v. Applegate ---- 342
Application of Midwest L. C. Co., Inc., In re, ---- 41
Application of Miller, In re, ---- 155

Banking, Department of, v. Keeley ---- 645
Barnes; R & S Corp. v. ---- 431
Baxter & Sons v. Sofio ---- 599
Beckman v. City of Grand Island ---- 840
Benes v. Matulka ---- 744
Berigan Bros. v. Growers Cattle Credit Corp. ---- 656
Blunt; State v. ---- 477
Board of County Commissioners; State ex rel. Little v. ---- 419
Board of Equalization; Equity Union Grain Co. v. ---- 182
Board of Equalization; First Fed. S. & L. Assn. v. ---- 25
Board of Equalization; Union L. & S. Assn. v. ---- 25
Bolles v. Bolles ---- 798
Bosiljevac v. Ready Mixed Concrete Co. ---- 199
Brainard; Delay v. ---- 509
Brown, County of, v. State Board of Equalization & Assessment 621
Burmood; County of Hall v. ---- 676
Burrious v. North Platte Packing Co. ---- 122
Butler; Jordan v. ---- 626

Campbell v. City of Lincoln ---- 459
Campbell v. Lutz ---- 27
Carr; State v. ---- 308
Carreau; State v. ---- 295
Cavitt, In re Sterilization of, ---- 712
Cavitt; State v. ---- 712
Central Constr. Co. v. Keefer ---- 83
Central Nebraska Council on Alcoholism; Beckman v. ---- 840
Cherry County; State ex rel. Little v. ---- 419
Cheyenne, County of; Landmesser v. ---- 345

City Nat. Bank of Crete; Rankin v. ---- 224
City of Grand Island; Beckman v. ---- 840
City of Imperial; Lock v. ---- 526
City of Lincoln; Campbell v. ---- 459
City of Lincoln; Kraft & Sons, Inc. v. ---- 187
City of Omaha; American Oil Co. v. ---- 532
City of Ralston; Sanitary & Improvement Dist. No. 75 v. ---- 63
City of Syracuse v. Farmers Elevator, Inc. ---- 783
Clatterbaugh v. Clatterbaugh ---- 160
Cleven; Pierson v. ---- 816
Commercial Sav. & Loan Assn. v. Holly Development, Inc. ---- 335
Conley; Wonderling v. ---- 446
Continental Baking Co.; Vincent v. ---- 206
Cook; State v. ---- 684
Cooper; State v. ---- 765
County of Cherry; State ex rel. Little v. ---- 419
County of Cheyenne; Landmesser v. ---- 345
County of Lancaster; Equity Union Grain Co. v. ---- 182
County of Lancaster; First Fed. S. & L. Assn. v. ---- 25
County of Lancaster; Union L. & S. Assn. v. ---- 25
County of Scotts Bluff; Summerville v. ---- 311
County of Seward; Rolfsmeyer v. ---- 348
County of Brown v. State Board of Equalization & Assessment 621
County of Hall v. Burmood ---- 676
County of Hall v. Engleman ---- 676
County of Hall v. Fishburn ---- 676
County of Loup v. State Board of Equalization & Assessment - 621
County of Otoe v. State Board of Equalization & Assessment - 621
County of Richardson v. State Board of Equalization & Assessment ---- 621
County of Saunders v. Moore ---- 377
Covault v. Covault ---- 119
Curtis Gas, Inc.; Stadler v. ---- 6

Delay v. Brainard ---- 509
Department of Banking v. Keeley ---- 645
Department of Public Welfare; Miller v. ---- 155
DePriest; Flanagin v. ---- 776
Deremer v. State ---- 586
Dobberstein; Williams v. ---- 862
Dowler; State v. ---- 598
Downey, In re Estate of, ---- 176
Duncan; State v. ---- 598

Eagle; State v. ---- 535
Eden v. Eden ---- 768
Edmonds; State v. ---- 140

Engleman; County of Hall v. ---- 676
Equity Union Grain Co. v. Board of Equalization ---- 182
Escamilla; State v. ---- 466
Estate of Downey, In re, ---- 176
Estate of Sass, In re, ---- 277

Farmers Elevator, Inc.; City of Syracuse v. ---- 783
Farmers Mut. Ins. Co. of Nebraska; Wymore v. ---- 763
Feenan, In re Guardianship of, ---- 524
Feenan; United States Nat. Bank v. ---- 524
First Fed. S. & L. Assn. v. Board of Equalization ---- 25
First Nat. Bank & Trust Co. v. Ley ---- 164
First Westside Bank; Hansen v. ---- 664
Fishburn; County of Hall v. ---- 676
Fitzgerald; State v. ---- 823
Flanagin v. DePriest ---- 776
Fleming; State v. ---- 249
Fletcher v. Fletcher ---- 549
Flynn; Kuta v. ---- 479
Ford; Paulson v. ---- 86
Forney; State v. ---- 802
Fort Kearney Hotel Co., Inc.; Snyder v. ---- 859
Fowler; State v. ---- 333
Frisch v. Svoboda ---- 825
Frye v. Haas ---- 73
Fugate; State v. ---- 325

Gau; State v. ---- 114
Gibb; Pensyl v. ---- 573
Godfrey; State v. ---- 451
Goldman; State ex rel. Sorensen v. ---- 126
Goodier; Johnson v. ---- 172
Grand Island, City of; Beckman v. ---- 840
Green; State v. ---- 615
Growers Cattle Credit Corp.; Berigan Bros. v. ---- 656
Guardianship of Feenan, In re, ---- 524

Haas; Frye v. ---- 73
Hackney v. Klintworth ---- 219
Hall, County of, v. Burmood ---- 676
Hall, County of, v. Engleman ---- 676
Hall, County of, v. Fishburn ---- 676
Halligan; Peters v. ---- 51
Hancock Mut. Life Ins. Co.; Neeman v. ---- 144
Hansen v. First Westside Bank ---- 664
Harrington v. Missouri Valley Constr. Co. ---- 434
Heiman v. Samuel Gerber Adv. Agcy., Inc. ---- 261

Heiser v. Heiser ---- 216
Highway Equipment & Supply Co. v. Jones ---- 234
Hohensee v. Hohensee ---- 388
Holiday; State v. ---- 229, 410
Holly Development, Inc.; Commercial Sav. & Loan Assn. v. ---- 335
Horn's Crane Service v. Prior ---- 94
Houp; State v. ---- 298
Howard County; Lemburg v. ---- 747
Howard; State v. ---- 411
Huffman v. Sigler ---- 290
Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---- 791

Imperial, City of; Lock v. ---- 526
Implement Dealers Mut. Ins. Co.; Rolfsmeier v. ---- 150
In re Application of Midwest L. C. Co., Inc. ---- 41
In re Application of Miller ---- 155
In re Estate of Downey ---- 176
In re Estate of Sass ---- 277
In re Guardianship of Feenan ---- 524
In re Interests of Owen ---- 132
In re Sanitary & Improvement Dist. No. 75 ---- 63
In re Sterilization of Cavitt ---- 712
Interests of Owen, In re, ---- 132

J. R. Watkins Co. v. Wiley ---- 242
Jackson; State v. ---- 472
Jameson; Plischke v. ---- 153
Janing; State ex rel. Norton v. ---- 539
John Hancock Mut. Life Ins. Co.; Neeman v. ---- 144
Johnson v. Goodier ---- 172
Johnson v. Prudential Ins. Co. ---- 673
Jones; Highway Equipment & Supply Co. v. ---- 234
Jordan v. Butler ---- 626
Josten-Wilbert Vault Co.; Stevens v. ---- 322

Kasparek v. May ---- 582
Keefer; Central Constr. Co. v. ---- 83
Keeley; Department of Banking v. ---- 645
Klasek; Reid v. ---- 485
Klein v. Klein ---- 387
Klintworth; Hackney v. ---- 219
Korinek; Wymore Arbor State, Inc. v. ---- 557
Kosinski; State v. ---- 390
Kozloski v. Modern Litho, Inc. ---- 270
Kraft & Sons, Inc. v. City of Lincoln ---- 187
Kuta v. Flynn ---- 479

Lancaster, County of; Equity Union Grain Co. v. ---------- 182
Lancaster, County of; First Fed. S. & L. Assn. v. ---------- 25
Lancaster, County of; Union L. & S. Assn. v. ---------- 25
Landmesser v. County of Cheyenne ---------- 345
Lemburg v. Nielsen ---------- 747
Ley; First Nat. Bank & Trust Co. v. ---------- 164
Lincoln, City of; Campbell v. ---------- 459
Lincoln, City of; Kraft & Sons, Inc. v. ---------- 187
Little, State ex rel., v. Board of County Commissioners ------- 419
Livingston; State v. ---------- 257
Lock v. City of Imperial ---------- 526
Losieau; State v. ---------- 367
Loup, County of, v. State Board of Equalization & Assessment - 621
Lukes; Makovicka v. ---------- 168
Lunzmann v. Yost ---------- 101
Lutkehuse; Mullikin v. ---------- 132
Lutz; Campbell v. ---------- 27

McElhose v. Universal Surety Co. ---------- 847
McKinley v. McKinley ---------- 819
McNeill v. McNeill ---------- 759

Makovicka v. Lukes ---------- 168
Matulka; Benes v. ---------- 744
May; Kasparek v. ---------- 582
May Plumbing Co. v. Shaver ---------- 251
Metropolitan Protection Service, Inc. v. Tanner ---------- 507
Mid States Engineering v. Rohde ---------- 590
Midwest Electric Membership Corp; Schimonitz v. ---------- 810
Midwest L. C. Co., Inc., In re Application of, ---------- 41
Midwest L. C. Co., Inc. v. Tri-State L. C. Co. ---------- 41
Miller, In re Application of, ---------- 155
Miller; State ex rel. Agricultural Extension Service v. ------- 285
Miller v. Department of Public Welfare ---------- 155
Miller v. Southwest Cas. Ins. Co. ---------- 605
Missouri Valley Constr. Co.; Harrington v. ---------- 434
Modern Litho, Inc.; Kozloski v. ---------- 270
Montgomery; State v. ---------- 737
Moore; County of Saunders v. ---------- 377
Morgan; State v. ---------- 639
Morrissey v. Morrissey ---------- 268
Moss; State v. ---------- 502
Muck; Wellnitz v. ---------- 22
Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc. ---- 261
Mullikin v. Lutkehuse ---------- 132
Mutual of Omaha; Vackiner v. ---------- 611
Myers; State v. ---------- 117

National Life & Acc. Ins. Co.; Robbins v. ---- 749
Neeman v. John Hancock Mut. Life Ins. Co. ---- 144
Nelson; State v. ---- 31
Nickel Grain Co., Inc.; State v. ---- 191
Nielsen; Lemburg v. ---- 747
North Platte Packing Co.; Burrious v. ---- 122
Norton, State ex rel., v. Janing ---- 539

Omaha, City of; American Oil Co. v. ---- 532
Otoe, County of, v. State Board of Equalization & Assessment - 621
Owen, In re Interests of, ---- 132
Oziah; State v. ---- 577

Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. -- 828
Paulson v. Ford ---- 86
Pensyl v. Gibb ---- 573
Perez; State v. ---- 680
Peter Pan Bakers, Inc.; Vincent v. ---- 206
Peters v. Halligan ---- 51
Pierce; State Farm Mut. Auto. Ins. Co. v. ---- 805
Pierson v. Cleven ---- 816
Pilgrim; State v. ---- 594
Plischke v. Jameson ---- 153
Prior; Horn's Crane Service v. ---- 94
Prudential Ins. Co.; Johnson v. ---- 673
Putnam; State v. ---- 185

R & S Corp. v. Barnes ---- 431
Radil v. State ---- 291
Ralston, City of; Sanitary & Improvement Dist. No. 75 v. -- 63
Rankin v. City Nat. Bank of Crete ---- 224
Ransom; State v. ---- 243
Raue; State v. ---- 735
Ready Mixed Concrete Co.; Bosiljevac v. ---- 199
Reed v. Reed ---- 136
Reid v. Klasek ---- 485
Reid v. Slepicka ---- 485
Rhodes v. State Board of Equalization & Assessment ---- 621
Richardson, County of, v. State Board of Equalization & Assessment ---- 621
Riley; State v. ---- 300
Roan Eagle; State v. ---- 535
Robbins v. National Life & Acc. Ins. Co. ---- 749
Rohde; Mid States Engineering v. ---- 590
Rolfsmeier v. Implement Dealers Mut. Ins. Co. ---- 150
Rolfsmeyer v. Seward County ---- 348
Rundall v. Whiteside ---- 176

Samuel Gerber Adv. Agcy., Inc.; Muller Enterprises, Inc. v. ... 261
Sanitary & Improvement Dist. No. 75, In re, ... 63
Sanitary & Improvement Dist. No. 75 v. City of Ralston ... 63
Sanny v. Sanny ... 1
Sass, In re Estate of, ... 277
Sass v. Sass ... 277
Saunders, County of, v. Moore ... 377
Schimonitz v. Midwest Electric Membership Corp. ... 810
Scotts Bluff County; Summerville v. ... 311
Sears; State v. ... 384
Seward County; Rolfsmeyer v. ... 348
Shaver; May Plumbing Co. v. ... 251
Sigler; Huffman v. ... 290
Simants; State v. ... 491
Slepicka; Reid v. ... 485
Smiley; State v. ... 211
Smith; Springer v. ... 107
Smith; State v. ... 458
Snyder v. Fort Kearney Hotel Co., Inc. ... 859
Sofio; Baxter & Sons v. ... 599
Sorensen, State ex rel., v. Goldman ... 126
Southwest Cas. Ins. Co.; Abel v. ... 605
Southwest Cas. Ins. Co.; Miller v. ... 605
Springer v. Smith ... 107
Stadler v. Curtis Gas, Inc. ... 6
State Board of Equalization & Assessment; County of Brown v. 621
State Board of Equalization & Assessment; County of Loup v. 621
State Board of Equalization & Assessment; County of Otoe v. ... 621
State Board of Equalization & Assessment; County of Richardson v. ... 621
State Board of Equalization & Assessment; Rhodes v. ... 621
State; Deremer v. ... 586
State ex rel. Agricultural Extension Service v. Miller ... 285
State ex rel. Little v. Board of County Commissioners ... 419
State ex rel. Norton v. Janing ... 539
State ex rel. Sorensen v. Goldman ... 126
State Farm Mut. Auto. Ins. Co.; Truck Ins. Exchange v. ... 330
State Farm Mut. Auto. Ins. Co. v. Pierce ... 805
State; Radil v. ... 291
State Tax Cases ... 621
State v. Alvarez ... 358
State v. Blunt ... 477
State v. Carr ... 308
State v. Carreau ... 295
State v. Cavitt ... 712
State v. Cook ... 684
State v. Cooper ... 765

State v. Duncan ---- 598
State v. Edmonds ---- 140
State v. Escamilla ---- 466
State v. Fitzgerald ---- 823
State v. Fleming ---- 249
State v. Forney ---- 802
State v. Fowler ---- 333
State v. Fugate ---- 325
State v. Gau ---- 114
State v. Godfrey ---- 451
State v. Green ---- 615
State v. Holiday ---- 229, 410
State v. Houp ---- 298
State v. Howard ---- 411
State v. Jackson ---- 472
State v. Kosinski ---- 390
State v. Livingston ---- 257
State v. Losieau ---- 367
State v. Montgomery ---- 737
State v. Morgan ---- 639
State v. Moss ---- 502
State v. Myers ---- 117
State v. Nelson ---- 31
State v. Nickel Grain Co., Inc. ---- 191
State v. Oziah ---- 577
State v. Perez ---- 680
State v. Pilgrim ---- 594
State v. Putnam ---- 185
State v. Ransom ---- 243
State v. Raue ---- 735
State v. Riley ---- 300
State v. Roan Eagle ---- 535
State v. Sears ---- 384
State v. Simants ---- 491
State v. Smiley ---- 211
State v. Smith ---- 458
State v. Tunender ---- 701
State v. Walle ---- 642
State v. Ward ---- 370
State v. Watson ---- 692
State v. Whited ---- 282
State v. Williams, Donald M., ---- 444
State v. Williams, Howard LeRoy, ---- 372
State v. Woods ---- 668
Stauffer v. Wilson ---- 129
Stephens v. Allied Mut. Ins. Co. ---- 562
Sterilization of Cavitt, In re, ---- 712

Stevens v. Josten-Wilbert Vault Co. ---------- 322
Summerville v. Scotts Bluff County ---------- 311
Svoboda; Frisch v. ---------- 825
Syracuse, City of, v. Farmers Elevator, Inc. ---------- 783

Tanner; Metropolitan Protection Service, Inc. v. ---------- 507
Tiemann; Anderson v. ---------- 393
Tri-State G. & T. Assn.; Hughes Farms, Inc. v. ---------- 791
Tri-State L. C. Co.; Midwest L. C. Co., Inc. v. ---------- 41
Truck Ins. Exchange v. State Farm Mut. Auto. Ins. Co. ---------- 330
Tunender; State v. ---------- 701

Union L. & S. Assn. v. Board of Equalization ---------- 25
United State Nat. Bank v. Feenan ---------- 524
Universal Surety Co.; McElhose v. ---------- 847

Vackiner v. Mutual of Omaha ---------- 611
Van Eperen v. Van Eperen ---------- 579
Vincent v. Continental Baking Co. ---------- 206
Vincent v. Peter Pan Bakers, Inc. ---------- 206

Walle; State v. ---------- 642
Ward; State v. ---------- 370
Warmbier v. Zeurlein ---------- 425
Watkins Co. v. Wiley ---------- 242
Watson; State v. ---------- 692
Wellnitz v. Muck ---------- 22
Whited; State v. ---------- 282
Whiteside; Rundall v. ---------- 176
Wiley; J. R. Watkins Co. v. ---------- 242
Williams, Donald M.; State v. ---------- 444
Williams, Howard LeRoy; State v. ---------- 372
Williams v. Dobberstein ---------- 862
Wilson; Stauffer v. ---------- 129
Wolpa v. Wolpa ---------- 178
Wonderling v. Conley ---------- 446
Woods; State v. ---------- 668
Wymore v. Farmers Mut. Ins. Co. of Nebraska ---------- 763
Wymore Arbor State, Inc. v. Korinek ---------- 557

Yost; Lunzmann v. ---------- 101

Zeurlein; Warmbier v. ---------- 425

IN MEMORIAM

JOHN W. YEAGER

And now, at the hour of nine o'clock a.m., on this eighth day of January, A.D. 1968, the same being the date fixed by the court for hearing the report of the Committee appointed to draft resolutions in memory of John W. Yeager, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE JACK W. MARER.

MAY IT PLEASE THE COURT:

We meet today before this Honorable Court to recall, with fond memory, the life and work of John W. Yeager, a Justice of this Court, from November 8, 1940, until his retirement on January 6, 1965. He died in Lincoln, Nebraska, on August 3, 1967.

As Chairman of the Committee appointed by this Court to conduct these exercises, it is my honor and privilege to speak on behalf of the members of the Nebraska State Bar Association and the committee consisting of:

Seymour L. Smith
Einar Viren
Herbert T. White
George C. Pardee
of Omaha and
Clarence A. Davis
of Lincoln.

These gentlemen are active members of the Nebraska State Bar Association and have practiced before this Court for many years, and were personal friends of Justice Yeager.

After I have concluded my remarks, each member of

the Committee will make a statement based upon his personal acquaintanceship and knowledge of our departed friend and brother lawyer.

To use the familiar cliche, the life of John W. Yeager is "an open book" into which pages we look today. As we begin with the first page, read through the years, we come to the close of a useful, fascinating and adventurous life. We find it exemplifies, in full measure, the ambition of youth with a goal, willing to make the sacrifices necessary to accomplish his aims, but all the while doing good for others, harming none, making a host of friends, and devoting himself to the public welfare.

John W. Yeager was born March 1, 1891, on a farm near Richland, Indiana. He was the second of twelve children in this family, each of whom worked and contributed to the family needs. Life was rugged for them. John walked several miles on dirt roads to a one-room schoolhouse where one teacher taught eight grades. He found little time for the usual boyhood play, for he worked the fields, hoed the tobacco and corn, and cleared the land. A move to a larger farm made better school facilities available, including high school, from which John graduated in 1910. Long hours and hard work came to him early in life, a habit which remained with him all his days. He never grumbled—his eye was on the goal—for he was desirous to move on to his purpose. After finishing high school at the age of 19, he went to Chicago to enroll at the Chicago-Kent College of Law. This was a night law school, so during the day, to support himself, he was employed at a law office doing all the chores performed by an ordinary clerk. He graduated from Chicago-Kent in 1913 and was elected president of his class. He was admitted to practice in Indiana and went to Evansville, Indiana, near his birthplace, to begin his career as a lawyer.

As we turn the pages of his book of life, we find he was not happy in this small southern Indiana town—his eye was on the larger community. Noting the growing state of Texas, he went to Houston to practice, but found

a stranger from the north was not well received. Somewhat disheartened, he returned to the farm, for he was now without funds. He worked on the home-farm in the summer and fall of 1914, remained there until the late winter. All the while he was looking into the future to use his legal knowledge and training he toiled so long and hard to acquire.

A classmate at Chicago-Kent, then located in Seattle, Washington, urged John to come there and enter the practice of law. Another friend, located in Omaha, persuaded John to stop off temporarily in Omaha on his way to Seattle. When John left the farm in January of 1915, the family pooled its cash resources and raised $156.00 for his trip to the coast. So, at 24 years of age, John left the family homestead again, to seek his place in a strange state. He did stop in Omaha to visit his friend, and became convinced his opportunities lay in this state. John had to wait until the following June for the annual bar examination, so he worked in a dental laboratory to support himself. He passed the bar examination, and was admitted to practice law by this Court on June 9, 1915.

He promptly engaged in the practice of law, which was interrupted by army service during World War I. He was assigned to the 88th Army Division and served from June 27, 1918, to June 15, 1919, part of which time was overseas. He returned to Omaha to resume his practice. Like other beginning lawyers, his days were not easy—clients came slowly—but he persisted. In the meantime, he made many friends and became interested in the political life of Nebraska.

On June 28, 1922, he married Lena E. Deeg, and they established their home in Omaha. She assisted John and encouraged him in his desires and ambitions, and was a valuable helpmate to him. Their love and affection was deep and lasting. They were blessed with two children: John, Jr. and Barbara, who gave them four lovely grandchildren.

On April 26, 1921, John W. Yeager was appointed as Deputy County Attorney in Douglas County. This ap-

pointment gave him the opportunity to demonstrate his capabilities and capacity. On January 1, 1931, he was appointed as Chief Deputy County Attorney and served in that position until he was elected a District Judge of the Fourth Judicial District and took that office in January of 1933.

He served as a District Judge until November 8, 1940, when he was appointed to fill an unexpired term on this Court, caused by the resignation of Justice Harvey Johnsen. However, Judge Yeager was elected to this Court at the November, 1940, election for a six-year term beginning in January, 1941. He was successfully re-elected as a member of this Court from his district, retiring January 6, 1965, after more than 24 years of active service on this Court. His total public service covered 44 years.

During his time on this Court, Justice Yeager spoke for the majority in 565 written published opinions. On 34 other occasions, he was the author of a dissenting opinion. His opinions are excellent examples of clarity of fact and law. It is well known the first draft of his opinions were in his long hand. He learned he could best express himself in this fashion. Numerous opinions of this Court, affecting the growth, development and welfare of this state, were written by him, and his mark upon the jurisprudence of this state is enscribed forever.

Justice Yeager, while serving as a prosecutor, a District Judge and a Justice of this Court, never permitted public pressure or his personal views to interfere with his independent, impartial judgment. He was fearless in his opinions and judgments, having reached his final conclusions after careful study of the problems before him.

All of these attributes were likewise reflected in his daily life as a husband, father, brother and friend. His early religious training remained with him throughout his life, and he practiced the lessons of sincerity, integrity, honesty and fair dealing. His warmth brought to him many, many lasting friends who sought his advice and counsel.

To his family he was a devoted husband and respected

father. No matter how heavy the burdens of his daily work, he made time for his family.

To those of us who had the privilege to know John W. Yeager, to work for and with him, we can say our lives have been enriched because of him. Personally, I owe much to him, and I am happy to have this opportunity again to publicly make this acknowledgment. I first met him in September, 1927, when I was appointed a Deputy County Attorney of Douglas County. As the Senior Deputy then in that office, he took me "under his wing" and trained me in the work. Having been in the practice only one year, I was both frightened and without experience. Knowing this, he put me at ease, watched and guided me at all times. His encouragement, advice and counsel were of immeasurable assistance to me, for which I shall always be grateful.

John W. Yeager was a warm, friendly person. He loved people, he was interested in their trials and tribulations. He had the confidence of people—he earned it by his sincerity and willingness to serve others.

This is well expressed in a description of Justice Yeager by Lucille Powell, who was his secretary in this court for 22 years. Here is what she has written to me about him:

> "Judge Yeager was more than a wonderful employer, he was a good friend. He was interested in those who worked with him and was always ready to be of help in times of personal stress or strain. Even when his own health was bad, his consistent fine sense of humor brightened any dark day.
>
> "He expected the work to be done right, but was always patient and understanding if human error occurred. In the 22 years I served as his secretary, I never heard a cross word from him.
>
> "To be associated with him was an educationl experience, both in the work we were doing and in life itself. His outlook on life and his willingness to discuss matters, either official or personal, made his suggestions and advice valuable when needed."

John W. Yeager loved life and all it held—its work, its burdens, its disappointments, its zest and its opportunities. He seldom thought of himself—he demanded little of life—but gave much.

And as we close the book on the life of John W. Yeager, it is proper that we pause, as we are doing now, to imprint upon the records of this Court, and this state, his many contributions to the welfare of Nebraska.

All of us should be grateful John W. Yeager sojourned in Omaha, instead of going on to the West Coast, for in that important decision, the State of Nebraska acquired a noble man, and a great jurist, whose life and work will continue to be for the advancement and betterment of Nebraska and its people.

HONORABLE CLARENCE A. DAVIS.

MAY IT PLEASE THE COURT:

Mr. Chief Justice and Justices of the Court:

What does one say on the death of a friend? A hundred memories well up in one's consciousness that we are powerless to translate into words.

What does one say of a long, complete, satisfying, and by our modern standards, successful life? It is there that words fail and that memories take over.

Then follows regret. Regret that we did not see more of our friend. The pressures of modern life and the speed at which we all live tend to prevent the ripening of those close friendships of a past generation. All of us in this chamber are friends. All of us see too little of each other. All of us are deprived of spending that relaxed time with each other in which friendships become close and we learn to know of each other's faults and virtues, secrets and ambitions. There is no time. That is one of the prices we pay for so-called progress. I suspect the price may be too high.

I have known John Yeager for almost 50 years. Thats a long time. I have known him since we met in the days

of the Omaha Court House riot and the stock selling frauds of the early 1920's.

Riots are not new, nor is racial tension.

In 1921 when he first became a deputy county attorney in Douglas County, I was conducting a grand jury for six months or more growing out of that terrible affair when an uncontrollable mob burned the Court House and lynched and murdered what may well have been a perfectly innocent man. Because of local tension in Omaha, I was directed as Attorney General to conduct a grand jury and John and I worked together on many things. I recall that the County Attorney could not file a complaint when a grand jury was in session so all of the late County Attorney's, Abel V. Shotwell, and John's Defendants had to be indicted by the grand jury. From that period in 1921, John and I have been friends.

I think the finest compliment I can pay Judge Yeager as a Judge is the fact that in all my long knowledge of him I never saw an eyebrow raised over his conduct or his decisions, let alone a questioning word. This, in Omaha or any other city where there are such diverse interests constantly in conflict, is as fine a compliment to the universal esteem of a Judge as can be paid.

He had thousands of friends, but once on the bench he knew them not.

He was always an agreeable friend. I never saw him lose his temper. I never heard from him a harsh word from the bench. There may well have been some, for the agony of having to listen to some of the preposterous proposals with which every court is faced must make restraint difficult, if not impossible, but certainly his judicial attitude was in marked contrast to some of the judicial tyrants that have occasionally occupied the bench.

His life is the typical American success story. A boy starting with nothing but ambition, ability and desire, he progressed steadily through the years, more than 40 of them in the public eye, as a Deputy County Attorney, as the Chief Deputy, as a District Judge and as a member of this Court. This succession of events of con-

tinually moving onward and upward by merited advances is the story of America. This is the type of life that has made America great.

John was possessed of a fine sense of humor and with a great friendliness for members of the Bar. Yet he always strictly observed the amenities.

If I may, I will personalize one little incident that shows his strict observance of the rules of the game no matter who might be involved. Some of you will remember when Governor Griswold appointed Jackson B. Chase of Omaha, who was Chairman of the Liquor Commission, to a vacancy on the District bench in Omaha and that the question was immediately raised as to whether Mr. Chase, as Chairman of the Liquor Commission was not an executive officer of the State, and therefore constitutionally barred from appointment during his term. The matter found its way into this Court, had been argued and submitted for a month or two when with a substantial number of other guests, we entertained both the Chases and the Yeagers. They were old Omaha friends and we were old friends of both of them. During the evening John was particularly hilarious. Everything evoked his laughter. No mention was ever made of this pending opinion about which everybody was holding their breath. The bridge party continued until after midnight before it broke up. The Yeagers returned home; the Chases returned to Omaha, but before leaving Judge Chase was convinced that he had lost the law suit. John, he said, was trying to be gay to offset his regret. At eight o'clock the next morning George Turner called me to advise me that "a liquor commissioner was not an executive officer within the contemplation of the constitution." That incident was Judge Yeager at his best. He knew what that opinion was to be, that it was to be released the next morning and it was unanimous. It was already past midnight of the day in which it was to be released; it was concerning an old and intimate friend and yet not one word, not one hint, was ever given until the official announcement was made. I have always

thought that was a great tribute to judicial restraint and propriety and of following the rules of this Court as they exist.

There are two other characteristics of Judge Yeager of which I should speak. The first is that he was possessed of a large measure of plain common sense. Thats the thing that we could use more of in the whole judicial system of the United States. When law deserts common sense, respect for law diminishes. Law is not a mere play on words no matter how cleverly contrived the words may be and it is the ability to measure these contrivances against that which we all know—that which we call common sense—that makes for sound judicial decision and which justifies our repository of the last word in the judicial system.

It is true that the law is a living thing. That in the nature of things that which was commonly regarded as good or harmless today may be considered—and perhaps be—bad and harmful tomorrow. Men's minds and the things acceptable or unacceptable to the community or society change with each generation. These changes the law must and does recognize.

But changes by means of redefinition of age old terms or to effect economic and social philosophies I am sure would not meet Judge Yeager's standards of common sense.

The other characteristic that I would mention was his basic gentleness of character. He demonstrated that it is not necessary to rant, to be belligerent, to demogague or to pontificate to be a fine judge. A firmness of conviction can still encompass a gentleness of manner, a courtesy to others with whom we differ and a respect for others without yielding our opinion.

These characteristics John Yeager had. It may well be said of him as Mark Anthony said of the passing of a great Roman:

> His life was gentle and the elements so mixed within him that all the world might look up and say—This was a Man.

HONORABLE GEORGE C. PARDEE.

MAY IT PLEASE THE COURT:

Each in our own way, today, seeks to record in the annals of this Court a contribution to the life and professional labors of one of its jurists. Also to preserve the memory of a gentle, unpretentious and kindly, but courageous man.

It was my privilege and good fortune to first come to know him while he was the Chief Deputy County Attorney for Douglas County. It was a professional acquaintance since I was then serving as Assistant Public Defender for Douglas County. He was elected to the District Court bench in 1932 and at the same election the Public Defender's office changed hands.

From this time forward our association grew to what I cherish as a beautiful friendship. It was enhanced and augmented, through the years, by many circumstances.

My father, Wilfred M. Pardee, served as his bailiff during the last few years of his life. This circumstance further strengthened and enriched our friendship.

During this period we were members of an informal luncheon group. This association continued until after he retired. A span of some thirty years. Through the years his visits to Omaha included lunch with this group if at all possible.

In recent years he spent many summers in South Dakota's Custer State Park which afforded some relief from the heat and humidity. I spent some time on several occasions in the same area—at the same time Judge Yeager and his family were there. This afforded many rewarding hours of sharing thoughts with him.

What a rich experience to have this interplay with such a person; to enjoy a friendship with him. To know intimately Justice John W. Yeager was indeed a rare but joyful experience. I was among many who sought his counsel on many matters on numerous occasions. Like all such seekers we were rewarded by his gracious and wise response.

His tenure on the District Court bench at Omaha was marked by a steadfast, courageous devotion to duty. As presiding judge of that court, which includes the duty to assign for trial pending cases, both civil and criminal, he made current a badly overcrowded list of cases awaiting trial. This again required the application of perseverance, and courage in order to overcome the ingenuity of the lawyer seeking to delay a trial. Also during this period of his career he heard a number of criminal cases which produced headlines in the press. These instances afforded further proof of his unswerving devotion to duty — the administration of justice on the highest plane, as well as his adherence to the principle that the advocate in such cases or lawyer in any undertaking should perform his duty in the best tradition of the profession. He had compassion for his fellow man, but did not compromise the demands of justice or the rights of the public.

His sense of humor was a delight to his friends, but sometimes so subtle as to be lost on the ears of others. A story that evoked the typical twinkle in his eyes when he told it, concerned the defendant charged with contempt of court. It was during the "farmer's holiday" period in the thirties arising out of the great number of farm mortgage foreclosures. A farmer in a county North of Omaha had been notorious as a chronic violator of orders of the court. He had been before several judges on contempt charges. Finally he came before Judge Yeager on the same charge. After the evidence was all in the Judge made his findings and then, in due course, asked the defendant if he had anything to say before sentence was pronounced. The defendant then launched on a detailed recitation of the extent of his family and deplorable financial condition in which it found itself. He concluded by strenuously urging his poverty and therefore his inability to pay a fine. Whereupon the Judge informed him that he need not be concerned about paying a fine because he was going to jail.

His opinions written for this court are a matter of record. His clear direct and understandable composi-

tion of these opinions makes of each one the precedential tool of the profession as it was intended when written.

His loyalty, passion and consecration to duty was stamped most indelibly on the minds of his friends in the last decade of his life. He was laboring under an increasingly difficult physical handicap. One not similarly afflicted will never know the full extent of the effort he expended each day in order to meet his responsibilities.

We should all be consoled by our association with and the memory of so loyal and dedicated a member of the legal profession; such a charming, warm and sweet personality; such a devoted family man, and so staunch an American in the finest and highest sense of the term.

In my view, the words of Edgar A. Guest in his poem "Compensation" are the epitome of the philosophy of the life of Justice John W. Yeager. I quote

"I'd like to think when life is done
That I had filled a needed post,
That here and there I'd paid my fare
With more than idle talk and boast;
That I had taken gifts divine,
The breath of life and manhood fine,
And tried to use them now and then
In service for my fellow men.

"I'd hate to think when life is through
That I had lived my round of years
A useless kind, that leaves behind
No record in this vale of tears;
That I had wasted all my days
By treading only selfish ways,
And that this world would be the same
If it had never known my name.

"I'd like to think that here and there,
When I am gone, there shall remain
A happier spot that might have not
Existed had I toiled for gain;
That some one's cheery voice and smile

Shall prove that I had been worthwhile;
That I had paid with something fine
My debt to God for life divine."

In closing may I add my personal sympathy to his widow June, son Jack and daughter Barbara.

HONORABLE SEYMOUR L. SMITH.

MAY IT PLEASE THE COURT:

It was my good fortune to become acquainted with John W. Yeager some forty years ago. He was then a Deputy County Attorney for Douglas County. Our acquaintance grew closer as we found ourselves in the same local political alignment, and as we took part in some litigation as opposing counsel.

I well remember the admiration I had for him from the very first. He held the important public position just mentioned; I was an unknown, trying to establish a law practice. Yet, he was always friendly, considerate, and encouraging. There was never any display of a feeling of superiority.

APPRECIATING OTHERS

Years ago, I heard a lecturer say that a man will make more friends in a week appreciating others, than he will make in a lifetime trying to get others to appreciate him. That observation tells us why John Yeager had a host of friends. He appreciated others; he enjoyed association with others. He was never aloof.

TOOK HIS POSITION FIRMLY

In the affairs of life, he took his position firmly, with the courage of his convictions. He would express his views vigorously, but he was never haughty. The very manner of his expression revealed clearly the sincerity with which he entertained his belief.

SENSE OF HUMOR

He was possessed of a sense of humor, ever enjoying the many humorous incidents inherent in the administration of the law.

GENUINE

If I had to describe him with one word, that word would be *genuine*. Webster tells us that a genuine person is real, true, honest, and forthright. That was John Yeager.

DEATH CANNOT DEPRIVE US

The tragedy of death has taken him from our midst, but death cannot deprive us of the pleasant memory of a loyal and true man, a public servant for nearly a half century, serving with honor and distinction, a devoted husband and father, and a friend of all who knew him.

COURT GAIN

In mourning the loss of John W. Yeager, we should count the definite gain from his having lived among us.

I appreciate the opportunity to add this personal tribute.

HONORABLE EINER VIREN.

MAY IT PLEASE THE COURT, AND WITH THE PERMISSION OF THE COURT, MRS. YEAGER, JACK AND BARBARA, MEMBERS OF THE BENCH, THE BAR AND FRIENDS:

I consider it a great personal honor and privilege to appear before, and briefly address this Court, in paying tribute to the memory of a wise law giver, a true Judge, and a great friend.

Others will undoubtedly allude to the life of our late departed friend, the Honorable John W. Yeager, for many years a distinguished Judge of this Court. Like many before him, in similar positions, in medieval and modern times, whose pronouncements have lived, I feel with equal certainty, his pronouncements of law and justice will live eternally for the guidance of the members of this and other courts, and more importantly, for the guidance of mankind.

It is my desire to address this Court in what I felt to be the other side of John Yeager's life as I knew him.

My acquaintanceship with John commenced in 1931

when I enrolled in the University of Omaha night law school and there to partake of the judgment and learning of John, then Chief Deputy County Attorney, in the field of Criminal Law. In those trying days of pursuit of an education and admission to the Bar, those of us in school never found John too busy in his duties as Deputy County Attorney, or as a Judge of the District Court, to give of his time, guidance and counsel. On reflection, many of the problems that we then felt confronting us, now seem rather naive; yet, John in his human way was always available to explain to us the workings of the judiciary, the meaning of the decisions, with our inadequacies, enabling us to fully understand. He urged and desired that all students should attend trials in his Court, both while he was Prosecutor and Judge, and was never too busy at the proper time and place to explain in great detail to us what had taken place.

After John ascended to this Court, his door was always open to the Members of the Bar, who were mystified by procedural questions, both before the Courts and administrative bodies of this state, and in discussion of opinions by this Court in which he had participated.

I remember well, my first appearance in this Court and the fears that preceded it and the kindly advice and guidance of John prior to that argument.

It was a great pleasure to read John's opinions and particularly the dissents in which he did not agree with the majority of the Court. I have in mind one particular such dissent in *McGuire v. McGuire*, where he dissented from the majority holding that a wife could have only what a wealthy husband desired to give her in material things. In this opinion, John Yeager expressed what he felt to be the true equity in the obligation of the Court to maintain a home, rather than to require it to be torn apart in order to provide properly for a wife.

As a lawyer, prosecutor, trial judge and member of this Court, John Yeager was one who will live in the memory of all of us as a shining example of the American

Tradition, that youth, if it desires, can achieve any goal it sets for itself.

Although dedicated to the law, John was a great outdoorsman, lover of sports, and an avid Nebraska football fan. It was my privilege to share many Nebraska games with John and to try his patience when as a native of Indiana, the Indiana and Nebraska Teams met. His loyalty never waivered, although at times his judgment would be guided by his place of birth. He ardently supported the Nebraska Team, both home and away, until his health deprived him of that pleasure. Enjoyable for many years, were those occasions following the Nebraska home games when John and June Yeager held open house for their children and many friends.

John's friends enjoyed many a pleasant occasion when it was their privilege to accompany John in the hunting blind after the duck, in the field after the pheasant and in the boat after the fish.

It is my sincere feeling that John's fellow Hoosier best expressed the feeling of those of us who remain in his poem "A Friendly Sort O'Way":

"When a man ain't got a cent, an' he's feelin' kind o' blue,
An' the clouds hang dark an' heavy an' won't let the sunshine through,
It's a great thing, O my brethren, for a feller just to lay
His hand upon your shoulder in a friendly sort of way!
It makes a man feel curious, it makes the tear drop start,
An' you feel a sort o' flutter in the region of the heart.
You can't look up an' meet his eyes; you don't know what to say,
When his hand is on your shoulder in a friendly sort o'way.
Oh, the world's a curious compound, with its honey an' its gall,

With its cares an' bitter crosses—but a good world after all,
An' a good God must have made it—leastways that's what I say
When a hand rests on my shoulder in a friendly sort o'way.

—James Whitcomb Riley."

His companionship, friendship, humaneness and the twinkle in his eye can never be hidden or forgotten.

HONORABLE HERBERT T. WHITE.

MAY IT PLEASE THE COURT:

It is a rare though sad privilege to have an opportunity to say a few words concerning one who had for almost a half century been a close and warm friend personally as well as being a strong associate in the many faceted legal profession.

Much of this time Justice Yager occupied a leading position on the Bench of Nebraska, yet our work often brought about a crossing of paths and a close contact.

Your speaker probably knew Justice Yeager for a longer period of time than many of the Bench or Bar here today, just a little under the fifty year span. We first because acquainted when, upon his return from the service in World War I he took a position in the County Attorney's office in Omaha and I was a young lawyer shortly out of the University of Nebraska. For the next twenty years we quickly became close friends personally and as part of the Bench and Bar of Omaha. We lunched together almost every day at our informal lunch table, played friendly card games together, golfed together, sometimes several times a week. I was often in his home because Justice Yeager was very much a family man, proud of his family. We attended football games as Justice Yeager became an ardent follower of Nebraska University football teams. Mrs. Yeager and he always had an open house after a game at Lincoln where I was a regular attendant.

During his practice years we had cases where we represented opposite sides. When he moved to the District Bench it was a pleasure to practice before him, and this close friendship and association continued though he moved to Lincoln in 1940. As I spent some two years in the Attorney General's Office as an assistant shortly after he moved to Lincoln, I had another two years of close association.

For several years it was a privilege to appear before him on this Court. Our luncheons, games and golf continued very close until my return to Omaha in 1943, but the friendship remained and most of the associations. Never did he fail to have lunch with his old Omaha associates at our informal lunch table, and he never failed to endeavor to assist me in anything outside of cases to be heard before him.

Justice Yeager came from the area of Indiana known as the "Lincoln Country." One of some twelve children, he early learned to fend for himself, yet kept rather close contact with his family when one considers the distances. Some of his Indiana family raised tobacco on their farms. It was a very strong tobacco and each fall after the tobacco was harvested, cured and processed, the Judge would have some of the Home Made Chewing and Twist sent to him. In our many golf games we soon learned that this was the ideal thing for us as the strong winds quickly ruined cigarettes and tobacco but both of us felt real comradeship on the golf links required tobacco. From that time on he frequently supplied this strong native tobacco twist. If you really want to know a man, one of the best ways to accomplish this is to, on proper occasions, enjoy good stout Indiana tobacco with him. I know this helped cement our friendship and revealed much of the inside man.

This little sideline is mentioned because in that central country where Justice Yeager originated, the pioneers had a saying, "The tree is best measured when it is down." In this span of life, death sooner or later takes each of us. Whence we go and whither we are travel-

ling we cannot be absolutely certain. To many, though not to me, every open grave is an open question and to many an epitaph on a tomb stone is only a belated advertisement of a line that has been permanently discontinued on this earth. Justice Yeager was, to paraphrase the above adage, "A tree that we can best measure because it is down." He was as sturdy as one of those pioneer trees and an old friend who had this opportunity to judge the man from many angles has learned what he has meant.

Considering his years on the Bench, his law practice, his family life, his social life, his family love, his lighter sides, his well regulated experience, made him a real leader of the Nebraska legal profession in his quiet way. It is inevitable that I should conclude from these close and intimate associations over the many years that here was a real American in the mold of those who made this country great, yet as up to date as the space age.

As a result of being a great American of that type, it was inevitable that on the Bench he would, as he did, become a great Jurist. Our section is much better for the life of our good friend. We shall truly miss him.

HONORABLE ROBERT G. SIMMONS.

MAY IT PLEASE THE COURT:

It is a new experience, or an old but proper one, to take my place again as a member of the bar on this side of the bench. It is to my liking.

I am sure it will come as a surprise to some, but all should know it, that in the consultation room, in our offices, and in social life, we seldom spoke to each other as "Judge", but rather by the first name. It is a word of endearment, of respect, of friendship, far more than the formal "Judge." So, I speak today of John Yeager as a man, a friend and a judge.

From the first day he came on the Court, he was contentious for what he thought was right, but never contemptuous of the views of others. He sought always an

answer to the questions of what is the law and what are the facts, always giving consideration to the views of others of us, but not yielding when he thought he was right. He was cooperative and helpful in the work of the Court, always promoting harmony and not discord. He was short and clear in his opinions.

He was ready and willing to help bear the work of others when by chance ill health befell one of us.

In all things he was a judge, cognizant of his duties and strict with himself in the performance of those duties, and expecting and promoting that ideal among others of us who sometimes faltered by the way.

During the years I was privileged to sit with him on the Court he was always to me friend, counselor, gentleman and judge in the full sense of those words.

Trained as we are in the exact use of words, they sometimes fail us. Such an occasion as this is one where the heart must speak when lips are dumb. My heart is full but my head empty. I can only say "Goodby, John —thanks for being my friend."

ASSOCIATE JUSTICE EDWARD F. CARTER.

John W. Yeager was born in Southern Indiana and suffered the hardships of the period in gaining his classical and legal education. His desire and energy to become a member of the legal profession was interrupted by military service overseas in World War I. The obstacles in his path were overcome and eventually he entered the practice of the law. His service as deputy and chief deputy county attorney in Douglas County, as district judge for the Fourth Judicial District, and as a judge of this court, have been adequately covered by the committee and require no reiteration by me.

After 24 years close association with Judge Yeager while a member of this court, it is difficult to put into words the respect I had for his courage, his character, and his intergrity. No weakness manifested itself in these attributes of a sincere and honest judge.

Judge Yeager was independent, but not unreasonable. He was strong-willed, but not stubborn. He was always ready to listen to logic and reason, but in the vernacular of the street he could not be pushed around. His objective in his work was to be right, knowing full well the proneness of all to make mistakes. He was not imbued with any notion that he knew all the law, but his fairness, his honesty, and his sense of justice stood him in good stead in solving the legal problems with which he was confronted.

To the day of his passing, he was a commonplace man. His friendships were based on the plain and simple elements that made them close and lasting. He has now passed from the living and it is only the memory of the man that remains with us. We regret exceedingly that he has passed beyond the vale from which no one returns, but we are thankful for the alloted time that he was permitted to be with us and for his contributions to a life well lived that immediately spring to mind.

Johnny Yeager was a friendly man; as friendly when he retired from the court as the day he first donned the judicial robes of the highest court in the State. The court and its integrity was his chief concern in all the years he served on it. His dedication to the court was recognized by lawyers and judges everywhere.

In his retirement, this court lost a courageous, conscientious, and dedicated judge. On his death, the court lost a true, gracious, and lasting friend. This unassuming man has left his mark in the halls of justice and on the minds of all who knew him. He was a man of small physical stature, but in that small frame was carried traits of honesty and integrity in his work, and the trust and fidelity of all who knew him, that will not soon be forgotten. It is an honor to this court to pay tribute to the memory of such a friend, lawyer, and judge.

CHIEF JUSTICE PAUL WHITE.

There is little that I can add to what has already been

said in honor of our brother, Justice John Yeager. Using John's diction, it could well be said that there are a multitude of others, besides the distinguished gathering here, who are of the same attitude and disposition as we are here this A.M. From time immemorial, we meet to honor great judges when they have finished the terms of their commission and have passed from our midst. A common impulse impells us. We meet to euologize their accomplishments, pay tribute to their personal qualities, and memoralize their unselfish and dedicated service. But, there is more than this that impels us, as we gather here together on this occasion to honor our former colleague, Justice John Yeager. More than being just a fine judge, John Yeager was a great judge in that he was the symbol of our great traditions, values, and ideals of the law and the concept of ordered liberty as we know them. Through his ability, his dedication, and his industry, these values and these ideals found in him a true expression. It can truly be said that in the permanent imprint of his pen, in the direct influence of his logic and reason, in the subtle but nontheless real impact of his personality and philosophy on the minds of his contemporaries, he has given us the torches to carry on the judicial tradition and has given us further light to search out our common judicial destiny in finding true justice.

To one, like myself, who has fallen into the line of march quite recently, Justice Yeager has meant a lot. He was a real physician of applied liberty. With intellect, dispassionate temperament, and courageous resolution of decision, he spelled out in his record, a clear concept of the law and of the judicial power. He was to me, and will be in the future, a continuing reminder of the proper posture of a judge and his proper attitude towards both the responsibilities and self-imposed limitations on judicial power. In striking a proper balance, he was unerringly vigilant in the protection of constitutional rights, and the supremacy of the law against arbitrary and unreasonable executive action, and with it all, he had a pervasive sense of the wisdom and spirit of our common

law and the necessity to achieve a certainty by which the people could guide their lives under our great concept of ordered liberty.

As a judge, in Socrates' terms, he heard courteously, answered wisely, considered soberly, and decided impartially. His hallmark was the same as Coke's, "that when the case should be, he would do that which should be fit for a judge to do."

John Yeager fulfilled the highest ideal of the dedicated servant for over thirty years on the bench. His devotion to the bench and to this court can only be characterized as religious in nature. But it did not narrow him in a personal sense. To us who knew him, he was kind, generous, tolerant, friendly and humorous. We miss him deeply in a personal as well as a judicial sense. He was a great workman. His life was literally the law. In the words of another great judge to the profession and the bench, John Yeager will forever remain as an example of the accomplished judge, sagacity, insight and acuteness, courtesy, dignity and humor, wisdom, learning and uprightness, as the commission of a judge must read. All of these he has given to his generation, and as a final tribute, we take increased devotion and inspiration so that we may carry on and continue the ideals and traditions that he so aptly and clearly represented. We hope that we who go forward have the wisdom to recognize what he has given us and that we, in some small sense, may march further forward to the goal of true justice and liberty.

The resolutions offered this morning are adopted by the Court. The resolutions, together with the statements of counsel, will be extended at length on the journal and printed in the official reports of this Court. Mrs. Yeager and the members of the family will be advised of the high regard of the Bench and the Bar for Justice Yeager, and of the expressions of sympathy made this day. Copies of the resolutions and statements of counsel will be sent to them.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1967

MAX JOHN SANNY, APPELLEE, V. LESLIE JANE SANNY, APPELLANT.
152 N.W. 2d 27

Filed June 30, 1967. No. 36473.

1. **Divorce: Parent and Child.** In a divorce action, the custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
2. **Parent and Child: Infants.** Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right.
3. **Divorce: Parent and Child.** In the context of child custody disputes in a divorce case, unfitness of a parent is not restricted to moral unfitness nor to inability or failure to provide physical needs and requirements of the child. The overriding and primary concern is for the best interests of the child.

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

Kutak, Rock & Campbell and James F. Kasher, for appellant.

Schrempp, Rosenthal, McLane & Bruckner, for appellee.

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

MCCOWN, J.

This is an appeal from an order of the district court

changing the custody of minor children from the appellant to the Omaha Home for Boys.

A rather full factual background is important here. The appellant, Leslie Jane Sanny and the appellee, Max John Sanny, the parents, separated in 1960. The appellee filed petition for divorce in April 1963, and a decree of divorce from bed and board on appellant's cross-petition was entered in July 1964. The appellant was awarded custody of the children, Robert and James, who were respectively 11 and 9 years old in July 1964, and 13 and 11½ years old at the hearings in 1966. Appellant also obtained judgment for permanent alimony in periodic payments, child support, and real and personal property.

The appellant placed the boys in Reverend Mick's Bible Camp in June 1964, where they remained for the summer, and, on August 31, 1964, she placed the boys in the Omaha Home for Boys. December 22, 1964, the appellee filed an application for change of custody of the boys from the appellant to the appellee, and on February 3, 1965, the court entered an order placing temporary possession of the boys in the Omaha Home for Boys, and directing payment of child support of $90 per month for each boy directly to the Omaha Home for Boys. They remained at the Omaha Home for Boys until June 11, 1965. On June 8, 1965, the appellant made an oral application showing that the school which they attended while they were at the Omaha Home for Boys would terminate June 11. The court entered an order terminating the temporary possession of the Omaha Home for Boys and placing possession and custody of the boys again with the appellant, and directed payments of $100 per month for each boy. The appellant again placed Robert in Reverend Mick's Bible Camp for the summer. On January 3, 1966, the appellant filed an application reciting that the older boy, Robert John Sanny, was emotionally disturbed, and in need of psychiatric treatment and prayed for modification of the original

decree to provide additional sums for the maintenance and support of Robert John Sanny. On April 11, 1966, the court denied appellant's application for increase in allowances. The court, on its own motion, then set a date for hearing and directed appellant to show cause why the decree should not be revised or altered insofar as it concerned the custody, care, and maintenance of the minor children, and directed that the children be produced at the hearing.

The evidence shows that appellant began having difficulties with the boys sometime in 1961. For a period prior to the hearings, Robert has been abusive to the appellant, beats up on her physically, chokes her, spits on her, and calls her obscenities. She first consulted a psychiatrist at Offutt Air Force Base in late August 1965. He referred them to the Meyer Therapy Center for Children on September 3, 1965, for testing and psychological evaluation. The psychiatrist found Robert to be emotionally disturbed and suffering from an adjustment reaction of childhood or adolescence, not a severe disturbance, but not considered normal. It was also the opinion of both the psychiatrist and the Meyer Therapy Center for Children that the appellant was unstable and had been inadequate in her dealings with the boys. The appellant was referred to a private psychiatrist, but she had no professional consultations with him. Her reason was that she did not have the money available.

While the boys were at the Omaha Home for Boys during the school year of 1964-65, they were both on the honor roll at their schools. During the 1965-66 year, during which the boys were in the appellant's home, Robert received all 4's and 5's and James was doing worse than while he was at the Omaha Home for Boys.

Mr. and Mrs. Hooten were houseparents of the boys at the Omaha Home for Boys. Mr. Hooten's testimony was that after 2 or 3 months, they got straightened out and got to be good boys. Mrs. Hooten testified that,

while she had no trouble with James, she had always had trouble with Robert, and that he was a problem when she was attempting to control him by herself. The two boys indicated their preference to remain with their mother.

On July 15, 1966, following hearing and after having taken the matter under advisement, the court found that it would be for the best interests of the children that the decree be modified in regard to possession, care, and custody of the children; that neither the appellant nor the appellee is personally unfit to have the possession, care, or custody of the children; but that appellee is either not fit or unwilling because of the nature of his duties and employment with the United States Air Force; and that appellant is not fit in that she is incompetent or inadequate to properly supervise and control the minor children. The court also found that neither boy is now a delinquent, but that if left in their present environment, it can be said with reasonable certainty that they will each become delinquent. It also found that the best interests of the boys would be served by keeping them together, and no reason appears why the Omaha Home for Boys would not be suitable.

The court then ordered appellant's custody of the children terminated as of August 1, 1966, ordered the decree modified, removed the care, custody, and control of the children from the appellant, reserved the custody of the children in the court, and ordered that possession, care, and control of the children be delivered to the Omaha Home for Boys, with the appellee to pay $100 per month per child. This is the judgment from which appeal has been perfected.

In a divorce action, the custody of a minor child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. Ball v. Ball, 180 Neb. 145, 141 N. W. 2d 449.

Ordinarily courts may not properly deprive a parent

of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445.

In the context of child custody disputes in a divorce case, unfitness of a parent is not restricted to moral unfitness nor to inability or failure to provide physical needs and requirements of the child. The overriding and primary concern is for the best interests of the child. Here the evidence indicates, and the court found, that the appellant was more interested in obtaining money from her husband than in getting help for her son and was using his misbehavior to gain increased financial settlement from her husband.

The evidence is that because of a lack of proper and sufficient discipline, the older child has been permitted to develop an emotional problem and to become abusive toward his mother beyond any reasonable limits, so that he now requires more care and supervision than the mother can render. While neither of the boys is now a delinquent, it can be said that, left in their present environment, they may each become delinquent. Although the appellant is not personally nor morally unfit to have the possession, care, and custody of these children, she is incompetent and inadequate to properly supervise and control them. The appellant's future ability to supply the boys' physical needs is extremely doubtful.

In the context of the multiple problems and conflicting interests involved, the best interests of the children remain paramount. Such circumstances require the finding that the appellant is unfit to perform the duties imposed by the relationship of parent and child.

The district court made extensive findings and entered a thorough and definitive order. The district court very competently balanced the conflicting interests involved, determined the issues, and premised the conclusion on the best interests of the children under the circumstances

confronted. The sound discretion of the court should not be disturbed.

For the reasons stated, the judgment of the district court was correct and is affirmed.

AFFIRMED.

SHIRLEY STADLER, ADMINISTRATRIX OF THE ESTATE OF ROY STADLER, DECEASED, APPELLANT, V. CURTIS GAS, INC., A CORPORATION, ET AL., APPELLEES.

151 N. W. 2d 915

Filed June 30, 1967. No. 36483.

1. States. A consent to suit is a waiver of immunity from suit which permits the enforcement of a preexisting liability. It is not a waiver of immunity from liability and does not create a cause of action not previously existing.
2. ———. When a state, by itself or through its corporate creations, embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling.

Appeal from the district court for Frontier County: VICTOR WESTERMARK, Judge. Reversed and remanded.

Smith Brothers and John Wightman, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellee Board of Regents.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, and Donald E. Girard, for appellee Curtis Gas, Inc.

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

BOSLAUGH, J.

This is an action by the administratrix of the estate of Roy Stadler, deceased, to recover damages for his injury and death. The deceased was injured on May 20,

1965, in a gas explosion caused by a defective valve on a water heater in a residence leased by the deceased from the defendant, Board of Regents of the University of Nebraska. The deceased died on June 7, 1965, as a result of the injuries sustained in the explosion on May 20, 1965.

The second amended petition alleged that employees of the defendant, Curtis Gas, Inc., had serviced the water heater in March at the request and authorization of the Board of Regents; that Curtis Gas, Inc., had notified the Board of Regents that the valve was defective but that each defendant had failed to repair the heater or notify the deceased of its defective condition; and that the Board of Regents was negligent in failing to keep the premises in a safe condition and in failing to warn the deceased of the defective valve.

The second amended petition further alleged that the Board of Regents had acquired the property in August 1947; that it had been leased to others since May 1964; that it was leased to the deceased on or about February 27, 1965; that there was no relationship between the Board of Regents and the deceased other than that of landlord and tenant; that the leasing of the property by the Board of Regents "was in the same nature and capacity as that of private parties leasing dwelling houses for rent"; and that the Board of Regents "was acting beyond the scope of any governmental capacity for which it was created" in leasing the property to the deceased.

A general demurrer filed by the Board of Regents was sustained and the action dismissed as to that defendant. The administratrix has appealed.

The question presented is whether the Board of Regents of the University of Nebraska may be liable for the negligence of its agents and employees. The Board of Regents contends that it is an agency of the state and as such is immune from liability.

By statute, the Board of Regents of the University of

Nebraska in constituted "a body corporate" that "may sue and be sued." § 85-105, R. R. S. 1943. This statute permits the maintenance of an action against the Board of Regents but it is not a waiver of any immunity from liability. A consent to suit is a waiver of immunity from suit which permits the enforcement of a preexisting liability. It is not a waiver of immunity from liability and does not create a cause of action not previously existing. Shear v. State, 117 Neb. 865, 223 N. W. 130; Kent v. State, 118 Neb. 501, 225 N. W. 672.

The plaintiff contends that the renting of the residence property to the deceased in this case was a nongovernmental or proprietary activity of the Board of Regents to which the immunity from liability does not extend. The Board of Regents argues that all of its activities are governmental in nature and the state engages in no activity of a nongovernmental or proprietary nature.

Although there is some conflict in the authorities, this court has recognized the doctrine that the state and its agencies may engage in proprietary activities and thereby incur liabilities from which they would otherwise be immune. In Sorensen v. Chimney Rock Public Power Dist., 138 Neb. 350, 293 N. W. 121, this court said: "* * * when a state, by itself or through its corporate creations, embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling." See, also, Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412; People v. Superior Court, 29 Cal. 2d 754, 178 P. 2d 1, 40 A. L. R. 2d 919.

In this case the plaintiff has alleged that there was no relationship between the Board of Regents and the deceased other than that of landlord and tenant, and that the leasing of the property by the Board of Regents was in the same nature and capacity as that of private

parties leasing dwelling houses for rent. In Pintek v. County of Allegheny, 186 Pa. Super. 366, 142 A. 2d 296 (Allocatur refused), the Superior Court of Pennsylvania held that a school district, a county, and a borough, which were operating an apartment building that they had bid in at a tax sale, were engaged in a proprietary activity and liable for injuries to a child who was injured on a defective fire escape. In the language of the court, they were "conducting a business operation on the premises as distinguished from a governmental operation." See, also, Morris v. School Dist. of Mount Lebanon, 393 Pa. 633, 144 A. 2d 737.

The ultimate determination in this case, as to whether there is any basis for liability on the part of the Board of Regents to the plaintiff, will necessarily depend upon the facts. Upon the present state of the record, the demurrer of the Board of Regents should have been overruled.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

I find it necessary to respectfully dissent from the majority opinion. I fully agree that the rule of governmental immunity should be relaxed as it relates to the State of Nebraska. The obsoleteness of the rule was well pointed out by Justice Edwards in the case of Williams v. City of Detroit, 364 Mich. 231, 111 N. W. 2d 1, when he said, it is: "* * * an ancient rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts. By so doing (eliminating the rule), we join a major trend in this country toward the righting of an age-old wrong." Indeed, logic dictates that a person run over by a state-owned truck should have the same right to recover as one run over by a privately owned truck.

I disagree that the power to abolish the immunity doctrine in Nebraska should be exercised by the judicial

branch of state government. It has been said that the doctrine having been originally of judicial conception should be abolished by the judiciary. Such a conclusion does not necessarily follow. It must be borne in mind that this doctrine antedates our state constitutions and that many of our state constitutions were adopted with this rule in mind. Such is the case in Nebraska.

In this state we have a constitutional provision as follows: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." Art. V, § 22, Constitution of Nebraska.

A majority of the states still adhere to the immunity doctrine and many of those which have abrogated it as to charitable and municipal corporations have refused to abrogate it insofar as the state is concerned. Wisconsin announced complete abrogation of the doctrine in Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N. W. 2d 618, but I am unable to find any case in which the Wisconsin court has actually held that it was abrogated in a tort action against the state itself. In this Wisconsin case, the court, in effect, destroyed the applicability of its rule abrogating governmental immunity for tort liability by referring to the Wisconsin Constitution which provides: "The legislature shall direct by law in what manner and in what courts suit may be brought against the state." It then went on to say: "The decision in the case at bar removes the state's defense of nonliability for torts, but it has no effect upon the state's sovereign right under the constitution to be sued only upon its consent." Minnesota announced abrogation of the doctrine prospectively in Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N. W. 2d 795, but in that case specifically stated: "Nor is it our purpose to abolish sovereign immunity as to the state itself."

A number of other states having similar constitutional provisions have likewise refused judicial abolition of the doctrine on the ground that the constitution vested

such authority in the legislative and not the judicial branch of government. See, Wilson v. City of Cincinnati, 172 Ohio St. 303, 175 N. E. 2d 725; Bach v. Bach (Ky. App.), 288 S. W. 2d 52; Hill v. Beeler, 199 Tenn. 325, 286 S. W. 2d 868; Chumbley v. State, 183 Tenn. 467, 192 S. W. 2d 1007; United Contracting Co. v. Duby, 134 Or. 1, 292 P. 309; Schippa v. West Virginia Liquor Control Commission, 132 W. Va. 51, 53 S. E. 2d 609, 9 A. L. R. 2d 1284; Turner v. State, 27 Ark. 337.

The import of such constitutional provisions is well summarized in 81 C. J. S., States, § 215 a, p. 1304, wherein it is said: "Although a state's consent to be sued in its own courts may be expressed in the state constitution, constitutional provisions authorizing or requiring the legislature to direct by law the manner and courts in which the state shall be sued are generally regarded as not being self-executing, and no suit may be maintained against the state until the legislature has properly provided therefor." This rule has been recognized in Nebraska for many years. See, Gentry v. State, 174 Neb. 515, 118 N. W. 2d 643; McShane v. Murray, 106 Neb. 512, 184 N. W. 147; Cox v. State, 134 Neb. 751, 279 N. W. 482; Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N. W. 2d 382; State ex rel. Davis v. Mortensen, 69 Neb. 376, 95 N. W. 831. It will be noted that the requirement is for the "legislature," not the courts, to authorize suit under such constitutional provisions.

Even in many of the states which apparently do not have such constitutional provisions, the courts have held that the matter is one for legislative and not judicial action. In Simpson v. Truesdale Hospital, 338 Mass. 787, 154 N. E. 2d 357, it was said: "While as an original proposition the doctrine might not commend itself to us today, it has been firmly imbedded in our law for over three quarters of a century and we think that its 'termination should be at legislative, rather than at judicial, hands.'" In In re Wolfe, 26 Ohio O. 2d 274, 187 N. E. 2d 658, it was said: "The absence of a remedy,

however, does not authorize a court to create one. That is a project for the legislature." In Thompson v. Druid City Hospital Board, 279 Ala. 314, 184 So. 2d 825, it was said: "Regardless of what our personal or private views might be on a matter of this kind, this court still prefers to be labeled 'unprogressive and unenlightened' * * * than to usurp the traditional powers and duties of the legislature. To adopt the position urged by appellant would be not only to go against the weight of authority but to do so without legislative sanction. If and when the legislature sees fit to change the existing law in Alabama, this court will perform its function in conformity thereto. Until then, we shall content ourselves with the performance of our judicial function as best we can and leave the law making function to the legislative branch." In McNayr v. Kelly (Fla.), 184 So. 2d 428, it was said: "Extension, qualification or abolition of immunity of government executive officers from liability for libel or slander is a matter for legislative branch of government, * * * and not for courts, which, in exercise of judicial power, merely decide, in accordance with such legislative guidelines, cases which have arisen." In Boyer v. Iowa High School Athletic Assn., 256 Iowa 337, 127 N. W. 2d 606, it was said: "* * * whether or not the state or any of its political subdivisions or governmental agencies are to be immune from liability for torts is largely a matter of public policy. The legislature, not the courts, ordinarily determines the public policy of the state. * * * Although the doctrine of governmental immunity may have been of ancient judicial origin, it has been recognized as the policy of the state by the limited action of the legislature toward relaxation. The purposes for which public funds may be expended are limited by statute. The legislature recognized and relaxed the limitation by passage of laws authorizing purchase of liability insurance covering proprietary functions and officers and employees of certain public bodies. Had the legislature favored complete

abrogation of the immunity rule, as plaintiff contends for, it could have said so * * *. In the particulars wherein the legislature has acted we have a clear recognition of legislative responsibility for action in the field of public policy. The limited action taken shows more than mere tacit approval of the long-standing doctrine left unchanged." To the same effect are McCoy v. Board of Regents, 196 Kan. 506, 413 P. 2d 73; and Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 117 S. E. 2d 685, 85 A. L. R. 2d 469.

There is one factor regarding the doctrine of governmental immunity which sometimes leads to confusion. The doctrine consists of two different and readily distinguishable principles. See 81 C. J. S., States, § 130, p. 1137, § 214, p. 1300. The first is immunity from *suit*, and the second, immunity from *liability*. The Nebraska constitutional provision, adopted when the immunity rule was universally recognized, incorporated the first principle, but not the second, in our Constitution. This left governmental agencies in the position best demonstrated by our law pertaining to counties. Section 23-101, R. R. S. 1943, authorizes counties to "sue and be sued." Yet Nebraska courts have always held that a county is purely a creation of the Legislature and has no powers and is charged with no duties or liabilities except such as are conferred or laid upon it by the Legislature. "Counties are not liable in damages resulting from the negligent or tortious acts of their officers in the discharge of their official duties, in the absence of a statute creating such liability." Dawson County Irr. Co. v. Dawson County, 106 Neb. 367, 183 N. W. 655. See, also, Frickel v. Lancaster County, 115 Neb. 506, 213 N. W. 826; Stitzel v. Hitchcock County, 139 Neb. 700, 298 N. W. 555. Here we have a situation where the Legislature has waived the constitutional provision by authorizing *suit* against a county, but the common law doctrine of immunity from *liability* persists and prevents recovery.

Regarding the present case, the Legislature by passage

of section 85-105, R. R. S. 1943, has apparently waived the constitutional provision, and the immunity of Board of Regents from suit. It did not waive this agency's common law immunity from liability. This has now been done by the decision adhered to by a majority of the members of this court. The decision is clearly against the weight of authority and in my judgment is one best left to legislative discretion. Its effects will be widespread in that it subjects some state agencies, and all counties and municipalities, to suits of all types. A few state agencies which have not been authorized to "sue and be sued" will still be protected by the constitutional provision above mentioned; otherwise there are no restraints. If history repeats, the Nebraska Legislature will react, as have legislatures in other states where the immunity rule has been abolished by judicial rather than legislative action, with a hodgepodge of legislative acts aimed at restricting the effect of such judicial abolition. It would appear that a much more orderly approach could be obtained by permitting the Legislature to relax the immunity rule in such manner as may be deemed best in the light of wisdom, experience, public policy, and modern conditions.

In the present case, the majority opinion is based on the assumption that the Board of Regents was engaged in a "proprietary" function. Such assumption is unwarranted. How the house was acquired does not appear, but since the law of Nebraska does not authorize the Board of Regents to engage in the real estate business, it must be presumed that it was acquired in its governmental capacity. There is certainly a distinction between the renting of an isolated or single property so acquired in pursuit of its governmental functions and the engaging in a business or industrial activity of the nature generally denominated as "proprietary." This is not a case of operation of a utility or similar enterprise by a municipal corporation.

I conclude that the judgment of the district court should be affirmed.

WHITE, C. J., and CARTER, J., concur in dissent.

WHITE, C. J., dissenting.

In my opinion, the court itself is embarking on a "private enterprise" in abrogating the Legislature's power to control and limit the state's basic immunity to liability for tort. The majority opinion cites Shear v. State (1929), 117 Neb. 865, 223 N. W. 130, but fails to note its basic holding as follows: "The legislature has not by law granted to any one the right to recover against the state damages for negligence of any of its officers, agents, or employees, *and until such legislation is enacted*, no recovery against the state can be had for such negligence." (Emphasis supplied.) This precise holding was reaffirmed in 1946. Schmutte v. State, 147 Neb. 193, 22 N. W. 2d 691. This rule follows the overwhelming weight of authority. See 81 C. J. S., States, §§ 130, 131, pp. 1137, 1143. It cannot be questioned that the Board of Regents is a direct agency of the state and is cloaked with the same immunity.

Beyond the other considerations of public policy inherent in the sovereign immunity doctrine, the reason for the special rule as to nonliability for tort is tersely expressed in Robertson v. Sichel, 127 U. S. 507, 8 S. Ct. 1286, 32 L. Ed. 203, as follows: "The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty, of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."

There is no statute whereby this state has assumed a liability for the negligence of its officers or agents; and I can find no established principle of law sustaining such liability in the absence of such statutory assumption.

To change substantive law is the province of the Legislature, and not of this court.

While I agree with the other dissents filed herein that the renting of this house was in no sense a business enterprise or a "proprietary" function, I point out that the Legislature has not authorized the Board of Regents, as a state agency, to embark on a private or commercial enterprise or engage in a "proprietary" capacity. Its control and management of property is incidental to and a part of its performance of its governmental function of operation and management of the University of Nebraska. As Judge Newton's dissent points out, the analogy to our cases holding counties free from liability unless provided by statute would seem to be controlling.

The majority opinion cites Sorensen v. Chimney Rock Public Power Dist., 138 Neb. 350, 293 N. W. 121. This case does not deal with tort liability of the state or its direct agencies. It establishes the liability of a public power district for the purchase of supplies used in connection with the business of supplying and selling electric power, the court finding that the statute authorized contracting for the purchase of supplies and therefore the Legislature had provided for liability for the same. We have no doubt that in such a case the Legislature has waived immunity and that a power district, engaged in a commercial enterprise, is liable for a purchase of supplies within the scope of legislatively authorized power to contract. But this is far different from a legislative waiver of immunity for unauthorized negligent tortious acts of misfeasance or nonfeasance.

By judicial fiat today we sever from the Legislature the power to determine the state's liability for tort. But we cannot sever its power to determine whether such a judgment can be enforced. The Legislature can still pay all or any part of such a judgment and formulate any criteria for payment as it sees fit, which power it has now. Would anyone suggest that the Legislature could be mandamused to appropriate the necessary

funds? This situation graphically illustrates that what we are doing today usurps our proper authority contrary to the constitutional command as to the division of powers of our state government. The legislative body of this state has plenary and absolute control over the state's finances. Even the majority would not suggest otherwise. Any power to create a liability on the state treasury must be derived from statute, and state courts have no inherent power to create such liability. 81 C. J. S., States, § 128, p. 1134; Advisory Opinion to the Governor, 156 Fla. 45, 22 So. 2d 397; Armory Commission v. Palmer, 253 Ky. 425, 69 S. W. 2d 681; State ex rel. Plant v. Board of Commissioners, 80 W. Va. 506, 92 S. E. 747; Estate of Buxton, 246 Wis. 97, 16 N. W. 2d 399. The inseparability of the two functions is recognized in the rule that even where specific legislative authority for suit exists, an agency of the state may not be sued in tort if there are no funds available for satisfaction of a judgment, or no power reposed in the agency for the raising of funds necessary to satisfy a recovery against it. 81 C. J. S., States, § 131, p. 1144. In University of Maryland v. Maas (1938), 173 Md. 554, 197 A. 123, the court said: "The decided cases here and elsewhere recognize and affirm the principle that purely governmental agencies, because of their relation to the state, are entitled to immunity from suits as is the state itself, unless the legislature has expressly authorized suits to be brought against it, but this authority to sue is not free from restrictions, even though they are not expressly made by the legislature, for this court has held that suits may not be maintained unless money has been appropriated for the payment of such damages as may be awarded, or the agency itself is authorized to raise money for that purpose."

The University has no profits or funds from a business or industrial activity to pay such a judgment and the Legislature might or might not appropriate funds for such payment. The conclusion from all of this is

inevitable—this is exclusively a legislative power and prerogative and should remain so.

Now that this uncertain course is created, does the Legislature's power under the constitutional provision still prevail? Is a legislative act limiting the rule adopted today merely advisory in nature? Is the Legislature's power to create political subdivisions and state agencies and define their power and liabilities limited? In the wilderness of the nebulous doctrine of "proprietary" functions, can this court and the Legislature avoid conflict and confusion?

The power of restraint imposed on the judiciary is the power of self-restraint. The tendency to usurp power to achieve a laudable policy objective is all too prevalent. The principle of division of power should not be crucified lightly. It is our solemn and perhaps paramount duty to preserve it. How can we preserve it by honoring it in the breach? And if there is doubt, judicial self-restraint requires resolution against the exercise of that very power. What we are doing today is responding to the "felt necessities of the time," under the guise of judicial power. The end does not justify the means and an objective born of judicial impatience should not be accomplished by judicial usurpation.

CARTER and NEWTON, JJ., join in this dissent.

CARTER, J., dissenting.

I concur fully with the dissent filed by Newton, J. The concurring opinion filed by McCown, J., fails to distinguish between a business enterprise in competition with private business and transactions that are incidental only to the administration of governmental power. Many incidental acts of government are also done by private persons. It is completely illogical to say that general governmental powers shall be separated into distinct acts necessary to this accomplishment of the purpose of the grant of governmental authority and hold that those which may be performed by private persons are beyond the reach of the sovereign immunity doctrine. It is

fundamental that the state or its subdivisions may not engage in a proprietary business without legislative authority.

The immunity of the state for the torts of its agents and employees rests on a much broader doctrine. It involves the right of the sovereign authority to be free of such liability except to the extent that it is waived or abrogated by the Legislature, the branch of government which determines matters of public policy. The Legislature has not waived or abrogated its immunity for tort, nor has it said in what manner and in what courts actions for tort may be brought against the state as required by Article V, section 22, Constitution of Nebraska.

The doctrine of sovereign immunity has been the law of the land in state and federal governments since our constitutional system of government has been established. It is true that many text and review writers have complained of the inequities of the doctrine and have advocated its abandonment or limitation, but in almost every instance they have conceded that such action is legislative and not judicial. I am firmly convinced that the majority opinion exercises a legislative function by judicial fiat.

The courts of this country have had the application of the doctrine before them on numerous occasions. In all the reported decisions no court has ever said, so far as I have been able to find, that a factual situation such as we have here, comes within the proprietary rule. The majority opinion relies upon Pintek v. County of Allegheny, 186 Pa. Super. 366, 142 A. 2d 296, an inferior court decision, to sustain its holding. But the holding of that court is based on a Pennsylvania statute authorizing the operation and a factual situation bearing no resemblance to the present case. The concurring opinion does not cite a single case to support it, because there are none to support it. It hardly seems possible that all of the learned judges that have served over the

years on the appellate courts of this country could have overlooked so simple an expedient as the proprietary principle to escape the reach of the sovereign immunity doctrine. The long establishment of the principle and the dearth of authority to support its judicial abrogation, whether on the theory of its being a proprietary function as herein defined or otherwise, adds force to the view that the majority opinion is an encroachment on the powers of the Legislature. It is the function of courts to declare the law as it is and not as they would like to have it. Judicial restraint should be meticulously exercised in guarding against violation of the division of powers provision of the Constitution. This court ought, at least, to impose upon itself the same restraints that it imposes upon the other divisions of government by seeing to it that no claimed equity, however appealing it may be, infringes upon this fundamental principle of the Constitution.

Here the Legislature has not authorized the Board of Regents to enter into a proprietary business, nor has the Legislature abrogated or limited the immunity of the Board of Regents from tort, or provided in what manner and in what courts such suits shall be brought. These failures alone defeat the plaintiff's claim.

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

McCOWN, J., concurring.

The doctrine of governmental immunity from tort liability in the United States has been considered and challenged for decades. As foundation articles in the 1920 era, see Borchard, Government Liability in Tort, 34 Yale L. J. 1, 6, and Harno, Tort Immunity of Municipal Corporations, 4 Ill. L. Q. 28, 42.

The governmental-proprietary distinction initially developed in connection with municipal corporations or quasi corporations of the state, as a means of constricting the area of immunity or broadening the area of liability, was extended to the state itself. See Annotation, State's immunity from tort liability as dependent on gov-

ernmental or proprietary nature of function, 40 A. L. R. 2d 927.

The rationale behind the "governmental-proprietary" dichotomy is that when a public entity is involved in a governmental function, it is immune from tort liability, but when involved in a proprietary function, it loses the cloak of immunity. The terms "public, sovereign, political, state, mandatory, essential, discretionary, legislative" have been used interchangeably with "governmental." The terms "private, corporate, quasi-private, nongovernmental, nonessential, ministerial, commercial, permissive" have been used interchangeably with "proprietary." See, Rebko, American Legal Commentary on the Doctrines of Municipal Tort Liability, 9 Law and Contemporary Problems, 214, 218; 2 Harper & James, Torts, § 29.5, p. 1620. These terms might be called liability or nonliability labels.

During the past 10 years judicial opinions in increasing volume have shifted from a process of whittling away to a much sharper attack, including complete abrogation of the doctrine in several states, which, in most instances, has been followed by legislative reaction. See, Some Thoughts on the American Law of Governmental Tort Liability, 20 Rutgers L. Rev. 710 (1966); The Role of the Courts in Abolishing Governmental Immunity, Duke L. J. (1964), 888.

The governmental-proprietary distinction is unsatisfactory. The consequences of immediate and complete abrogation of the doctrine, with all of its ramifications, is likewise unsatisfactory. The former, however, does provide a case-by-case modification of the doctrine of governmental immunity in the traditional pattern of solution.

The dissents here indicate the basic judicial conflict is no longer in the area of whether the old doctrine of governmental immunity from tort liability is obsolete, but only with the question of the responsibility and power of the courts to reform it. For a thorough dis-

cussion of the relative responsibilities of courts and legislatures in this area, see Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 Minn. L. Rev. 265.

Justice Schaefer of the Supreme Court of Illinois has expressed the problem of precedent and policy most effectively. "Precedent speaks for the past; policy for the present and the future. The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present. Two agencies of government are responsible for the proper blend, but each has other responsibilities as well. The legislature must deal with the ever increasing details of governmental operations. It has little time and little taste for the job of keeping the common law current. The courts are busy with the adjudication of individual controversies. Inertia and the innate conservatism of lawyers and the law work against judicial change." 34 U. Chicago L. Rev. 3, 24.

While the majority opinion here does not constitute an immediate and complete abrogation of the entire doctrine of governmental immunity in Nebraska, its implications suggest the desirability of legislative action.

SPENCER, J., joins in this concurrence.

H. B. WELLNITZ, APPELLANT, V. EVERETT MUCK, APPELLEE.

152 N. W. 2d 1

Filed June 30, 1967. No. 36500.

Limitations of Actions: Account, Action on. The latest item of a continuous account removes prior items from the operation of the statute of limitations.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed and remanded.

Edmund Hollstein, for appellant.

Anderson & Smith, for appellee.

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

SMITH, J.

The question is whether a 4-year statute of limitations barred recovery on an unsettled account except the latest item, a debit. Plaintiff, a farm implement dealer, commenced this action on August 4, 1965, to recover a principal balance of $5,505.84 for repairs and sales. At the close of his evidence-in-chief the district court directed a $5.04 verdict for him on the latest item. It ruled that the claim was otherwise unenforceable.

The account, which covers about 12 years, was inactive at times. Plaintiff's ledger sheet shows 7 intervals of 8 to 19 months between transactions and from December 1953, to March 1958, 7 entries only. The sequence of transactional dates after August 23, 1960, is April 18, June 17, July 15, 24, and 27, and August 5, 1961.

The debit postings identify approximately 84 sales slips: 29 for 1949-1952, 11 for 1953-1957, and 44 for 1958-1961. Almost all the charges were made for labor and spare parts, but 3 arose out of implement sales. Defendant purchased in 1950 a tractor for $1,934.95 payable in definite installments with interest; on March 27, 1951, a disc harrow, grain drill, and set of wheels for $1,017.50; and in 1952 a combine for $4,993.25. To pay the balance on the combine defendant promised in writing to give two promissory notes, interest rate and maturity dates being specified. He failed to perform, and so plaintiff debited the account. The entry, which is dated July 2, 1952, appears between entries in 1954 and 1956.

The credit side of the ledger account has only 9 entries, all dated prior to 1959. Two refer to the tractor sale; one, to repairs; one, to the combine trade-in; and five, to merchandise returned. When defendant returned

merchandise in 1957, he probably received from plaintiff a copy of this memorandum: "Returned bearing * * * and got wants cash back 27.55 Credit acct 27.55 * * * Thanks."

Defendant received no statement of account, but prior to August 1961, plaintiff made several requests for part payment. Plaintiff testified at the trial that he considered the account open. He sketched his understanding in these words: "* * * I was always hoping that he would have a good crop and be able to pay some of his indebtedness. It just seemed * * * that I never did get any settlement out of him."

The latest item of a continuous account removes prior items from the operation of the statute of limitations. Transactions may be independent because of special contracts, long intervals, or other circumstances. The test of continuity is indefinite. See, Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132; Pankau v. Boyer, 141 Neb. 310, 3 N. W. 2d 634; Reeves v. Nye, 28 Neb. 571, 44 N. W. 736.

The sales of implements to defendant were unrelated to the charges for labor and supplies. The interval of 8 months between items in 1960-1961 is viewed against the background of inactivity. We conclude that the account for the period prior to 1961 lacks continuity; to that extent the district court ruled correctly. The items for 1961, however, were interrelated closely in time and subject matter. The law is not so stringent that the latest item of an account must amalgamate with all or none of its predecessors. The district court erred in ruling that items for 1961 prior to the latest one were unenforceable as a matter of law.

The judgment of items prior to 1961 is affirmed, and on items for 1961 reversed and cause remanded with costs on appeal taxed against defendant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, APPELLEE, V. BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, APPELLANT.

UNION LOAN AND SAVINGS ASSOCIATION, A CORPORATION, APPELLEE, V. BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, APPELLANT.

152 N. W. 2d 8

Filed June 30, 1967. Nos. 36508, 36509.

Building and Loan Associations: Taxation. Advance payments made to a building and loan association, for the purpose of defraying taxes and insurance upon property mortgaged as security for a loan, are the property of the association and exempt from intangible tax under section 77-719, R. R. S. 1943.

Appeals from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Walter D. Weaver, and Janice L. Gradwohl, for appellant.

Dean & Finnigan, John W. Delehant, and Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellees.

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

BOSLAUGH, J.

First Federal Savings and Loan Association, the plaintiff in case No. 36508, is a building and loan association organized under the laws of the United States. Union Loan and Savings Association, the plaintiff in case No. 36509, is a building and loan association organized under the laws of Nebraska. Both plaintiffs are engaged in the business of making loans secured by mortgages upon real estate.

Generally, the plaintiffs require their borrowers to make monthly payments which are used to pay the interest upon the loan, the taxes and insurance upon the real estate which is the security for the loan, and re-

tire the principal. The payments which are to be used to pay the taxes and insurance upon the security are generally referred to as "advance payments" or "escrow payments."

On December 28, 1965, after notice and hearing, the amount of the advance payments held by each plaintiff on January 1, 1965, was added to the tax rolls as Class A intangible property by the Lancaster County Board of Equalization. The plaintiffs then appealed to the district court where the action of the board was set aside as erroneous and void. The board has now appealed to this court where the actions were consolidated for briefing and argument.

The cases turn on the question of the ownership of the advance payments. If the advance payments are the property of the plaintiffs, they are exempt from the intangible tax under section 77-719, R. R. S. 1943, which imposes a gross earnings tax upon the plaintiffs "in lieu of all other taxes on intangible property." If the advance payments are the property of the borrowers, then they are subject to the intangible tax and must be reported by the plaintiffs as property held by an agent, trustee, or other representative. § 77-713, R. R. S. 1943.

The relationship between the plaintiffs and their borrowers is one of contract. The rights and liabilities of the borrowers are determined by the loan instruments which evidence the agreement between the borrowers and the plaintiffs. Although there is some minor variance in the language used in the various instruments, depending upon the nature of the loan and whether it is one insured or guaranteed by an agency of the United States, the differences are not material to the question presented in these cases.

The testimony and the loan instruments which appear in the record show that the advance payment for taxes and insurance, where required, is as compulsory as the payment for interest and principal. The borrower's only right is to require that each payment be applied in ac-

cordance with the terms of the contract. The plaintiffs are not required to keep the advance payment funds separate, but are permitted to commingle and invest them and keep the earnings. Any surplus over and beyond the amount required to pay the taxes and insurance is used to reduce the principal of the loan. The borrower has no right to a refund while the principal indebtedness remains unpaid, but in some cases the association could make a refund at its option.

We think that the record shows that the advance payments for insurance and taxes, when made, become the property of the plaintiffs the same as any other payment required of the borrower. Other courts which have considered the question have reached a similar conclusion. See, In re Simon, 167 F. Supp. 214; Central Suffolk Hospital Assn. v. Downs, 213 N. Y. S. 2d 192; Valerio v. Colloge Point Savings Bank, 48 Misc. 2d 91, 264 N. Y. S. 2d 343.

It is unnecessary to consider the other matters discussed in the briefs. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

H. D. CAMPBELL, DOING BUSINESS AS H. D. CAMPBELL CONSTRUCTION COMPANY, APPELLEE, V. RICHARD LUTZ ET AL., APPELLEES, IMPLEADED WITH ARTHUR J. HENDERSON, DOING BUSINESS AS HENDERSON ELECTRIC SERVICE, APPELLANT.

152 N. W. 2d 101

Filed June 30, 1967. No. 36510.

1. **Mechanics' Liens.** In a suit to foreclose a mechanic's lien where the amount of the lien is the reasonable value of the labor and materials furnished, the defendant may properly inquire into the amount of work done, the rates of pay therefor, and the correctness of the amount chargeable to him.
2. **Evidence: Contempt.** The refusal of a witness to answer ques-

tions or interrogatories within the scope of sections 25-1267.02 and 25-1267.38, R. R. S. 1943, subjects the witness to the penalties for civil contempt.

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

Johnston & Grossman, for appellant.

Norman Langemach, for appellee Campbell.

Kier, Cobb & Luedtke and John E. Dean, for appellees Lutz et al.

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

CARTER, J.

This is an appeal from the imposition of a fine of $100 on the defendant Arthur J. Henderson for contempt of court for refusing in open court to answer certain questions propounded in the taking of a deposition after being ordered by the court to do so. The defendant Henderson has appealed.

On April 2, 1965, the H. D. Campbell Construction Company filed its action in the district court for Lancaster County to foreclose a mechanic's lien on certain property described in its petition belonging to defendants Lutz et al. Arthur J. Henderson was made a party defendant because of a claim to a mechanic's lien on file in the office of the register of deeds in Lancaster County which plaintiff asserts to be inferior to his lien. Henderson filed an answer and cross-petition in which he asserted and sought the foreclosure of his claimed mechanic's lien against Lutz et al. It appears that Henderson was prevented by the owners from completing the construction of the building. The owners requested Henderson to submit an itemized bill for work performed. He submitted his itemized bill in the amount of $7,790.34 for work done and not paid for which he asserted to be fair and reasonable and for which he

subsequently filed his claim of lien. The owners, the defendants Lutz et al., undertook to take the deposition of Henderson regarding his claim to a mechanic's lien, which gave rise to the present litigation.

The evidence shows that Henderson was to perform the labor and provide the electrical materials required in the construction of the building. In the taking of the deposition, Henderson was asked questions about the cost of the labor and the amounts he charged over and above cost as his profit, which he refused to answer. The issue can be pointed up by quoting one of the questions asked and the answer given. Question: "All right, now how much difference was there between what you paid them and what you charged Mr. Lutz and his associates?" Answer: "I believe that the amount I may pay my employees, or the amount of profit I may be able to realize in my business in this instance is confidential, and not open to public scrutiny. I have charged Mr. Lutz and his associates what I believed to be the reasonable value of the services rendered and material required for the job, at the going rate in this community, as shown by the itemized statement, a copy of which is attached hereto. I do not believe that what I may pay my employees, costs in operating my business, or the profit or loss I may incur, is relevant or material to the question of reasonable value of the services rendered. For this reason, I elect not to answer your question." Similar questions were asked which Henderson refused to answer on the advice of counsel. In the hearing in the district court on the citation for contempt, Henderson and his counsel made it clear that the defendant was refusing to answer the questions propounded for the reason that the information sought was not relevant to the subject matter involved in the pending action, that the information sought would not be admissible at the trial of the pending action, nor would the disclosure of said information appear reasonably calculated to lead to the discovery of admissible evidence.

Answers to interrogatories of similar nature and import were also requested. They were answered in the same manner as in the deposition and will be disposed of according to the rules applicable to the scope of the examination in taking depositions.

The scope of the examination by deposition is set out in section 25-1267.02, R. R. S. 1943, as follows: "Unless otherwise ordered by the court, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." It is provided in part by section 25-1267.38, R. R. S. 1943: "Interrogatories may relate to any matters, not privileged, which are relevant to the subject matter involved in the pending action, and the answers may be used by any party to the same extent as testimony taken by deposition."

The defendant Henderson asserts that the charges made for labor and materials have no relevancy to their reasonable value. With this we do not agree. It may be that the charges made for labor and materials are not controlling, but they are relevant to the issue. In fact, unless questioned, such charges are sufficient to make a prima facie case of reasonable value. In Sorensen Constr. Co. v. Broyhill, 165 Neb. 397, 85 N. W. 2d 898, we said: "In Hibbard v. Wilson, 51 Neb. 436, 71 N. W. 65, it was pointed out that in an action on quantum meruit for services rendered evidence of stated rates is competent evidence tending to show the value. That is the situation here, and there is no evidence to

the contrary, in consequence of which it must be said that the reasonable value of the work and labor performed was sufficiently proved." In Umberger v. Sankey, 154 Neb. 881, 50 N. W. 2d 346, it is said: "There is no specific standard by which such reasonable value is to be determined. In the present case the records of the plaintiffs showing the costs of the labor and materials used, which are testified to as being their reasonable value, were offered in evidence for this purpose." The defendants Lutz et al. may properly assume that the charges for labor and materials will be asserted as their reasonable value. Such defendants on cross-examination have the right in questioning such charges to inquire into the amount of work done, the rates of pay therefor, and the correctness of the amount chargeable to them. We are of the opinion that the trial court correctly determined that the questions and interrogatories here involved were proper in discovery proceedings and answers thereto were proper to be coerced by civil contempt proceedings. The remedy by civil contempt is available to the defendants Lutz et al., in the instant case under the law declared in Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512, and cases therein cited.

We find no reversible error in the record and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYLE EDGAR NELSON, APPELLANT.
152 N. W. 2d 10

Filed June 30, 1967. No. 36516.

1. **Juries: Trial.** Objections to the mode of selecting petit jurors must be made before the trial to be of any avail.
2. **Larceny: Criminal Law.** In a prosecution for cattle stealing,

it is not necessary to allege or prove the value of the cattle stolen.

3. **Indictments and Informations.** A variance between the allegations in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the case or such as is prejudicial to the defendant.
4. **Larceny: Criminal Law.** Ownership of chattels may, in an indictment for their theft, be laid either in the owner, or in the person who at the time of the theft was in the actual peaceable possession of them, although such person may have no other property therein than the right of possession as against the thief.
5. ———: ———. In prosecutions for larceny, nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances.
6. **Criminal Law: Witnesses.** Evidence is relevant which shows that the accused has threatened or assaulted a witness, has endeavored to prevail on him to abscond, has procured his absence, has endeavored to induce him to testify falsely, or has concealed the whereabouts of such witness from the prosecution; and such conduct on the part of an accused person is an incriminating circumstance to be weighed by the jury in determining the question of his guilt.
7. ———: ———. The mere fact that a witness in a criminal prosecution is a regular public law enforcement officer does not entitle an accused to an instruction that the jury, in weighing his testimony, should exercise greater care than in weighing the testimony of other witnesses.
8. **Criminal Law: Trial.** In a criminal action, an instruction which informs the jurors that they have nothing to do with the punishment of the defendant and that they have no right to take into consideration what punishment he might or might not receive, in event of his conviction, is proper in the cases where the punishment is left to the trial court.
9. ———: ———. Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case, and, if there is direct incriminatory evidence of the principal facts essential to guilt, the failure to instruct in this regard is not error.

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

Charles A. Fisher and Charles F. Fisher, for appellant.

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

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

NEWTON, J.

This is an action wherein the State prosecuted Lyle Edgar Nelson, appellant herein, on a charge of cattle stealing. Trial was had to a jury and a verdict of guilty rendered. The evidence is to the effect that one Margaret Molzahn, who resided in Hay Springs, Nebraska, was the owner of a ranch in Sheridan County on which, she testified, a herd of black angus cattle owned by her was maintained, and that Arthur Klemm resided on the ranch and acted as the foreman or supervisor of the ranch and livestock. Arthur Klemm testified that he was the owner of the cattle although they were listed for taxation in the name of the ranch owner. The fact that Arthur Klemm was in sole possession of the cattle at the time of the alleged theft was undisputed however. Mr. Klemm was accustomed to checking the cattle every 2 days and in the first part of January discovered that 25 out of the 76 head of cattle on the ranch had disappeared. He searched the neighborhood for the missing cattle, but was unable to locate them and then reported the fact that some of the cattle were missing to the Sheridan County sheriff. Klemm stated that out of the 76 head, all but 7 cows and 2 bulls had been raised by him. He had made it a practice to tame and make pets of the heifers and cows, had named each of them, many of them would come when he called them, and could be fed by hand. This witness further stated that some of the cattle were not branded and that on March 2 and March 10, 1966, he made trips to the Cameron Fanning ranch at Vetal, South Dakota, at which time he was able to call 5 cows, varying in age from 2 to 6 years, from a larger herd and feed them by hand. He referred to these cows by the individual names he had

given them. Other persons who accompanied him on the trip also attempted to approach the five cows, but could not get near any of them. Mr. Klemm testified that these were five of his missing cows.

The evidence further shows that these cows were purchased by Ronald J. Fanning, son of Cameron Fanning, at the Martin, South Dakota, sale barn on January 15, 1966; they then bore the lazy B mill iron brand on the left hip, and the brands were fresh. This brand was owned by B. J. (or Betty Joe) Schmitz Nelson, wife of the defendant, and a bill of sale was executed by her to the purchaser. Mr. Fanning made out two checks in payment for the cattle, one to the defendant for $1,928 and one to a man by the name of Bill Porch for $447, the checks being thus made in accordance with the directions of the defendant. The defendant's evidence indicated that the defendant had sold some horses belonging to the defendant in the name of Bill Porch but no explanation was offered regarding the consideration for the $447 check. Ernest Bailey, investigator for the Nebraska Brand Committee, was called by the State and testified that cattle were usually branded as calves, it being unusual to brand them at a later date. He also stated that he was present at the Fanning ranch on March 2 and 10, 1966, when Mr. Klemm inspected and identified the cattle and, in his judgment, the brands were fresh and just starting to "peel" when he saw them in March; and that it ordinarily required, during cold weather, a period of from 5 to 7 weeks for brands to peel.

The Molzahn ranch occupied by the witness Klemm in Sheridan County lies adjacent to what was referred to in the evidence as the Albert Gehrt ranch, northwest of Rushville, Nebraska. There were some corrals in the pasture at the Gehrt place located about a half mile south from the Molzahn ranch buildings. One Frank Ogle was called as a witness by the State and testified that he had worked for the defendant at the defendant's

ranch in South Dakota commencing a little before Thanksgiving 1965. His evidence is, in substance, as follows: On Sunday, January 2, 1966, he rode with the defendant in defendant's 1½-ton, red, Chevy truck to Rushville, Nebraska, where defendant got a Chevrolet pickup owned by him from the Chevrolet garage where it had been repaired. Defendant, Ogle, and one Ernie Abold then drove out in the country northwest of Rushville in Abold's car where they looked at some horses and black cattle. They returned to Rushville; Ogle drove the pickup truck to defendant's ranch; and defendant drove the truck home. About 11 p.m. that evening, defendant woke Ogle and took him on a trip in the truck. It was a clear, moonlight night. They drove west to Pine Ridge, South Dakota, turned south through White Clay, and continued on for several miles in a southwesterly direction. Defendant stated that he had lost the tailgate of his truck and wanted to find it. The tailgate was found on the shoulder of a county road and they continued on for about 2 miles where defendant turned off onto a pasture trail. Defendant turned off the truck lights and drove approximately another 2 miles through the pasture to the corrals on the Albert Gehrt place. There, approximately 10 head of black cows were loaded by defendant and the witness; they retraced the trail through the pasture to the county road where the lights were turned on, then drove to the defendant's ranch and unloaded the cattle. A couple of days later, the cattle were branded with the lazy B mill iron brand on the left hip and were then taken to the Martin, South Dakota, sale ring and unloaded. After the cattle were sold, the witness and defendant returned to the defendant's ranch and a couple of days later, the witness Ogle went into Gordon, Nebraska. The defendant found him in a hotel room and told him: "I think I just as well get you out of here," drove him to Alliance, Nebraska, and gave him $20 and a bus ticket to Denver. Ogle stayed in Alliance and cashed in the bus ticket.

On New Year's Day, Ogle had driven with the defendant to Mobridge, South Dakota, to take some horses to the sale ring there. The horses were sold that evening and they then returned to the defendant's ranch, arriving there on the morning of January 2, 1966. The witness further stated that later in the spring, he gave directions to the Sheridan County sheriff and to Ernest Bailey to enable them to find the corrals where the cattle had been loaded and rode with them to the corrals on the Gehrt place.

Defendant's evidence was, in substance, as follows: His wife testified that she had left November 17, 1965, to visit her parents in Montana and did not return until December 23 at which time she observed the 14 black cows on the place which, she said, were taken to the Martin, South Dakota, sale barn on December 24, 1965, and bore her brand. She stated it was on December 31 when she took her husband and the witness Ogle to Rushville and they picked up from the Chevrolet garage both the 1½-ton truck and the pickup. Eugene American Horse testified that he occasionally worked for defendant and on Thanksgiving Day 1965 helped him brand some black and mixed cattle. Also, on the day before Christmas, he helped load some black cattle and hay that were taken to Martin, South Dakota. Defendant's wife further testified defendant did not return from the horse sale in Mobridge until 8 or 9 o'clock on the evening of January 2, 1966, and did not leave the ranch thereafter during that evening or the next day. Defendant's evidence corroborated that of his wife and Eugene American Horse as to the branding of the cattle on Thanksgiving Day, the sale of the horses in Mobridge. the return to the ranch late on the evening of January 2, 1966, and the sale of the 14 black angus cows at Martin, South Dakota. He had about 50 steers and 30 cows of mixed types on the ranch of which 30 or 40, including cows, yearlings, etc., were black cattle. He also stated he obtained the truck and the pickup from the Rushville

garage on December 31, 1965, and denied he was in Rushville on January 2, 1966. He admitted seeing the witness Ogle in Gordon, driving him to Alliance, and buying him a bus ticket to Denver, but stated this was in accordance with Ogle's request. He denied ever being on the Molzahn or Gehrt places at or about the time of the alleged theft and on cross-examination, admitted that he had talked with Ogle at Rapid City, South Dakota, since the preliminary hearing, but denied talking to him about this case or about leaving the country. Two other neighbors of defendant testified they stopped at his place on the afternoon of Thanksgiving Day and that he had then been branding some black cattle. Another witness for defendant, who was a trader in livestock, stated that a day or two after Christmas, defendant had taken him to the Martin sale barn and tried to sell him 14 black cows.

In rebuttal, the State called the owner of the Chevrolet garage at Rushville, and his parts-man, both of whom positively testified that on the afternoon of Sunday, January 2, 1966, the defendant came in after his pickup truck, having obtained his other truck on December 31, 1965. Frank Ogle was also recalled and testified that during August 1966, he was in Rapid City when the defendant accosted him on the street, and asked him to get in defendant's car after which they, together with another individual, drove out into the country where defendant said: "* * * he was going to whip me," and that "* * * I should have got out of the country * * *." They stopped, got out of the car, and the witness was assaulted by defendant and the other individual. The witness was then left out in the country, walked to the nearby community of Farmingdale, South Dakota, caught a ride to Rapid City, South Dakota, and went to Bennett Clarkson Hospital where his wounds were stitched up.

It appears that this case came on for trial on July 26, 1966, and after a jury had been partially impaneled, it became apparent that there were not enough jurors

on hand to make it possible to obtain 12 disinterested jurors. At this time the court, on its own motion, quashed the panel and continued the cause until September 21, 1966, when a new jury was called, a jury selected, and the cause tried. No objection to this procedure was raised by the defendant until his motion for new trial was filed. The record does not disclose that the defendant was prejudiced in any manner by this procedure and it is fundamental that objections to the mode of selecting petit jurors must be made before trial to be of avail. Satterfield v. State, 172 Neb. 275, 109 N. W. 2d 415; Davis v. State, 31 Neb. 247, 47 N. W. 854.

The information in this case charged the defendant with stealing "five (5) or more, three to five year old Black Angus Cows, the property of Arthur Klemm." In connection therewith, defendant contends that the information was defective, and also the verdict of the jury, in that the information failed to allege, and the verdict of the jury failed to fix, the value of the cattle alleged to have been stolen. That there is no foundation for this contention may be readily ascertained. See, Leistritz v. State, 165 Neb. 220, 85 N. W. 2d 318; Buthman v. State, 131 Neb. 385, 268 N. W. 99; Cochran v. State, 122 Neb. 79, 239 N. W. 471; Halbert v. State, 116 Neb. 1, 215 N. W. 459.

It is also contended that there was a material variance in the evidence in that the information alleged the cattle to be from 3 to 5 years old whereas the evidence indicated that the 5 cattle identified were from 2 to 6 years old. Such variance is not material or prejudicial. See, Clark v. State, 102 Neb. 728, 169 N. W. 271; Brown v. State, 103 Neb. 271, 171 N. W. 906; Goldsberry v. State, 66 Neb. 312, 92 N. W. 906; Fullerton v. State, 148 Neb. 811, 29 N. W. 2d 618.

Issue is taken with instruction No. 7 of the court to the effect that for the purposes of this prosecution "the owner of cattle may be either the actual owner or one

who is in the actual peaceable possession of them, although such person may have no other property therein than the right of possession as against a thief." This is a correct statement of the law. See, Lovejoy v. State, 130 Neb. 154, 264 N. W. 417; 52 C. J. S., Larceny, § 13b, p. 811, § 81a (1), p. 886.

It is contended that the record fails to disclose a lack of consent by the owner to the taking of the cattle alleged to have been stolen. In this case the record discloses that the cattle were alleged to have been the property of Arthur Klemm and although the evidence as to ownership was conflicting, the undisputed evidence shows that Arthur Klemm was in sole possession of the cattle and that he did not consent to their being taken. In view of the law cited in the preceding paragraph, this would be sufficient; however, it is now the settled law of Nebraska that a lack of consent need not be shown in express terms but may be inferred from circumstances appearing in evidence the same as any other fact. See Holthus v. State, 138 Neb. 200, 292 N. W. 603.

Another assignment of error is based upon the fact that on cross-examination, defendant was questioned about his meeting with the witness Frank Ogle at Rapid City, South Dakota, in August of 1966, and the rebuttal evidence of the State indicating that at that time Frank Ogle was assaulted by the defendant and another individual because he had not left the country. The admission of this evidence, although damaging to the defendant's defense, does not constitute error because it was used for impeachment purposes or because it involved the additional offense of assault and battery. Evidence of threats made to, or of an assault made upon, a witness by a defendant is admissible. See, Blair v. State, 72 Neb. 501, 101 N. W. 17; Woodruff v. State, 72 Neb. 815, 101 N. W. 1114; Welter v. State, 112 Neb. 22, 198 N. W. 171; United States v. Howard, 228 F. Supp. 939; 22A C. J. S., Criminal Law, § 633, p. 483; Annotation, 62 A. L. R. 136.

It is contended that the court was in error in refusing to give a cautionary instruction regarding the testimony of the investigator for the Nebraska Brand Committee. Chapter 54, article 1, R. R. S. 1943, makes the Nebraska Brand Committee and its employees public officers. It is well settled that the mere fact a witness in a criminal prosecution is a regular public law enforcement officer does not entitle the accused to an instruction that the jury, in weighing his testimony, should exercise greater care than in weighing the testimony of other witnesses. See, Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151; Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

An instruction was given by the court that the jury was not to be concerned with or influenced by any consideration as to what punishment the defendant might receive in the event of his conviction. Such instruction was not erroneous. See, Witt v. State, 123 Neb. 799, 244 N. W. 395; Trimble v. State, 118 Neb. 267, 224 N. W. 274.

Another assignment of error is the refusal of the court to give a cautionary instruction on circumstantial evidence. Such an instruction was not required under the facts of this case. "Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case, and, if there is direct evidence of the principal facts essential to guilt, the failure to instruct in this regard is not error." Franz v. State, 156 Neb. 587, 57 N. W. 2d 139. See, also, Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349.

Numerous other assignment of errors mentioned in the brief we find to be without merit and not requiring discussion.

The evidence in this case, although conflicting, is sufficient to sustain the verdict of the jury and no error appearing, the judgment of the district court should be and is affirmed.

AFFIRMED.

IN RE APPLICATION OF MIDWEST LIVESTOCK COMMISSION COMPANY, INC., MCCOOK, NEBRASKA, FOR A MARKET LICENSE TO CONDUCT A LIVESTOCK AUCTION MARKET. MIDWEST LIVESTOCK COMMISSION COMPANY, INC., APPELLANT, V. TRI-STATE LIVESTOCK COMMISSION COMPANY ET AL., APPELLEES.

151 N. W. 2d 908

Filed June 30, 1967. No. 36600.

1. **Livestock: Statutes.** The regulation of livestock auction markets under the police power of the state for the purpose of encouraging, stimulating, and stabilizing the livestock economy of the state by encouraging the construction, development, and productive operation of livestock auction markets, is a proper subject for legislative action.
2. ———: ———. The operation of a livestock auction market is a lawful business which any person has a right to pursue, subject only to reasonable legislative regulation.
3. **Administrative Law: Licenses.** Where the Livestock Auction Market Board determines from competent evidence that a livestock auction market would beneficially serve the livestock economy after giving reasonable consideration to the five propositions listed in section 54-1163, R. S. Supp., 1965, it is the duty of the board to issue a market license.
4. **Administrative Law: Statutes.** The scope of a regulatory statute in derogation of the common law will not be extended beyond its express provisions and, if its terms have been complied with and so found by the regulatory board on competent and relevant evidence, its findings will not be disturbed by the courts.
5. **Administrative Law: Licenses.** Where the Livestock Auction Market Board has jurisdiction of an application for a license to operate a livestock auction market and the evidence is sufficient, if believed, to sustain the grant of a license, even if the evidence is in direct conflict, the order of the board is not arbitrary or capricious.
6. **Administrative Law: Evidence.** While an administrative board may relax the strict rules of evidence applicable in law courts in affording a full and fair hearing, it must in every instance require any action taken by it to be supported by competent and relevant evidence.

Appeal from the district court for Red Willow County:

VICTOR WESTERMARK, Judge. Reversed and remanded with directions.

Charles Thone and Charles M. Bosley, for appellant.

Nelson, Harding, Acklie, Leonard & Tate and Russell, Colfer & Frazier, for appellees.

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

CARTER, J.

This is an appeal from a judgment of the district court for Red Willow County denying the application of the Midwest Livestock Commission Company for a livestock auction market license under the Nebraska Livestock Auction Market Development Act, sections 54-1157 to 54-1186, R. S. Supp., 1965.

The record discloses that Midwest made an application to the Nebraska Livestock Auction Market Board for a license to conduct a livestock auction market. Protests were filed by Tri-State Livestock Commission Company, McCook, Nebraska, Chester G. Youngs, Harry H. Eiler, Leslie W. Horn, Western Livestock Auction Co., Farmers Livestock Sales Co., Republican Valley Livestock Auction, Ogallala Livestock Commission Co., Lexington Livestock Commission Co., Imperial Auction Market, Farmers Livestock Sales Co., Beaver Valley Livestock, Elwood Livestock Commission Co., Curtis Livestock Commission Co., and Nebraska Livestock Markets Association. After a hearing, the board granted the application. On appeal to the district court, that court found that the grant of the license would not beneficially serve the livestock economy, is contrary to the law and the evidence, and, consequently, that the order granting the license is arbitrary and capricious. The applicant, Midwest, thereupon appealed to this court.

The applicable statute provides as follows: "The hearing required by section 54-1162 shall be heard by two or more members of the board. If the board deter-

mines, after such hearing, that the proposed livestock auction market would beneficially serve the livestock economy, it shall issue a market license to the applicant. In determining whether or not the application should be granted or denied, the board shall give reasonable consideration to: (1) The ability of the applicant to comply with the federal Packers and Stockyards Act, 1921, as amended; (2) The financial stability, business integrity and fiduciary responsibility of the applicant; (3) The adequacy of the facilities described to permit the performance of market services proposed in the application; (4) The present needs for market services or additional services as expressed by livestock growers and feeders in the community; and (5) Whether the proposed livestock auction market would be permanent and continuous." § 54-1163, R. S. Supp., 1965.

A declaration of policy is contained in the act which states: "It is hereby declared to be the policy of the State of Nebraska, and the purpose of this act, to encourage, stimulate and stabilize the agricultural economy of the state in general, and the livestock economy in particular, by encouraging the construction, development and productive operation of livestock auction markets as key industries of the state and those markets' particular trade areas, with all benefits of fully open, free, competitive factors, in respect to sales and purchases of livestock." § 54-1157, R. S. Supp., 1965.

The protestants complain that the applicant failed to adduce sufficient evidence that it had the ability to comply with the federal Packers and Stockyards Act as required by the Nebraska act. The only evidence on the subject was supplied by an attorney employed by the applicant. His testimony was that he had been in contact with the federal administrator of the Packers and Stockyards Act for Nebraska by letter and telephone. All steps had been taken preliminary to the grant of the license by the Nebraska board which could be taken. While there is no assurance by the federal administrator

that the federal license would be granted, the federal administrator gave assurances of continued cooperation in the procurement of the federal license without any inference that the applicant might not be qualified. The application has been made out and its filing is contingent only upon the grant of the state license by the Nebraska board. Protestants offered no evidence on this point and failed to point up any reason why the applicant would be unable to qualify for the federal license if the Nebraska application was granted. The evidence was sufficient to sustain a finding of the Nebraska board that the applicant had the ability to comply with the federal Packers and Stockyards Act.

Protestants also contend that the evidence does not sustain the board's finding that the applicant had the financial stability, business integrity, and fiduciary responsibility required by the act. No evidence was offered and no contention is here made that the officers and stockholders of the applicant were lacking in business integrity and fiduciary responsibility. In fact, the evidence indicates that the officers and stockholders were men of integrity and responsibility. Protestants appear to concur with the applicant's evidence in this respect.

The financial stability of the applicant corporation raises a different question. The evidence shows that the 10 incorporators of the Midwest Livestock Commission Company are large-scale ranchers and farmers in the McCook area. Each of the incorporators purchased and paid for one share of stock in the amount of $100 to cover the expenses of incorporation. The articles of incorporation have been adopted and filed with the Secretary of State. The expenses for incorporation have been paid, or the money is available for their payment. The amount of capital stock authorized is 2,500 shares with a par value of $100 each. It is the plan of the corporation to sell stock in the amount of $250,000 upon attaining a license under the Nebraska Livestock Auc-

tion Market Development Act and compliance with the federal Securities and Exchange Commission and state Department of Banking rules and regulations governing the issue and sale of stock. With this money acquired through the sale of the 2,500 shares of stock of the applicant, the corporation plans to purchase the land required and to construct the necessary buildings, pens, fences, and other facilities needed to carry on a modern livestock auction market. Protestants contend that after the construction of the needed facilities in accordance with the plans and estimated costs, there will be $12,500 remaining to carry on operations, an amount they deem inadequate. They assert also that none of the stockholders have had experience in operating a livestock auction market and that this want of experience reacts unfavorably to the grant of a license. The president of the corporation testified that it is the plan of the board of directors to lease the facilities to an experienced operating agency or, if necessary, to employ an experienced manager to manage the business. Some complaint is voiced that no application has been made to the state Department of Banking to register these securities and to comply with the Blue-Sky Law as to their sale to the public. But this is not a bar to the grant of the license. In any event, compliance with the Blue-Sky Law is essential as a condition precedent to the offer of the stock for sale. If such compliance is not had and the stock is not sold, the purpose of the license is defeated unless the money is obtained by means without the scope of the Blue-Sky Law and the jurisdiction of the Securities and Exchange Commission. We fail to see where the failure to comply with the regulations of the Securities and Exchange Commission and the state Department of Banking is very important to the issue before us in the absence of evidence that compliance cannot be had with the regulations of these two agencies. There is no merit in the contention that compliance need be had with these two agencies since such compliance

becomes important only after the obtaining of a license under the Livestock Auction Market Development Act. We conclude that the evidence is sufficient to sustain the finding of the board that the financial stability of the applicant is adequate.

The statute also requires that the board give reasonable consideration to the adequacy of the facilities described to permit the performance of market services proposed in the application. Protestants concede in their brief that the proposed facilities are adequate. It is their contention that the construction of the proposed facilities is so conjectural and speculative under the plan testified to that there is no assurance that they can or will be built. We must assume that if sufficient stock is not sold and money thereby obtained to construct the facilities, the facilities will not be built. The board is not required to substitute its judgment for that of the board of directors of the corporation. It is true, of course, that the success of the corporation is dependent on its ability to sell its stock, which is true of most new corporate ventures. Protestants are concerned only with the entry of the new livestock auction market into the competitive field. If the applicant does not enter the field, for financial reasons or otherwise, their fears have been alleviated and their concern no longer exists. Every new venture is subject to some risks. If certainty of success must be guaranteed before a license is issued, few licenses would be granted. We think the adequacy of the proposed facilities is established. The continued existence of the license is contingent upon compliance with the terms of the application. A failure to comply therewith subjects the applicant to a possible revocation of the license. This affords protection to the public, one of the basic reasons for the board's existence.

The more serious contention of the protestants is the requirement of the statute that the board give reasonable consideration to the present needs for market services or additional services as expressed by livestock

growers and feeders in the community where the proposed facility is to be established and operated. The board found that there was a present need for additional market services for livestock growers and feeders in the McCook area. The president of the applicant corporation testified that in his opinion the McCook area is in need of additional facilities. He is an extensive grower and feeder of livestock. He testified that the number of cattle in the area had increased during the last few years, but the number sold in auction markets had decreased during the same period. Nine other growers and feeders testified to the need for an additional market. Signed petitions by 93 livestock growers and feeders desiring a second auction market were received in evidence. Protestants assert error on the part of the board in admitting these petitions into evidence. It is true that such petitions would not be admissible in a court of general jurisdiction. But here we are dealing with a hearing before an administrative board that is not bound by the strict rules of evidence. Chicago & N. W. Ry. Co. v. City of Norfolk, 157 Neb. 594, 60 N. W. 2d 662. While an administrative agency may relax the strict rules of evidence in affording a full and fair hearing, it must in every instance require any action taken by it to be supported by competent and relevant evidence. In the instant case, the present need for the facility as expressed by livestock growers and feeders is pertinent to the issue. The proof of numbers of such growers and feeders expressing such a need in addition to a reasonable number of witnesses on the subject appears to have some probative value. If petitions could not be used the record could be filled with repetitious and cumulative evidence. We find no error in the admission of the petitions even though they are not a controlling factor.

Protestants produced the evidence of 10 witnesses of which but two were livestock growers and feeders in the McCook community. Virtually all of these

witnesses were persons engaged in the operation of livestock auction markets. The evidence of these witnesses is to the effect that livestock growers and feeders were selling directly to meat packers and thereby reducing the number of livestock being sold through livestock auction markets. The evidence shows that approximately 3 years prior to the hearing there were two auction markets in McCook. One of them became involved in financial difficulties and was absorbed by the other. It is contended that this shows a want of need for a second auction market facility in McCook and that a second one can result only in economic loss to one or both. It is shown also that two auction markets will reduce the number of buyers attending each sale which has a depressive effect on sale prices. It is also asserted by the protestants that adequate competition is supplied by auction markets in neighboring and more distant cities and that the competitive factor is not therefore important to the grant of a license in the instant case. There is evidence that the existing auction market can handle all the business in the McCook area except on 2 or 3 days of each year. It is shown also that the existing facility has made improvements to improve its service and to increase its capacity.

As to whether or not a present need exists for the construction and operation of the new facility, the evidence is in conflict. This issue was peculiarly a matter for the board to determine. The finding of need for a new or additional service has adequate support in the evidence with which the courts may not properly interfere.

Complaint is also made of the finding that the proposed facility would be permanent and continuous. Protestants contend that the financial structure is a precarious one. But this is not the real issue. The question is, if the facility is constructed and put into operation, will it continue as a permanent business. Of course, neither the board nor anyone else can foretell with cer-

tainty the success of a new enterprise. It is the duty of the board to give reasonable consideration to the question as to whether or not the facility is a permanent one as distinguished from a temporary one. We think the board correctly found that, if the conditions precedent to beginning operations are met, the facility would be permanent and its operations continuous within the meaning of the statute.

A livestock auction market has sufficient public interest to be subject to public regulation under the police power. The statute, sections 54-1157 to 54-1186, R. S. Supp., 1965, requires that livestock auction markets be subjected to certain regulations in the public interest. It does not provide for a regulated monopoly as is sometimes provided in the case a street railway, nor does it require a certificate of convenience and necessity as in the case of railroad and trucking operations. The regulation of a livestock auction market is limited to the strict wording of the statute imposing the regulations, the purpose of such regulations being shown in a declaration of policy contained in the statute which states its purpose to be "to encourage, stimulate and stabilize the agricultural economy of the state in general, and the livestock economy in particular, by encouraging the construction, development and productive operation of livestock auction markets as key industries of the state and those markets' particular trade areas, with all benefits of fully open, free, competitive factors, in respect to sales and purchases of livestock." § 54-1157, R. S. Supp., 1965.

It is patent from an examination of the Nebraska Livestock Auction Market Development Act that its purpose was to require adequate service to the agricultural and livestock economy. It was not its purpose to establish a monopoly in existing livestock auction markets, nor, under the guise of regulation, to limit the number of livestock auction markets if the provisions of the statute are met. The operation of a livestock

auction market is a lawful business which any person has a right to pursue, subject to reasonable legislative regulation. Compliance with such lawful regulations maintains this fundamental right of which he may not be arbitrarily deprived. When the evidence of compliance with legislative regulations and the conditions for the issuance of a license supports the issuance of a license, even though such evidence thereon may be in direct conflict, the findings of the board must be sustained.

Protestants express concern about the financial structure of the applicant, of the want of experience of its incorporators in the livestock auction market field, and the asserted fear that the facility has no chance of success. But every person has the right to enter into any lawful business subject to reasonable and lawful legislative regulation when the public interest requires. A person has the same right to fail as he has to succeed. The incentive to enter legitimate fields of endeavor, taking his chances on gain or loss, is a basic right in our private enterprise system that should not be lightly disregarded. The statute recognizes that the benefits of free competition are to be preserved. The scope of the statute will not be extended beyond its express provisions and if its terms have been met and so found by the board on competent evidence, its findings will not be disturbed by the courts. The board specifically found that a livestock auction market at McCook, Nebraska, would beneficially serve the livestock economy of this state. This is the ultimate finding required by section 54-1163, R. S. Supp., 1965, for the issuance of a market license to the applicant. There being evidence to sustain the board's action in granting a license, even though opposed by credible evidence, its action is not arbitrary or capricious. Lewis v. City of Omaha, 153 Neb. 11, 43 N. W. 2d 419.

The board had jurisdiction to hear the application. There is evidence in the record to sustain the board in granting the license and its grant is not therefore arbi-

trary or capricious. The trial court was in error in holding that the evidence before the board did not sustain its action. The judgment of the district court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RAYMOND PETERS, JR., APPELLEE, V. CLINTON J. HALLIGAN ET AL., APPELLANTS, IMPLEADED WITH UNITED STATES OF AMERICA, APPELLEE.

152 N. W. 2d 103

Filed July 7, 1967. No. 36492.

1. **Contracts.** A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract.
2. **Trial: Appeal and Error.** Where there is irreconcilable conflict on a material issue, this court will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other.
3. **Mechanics' Liens.** Mechanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes, and they find their basis in the equitable principle that everyone who, by his labor and materials, contributes to the preservation or enhancement of the property of another, thereby acquires a right to compensation.
4. ———. If the furnishing of materials and labor under a contract is sufficient to create an indebtedness or liability, it is sufficient to create a lien under the provisions of the statute.
5. **Contracts: Mechanics' Liens.** In spite of lack of substantial performance, where there has been a part performance and it has been of substantial benefit to the other party and he has accepted and retained the benefits thereof, he should not be permitted entirely to avoid the duties assumed by him under his contract, and, under such circumstances, the party partially performing is entitled to recover the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such damages as he has suffered from the

failure of the plaintiff to perform fully or substantially his contract.

6. **Work and Labor: Damages.** A party may recover on a quantum meruit basis for partial performance for the value of benefits conferred even though he fails or refuses to perform the contract, subject to any counterclaim for damages that the other party has sustained by reason of the breach of the agreement.
7. **Contracts.** The rule that a party who has failed fully to perform his contract cannot recover on the contract for part performance applies only to entire indivisible, and not to severable, contracts; and there may be a recovery on the contract for a part performance of a divisible contract.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Affirmed as modified.

McGinley, Lane, Mueller & Shanahan and James M. McQuillan, for appellants.

Firmin Q. Feltz, for appellee Peters.

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

WHITE, C. J.

The defendants Halligan appeal from a judgment of the district court foreclosing a mechanic's lien for labor and materials in the sum of $1,576.82 furnished in the construction of a basement on defendants' property.

In his petition plaintiff alleges that he was employed to construct and furnish the material for a basement on the defendants' premises and that the fair and reasonable value of the labor and material charges was in the sum of $1,576.82. Defendants, in an answer and cross-petition, allege that the plaintiff did perform work and labor on their premises under an oral contract; that the plaintiff entered into an oral contract with the defendants to construct a basement and a frame addition to the trailer home of the defendants for the agreed sum of $2,850; that thereafter the plaintiff did construct the basement; that it was defectively constructed by reason of the failure of the plaintiff to properly seal and

waterproof the floor; that after construction of the basement plaintiff refused to construct the frame addition to defendants' trailer as provided under the oral contract; that the defendants were required to employ another contractor to construct the trailer house addition; and that by reason of the defective construction work in the basement and the additional cost of constructing the trailer house addition they were damaged in the sum of $1,968.20.

Outside the question of defective workmanship in the construction of the basement, the basic question involved in this case is whether the parties entered into a contract for an agreed price for the construction of a basement and the trailer house addition. In approaching this problem, we bear in mind the basic rule that a fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract. Voss v. Linn, 171 Neb. 32, 105 N. W. 2d 383; Griggs v. Oak, 164 Neb. 296, 82 N. W. 2d 410. The evidence in this case is in irreconcilable conflict consisting of the testimony of Peters and the defendant Clinton J. Halligan. A few days prior to August 25, 1965, the Halligans contacted Peters in Ogallala, Nebraska, about the building of an addition on their trailer house which, at that time, was located on their parent's property but which they planned to move to their property south of Brule, Nebraska. Peters told them that he was building a house at that time; that he did not know whether he had time to do the job; and that he had never done anything like that before. In response to the Halligans' request, Peters went out to the trailer house to discuss the matter with them. At this time they talked about moving one wall of the trailer out to form the outside wall of the new addition and filling in the ends and the ceiling. They discussed the subfloor and the flooring, the stairwell location in the basement, the moving and possible installation of cup-

boards, and various other details as to the addition. At this time, the Halligans stated they wanted a basement under the trailer house that was to be constructed on their property south of Brule on which the trailer was to be moved, and there was discussion of the details of the basement construction. Peters testified that the main thing that the Halligans were interested in was to get the basement done so they could get the trailer moved to their property south of Brule. After this conversation the parties visited the Halligan place south of Brule to inspect the construction site. The basement under the trailer house was to be 20 feet by 48 feet and the basement under the new addition was to be 12 feet by 22 feet. Peters' attention was called to a spring located close to the proposed site of the basement and to a wet spot at the site of the excavation. Peters told Halligan that in order to prevent any water problem he was going to put in a polyethylene seal.

Peters testified he told the Halligans, with reference to the construction of the addition, that he did not know actually when he could do it; that he could not give them any possible date; that at all times in his conversation with them he stressed there was no way he could give an exact figure because he did not know exactly what they had in mind; that he did not know what he might run into; that he had never done anything like that before; and that the cost of an ordinary basement was at least $1,000 for the blocks and laying.

It appears from the plaintiff's evidence that he did not do any plumbing or electrical work and, in the preliminary negotiations, there was no discussion as to the electrical work or the plumbing other than hooking up a temporary toilet drain in the trailer prior to the time of the construction of the addition. The testimony is that the defendants were securing an F.H.A. loan to finance the basement and the addition. Peters testified that in giving the Halligans a figure of $1,800 on the addition and a figure of $1,000 on the basement these

were only estimates and the defendants "would have to allow accordingly." The evidence shows that there were no written plans or specifications for the building of the addition or the basement and none were ever introduced into evidence in this case. Peters testified that there were some rough specifications in writing submitted to the F.H.A. for the loan but again the substance of his testimony is that this was a mere estimate and he could not give an exact figure because he did not know exactly what they wanted and because he did not know what he might run into in building the addition.

Defendant Halligan's testimony varies considerably from the plaintiff's testimony. He testified that when Peters came out to discuss the addition they discussed "what ideas we had as far as the addition to the kitchen." He says they discussed the size of the addition, the construction and size of the basement, the floor covering, the details of the walls, the building of the walls out 12 feet from the trailer, the exterior to be aluminum covered, the interior to be of wood paneling, the ceiling, the placement of the stairway, the building of cabinets and their location, the installation of insulation and aluminum windows, the moving of the sink, and the electrical outlets around the top of the counters. They made a trip to the basement site where they discussed the details of the construction and Halligan advised Peters about the spring and asked him about a water problem in the basement. He says that the plaintiff was taking notes in a small notebook during this period of time and after these conversations Peters left and returned and told defendant Halligan that it would cost $1,850 to build the kitchen. He had previously given him a figure of $1,000 on the basement. Halligan told him that he needed these figures for the F.H.A. in order to get a loan. He does not testify that they had a specific conversation or agreement that this would be the contract price. That inference must be drawn from the following testimony on the part of Halligan: "When

he told us the figures that he had, we told him that was agreeable with us, and asked him when he could start construction, * * *."

We observe that no explanation appears as to why the defendant Halligan's wife did not testify in this case and corroborate his testimony. We observe further that Peters' repeated and precise testimony that the figures he furnished the Halligans were only estimates and the reasons he gave therefor stand undenied in the record by Halligan.

The basement was finished about October 25, 1965. In November or December 1965, defendants received a partial bill for $1,356 and a final one for $1,586.31. In their conversations Peters demanded payment and we observe that Halligan did not object to the amount or assert that the contract was for $1,000 but merely stated to the plaintiff that he had not finished cleaning up the material at the site of the excavation. In a conversation in the first part of November 1965, Halligan told the plaintiff that he was planning on him constructing the addition and was wondering when he could start it. Halligan not only made no objections to the bill rendered him for the cost of materials and labor but we could reasonably infer that he intended to proceed on the same basis of payment with reference to the addition when he inquired of the plaintiff and insisted that the plaintiff begin work on the addition. We are further aided in the determination of this issue by the rule that where there is irreconcilable conflict on a material issue, this court will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other. Uptegrove v. Elsasser, 161 Neb. 527, 74 N. W. 2d 61; Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403. The trial court must have found, in coming to the conclusion that it did,

that there was no contract between the parties for the building of the basement and the addition for the agreed price of $1,000 for the basement and $1,850 for the addition, or a total of $2,850. We come to the same conclusion.

The defendants strongly contend, nevertheless, after the basement was done, that the plaintiff Peters refused to perform the contract for the building of the trailer addition; that he gave no excuse for his action except that he would not and could not do it; that therefore he abandoned the contract; and that he is not entitled to recover on a quantum meruit basis for the reasonable cost and charge of the labor and materials furnished. There is no question, under the evidence, that in November 1965 the plaintiff informed the defendants that he could not construct the addition. Accepting defendants' own testimony in this respect, Halligan testified that the plaintiff told him that he had a man hired who he was going to send out to complete the addition on the trailer house but Halligan told him, "Well, if you are not going to complete the job, I will do my own hiring, as far as completing it." The evidence shows that the defendants did hire a contractor by the name of Hopken to construct the trailer addition on a labor and material basis at a total cost of $4,580.84 which represented the fair and reasonable cost therefor. Assuming, therefore, that the plaintiff did contract to build the trailer addition and that his failure and refusal to construct it constituted a lack of substantial performance, the question arises as to whether this action forfeits the plaintiff's right to establish a mechanic's lien for the reasonable value of his services performed and the labor and material furnished. Our mechanic's lien statute provides as follows: "Any person who shall perform any labor or furnish any material, * * * for the construction, erection, improvement, repair, * * * of any house, * * * building, or appurtenance, * * * by virtue of a contract or agreement, expressed or implied, with the owner

thereof or his agents, shall have a lien to secure the payment of the same upon such house, * * * building, or appurtenance and the lot of land upon which the same shall stand or the work is performed, * * *." § 52-101, R. R. S. 1943.

Our mechanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes, and they find their basis in the equitable principle that everyone who, by his labor and materials, contributes to the preservation or enhancement of the property of another, thereby acquires a right to compensation. Muenchau v. Swarts, 170 Neb. 209, 102 N. W. 2d 129; Greenblatt v. Goldin (Fla.), 94 So. 2d 355, 59 A. L. R. 2d 877. We note that our statute refers to "any person" who performs labor or furnishes material "by virtue of a contract or agreement, expressed or implied" shall be entitled to a lien. The statute does not require any particular degree of performance of a contract, but simply uses the term "by virtue of a contract or agreement." It is inferable from the language of the statute itself that a person is entitled to a lien for the reasonable value of the benefit conferred upon property, irrespective of the degree of performance of the contract. The question is apparently a first impression in this state. As far as we can determine, this court has never held that even if a contractor abandons his contract, he forfeits any right to recover for material and labor actually performed of benefit and value to the defendant's property. We have held, however, in construing our mechanic's lien statutes that if the furnishing of material and labor under a contract is sufficient to create an indebtedness or liability, it is sufficient to create a lien under the provisions of the statute. Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313; Great Western Manufacturing Co. v. Hunter Bros., 15 Neb. 32, 16 N. W. 759. The general rule is that in spite of lack of substantial performance, where there has been a part

performance and it has been of substantial benefit to the other party and he has accepted and retained the benefits thereof, he should not be permitted entirely to avoid the duties assumed by him under his contract, and, under such circumstances, the party partially performing is entitled to recover the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such damages as he has suffered from the failure of the plaintiff to perform fully or substantially his contract. 17A C. J. S., Contracts, § 511, pp. 829 and 830; 17 Am. Jur. 2d, Contracts, § 379, p. 823. But the defendants claim that there can, in no case, be a recovery in case of a voluntary incompletion or abandonment of the contract, which they assert to be a fact in this case. On this question there appears to be a conflict in the authorities. It is true that in the cases cited by the defendants in some jurisdictions a party who abandons a contract or refuses to perform it cannot recover, either on the contract or on a quantum meruit, the value of the labor or materials he has expended in his partial performance. The opposite and we believe the better view is held in other jurisdictions. It is pointed out in the authorities discussing this question that a party who contracts to perform certain specified labor and to furnish materials and then breaks his contract in the first instance, without any attempt to perform it, can be made liable to pay only the damages which the other party has sustained by reason of such nonperformance, which in many instances may be trifling. A party who has entered upon a contract, even though he has not substantially performed it, may have rendered a substantial benefit to the other party, and yet be subjected to a loss of all which he has performed in the nature of damages for the nonfulfillment of the remainder of the contract, upon the technical rule that the contract must be substantially performed in order to warrant a recovery of any part of the compensation. The rule denying recovery, therefore, puts the party

who partially performs his contract in a much worse position than one who wholly disregards his contract, and the other party may receive much more, by the breach of the contract than the injury he has sustained by such breach and more than he could be entitled to if he were seeking to recover damages by an action. We believe the better rule to be that a party may recover on a quantum meruit basis for partial performance for the value of benefits conferred even though he abandons the contract or refuses to perform it, subject to any counterclaim for damages that the other party has sustained by reason of the breach of the agreement. See, 17 Am. Jur. 2d, Contracts, § 380, p. 824; Pixler v. Nichols, 8 Iowa 106; Zimmerle v. Felzien, 121 Kan. 34, 245 P. 1024; Lee & Dolen v. Ashbrook, 14 Mo. 378; Parcell v. McComber, 11 Neb. 209, 7 N. W. 529, 38 Am. R. 366; McMillan v. Malloy, 10 Neb. 228, 4 N. W. 1004, 35 Am. R. 471; Britton v. Turner, 6 N. H. 481; Lynn v. Seby, 29 N. D. 420, 151 N. W. 31. We note further that the annotator in the American Jurisprudence citations above cites two Nebraska authorities in sustaining the rule we have announced herein. In McMillan v. Malloy, *supra*, the plaintiff entered into a contract to thresh an entire crop of wheat for the defendant. He threshed only about one-third of the crop and then sued to recover the value of his services. The court held: "* * * that the entirety of the contract having been severed by part performance, beneficial to the employer, the employee was entitled to recover the value of his labor over and above the damages sustained by a breach of the contract." More closely in point is the case of Millsap v. Ball, 30 Neb. 728, 46 N. W. 1125, wherein this court said as follows: "If we understand the position of Groves' counsel it is this: that neither a contractor or subcontractor can enforce a mechanic's lien when the building is not completed according to contract. We cannot accept this as a correct statement of the law. There is certainly no legislative enactment so limiting

the right of the mechanic or materialman to a lien. He must establish his account, and the lien attached for the amount found to be due thereon. If the contract for the erection of the building is not fulfilled by the contractor, it does not necessarily defeat his lien. The owner of the building is entitled to set up as a counterclaim any damages he has sustained by reason of the breach of the agreement, and the lien attaches for the amount actually due, after deducting such damages."

We feel that the conclusion we come to follows the language and the purpose of the statute and the holding that if the furnishing of material and labor under a contract is sufficient to create an indebtedness or liability, it is sufficient to create a lien under the provisions of the statute. Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313.

We further note that there were two distinct parts to this contract, one for the construction of the basement and one for the trailer addition. The parties considered them separately, both during their negotiations and during the conversations that followed the construction of the basement. The general rule is that a party who has failed fully to perform his contract cannot recover on the contract for part performance applies only to entire indivisible, and not to severable, contracts; and there may be a recovery on the contract for a part performance of a divisible contract. 17 Am. Jur. 2d, Contracts, § 386, p. 831. We therefore hold that the plaintiff is entitled to recover on a quantum meruit basis for the reasonable cost and charge of labor and materials furnished in the construction of the defendants' basement and that the defendants' rights are fully protected because they may, and have, set up a breach of the contract as a basis for the claim of damages.

The only remaining question is whether the defendants are entitled to recover on their counterclaim for the breach of the contract. Defendants in their brief do not contend that they are entitled to any net affirma-

tive damages but only ask that the plaintiff's petition for enforcement of the lien be dismissed. As we have noted, defendants have not proved a contract for a definite price for the building of the trailer addition. Their own evidence shows that they hired Hopken to complete the trailer addition on the basis of a reasonable cost for labor and materials. The evidence shows that the trailer addition was constructed in a substantially different manner than was contemplated in the original discussion with the plaintiff Peters. There is no evidence that there were any damages due to the delay in the construction or that the cost of the labor and materials was higher than if the plaintiff had completed the contract. On the other hand, the almost undisputed evidence is that Peters did not perform a proper and workmanlike job in waterproofing the basement. He knew there was a water problem and undertook, after discussion with the defendants, to protect the basement from water by placing polyethylene strips underneath the concrete floor. He failed to properly lap and seal the strips of polyethylene used, and drove stakes through the strips, creating holes, through which water leaked. The evidence shows that water seeped through cracks in the basement floor and that at times water collected to the extent of a 4-inch depth for which the defendants had to install a sump pump to remove the water. The defendants' evidence, supplied by the contractor Hopken is that the reasonable value of the basement was reduced by the sum of $300 in this respect. The evidence shows that the reasonable cost and value of the labor and materials furnished in the basement were $1,576.82 and there appears no dispute in the evidence as to the reasonable cost and charge for these items. We therefore come to the conclusion that the plaintiff is entitled to a lien in the sum of $1,576.82 less the amount of $300 for damages due to the failure to properly perform the work of waterproofing the floor or a total net amount of $1,276.82, and the decree of the district court is modi-

fied accordingly. As modified the decree is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, MCCOWN, and SPENCER, JJ., concurring.

We concur in the decision of the court that the judgment of the district court as modified should be affirmed upon the ground that the contract between the parties was severable and the record will support a finding of substantial performance of the contract to construct the basement.

We do not agree that a party may recover on a quantum meruit basis for partial performance for the value of benefits conferred even though he abandons the contract or refuses to perform it, subject to any counterclaim for damages that the other party has sustained by reason of the breach of the agreement. Generally, substantial performance is a condition precedent to any recovery where there is an express contract between the parties. See, Rickertsen v. Carskadon, 172 Neb. 46, 108 N. W. 2d 392; McGowan v. Gate City Malt Co., 89 Neb. 10, 130 N. W. 965.

Recovery upon a quantum meruit basis where there has been no substantial performance should be limited to the circumstances specified in Restatement, Contracts, § 357, p. 623.

IN RE SANITARY AND IMPROVEMENT DISTRICT NO. 75 OF DOUGLAS COUNTY, NEBRASKA.

SANITARY AND IMPROVEMENT DISTRICT NO. 75 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. CITY OF RALSTON, APPELLEE.

152 N. W. 2d 111

Filed July 7, 1967. No. 36503.

1. **Municipal Corporations: Drainage.** Section 31-766, R. R. S. 1943, contemplates that the rights of a sanitary and improvement district and of a municipality will be promptly adjusted after annexation of part of the district by the municipality.

2. **Municipal Corporations: Estoppel.** Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions, but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class.
3. **Estoppel.** A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded with directions.

Frost, Meyers & Farnham, for appellant.

Shrout, Hanley, Nestle & Caporale, for appellee.

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

SPENCER, J.

This is an appeal from a summary judgment determining that Wildewood Addition was not validly annexed to the city of Ralston, hereinafter referred to as city, and that the city did not become liable for any indebtedness of Sanitary and Improvement District No. 75 of Douglas County, Nebraska, hereinafter referred to as district 75. City is a city of the second class, located in Douglas County, Nebraska.

During the early part of the year 1961, city was approached by developers of Fairview Heights and Wildewood Addition for voluntary annexation to city. Wildewood Addition was not continguous to city unless Fairview Heights was also annexed. City's evidence is that the developers were told that city would only be willing to annex the areas if annexation would involve no financial obligation on the part of city. Specifically, the developers were advised that city would not incur expenses for water, sewer, and paving.

The record would indicate that agreements were to

be prepared by developers and presented to the city council previous to annexation. The attorney for Fairview Heights corroborated this version, and testified that an agreement was prepared and signed for Fairview Heights.

On August 15, 1961, city passed annexation ordinance No. 464, annexing both developments by metes and bounds. The 1961 mayor and all of the councilmen who appeared testified that there was a written agreement signed by the Wildewood developers, but it was not produced and they did not know where it was. No evidence was produced as to its actual contents except the testimony that the annexation was to be at no cost to city, and all paving, water, and sewer were to be at the expense of the developer. This evidence is not rebutted by district 75 except by inference from a copy of a letter produced by the developer dated June 23, 1961, as follows:

"To: City of Ralston, Nebraska

"In re: Wildewood Addition - Northeast Corner of 84th and Harrison

"Gentlemen:

"With respect to the above plat, it is our understanding that the City of Ralston, Nebraska will annex this area to the City and will permit connection of the sewers with the City system. The undersigned developer agrees as follows:

"1) The developer has formed Sanitary and Improvement District No. 75, which District has sufficient funds to install sewer and street surfacing. All lots specially benefited will be specially assessed, and the cost of the outfall sewer together with intersections and oversizing of Ralston Avenue beyond 24 feet will become part of the general obligation debt of the District, as is customary in this area.

"2) The protective covenants attached hereto will be placed of record.

"3) A complete sanitary sewer system, water mains

and gas mains will be installed to serve all lots in the Addition, subject to the approval of the Ralston City Engineer. *These improvements shall be paid for by the District above described.* (Italics supplied.)

"4) Concrete streets and intersections shall be installed in accordance with Ralston's specifications to serve all lots, and the cost thereof shall be paid by the District as above described.

"5) The annexation of the area to the City of Ralston shall be effective as of the tender of the plat for recording.

"EXECUTED this 22nd day of June, 1961.

"WILDEWOOD DEVELOPMENT CO.

"By: _____

Agent."

The agent and principal developer, Clair M. Wilson, was deceased at the time of the trial.

District 75 is a municipal corporation, organized, established, and approved by the Douglas County district court on April 11, 1961, to construct public improvements. Wildewood Addition and district 75 are identical except for one building lot which is in the district but not in Wildewood Addition. This lot was jointly owned by the trustees of the district. The annexation ordinance, therefore, included all of district 75 except one building lot.

On September 21, 1961, the trustees of district 75 adopted a resolution of necessity to construct sanitary sewer, section 1, and paving and storm sewer, section 1. On January 19, 1962, the trustees of district 75 adopted a resolution of necessity to purchase a sanitary outfall sewer. On April 5, 1963, the trustees of district 75 adopted a resolution of necessity to construct paving and storm sewer, section 2, sanitary sewer, section 2, and water system, section 2. These were all constructed and warrants were issued by district 75 to cover their payment. The city council was not consulted relative to these improvements, took no part in them, was not

notified of any trustees' meeting of district 75, and never attended any such meeting. The improvements, however, were inspected by the city engineer, in accordance with the agreement that all improvements would conform to city standards.

The present action was instituted by district 75 on December 14, 1964, in the form of a petition for approval of proceedings and for the approval of issuance and sale of bonds, as provided in Chapter 31, Reissue Revised Statutes of Nebraska, 1943. On the same day, an application was filed for a merger decree merging district 75 with city, and transferring all of the rights, privileges, duties, and obligations of district 75 to city. The answer to the application for a merger decree raised the issue that the annexation order was not valid by reason of misrepresentation, and there was therefore no basis for merger.

The decree of the court determined annexation ordinance No. 464 to be void; that Wildewood Addition was not annexed to the city by that ordinance; that no merger was effected by it; and that the city was not liable for any indebtedness of district 75. It further provided that the city refund within a reasonable time to the real estate owners of Wildewood Addition all taxes properly refundable, paid by said real estate owners pursuant to the city levies for the years 1961, 1962, 1963, 1964, and 1965. The decree made no provision respecting the petition for approval of the proceedings and the issuance and sale of bonds, nor did the decree make any provision respecting the consequences of the voiding of annexation ordinance No. 464 on Fairview Heights, which subdivision was annexed at the same time and as a part of the same ordinance.

The problem is the liability for the general obligation portion of the improvements made by the trustees of district 75 subsequent to the annexation ordinance, if the ordinance is valid as to Wildewood Addition. This problem is not met, except by inference, by either brief, and

we see no purpose in discussing the various assignments argued in the briefs. City attempts to avoid any liability by voiding the annexation ordinance because of misrepresentation. District 75 seeks merger to make the general obligation of the district the obligation of the city.

Section 31-763, R. R. S. 1943, covers the annexation by a city of all of the property within the boundaries of a sanitary and improvement district. It provides in that instance that the district shall merge with the city, and the city shall succeed to all the property rights and obligations of the district.

Section 31-765, R. R. S. 1943, provides that the merger shall be effective 30 days after the effective date of the ordinance annexing the territory within the district, unless challenged by a court proceeding, in which event the effective date shall be 30 days after a final determination of the validity of the ordinance.

Section 31-766, R. R. S. 1943, which is the one applicable herein, provides if only a part of the territory within any sanitary and improvement district is annexed by a city or village, the district, acting through its trustees, and the city or village, acting through its governing body, may agree between themselves as to the equitable division of the assets, liabilities, maintenance, or other obligations of the district and for a change in the boundaries of the district so as to exclude the portion annexed by the city or village from the district, or may agree upon a merger of the district with the city or village. This section further provides that if the district and the city do not agree upon an adjustment of all matters growing out of the annexation of a part of the territory located within the district, either party may apply to the district court for an adjustment of all matters growing out of the annexation.

In this instance, no attempt was made to comply with the provisions of section 31-766, R. R. S. 1943, until this action, which was filed December 14, 1964, or more than

3 years after the passage of the annexation ordinance. As of the time of annexation, and within 30 days thereafter, there was no obligation to be assumed by the city. The trustees of district 75 continued to treat Wildewood Addition as though it were still a part of the district, and to incur the liability for the improvements listed heretofore, all of which took place more than 30 days subsequent to the passage of the annexation ordinance. In addition thereto, the trustees of district 75, without regard to any rights of the city, determined that the total cost of the improvements was $382,440.48, of which $189,252.75 was levied as special assessments against individual lots, and the balance was determined to be a general obligation of the district.

Section 17-568.01, R. R. S. 1943, provides that before a city of the second class may make any contract for improvements which exceed $2,000, an estimate of the cost thereof shall be submitted to the city council, and no contract shall be entered into for any improvements for a price exceeding such estimate nor without advertising for bids, in the manner provided in said section. The engineer's estimate of costs is jurisdictional, and must be submitted to and approved by the city council before a contract may be made. Moss v. City of Fairbury, 66 Neb. 671, 92 N. W. 721.

Section 31-730, R. R. S. 1943, provides specifically that no land within a municipality may be included in the formation of a sanitary and improvement district. Section 31-761, R. R. S. 1943, provides that no district may enlarge by annexing or including land located within any municipal corporation. The intent of these statutory provisions is obvious.

There is no provision in article 7 of Chapter 31, R. R. S. 1943, which permits the trustees of a district to continue to incur liability for any portion of the district annexed by a municipality. Section 31-766, R. R. S. 1943, covers the annexation of a portion of a district, and, notwithstanding the permissive tone of the language

used, it obviously contemplates a prompt division of the assets and liabilities of the district and the exclusion of the portion annexed from further control by the district. Further, no provision has been called to our attention which would permit the governing body of a second-class city to allow any corporation to usurp the city's prerogatives and to incur obligations to be assumed by the taxpayers of the city.

The annexation of Wildewood Addition was a voluntary annexation, sought by the developers for the benefit of Wildewood Addition. The inferences are fairly conclusive that the city was only interested if annexation could be accomplished without cost to the city. The testimony is undisputed that both the developers of Fairview Heights and Wildewood Addition agreed to those conditions. The attorney for Fairview Heights testified that Fairview Heights complied with the conditions. It is apparent that the developers of Wildewood Addition, by forming a sanitary and improvement district with an additional building lot, attempted to retain control of the installation of all public improvements in Wildewood Addition, even though it was annexed to the city. We will not speculate on the reason for this, except to observe that if this lot had been included in the annexation, merger would have been automatic in 30 days.

We do not agree with district 75 that equity and justice require a merger so as to transfer an obligation in excess of $200,000 from district 75 to all of the property owners in city. The record is conclusive, if the development had been handled by city instead of district 75, any bonds used to pay for it would command a lower interest rate than it is possible for district 75 to obtain. We note the testimony of the representative of the company which from the start has worked with district 75 on financing the improvements and which expects to float the proposed bond issue. That testimony in substance is that they did not put the bond

rate as low as possible because they did not want to give up their "windfall," even though the liability may be shifted to the city. The individuals who dealt with district 75 did so at their own risk. Equity does not require that the property owners in district 75 be permitted to shift a portion of their burden to all of the taxpayers of city. Equity and justice in this instance is with city.

The trial court sought to remedy the situation by voiding ordinance No. 464. The answer is not quite that simple. Wildewood Addition has had the benefit of all city services since annexation. Fairview Heights is also involved in ordinance No. 464. The more obvious answer is to effectuate as nearly as possible, under the equity powers of the court, the intention of the parties as we determine that intention to be.

We find that the trustees of district 75 exceeded their authority in making further improvements in that portion of Wildewood Addition annexed by city. We do not interpret section 31-766, R. R. S. 1943, to permit the district trustees to continue to improve any portion of the district annexed under is terms. While the change of boundaries is not to be effective until a decree of the district court is entered confirming any agreement, the section contemplates that the rights of the parties will be promptly adjusted after annexation.

The officials of city are not without fault herein. They were aware of the improvements being made after annexation and were as much bound by the provisions of section 31-766, R. R. S. 1943, as the trustees. District 75 raises the issue of estoppel. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions, but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448. While the laxity of the city council is inexcusable, we do not feel right and justice demand that es-

toppel should be invoked herein to benefit an active participant at the expense of the taxpayers of the city. As we held in Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490: "A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations."

The improvements have been made and rights of creditors are now involved. District 75 has the benefit of the improvements. The creditors contracted with district 75, relying on the credit of the district. The liability was intended to be, is, and should remain that of the property owners in district 75. This effectuates the intention of the parties as we determine it to be. This also protects the rights of creditors by giving them the full benefit of their contract.

For the reasons given, we direct that the judgment of the district court voiding annexation ordinance No. 464 be reversed and the cause remanded. We also direct that the court proceed with a hearing on the petition for approval of all proceedings and for the approval of issuance and sale of bonds, and that district 75 be permitted to issue bonds for not to exceed 30 years, in accordance with section 31-755, R. R. S. 1943, on such conditions as the court may direct. We also direct that these bonds be the sole obligation of district 75 and the property owners in district 75, and in no way constitute a liability of city. We further direct that subsequent to approval and issuance of the bonds of district 75 a merger of the district be approved on the specific condition that no part of the liability of district 75 and the owners thereof for the special improvements covered by said bonds shall become a liability of the city, but shall remain the sole liability of the property owners embraced within the confines of district 75.

REVERSED AND REMANDED WITH DIRECTIONS.

GARY FRYE ET AL., APPELLANTS, V. KENNETH HAAS, COUNTY TREASURER OF CHERRY COUNTY, NEBRASKA, ET AL., APPELLEES.

152 N. W. 2d 121

Filed July 7, 1967. No. 36549.

1. **Constitutional Law: Taxation.** Within the meaning of the due process clause, laws for the levy and collection of general taxes stand upon a different footing than laws for the levy and collection of special assessments or special taxes.
2. ———: ———. The power to levy a general tax is inherent in the sovereign, is purely legislative in character, and due process does not require that the property subject to the tax or the amount to be levied should be subjected to judicial inquiry.
3. ———: ———. Tax proceedings are necessarily summary in nature, are not judicial in character, due process does not require notice and an opportunity to be heard at any particular stage of the proceedings, and notice by a statute itself is sufficient.
4. ———: ———. There is no constitutional command that notice of the assessment or levy of a tax, and opportunity to contest it, must be given in advance of the assessment or levy. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable.
5. **Taxation.** Section 77-1735, R. R. S. 1943, creates a direct cause of action in the tax proceedings by which a taxpayer may test the validity, for any reason, of a tax or any part thereof.
6. **Taxation: Injunction.** If taxes are levied without authority of law, their collection may be enjoined.
7. **Constitutional Law: Taxation.** There is no requirement of due process that a taxpayer must be given an opportunity to be heard before any particular stage of the taxation process.
8. **Schools and School Districts.** The determination of the number of school age children in a joint school district residing in a county is not an adjudicative fact and requires no judicial hearing.
9. **Constitutional Law: Corporations.** Article XII, section 1, of the Constitution of the State of Nebraska, provides by general law for the organization, regulation, supervision, and general control of all corporations. No corporations shall be created by special law, nor their charters be extended, changed, or amended, except those corporations organized for charitable, educational, penal, or reformatory purposes.

10. Statutes. Rules of statutory construction are created to resolve ambiguities, not create them.

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

Wilson, Barlow & Watson, for appellants.

Clarence A. H. Meyer, Attorney General, Harold Mosher, and Richard L. Spittler, for appellees.

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

WHITE, C. J.

In establishing 19 educational service units composed of different groups of counties and embracing all 93 counties, to supplement the services of school districts of the State of Nebraska (L.B. 301, sections 79-2201 to 79-2212, R. S. Supp., 1965), the Legislature authorized the units to certify a tax levy of not to exceed 1 mill directly to the county treasurers for collection, thus bypassing the county boards of equalization who, under the statute, section 77-1601, R. S. Supp., 1965, within a fixed period of time, levy the taxes for cities, school districts, and other political subdivisions existing within the counties. The primary question involved is whether this procedure and the whole procedure provided for deprives the plaintiffs, taxpayers, of due process of law in that they are not given their constitutional right to a suitable notice and opportunity to be heard. The district court found the statute constitutional and we affirm the judgment.

The statute under attack, section 79-2210, R. S. Supp., 1965, provides: "The board for each educational service unit may levy a tax of not to exceed one mill on the dollar on the assessed valuation of all property except intangible property within its geographical unit. The amount of any such levy shall be certified by the secretary of the board to the county treasurer of each county within the educational service unit who shall collect

the same as other taxes are collected and remit the proceeds therefrom to the county treasurer who is ex-officio treasurer of the board."

In order to frame this problem in proper perspective some preliminary observations are necessary. This is a general and not a special tax, levied for public purposes under section 6 of Article VII of the Constitution of the State of Nebraska, directing the Legislature to provide for the common schools. Within the meaning of the due process clause, laws for the levy and collection of general taxes stand upon a different footing than laws for the levy and collection of special assessments or special taxes and are to be construed with the utmost liberality. In some cases no notice whatever is required. State v. Several Parcels of Land, 83 Neb. 13, 119 N. W. 21, L. R. A. 1916E 1; Turpin v. Lemon, 187 U. S. 51, 23 S. Ct. 20, 47 L. Ed. 70; Glidden v. Harrington, 189 U. S. 255, 23 S. Ct. 574, 47 L. Ed. 798. See exhaustive discussion of this distinction in Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33, 2 A. L. R. 609. The power to levy a general tax is inherent in the sovereign, is purely legislative in character, and due process does not require that the property subject to the tax or the amount to be levied should be subjected to judicial inquiry. Tax proceedings are necessarily summary in character, may not be impeded by a due process requirement of notice and opportunity to be heard at any particular stage of the proceedings, are not judicial in character, personal notice is not necessary, and notice by a statute itself is sufficient. 16A C. J. S., Constitutional Law, § 650(a) (2), pp. 971 to 977; 84 C. J. S., Taxation, § 359, p. 692.

The decisions reveal that there are no categorical imperatives in this area. Taxation takes property. The balance must be struck between the time urgencies of governmental necessity and the taxpayer's right of resistance.

At the outset we observe that this is an ad valorem

tax, the amount depending on the value of the taxpayer's property. Notice is given by statute, and he has a full opportunity to be heard and to appeal as to valuation and equalization. The power of the Legislature or the unit board to make the levy is not challenged. But, it is said, this power to levy may be illegally or improperly exercised and no notice and opportunity are provided and that therefore the proceedings lack due process. The statute here under consideration bypasses the statutory procedure, section 77-1601, R. S. Supp., 1965, in which the county board of equalization makes the levies for cities, school districts, and other governmental subdivisions within 14 days after the action of the State Board of Equalization and Assessment. A taxpayer may appeal from this action but it is noted that the grounds of appeal are restricted and the collection process may not be impeded. §§ 77-1606 to 77-1610, R. R. S. 1943. It is this narrow or minimal deviation from established tax procedure that the plaintiffs attack. The rule is stated in Nickey v. State of Mississippi, 292 U. S. 393, 54 S. Ct. 743, 78 L. Ed. 1323, as follows: "There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. Wells, F. & Co. v. Nevada, 248 U. S. 165; Bristol v. Washington County, 177 U. S. 133, 146; McMillen v. Anderson, 95 U. S. 37; see American Surety Co. v. Baldwin, 287 U. S. 156, 168."

The application of this rule is well stated in 16A C. J. S., Constitutional Law, § 650(a) (2), p. 977, as follows: "Due process is afforded if the taxpayer has an opportunity to question the validity or the amount of an assessment before the amount is determined, or at any subsequent proceedings to enforce its collection, or subsequent to collection in a suit for refund of taxes paid

under protest, or at any time before liability for the tax becomes finally and irrevocably fixed."

We have long followed this rule in Nebraska. In County of Douglas v. State Board of Equalization & Assessment, 158 Neb. 325, 63 N. W. 2d 449, a general tax case, we said: "The following language in the case of Hacker v. Howe, 72 Neb. 385, 101 N. W. 255, is also pertinent: 'An owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined, or in subsequent proceedings for its collection.' " That the right to collateral attack alone is sufficient to constitute due process is apparent from Hacker v. Howe, 72 Neb. 385, 101 N. W. 255. The State Board of Equalization and Assessment raised values and there was no appeal provided. Said this court: "He certainly is not denied due process of law if the courts are open to him in which he may try the question of the scope of action and the power of the state board to equalize the valuation of properties as between the different counties so as to bring about uniformity and equality of taxation."

Any doubt in this matter is laid to rest by State v. Several Parcels of Land, *supra*. There the required statutory notice of the meeting of the county board of equalization was not given and the taxpayer asserted that therefore he was denied his opportunity to be heard before the levy and the right to appeal. This court said: "Again, it cannot be said that due process of law is lacking, in proceedings for taxation, although the statutory notice is omitted at some particular stage, if the maxims of the law provide an alternative remedy which is sufficient to correct any wrong done. As a safeguard for the protection of a taxpayer, our legislature made provisions, now appearing as section 11061, Ann. St. 1907, which gives to a taxpayer the right to an injunction in the event that the objectionable tax, or some part

thereof, be levied or assessed for an illegal or unauthorized purpose."

The taxpayer's opportunities to be heard and his remedies have been been considerably expanded since this case, both collaterally and directly. If taxes are levied without authority of law, their collection may be enjoined. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. Section 77-1735, R. R. S. 1943, our refund statute, creates a direct cause of action in the tax proceedings by which he may test the validity, *for any reason,* of a tax or any part thereof. Under this section, for example, he may test special assessments or benefits in an improvement district. Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N. W. 2d 210. Section 77-1736, R. R. S. 1943, gives him an administrative remedy, as the treasurers of the different districts are required to refund the taxes, if, "it appears to the satisfaction of such authorities that the tax, or a part thereof, was clearly invalid." And, further, a suit under our statutes to enforce and collect the lien of taxes would afford the taxpayer notice and process and a judicial hearing as to his tax liability. Nor can he complain that the tax is collected before he is afforded relief. Collection does not irrevocably fix the charge under our tax procedure. There is no requirement of due process that he be given such a hearing and notice so that he may stay the collection process or that he be given an opportunity to be heard *before* any particular stage of the taxation process. Our statutes, with respect to hearings and appeals, specifically provide that collection shall not be stayed. See §§ 77-1606 to 77-1610, R. R. S. 1943. The necessities of government prevail. The balance of right remains, and it is only the balance of convenience that is struck against the taxpayer. The fact that he is required to take affirmative action does not deny him due process.

We point out that our consideration here is commensurate with the whole breadth of plaintiffs' attack. The

establishment of a deviation from our customary statutory levying procedures could be answered by pointing out that we have recently held that in fixing levies for cities and other political subdivisions that the county board of equalization is restricted to the powers granted it under the statute, that it has a mandatory ministerial duty conferred by legislative power to fix the levy at the number of mills certified to it. The county board of equalization has no standing to question those matters lying within the discretionary legislative power of a city or political subdivision nor to determine as a quasi judicial body the legality or illegality of a tax levy made by a political subdivision to whom the Legislature has entrusted the legislative power. State ex rel. City of Omaha v. Lynch, 181 Neb. 810, 151 N. W. 2d 278; Municipal University of Omaha v. County Board of Equalization, 181 Neb. 881, 151 N. W. 2d 924. An opportunity to be heard, at this point, would be futile and therefore unnecessary. It follows, therefore, that plaintiffs' attack embraces the question of due process in our whole normal tax levying procedure, and we have considered it so.

What we have said disposes of all of the contentions of plaintiffs in this respect because our tax procedure provides for more than the minimum requirements of due process. However, out of deference to the able and persuasive argument of counsel in this case we will discuss two further matters in this portion of the argument. Plaintiffs strenuously argue that the statute does not provide when the levy shall be certified to the county treasurer. This is really an argument that he must be notified at a definite or within a specific period of time. But he is not entitled to be heard at any particular stage of the tax procedure. The statutes give him notice within the time limits of his required opportunity to be heard which is only before the tax becomes irrevocably fixed. The statute, section 79-2210, R. S. Supp., 1965, notifies him of the tax, by whom the levy

is made, to whom it is certified, "who shall collect the same as other taxes are collected." The statutes tell him when taxes go on the books, open to public inspection, when they are due and delinquent. This is sufficient. Again plaintiffs are arguing for mere convenience, and not demonstrating anything that destroys their rights.

Plaintiffs cite McCord v. Marsh, 108 Neb. 723, 189 N. W. 386, and Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748. Neither one of these cases is a tax case and are therefore clearly not applicable to the rules of due process as to taxation procedure. But even if they were, the holdings therein do not apply here. Summerville was an improvement district case, organized by private individuals pursuant to statute. A holding that due process requires a tribunal with notice and an opportunity to be heard before a determination of public convenience and necessity, private benefits, and whether lands should be included in the district, in no way relates to the requirements of due process in establishing a tax procedure for the levying and collection of general taxes. McCord v. Marsh, *supra,* by maximum import holds that hearings of the county board of equalization provided by statute satisfy due process. By so holding the court did not hold that something less or different might not also be due process. As we have pointed out the taxpayer here has a full opportunity to resist the tax before it becomes irrevocably fixed as a charge against his property but he has no due process right to resist it before any particular stage of the tax process, unless given by statute or suit by injunction.

Plaintiffs argue, in a separate section of their brief, that L.B. 301 is unconstitutional because no notice and hearing or tribunal is provided for a determination by the county officials preparing the tax lists of the number of "school age" children in the district residing in each county where there is a joint school district com-

prised of parts of two or more counties. The law provides that the school district shall belong to the educational service unit of the county having the greatest number of children residing in the school district. It is asserted that this determination is "adjudicative" and requires an antecedent hearing with notice. The determination of the number of "school age" children in a school district is not an adjudicative fact and requires no judicial hearing. School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301. And the further determination of the number in the district residing in each county does not alter this holding. We do not imply that if the determination was "judicial" in nature that such notice and hearing would be required. Unless provided by statute, due process does not require such a hearing prior to the levy and collection of a general tax. Again, plaintiffs' cited cases are not applicable because they are not tax cases and are distinguishable for the reasons hereinbefore given.

Finally, plaintiffs claim L.B. 301 is unconstitutional because it creates corporations by special law. We assume, without deciding, that the educational service units are corporations and that this is a special law. Article XII, section 1, of the Constitution of the State of Nebraska, provides in part: "The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations, * * *. No corporations shall be created by special law, nor their charters be extended, changed or amended, *except those corporations* organized for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state." (Emphasis supplied.) The meaning of this provision is so clear as to hardly require argument. The educational service units are educational in purpose and clearly embraced in the exceptions. Plaintiffs argue a rule of statutory construction that the exceptions apply only to the words or phrases immediately preceding, and that

therefore the exception applies only to changes or amendments to corporation charters. Such an unreasonable interpretation would result in holding that no corporation at all could be created by special law, but that charters could be amended by special law to achieve the same purpose. Of course, the plain meaning of this constitutional provision is that you cannot *create* a corporation by special law, nor may you circumvent the prohibition by amending a charter by special law. A special law cannot create a corporate charter; a special law cannot amend an existing charter. By its very terms, the provision prohibits either creation or change by special law. The exceptions apply to either or both. Nor can we accept the plaintiffs' interpretation of the word "organized" as meaning charters of corporations already organized, thus excluding the exceptions application to the creation of corporations. This, of course, is sematical nitpicking. It flies in the face of the meaning of the provision. The words "those corporations" obviously include the "corporations" mentioned in the *creation* provision. And in the first sentence of this provision "organization" is used in the generic sense. It does not say "provide for the creation, organization, etc.," but simply refers to the general legislative power to organize. If plaintiffs' interpretations were correct and organization simply means subsequent steps after creation, then the Legislature would have no power to create corporations, an absurd result. Plaintiffs' interpretation would prohibit the legislative formation of school districts, which are corporations under our law. Rules of statutory construction are created to resolve ambiguities, not create them. We hold that the formation of the 19 educational service units and their geographical boundaries as established in L.B. 301 was a proper exercise of legislative power and within constitutional limits.

We therefore hold that L.B. 301, now sections 79-2201 to 79-2212, R. S. Supp., 1965, is constitutional in all

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

AFFIRMED.

CENTRAL CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. ROBERT K. KEEFER ET AL., APPELLEES.
152 N. W. 2d 117

Filed July 7, 1967. No. 36553.

1. **Mechanics' Liens.** A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved and the contractor. The right to such a lien is based upon the contract and its purpose is to secure the debt due under the contract.
2. ———. When labor or materials have been furnished pursuant to a written contract, the contractor is required to record a copy of the contract with the account. The recording of a copy of the contract is essential to the lien.
3. ———. Where an earlier contract has been superseded by a later contract, which materially changed the obligations of the parties, the recording of a copy of the earlier contract will not support a claim of a mechanic's lien.

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

Abrahams, Kaslow & Cassman, for appellant.

Francis M. Casey and Roger C. Andrews, for appellees.

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

BOSLAUGH, J.

This is an action to foreclose a mechanic's lien brought by Central Construction Company, a corporation engaged in the home improvement business. On October 25, 1964, the plaintiff entered into a written contract with the defendants, Robert K. Keefer and Phyllis M. Keefer, to improve a residential property in Plattsmouth, Nebraska.

The October 25, 1964, contract provided that the plaintiff would install aluminum siding on the house, construct a roof extension on the carport, and replace any window casings or sills found to be rotted. The defendants agreed to pay the plaintiff $1,960 plus a "time charge" of $176.40 on December 16, 1965.

On November 11, 1964, while the siding work was being done, the plaintiff entered into a new contract with the defendants. The new contract included the same items as the previous contract and further provided that the plaintiff would construct a separate garage upon the property of the defendants. Under the new contract the defendants agreed to pay $4,260 plus a "time charge" of $383.40 on January 1, 1966. On the reverse side of the defendants' copy of the new contract the following appears: "This contract can be finace (financed) for Five years if want to carry it for five years, the year of 1966, or Pay it cash if want to of Jan 1 - 1966

"This contract Does not mean to be paid in One full Payment in of 1966.

"Joe Dinovo
Witness Steve Grandinette
Sharon Keefer Witness Sharon Keefer"
c/o Jerry

Robert K. Keefer testified that the writing on the reverse side of his copy of the contract was placed there by Mr. Dinovo, the plaintiff's agent, before Keefer had signed the contract; that Dinovo's signature was witnessed by Steve Grandinette, his future son-in-law, and Sharon Keefer, the defendants' daughter; that Dinovo had said that the contract could be financed for a 5-year period; and that the plaintiff did its own financing.

Dinovo was deceased at the time of the trial. Grandinette was in the army in Vietnam. Phyllis M. Keefer and the defendants' daughter, now Mrs. Dennis Bohn, both corroborated Robert K. Keefer's testimony concerning the writing on the reverse side of the defendants' copy of the contract.

The writing does not appear on the original copy of the contract produced by the plaintiff. An examination of the exhibits indicates that this is due to the fact that the carbon paper between the copies was not reversed at the time the writing was placed on the reverse side of the defendants' copy.

The siding work and the roof extension on the carport were finished on or about November 15, 1964. At about this time the plaintiff's president told Robert K. Keefer that the plaintiff would not build the garage because Keefer "wasn't financially able to pay for it." This was not agreeable to Keefer and he stated: " 'Well, you had better go ahead and build it.' "

A mechanic's lien with a copy of the October 25, 1964, contract attached was recorded on December 14, 1964. This action was filed on February 7, 1966.

The trial court held that the October 25, 1964, contract was extinguished by merger into the November 11, 1964, contract and could not be the basis for a mechanic's lien, but granted the plaintiff 30 days in which to file an amended petition for an action at law. The plaintiff elected not to proceed further and the action was dismissed. The plaintiff has appealed.

The mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved and the contractor. The right to such a lien is based upon the contract and its purpose is to secure the debt due under the contract. Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 82 N. W. 112, 83 Am. S. R. 512; Occidental Building & Loan Assn. v. McGrew, 86 Neb. 694, 126 N. W. 382; § 52-101, R. R. S. 1943. When labor or materials have been furnished pursuant to a written contract, the contractor is required to record a copy of the contract with the account. § 52-103, R. R. S. 1943. The recording of a copy of the contract is essential to the lien. Barnacle & Co. v. Henderson, 42 Neb. 169, 60 N. W. 382.

The plaintiff in this case recorded a copy of a contract

that had been superseded by a later contract which had become effective before the initial construction had been completed. The later contract materially changed the obligations of both parties including the time of performance for the defendants.

The trial court concluded that the parties did not intend that the October 25, 1964, contract should remain effective after the November 11, 1964, contract had been executed and that the October 25, 1964, contract would not support a claim of lien. We think this conclusion was correct.

The judgment of the district court is affirmed.

AFFIRMED.

JACK F. PAULSON ET AL., APPELLEES, V. BARTON H. FORD, DOING BUSINESS AS NEBRASKA AGGREGATE COMPANY, APPELLANT.

152 N. W. 2d 341

Filed July 21, 1967. No. 36535.

1. **Waters: Damages.** A jury might reasonably infer that defendant's dumping sand in the Platte River substantially contributed to a subsequent ice jam against a sandbar downstream, a levee failure upstream, and flood damage to plaintiffs' property.
2. ———: ———. The damages in this case are excessive, appearing to have been given under the influence of prejudice.

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

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Lathrop & Albracht, for appellees.

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

SMITH, J.

A levee failed, and escaping waters of the Platte River flooded part of plaintiffs' farm north-northwest of Valley, Nebraska. In this negligence action a jury has assessed damages for the harm to plaintiffs. Defendant contends on appeal that causation between his conduct and the levee failure was not reasonably inferable and that excessive damages were awarded.

The river flowed southerly in two channels along the west side of defendant's land and less than ¾ mile west of plaintiffs' farm. The east channel, studded with sandbars and small islands, was 500 to 600 feet wide. It ordinarily carried 75 or 80 percent of the streamflow, which had a sediment bearing load and a tendency toward deposition of sediment.

The levee ran along the left bank of the river for 10 miles. Maintenance was a function of the Union Dike and Drainage District, which had built the structure in 1918. The embankment had a 50-foot base, 2 to 1 or 3 to 1 slope, and 10-foot top used for vehicular travel. It was composed of light soil excavated from parallel borrow pits. One of the adjoining pits was located ½ mile north of a point west of plaintiffs' farm. In that pit water stood 16 feet deep. The levee failed there at an early hour on March 25, 1962.

Defendant, doing business as Nebraska Aggregate Company, had begun production of aggregate from his land in July 1961. The relevant activity took place ½ mile south of the site of the levee failure. During the next several months production was sizable. In an around-the-clock operation employees daily filled 50 railroad cars with aggregate, which amounted to 70 percent of the raw material. The remainder, fine sand, was discharged through a pipe across the levee and into the east channel. The men used a bulldozer to move the accumulation westward. The dump, 20 to 25 feet high with a taper, finally occupied between 17 and 85 percent of the channel width in estimates by witnesses. Re-

peated protests, public and private, had been ignored.

After several days of thaw and on the day before the flood, ice restricted the hydraulic effectiveness of the east channel. A sheet remained at the Leshara bridge, a mile south of the dump. The flow there was relatively minute with no water backed up as late as evening. At the dump site a conservation officer, while walking north 100 yards on the levee, observed a different condition. The water in a day had receded 6 inches to a level 3½ feet below the levee top, but a large ice jam existed in the area. In photographs of the flood the upstream end of the ice jam is located a short distance north of the dump site. Other observations were made in the afternoon and evening by Harry Green, president of the drainage district. He was unaware of any sand boil, although railroad employees were sandbagging the levee top upstream 6 miles. Referring indefinitely to the area of the Nebraska Aggregate Company, Green testified:

"A. It was blocked by an ice jam at this area, and it had been raising for some little time and was getting quite high. Q. Where was the ice jam * * *? A. Well, it was lodged from approximately the sandbar on south or downstream for quite some distance. Q. And could that ice get through there? A. No. * * * It was lodged on the hump in the sand."

Defendant's manager witnessed the levee failure. For several days ice cakes on high water had eaten away at the levee, which was full of trees and brush. His men had checked several sand boils. Although they attacked another one with sandbags and a bulldozer, they could not defend the levee. Removal of foundation material had created a channel under the embankment, which collapsed. Through the wide breach water rushed southeasterly in a 3-foot current across plaintiffs' land. On the third day of the flood a construction company closed the breach.

Plaintiffs' farm had been flooded one other time during

the years 1952 to 1962. In 1960 the levee upstream 6 miles failed because of abnormal runoff. Parts of the Burlington railroad tracks and U. S. Highway No. 275 were washed out. In 1962 the runoff was normal, and detailed information concerning any dangerous condition north of the breach was not shown.

Plaintiffs' theory of factual causation has several elements. The waste sand increased the sediment bearing load of the stream, and the increase contributed substantially to formation of sandbars downstream. Ice cakes lodging against one of the bars created the jam, which raised the water level upstream. Through the pipeline of the sand boil foundation material was removed by hydrostatic pressure, and the levee collapsed. In our opinion the evidence was sufficient to support a reasonable inference that defendant's conduct caused plaintiffs' harm.

Defendant argues that assessment of excessive damages is demonstrated by plaintiffs' petition and testimony of plaintiff Jack F. Paulson. The petition itemized damage of $13,720, the amount of the claim, as follows: (1) Leveling, $1,500; (2) planing, $300; (3) plowing, $200; (4) fencing, $1,200; (5) debris, $200; (6) shelled corn, $220; (7) access road, $600; (8) top soil, $5,500; and (9) unplanted crops for 1962, $4,000. Paulson, a Bachelor of Science in Agriculture and a licensed real estate broker, engaged in farm management. He testified to items (1) through (6) with a total estimate of $3,626, which included $250 for shelled corn. He also valued the farm, 80 acres, before the flood at $48,000 and after the flood at "400, 450 dollars an acre. * * * $32,000 to $36,000." No other evidence of amount as an equivalent to adequate compensation appears in the record.

The district court instructed the jury on damages measured by the value of the shelled corn and by depreciation in the value of the land. Plain language removed the danger of duplication in a recovery. The jury assessed damages at $16,000, which responded to the

upper limit of the totals, $12,250 and $16,250, in the substance of Paulson's testimony.

Significant are the considerable range of post-injury valuations by Paulson in the same breath, the lack of other evidence, the interest of Paulson, and the itemization in the petition. In the state of the record damages are excessive, appearing to have been given under the influence of prejudice. The issue of responsibility, however, should not be tried again. See, Caster v. Moeller, 176 Neb. 30, 125 N. W. 2d 89, rehearing denied, 176 Neb. 446, 126 N. W. 2d 485; Scofield v. Haskell, 180 Neb. 324, 142 N. W. 2d 597.

The judgment is affirmed in part and in part reversed, and the cause is remanded for a new trial on damage issues alone. Costs on appeal are taxed against plaintiffs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CARTER, J., dissenting.

The evidence set forth in the majority opinion does not, in my opinion, establish that the negligent acts of the defendant were the cause of the harm suffered by the plaintiffs to their lands.

The evidence shows that the Union Dike and Drainage District constructed a dike on the left bank of the Platte River in the area involved for a distance of 10 miles. The dike was 50 feet wide at its base and 10 feet wide at the top. Its purpose was to protect adjoining lands against floodwaters. The evidence shows that the defendant owned lands to the east of the dike on which coarse gravel aggregate was being mined for commercial use. In its operations, the defendant returned the fine waste sand over the dike to the river by a sluice pipe. A bulldozer was used to push the waste sand away from the sluice pipe into the river. There is a great variance in the evidence as to the distance the waste sand was pushed into the river, the witnesses estimating the distance as being from 100 to 300 feet of

the 600-foot channel. Protests were made to the blocking of the river which were ignored. The alleged protest of plaintiffs consisted of a discussion of possible hazards not detailed in the evidence. The protest of the Nebraska Game, Forestation and Parks Commission was directed to the blocking of the stream and the pernicious effects on animal and vegetable life within the stream. The protest of the president of the dike company consisted of a warning not to mine gravel aggregate within 150 feet of the land side of the dike, a warning that was admittedly complied with. The foregoing is the extent of the warnings shown by the record.

In 1962, the dike washed out approximately one-half mile upstream from defendant's gravel facility and caused the flood damage that resulted in the present suit. It is the contention of the plaintiffs that the pushing of the waste sand into the river caused the break in the dike and subjects the defendant to liability by virtue of the following chain of circumstances.

The Platte River is a sand-bearing stream. In nature, it contains many sandbars, some temporary in nature and some of more permanent duration as evidenced by vegetation thereon. The amount of sand being carried by the river is dependent largely on the velocity and amount of water at the particular time. The greatest sedimentation occurs in slack waters when velocity is reduced. The action of the waters on sand and sandbars is dependent on many conditions which are practically impossible of determination at any given time. In high water periods, sand may scour out in areas where velocity is high and sandbars may be moved only to form elsewhere. In areas where the velocity of the water is reduced, sedimentation is more likely to occur and sometimes produces sandbars that did not previously exist. The results of river action are notoriously problematical.

The only witness purporting to testify to the origin of the ice jam alleged to have caused the break in the

dike is the president of the dike company. He states that he stood on the Leshara bridge approximately a mile downstream from the break in the dike and viewed the ice jam. He says that the ice jam did not form at the bridge but some distance upstream. He says the ice lodged on a sandbar and piled up behind it causing the jam. There is nothing to indicate if the sandbar was recent or of longstanding, or had any relation to the casting of waste sand into the river by the defendant. The contention that the waste sand pushed into the river by the defendant caused the ice jam is pure speculation, although the majority opinion treats it as a reasonable inference which the jury could draw from the facts.

I am in agreement with the finding that the ice jam blocked the flow of the stream to an undetermined extent. But it is not the only evidence in the record as the source of the high water at the point of the break in the dike. The evidence shows that the top of the dike was being sandbagged several miles north in the area of Fremont. There is evidence of several weak places that were watched during periods of high water. There was evidence that the moving ice was striking the banks and eroding them to some extent. The claim relied on here, however, is that the break in the bank was caused by a sand boil opening a channel under the dike. There is something said about hydraulic pressure of the high water contributing to the break. I point out, however, that there was a borrow pit containing as much as 16 feet of water along the land side of the dike. The level of the water in the borrow pit raised and lowered with the rise and fall of the level of the river. This, of course, had a tendency to decrease the hydraulic pressure. The depth of the borrow pit could have been an important factor in creating sand boils by permitting the passage of water in the more porous soil aggregates at the greater depth. These factors lessen the probability that the pertinent sand boil was caused by the alleged negligent acts of the defendant.

The evidence shows that the water did not approach the top of the dike by more than 3 feet at the point of the break. The cause of the break in the dike, under the evidence, was the sand boil. Whether or not it was the result of sandy soil used in the construction of the dike, the existence of the borrow pit, or the work of burrowing animals is a matter of pure speculation. It is my opinion that the result of the majority opinion is based on inference on inference on inference, or, what is more likely, speculation on speculation, or a combination of both. The result of the majority opinion is based on a coincidence of events without proof of causal connection. Even though warnings of possible hazards may have been communicated to the defendant or his agents, the burden rests upon the plaintiffs to show that the negligence of the defendant was a legal cause of plaintiffs' harm.

In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. In giving plaintiffs' evidence such weight, I submit that there is no evidence that the dumping of the waste sand caused the break in the dike one-half mile above defendant's facility. The conclusion arrived at by the majority is the result of pure speculation accompanied by a coincidence of events having no reasonable relation to each other. In permitting the evidence in this case to go to the jury, the court authorized the jury to return a verdict for the plaintiffs without evidentiary proof that the legal cause of plaintiffs' harm was the negligence of the defendant.

SPENCER, J., joins in this dissent.

HORN'S CRANE SERVICE, A CORPORATION, APPELLANT, V. WENDELL H. PRIOR ET AL., APPELLEES.

152 N. W. 2d 421

Filed July 28, 1967. No. 36555.

1. **Partnership: Joint Adventures.** In an action seeking a personal judgment against the individual members of a partnership or a joint adventure the petition does not state a cause of action if it fails to state that there is no partnership property or that it is insufficient to satisfy the debts of the partnership or joint adventure.
2. **Partnership.** A partnership is an association of persons organized as a separate entity to carry on a business for profit.
3. **Partnership: Joint Adventures.** The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction. The law of partnership applies to the questions arising between the parties and among the parties in relation to third parties.
4. **Limitation of Actions.** Where a new independent cause of action is filed by way of amendment, the statute of limitations runs until the filing of such amended petition.
5. **Partnership: Process.** The remedies against the partnership and the individual members are cumulative and there is no requirement that the firm or entity be sued and process served on it in order to acquire jurisdiction over individual members to establish their separate liability.

Appeal from the district court for Chase County: VICTOR WESTERMARK, Judge. Affirmed.

Frederick E. Wanek, for appellant.

Murphy, Pederson & Piccolo, for appellees.

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

WHITE, C. J.

The district court sustained a general demurrer and a motion to dismiss an amended petition, dismissed the action, and plaintiff appeals. We affirm the judgment.

Plaintiff, a seller of equipment and supplies, in two causes of action in his amended petition seeks a personal judgment against the defendants, and each of them, for

liability arising out of specific sums due under a written contract with (first cause of action) and for supplies and services furnished (second cause of action) a partnership or joint adventure comprised of the two defendants, Wendell H. Prior and Orie Cook, and one C. E. Piper, the manager who, being a resident of Colorado, was not joined in the action. The partnership or joint adventure was formed for the purpose of operating a quarry and rock-crushing business for profit, and the written contract was entered into and the supplies and services furnished pursuant thereto. Defendants' ultimate liability for personal judgment flowed out of the partnership's or joint adventure's original liability as a separate entity in the transactions.

The detailed allegations of the original and amended petition are too lengthy to set out herein. In neither the original nor amended petition is it alleged, either directly or by inference, that the partnership or joint adventure property was insufficient to satisfy its debts, or that there was no partnership property, and there is no allegation of dissolution or insolvency of said joint adventure or partnership. This was fatal.

In an action seeking a personal judgment against the individual members of a partnership or a joint adventure the petition does not state a cause of action if it fails to state that there is no partnership property or that it is insufficient to satisfy the debts of the partnership or joint adventure. Ruth v. Lowrey, 10 Neb. 260, 4 N. W. 977; Leach v. Milburn Wagon Co., 14 Neb. 106, 15 N. W. 232; State v. Pielsticker, 118 Neb. 419, 225 N. W. 51; Lindell v. Deere, Wells & Co., 66 Neb. 87, 92 N. W. 164.

In Ruth v. Lowrey, *supra,* it is said: "Must they not allege sufficient facts in their petition to show their right to proceed against the members individually? We think they must. This, in effect, is a proceeding to charge the individual property of the persons composing the firm, and in order to maintain the action the peti-

tion must show the insufficiency of the partnership property in Wyoming to satisfy the amount due upon the judgments."

In Leach v. Milburn Wagon Co., *supra,* an action was brought to recover a personal judgment against an individual partner on a judgment against the partners as a firm. In sustaining the demurrer to the petition this court said: "The petition (referring to a cited Ohio case) also set out the names in full of the individual ment against them individually. * * * This was what members of the firm, and contained a prayer for judgwas attempted to be done in this case, but the petition fails to show that the partnership property had been exhausted. * * * There is no allegation, claim, or pretense that the partnership property in this state had been exhausted."

In State v. Pielsticker, *supra,* this court said: "This court is committed to the doctrine that a partnership is a legal entity by a long line of cases. * * * However, the partnership relation is such that the separate property of a partner cannot be subjected to the payment of partnership debts until the property of the firm is exhausted. Leach v. Milburn Wagon Co., 14 Neb. 106. Firm property must also be subjected to the payment of the firm debts before it can be applied to the debts of the individual members of the firm. Roop v. Herron, 15 Neb. 73; Steele v. Kearney Nat. Bank, 47 Neb. 724. The partners are personally, jointly, and severally responsible for partnership liabilities. But the benefits and liabilities of a partner arise from and are the result of the partnership relation. Therefore in this state a partnership is an entity, distinct and apart from the members composing it, for the purpose for which the partnership exists. First Nat. Bank v. Sloman, 42 Neb. 350." See, also, In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793; Svoboda & Hannah v. Board of Equalization, 180 Neb. 215, 142 N. W. 2d 328.

There are several reasons for the rule. One of the

most obvious is that credit having been extended to the partnership or firm, the members ought to have a right to insist that the partnership property be exhausted first. And to permit a firm creditor to by-pass the partnership property and exhaust the assets of an individual member leaving the partnership property extant, would be an obvious injustice, permit the other partners to profit at his expense, and place him in an adverse position with relation to his copartners.

No problem arises out of the plaintiff's allegation that this is a joint adventure. Both parties consider it as a partnership in their briefs. Plaintiff alleges that the defendants and Piper jointly entered into an enterprise for the purpose of acquiring and operating a business; that they contributed money and property thereto; that they all exercised control but that Piper was the manager; and that the plaintiff entered into said contracts on the representation of the defendants that they were an existing partnership. The substance of plaintiff's theory, which he affirms in his brief, is that defendants were members of a partnership and individually and jointly liable on that basis. We further note that section 67-306, R. R. S. 1943, defines a partnership as "an association of persons organized as a separate entity to carry on a business for profit." Under the facts alleged and the theory presented by the plaintiff, the law of partnership applies. With reference to joint adventures, this court, in Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368, said as follows: "The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction. * * * The law of partnership applies to the questions arising between the parties and among the parties in relation to third parties." The district court was correct in sustaining the demurrer and dismissing the action on the ground that the petition did not state a cause of action.

Although not necessary for a disposition of this case the general demurrer was sustainable because of the bar

of the statute of limitations appearing on the face of the petition. The execution of the written contract and the transactions out of which this action arose occurred between April 25, 1960, and January 16, 1961. The original petition herein was filed January 15, 1965, before 5 years had elapsed, and the amended petition was filed July 28, 1966. It is suggested, although plaintiff does not argue the point, that the amended petition relates back to the filing date of the original petition, and therefore is not barred, this because it is substantially the same and does not allege a new and independent cause of action. Where a new independent cause of action is filed by way of amendment, the statute of limitations runs until the filing of such amended petition. Streight v. First Trust Co. of Omaha, 133 Neb. 340, 275 N. W. 278. We need not resolve this question. There is a conflict in the authorities as to whether an amended petition stating a cause of action relates back to the date of filing of an original petition which fails to state a cause of action. See 34 Am. Jur., Limitations of Actions, § 263, p. 217. But however that may be, it is clear that the new petition or amendment must state a cause of action. Here neither the original petition nor the amended petition stated a cause of action. The action is clearly barred by the statute of limitations.

The trial court also sustained a motion to dismiss on the ground that the court had no jurisdiction because there was no service of process upon the partnership or joint adventure. As we have pointed out the plaintiff here had elected to proceed against the members individually and did not sue or issue process against the partnership. This it may do. The remedies against the partnership and the individual members are cumulative and there is no requirement that the firm or entity be sued and process served on it in order to acquire jurisdiction over individual members in order to establish their separate liability. Herron v. Cole Bros., 25 Neb. 692, 41 N. W. 765; Hanna v. Emerson, Talcott & Co., 45

Neb. 708, 64 N. W. 229. The service of process herein therefore was proper, and as plaintiff contends, sufficient to subject the defendants to the jurisdiction of the court. But this, of course, has nothing whatever to do with the necessity, once having acquired jurisdiction, to state a cause of action in a petition filed within the limitation period against them. The plaintiff may proceed against them individually, but it must state a cause of action against them in the same capacity.

The judgment of the district court in dismissing the action is correct and is affirmed.

AFFIRMED.

SMITH, J., dissenting.

The asserted obligations of the partnership are the kind for which members of a firm are liable jointly under the Uniform Partnership Act, § 67-315 (b), R. R. S. 1943. Plaintiff alleged painstakingly that C. E. Piper, the one partner not made a party defendant, was beyond the jurisdiction of Nebraska. Laying aside momentarily the features of the entity theory announced by the court, I think that causes of action were stated. See, Bowen v. Crow, 16 Neb. 556, 20 N. W. 850; Winters v. Means, 25 Neb. 241, 41 N. W. 157, 13 Am. S. R. 489; Restatement 2d, Conflict of Laws, Tent. Dr. No. 3, § 87, Comment f; Restatement 2d, Contracts, Tent. Dr. No. 2, §§ 112 and 117.

Plaintiff is denied an adjudication on the merits because the firm is presumably solvent. That formula strangely enough derives color of support from equitable rules written into statutes a century ago. Writ of execution on a judgment against the firm itself is issued against partnership property. If the judgment is not satisfied, the creditor may file a bill in equity against the partners. The prescribed allegations of the bill are the judgment and the insufficiency of partnership property. §§ 25-313, 25-314, and 25-316, R. R. S. 1943. An alternative remedy for the creditor's benefit —not an obstacle to a direct action against partners—

was probably intended. See, Herron v. Cole Bros., 25 Neb. 692, 41 N. W. 765; Roggenkamp v. Hargreaves, 39 Neb. 540, 58 N. W. 162; Ruth v. Lowrey, 10 Neb. 260, 4 N. W. 977.

The problem is complicated by a variant of the partnership definition in the uniform act. A partnership is an association of persons organized as a separate entity to carry on a business for profit. § 67-306, R. R. S. 1943. The definition, which is associated with an entity-aggregate dichotomy, emphasizes quasi-corporate relations. The provision for joint liability of members to partnership creditors strongly suggests a primary liability. In any event the ambiguities of procedural and substantive law should be considered in light of the justification offered in the majority opinion.

Does the businessman intend primarily to extend credit to the firm? Two writers gave negative answers in 1915. See, Williston, "The Uniform Partnership Act * * *," 63 U. Pa. L. Rev., 196, 209; Lewis, "The Uniform Partnership Act * * *," 29 Harv. L. Rev., 158, 166; Lewis, "The Uniform Partnership Act," 24 Yale L. J., 617, 639. An affirmative answer is not obvious even in 1967.

The need of a partner for protection against inroads on firm assets should be evaluated with other considerations. By hypothesis the firm is solvent in some sense. A general partner runs the risk that he will be compelled ultimately to pay all partnership debts. The partnership creditor in pursuit of a remedy will at times view this need with a healthy skepticism, which I share.

McCOWN, J., joins in this dissent.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1967

LOIS M. LUNZMANN, APPELLANT, V. RAYMOND E. YOST ET AL., APPELLEES.
153 N. W. 2d 294

Filed September 29, 1967. No. 36416.

1. **Equity: Appeal and Error.** In reviewing equity cases, where there is an irreconcilable conflict on a material issue, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other.
2. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period.
3. **Boundaries.** The evidence held to be insufficient to establish a common boundary line by monument so as to bind adjoining landowners to such line as against a line described by deeds of conveyance.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Wellenseik, Morrissey & Davis and Moran & James, for appellant.

Spencer & Hoch, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and C. THOMAS WHITE, District Judge.

WHITE, District Judge.

This is a boundary case. The plaintiff Lunzmann, appellant in this court, brought an action against the defendants Yost in the district court to quiet title to a triangular strip of land in Lot 24 of Ware's Division, located in Section 4, Township 8, Range 14, Otoe County, Nebraska. The plaintiff, in the district court, relied on adverse possession and on the theory that the plaintiff and defendants purchased adjoining lands with reference to a common boundary as marked by a common grantor, and that the line, as so marked, is binding on the parties, even though it conflicts with a metes and bounds description. The trial court found generally for the defendants and dismissed the plaintiff's petition.

The part of Lot 24 with which we are concerned, and of which the Lunzmann and Yost tracts are a part, is an irregular tract of land, the north and south lines of which run in an east-west direction, the west line of which runs at an interior angle of 94.25 degrees to the south line along a course measuring 370 feet from the south line to the north line. From the south, the east line of the tract parallels the west line of the tract for 100 feet. At this point, the east and west lines are 165 feet apart, the line then taking a more northwesterly course to where it narrows to 90 feet at the north line of the tract.

The evidence discloses that the entire tract was owned by John W. and Gladys M. Neihart, who, on February 14, 1944, contracted to sell it to Richard Starner, also spoken of in the record as William Starner, and Myrtle Starner. The Starners assigned the contract on April 6, 1946, to Mason L. Colbert, and, on that same day, the Neiharts conveyed the tract to Colbert. The transaction, in the form of an absolute conveyance, was, in substance, a mortgage, with Colbert advancing money to pay the balance of the purchase price to the Neiharts and holding the title to the real estate as security for payment by the Starners. It was, in any event, so treated by the parties.

The entire tract was subsequently disposed of in 5 parcels. Colbert, the record owner, took no active part in the transactions leading up to the sales other than signing deeds prepared for him. All negotiations were by Richard Starner. The tract was not surveyed before the sales except as to the sale to the plaintiff Lunzmann.

The first parcel was sold by Starners to Shoemakers and was the southernmost parcel, which, by deed description, ran from the south line 100 feet along the west line, east to the east line of the tract, south 100 feet to the south line of Lot 24, thence west to the place of beginning.

The next parcel sold was immediately north of the Shoemaker parcel and described a tract as beginning at the northeast corner of the Shoemaker parcel, thence north along the west side of a traveled road 55 feet, then west 137 feet, thence south 55 feet, thence east 165 feet to the point of beginning. This parcel was sold on June 4, 1955. Stakes were driven at the northeast and northwest corners of this tract. This tract was sold to Paul McMullen and wife.

The property of the defendants Yost is immediately north of the McMullen tract and was conveyed to them on February 4, 1956. The tract is described as commencing at the northeast corner of the tract sold to Paul V. McMullen and Pearl McMullen, thence west 137 feet, thence north 55 feet, thence east to the west line of said traveled road (the east line), thence southeasterly along the west line of said road to the place of beginning.

It is substantially the plaintiff's contention that the defendants' line is 55 feet northwest of the northeast corner of the McMullen tract, and that stakes were placed thereon at the time of the conveyances with knowledge of the defendants. The line claimed by defendants as the true line would have as its eastern terminus a point 57.48 feet north of the northeast corner of the McMullen tract. The plaintiff relies on the stakes, and the defendants rely on the description contained in their deed.

The plaintiff's tract is immediately north of the Yost

tract, and was conveyed to a predecessor in title by Colbert on May 21, 1957, and subsequently conveyed to the plaintiff on January 3, 1962. The plaintiff's tract was described as commencing at a point on the west right-of-way line of a public road across said Lot 24, 95 feet directly south of the *north line* of said Lot 24; thence west on a line 95 feet south and parallel with the said north line of Lot 24, 104 feet; thence south 80 feet; thence east on a line 175 feet south of and parallel with the north line of said Lot 24, 124 feet; thence northwesterly along said right-of-way line 83.65 feet to the point of beginning.

The description in the plaintiff's deed is in harmony with the description in the defendants' deed, but not with plaintiff's contention here. The east and west lines in all deeds of the various tracts are parallel with the north and south boundary lines of Lot 24.

The evidence fails to disclose any conflict between the defendants and their grantor Colbert as to the northeast corner of the tract purchased by defendants. It further fails to disclose any conflict or adverse use by the plaintiff's grantor Shoemaker against the defendants. There is a complete lack of evidence that anyone other than the defendants occupied the disputed strip to the date of the conveyance to plaintiff, which was in 1962, and which conveyance was entirely consistent with the description of defendants' tract and the land claimed here. There is evidence of a dispute as to the true corner, but all of it after 1962.

Even conceding for purposes of argument that the plaintiff's use after 1962 met the requirements of adverse possession, no evidence being presented of previous adverse claims to which the plaintiff could tack her claim, the contention of adverse possession must fall. The plaintiff having failed to establish the required elements of adverse possession for the statutory period, the relief must be denied. McDermott v. Boman, 165 Neb. Neb. 429, 86 N. W. 2d 62.

The plaintiff further contends, however, that the de-

fendants could not properly be held to be entitled to a decree quieting title to the disputed tract since they had not held it for the required statutory period. The trial court, in its memorandum, specifically found that defendants' deed correctly reflected the intention of the parties and described the tract the defendants claim. The defendants claim under a deed of record from an acknowledged record owner. The plaintiff must recover on the strength of his own title and not upon the weakness of his adversary's title. McDermott v. Boman, *supra*.

The plaintiff further asserts that the plaintiff's predecessor and the defendants, as purchasers from a common grantor, purchased with reference to a boundary line as marked by the common grantor, such line is binding upon such owners and their successors regardless of the length of time which has elapsed. Thiel v. Damrau, 268 Wis. 76, 66 N. W. 2d 747; Maes v. Olmsted, 247 Mich. 180, 225 N. W. 583.

The evidence with respect to the common boundary line may be summarized as follows: The witness William Starner testified that at the time tract 3 was sold to the defendants Yost, stakes marking the northeast and northwest corners of the Yost tract were driven and that the defendant Raymond Yost was present at the time. However, the witness testified that it was his intention that the east-west lines of each lot as it was sold be at the same angle and parallel the boundary lines of Lot 24. Clarence D. Starner, a son of William Starner, testified to the same effect. James A. Shoemaker testified that at the time he purchased tract 4 (subsequently sold to the plaintiff), the tract was purchased with reference to stakes found at the northeast and northwest corners of the Yost tract, and that at the time tract 4 was sold to the plaintiff, the stakes were still present and pointed out to Mrs. Lunzmann, and that when the defendants erected a home on tract 3, the witness used the stakes to string a line in order to properly locate the basement on the tract. Thelma Shoemaker, the wife of James, testified

she saw the string at the time of the construction. Marvin Almquist, the Otoe county surveyor, testified that at the request of the plaintiff, he located an iron pipe on the southeast corner of the plaintiff's tract at the point claimed by her. The survey was made August 7, 1965. The plaintiff testified that at the time she was negotiating for purchase of tract 4 with the Shoemakers, the iron pipe, marking the southeast corner of the tract, was pointed out to her, and that she purchased according to the stakes, even though her deed does not reflect the southeast corner marked by the iron pipe as the southeast corner.

County surveyor Almquist was also called as a witness for the defendants and testified that he prepared a survey according to the descriptions contained in the deeds; that at the time he made the survey in exhibit 15 on June 18, 1965, he did not recall finding a steel stake at the claimed corner of the plaintiff's tract, but testified that on August 7, 1965, he found a stake. The finding of the stake in August and not in June is not explained in the record. The defendant Raymond Yost testified that at no time did anyone point out to him a stake as marking his northeast corner, and that he relied on the description in his deed. The defendant Esther Yost, wife of Raymond, testified to the same effect as her husband.

The cross-examination of the witness William Starner was to the effect that each east and west division line was at the same angle to the west line, and was intended to be. The cross-examination of the plaintiff indicates that at the time she purchased tract 4 from the Shoemakers, the abstract was examined by her attorney and a survey was ordered, which was certified on December 11, 1961, by C. A. Shannon, then Otoe county surveyor. The survey, procured by plaintiff through her attorney and attached to her abstract of title, recites that wooden stakes were fixed by the surveyor at the corners fixed by the description in the deed. The deed to the plaintiff was executed on January 3, 1962. It is obvious that

even if the testimony of the plaintiff and James Shoemaker with reference to the iron stakes is true, nevertheless, the plaintiff knew, as a result of the Shannon survey and the wooden stakes placed thereon, that the wooden stake at the southeast corner was north of the iron stake. We fail to see how the plaintiff relied on the iron stake as her southeast corner, in view of this fact.

While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. Onstott v. Olsen, 180 Neb. 393, 142 N. W. 2d 919; Webb v. Lambley, 181 Neb. 385, 148 N. W. 2d 835.

The evidence tends to support defendants' contention that, as reflected by the deeds, the east-west lines of all tracts were intended to be at the same angle in a true direction; that plaintiff and defendants never came to an understanding as to a common boundary; and that, in fact, the plaintiff did not rely on the iron stake as she claimed. The trial court having come to the same conclusion, the judgment is affirmed.

AFFIRMED.

BERT L. SPRINGER, APPELLEE, V. LARRY SMITH, APPELLANT.
153 N. W. 2d 300

Filed September 29, 1967. No. 36435.

1. **Negligence: Trial.** In a case where the trial court may properly direct a verdict of liability against a defendant, the only questions being those of proximate cause and damages, an instruction which states that, before the plaintiff may recover,

he must prove by a preponderance of the evidence that plaintiff's injuries were proximately caused by the negligence of the defendant and the amount of plaintiff's damages, sufficiently informs the jury as to what it should do in the event the plaintiff's evidence as to a particular element of the damage claimed fails to preponderate in favor of the plaintiff.

2. **Automobiles: Damages.** Where the nature and extent of the injuries received by the plaintiff in an automobile accident are in dispute, photographs of the automobiles involved in the collision tending to show the force of the collision are admissible as bearing on those issues.
3. **Negligence: Pleading.** An answer which admits negligence of a defendant and that such negligence was the proximate cause of the accident, but denies the nature and extent of the injuries suffered, does not constitute an admission that the injuries were proximately caused by such accident and negligence.
4. **Trial: Damages.** Where a trial court properly submits to a jury pain and suffering that plaintiff has heretofore sustained, the trial court is not required to instruct the jury that it is not to make an award for possible future pain.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Reversed and remanded.

Kier, Cobb & Luedtke and William A. Wieland, for appellant.

Merril R. Reller and Donald R. Hays, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and C. THOMAS WHITE, District Judge.

WHITE, District Judge.

The automobile which the plaintiff was operating on May 22, 1965, was driven into from the rear by an automobile operated by the defendant. Plaintiff brought this action for the resultant personal injuries and property damage. The defendant's amended answer admitted the accident, the negligence of the defendant, and that plaintiff suffered some injury. Defendant denied that the injuries were of the nature and extent alleged in the petition. Defendant further denied each and every

other allegation of plaintiff's petition. The case was tried to a jury, a verdict of $8,000 was rendered for plaintiff, and defendant appeals.

The evidence discloses that plaintiff, a farmer, 78 years of age, was driving his automobile east on Court Street in Beatrice, Nebraska, when his car was struck from the rear. The plaintiff had no recollection between the time he lost his grip on the steering wheel and awakening in a hospital.

The witness Waltke, a police officer, testified that he arrived at the scene of an accident at about 1:25 p.m. on May 22, 1965, on Court Street in Beatrice, Nebraska. The officer identified a newspaper photograph, exhibit 3, as the automobile of the defendant, and exhibit 4 as a photograph of plaintiff's automobile. The exhibits show the defendant's car resting against a shattered utility pole and substantial damage to the front end of the car. The damage to the plaintiff's car is also substantial and confined to the rear of the vehicle. The officer testified that the plaintiff was lying on the shoulder of the street 28 paces from where plaintiff's automobile had stopped. Debris was scattered over the highway west of the plaintiff's car. The beginning point of the debris was 375 feet from the point where the defendant's car stopped. Plaintiff's hat was caught in the left rear door of his car. Plaintiff was conscious, but was lying down and in an excited state. Plaintiff was taken to a hospital for treatment of injuries.

The first assignment of error relates to the admission in evidence of photographs of the automobiles of the parties. The defendant contends that the photographs were admitted to show force of the collision and were immaterial, as the answer admitted negligence and that such negligence was the proximate cause of the accident. The defendant cites Patras v. Waldbaum, 170 Neb. 20, 101 N. W. 2d 465, in support of his theory. In that case, this court held that admission in evidence of two photographs of the automobile was error, since the de-

fendant had admitted negligence and the nature of the injuries suffered; the only dispute being the condition of the plaintiff at the time of the trial, and whether his then condition flowed from the accident or in whole or in part from congenital causes. The court cited as authority 32 C. J. S., Evidence, § 709, p. 986.

The defendant, in his amended answer, admitted "that said accident was proximately caused by the negligence of * * * defendant," and "that said plaintiff suffered some injury in said accident *but specifically denies* that said injuries are of the character and extent alleged." (Italics supplied.) An admission of liability for an accident does not constitute an admission that all damages claimed by a plaintiff, even though undisputed in the record, were the proximate result of the collision. Cooper v. Hastert, 175 Neb. 836, 124 N. W. 2d 387. Proximate cause is an issue in the instant case. Defendant disputed the claimed injuries in his pleadings and at the trial. The photographs were relevant to show the nature of the contact and its force. To have refused to admit them would deny to the jury evidence helpful in resolving the issue of the injuries the plaintiff sustained and their nature and character. The trial court properly admitted the photographs.

The second assignment of error relates to Instruction No. 2, which reads as follows: "Before the plaintiff can recover against the defendant in this action the burden is upon the plaintiff to prove, by a preponderance of the evidence, each and both of the following propositions: 1. That as a proximate result of the accident of the automobiles involved in this case the plaintiff sustained injuries and damages; and 2. The extent of the damages, if any, which the plaintiff has sustained. If the plaintiff has established both of the foregoing propositions, by a preponderance of the evidence, then your verdict should be for the plaintiff." The defendant complains that this instruction fails to inform the jury as to what its verdict should be in the event the evidence is equally balanced

or preponderates in favor of the defendant.

In Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531, the trial court instructed the jury that: "You are instructed that before the plaintiff can recover in this action, she must prove, by a preponderance of the evidence, all of the material allegations of her amended petition. Therefore, the burden is on the plaintiff to prove, by a preponderance of the evidence * * *. If the plaintiff has established both of said propositions by a preponderance of the evidence, then your verdict should be for the plaintiff. On the other hand, if you believe, from a preponderance of the evidence, that the plaintiff has failed to establish said propositions, your verdict should be for the defendant." This court held that there was "no language in the instruction that informs the jury to whom the verdict should go in the event the evidence was equally balanced, or in the event the evidence preponderates in favor of the defendant," and was error, and accordingly reversed the judgment.

In Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, this court held that an instruction that the burden was on the plaintiff to prove by a preponderance of evidence the negligence charged in the petition and that such negligence was the proximate cause of plaintiff's injuries, to entitle plaintiff to recover, without further instructing the jury "of what their verdict should be if the appellee has not sustained this burden," was prejudicial.

In Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923, an instruction stated: "If the plaintiff has established all of the foregoing propositions by a preponderance of the evidence, then your verdict should be for the plaintiff and against the defendant. If, however, the plaintiff has failed to establish any one of the foregoing propositions by a preponderance of the evidence, then he cannot recover and your verdict should be for the defendant." This court held that the plain import of the instruction was that if the evidence is evenly balanced the verdict should be for the defendant, and that the instruc-

tion met the standard required in Ficke v. Gibson, *supra,* in that the jury was informed as to what its verdict should be if plaintiff failed to prove one or more of the necessary allegations of his petition.

In Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635, the appellant assigned as error the trial court's failure to inform the jury as to whom the verdict should go in the event the evidence was evenly balanced, or in the event that the evidence preponderated in favor of the defendant. This court held: "An instruction, which correctly advises the jury that the plaintiff must prove all the material elements of his case by a preponderance of the evidence and that if it fails to so establish any one of them the verdict should be for the defendant, is not erroneous in that it fails to inform the jury as to what their verdict should be if the evidence was evenly balanced."

The trial court did not give a general instruction on the burden of proof in Omey v. Stauffer, 174 Neb. 247, 117 N. W. 2d 481, but referred to the greater weight of the evidence and defined the same. We held the failure to instruct the jury as to what the verdict should be in the event the evidence was evenly divided or preponderated in favor of the defendant was prejudicial.

Here, the defendant admitted liability for the accident, but denied all other matters alleged in the petition. The defendant, however, did not dispute the amount of certain repair and medical bills, nor question that these items of expense were the proximate result of the defendant's negligence. Thus, the trial court could properly have directed a verdict for the plaintiff as to these matters. The jury then could not have properly found for the defendant. As to the matters principally in dispute, the injuries suffered by the plaintiff and their nature and extent, the question presents itself that whether the instruction, urged by the defendant, is necessary for the guidance of the jury, or, whether, as urged by the plaintiff, the jury was sufficiently informed as to

what the jury should do if it found as to any particular element of damages in dispute did not preponderate in favor of the plaintiff. We hold that, with reference to the fact situation here presented, the jury was sufficiently instructed and that the rule in the line of cases commencing with Fitzsimons v. Frey, *supra,* does not apply.

The defendant's next assignment of error relates to the cross-examination of plaintiff's medical witness. On direct examination, the plaintiff's physician testified that, in examining the plaintiff, he discovered a shakiness of plaintiff's right hand. On cross-examination, the physician testified that he diagnosed plaintiff's condition as Parkinson's disease, and, in his opinion, this was not related to the accident in question. The defendant's counsel asked how the Parkinson's disease would manifest itself and the effect it would have on the plaintiff. Objection to the question as outside the scope of the direct examination was sustained. We think this was erroneous. The plaintiff's evidence as to his physical condition at the time of the trial was offered for the obvious purpose of influencing the jury as to the injuries sustained by the plaintiff and their duration. The physician's testimony was offered to corroborate and support the plaintiff. Evidence that the claimed results of injuries are, in fact, the symptoms of an unrelated disease is manifestly relevant, and the error resulting from the denial of such inquiry by the defendant's counsel on cross-examination is prejudicial. See, Larson v. Hafer, 105 Neb. 257, 179 N. W. 1013; Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415.

The defendant further complains of the trial court's failure to instruct the jury that it should make no award for future pain and suffering. In its instruction, the trial court informed the jury that it could make an award for conscious mental and physical pain and suffering which he (the plaintiff) *may have sustained.* The defendant cites no authority for the point that the trial

court must negate future pain and suffering when it has instructed as to the allowance of pain already sustained. The assignment is without merit.

The remaining assignments of error as to the alleged excessiveness of the award and misconduct on the part of a member of the jury do not need to be discussed, in view of the disposition of this case.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE GAU, APPELLANT.
153 N. W. 2d 298

Filed October 6, 1967. No. 36528.

1. **Criminal Law.** The right of accused to discharge for failure to receive a speedy hearing or trial is a personal right which may be waived, and it ordinarily is waived if the accused fails to assert his right by making a demand for hearing or trial, by resisting a continuance, or by failing to make some effort to secure a speedy hearing or trial.
2. **Robbery.** The theft of property is a necessary element of the crime of robbery and proof regarding the taking, identity, and value of such property is not only pertinent but necessary and required in order to prove the crime. When properly identified, it is always admissible.
3. **Criminal Law: Trial.** The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial.

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

Alfred A. Fiedler and Stephen E. Sturek, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

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

NEWTON, J.

The defendant Wayne Gau and another party were accused of the robbery of a jewelry store occurring on November 9, 1965, in Douglas County, Nebraska. Two days later the defendant was arrested and on November 15, 1965, complaint was filed against the defendant charging him with such robbery. Warrant was issued and served and on defendant's appearance before the court, the amount of the bail bond required was fixed. Date for preliminary hearing was not fixed until defendant obtained counsel at which time such hearing was set for December 21, 1965. Defendant obtained bail and was released on December 9, 1965. The preliminary hearing was continued and not had until June 22, 1966, at which time defendant was bound over for trial, information filed on June 24, 1966, and trial commenced on September 8, 1966.

Prior to the preliminary hearing, a plea in abatement was filed based upon delay in holding the preliminary hearing. The plea in abatement was overruled. The plea in abatement was renewed at the time of trial in the district court and was again overruled. Defendant contends that the denial of a preliminary hearing for 36 days, extending from November 15 to December 21, 1965, was a violation of section 29-504, R. R. S. 1943, which provides that: "* * * upon the accused being brought before the magistrate, he shall proceed as soon as may be, in the presence of the accused, to inquire into the complaint; * * *." The record in this case is entirely devoid of any explanation for the delay in holding a preliminary hearing and does not reflect that the defendant or his counsel at any time demanded a speedy preliminary hearing. The only clue to the delay in setting the cause down for preliminary hearing on December 21, 1965, is found in the plea in abatement entered by the defendant wherein it is stated: "* * * that no preliminary hearing was set until this Defendant obtained counsel and appeared again before Judge O. M. Olson at which time said prelim-

inary hearing was set for the 21st day of December, 1965." It would appear that any delay was occasioned by the defendant's desire to obtain counsel, was for his convenience, and with his consent. In any event, the right of accused to discharge for failure to receive a speedy hearing or trial is a personal right which may be waived, and it ordinarily is waived if the accused fails to assert his right by making a demand for hearing or trial, by resisting a continuance, or by failing to make some effort to secure a speedy hearing or trial. See, Sheperd v. United States, 163 F. 2d 974; Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649.

For his second assignment of error, defendant contends that items identified as having been stolen at the time of the robbery should not have been received in evidence. It may be pointed out that the theft of property is a necessary element of the crime of robbery with which defendant was charged, and proof regarding the taking, identity, and value of such property is not only pertinent but necessary and required in order to prove the crime. When properly identified, it is always admissible. § 28-414, R. R. S. 1943.

For his third assignment of error, defendant objects to an instruction given by the court on "aider and abettor." Such an instruction is usually proper where two or more parties are charged with the commission of an offense, but in any event, no objection was made to this instruction in defendant's motion for new trial and such assignment of error will, therefore, not be considered in this court. See, Lukehart v. State, 91 Neb. 219, 136 N. W. 40; Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224; Miller v. State, 173 Neb. 268, 113 N. W. 2d 118.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD J. MYERS, APPELLANT.

153 N. W. 2d 360

Filed October 6, 1967. No. 36538.

1. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of their testimony are to be determined by the jury in a criminal case.
2. **Criminal Law.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or to weigh the evidence.
3. **Criminal Law: Indecent Exposure.** In a prosecution for indecent assault, it is not essential that the testimony of the prosecutrix be corroborated by other testimony as to the particular act charged. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Sodoro & Meares, for appellant.

Herbert M. Fitle, Charles A. Fryzek, Gary P. Bucchino, John B. Abbott, John A. Gutowski, Raymond E. Gaines, Theodore L. Carlson, Thomas E. Brown, and William J. Gallup, for appellee.

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

BOSLAUGH, J.

The defendant, Donald J. Myers, was convicted of violating an ordinance of the city of Omaha, Nebraska, by enticing a minor under 18 years of age with intent to take indecent liberties with the person of the child. His motion for new trial was overruled and he has appealed.

The sole issue presented by the assignments of error is the sufficiency of the evidence to sustain the conviction.

The prosecuting witness, known as Susie, was 8 years of age. She testified that on the date of the offense she

was playing with Sandra in the back yard of Sandra's home which is adjacent to that of the defendant; that the defendant called to her and said that he had some candy for her; that she entered the defendant's house with him; that the defendant placed his hand inside of her shorts and unzipped his trousers; that the defendant exposed a part of his person and asked her to touch it; and that the defendant gave her some candy which she then took outside and gave to the other children.

The prosecuting witness further testified that she gave the remaining candy to Sandra's mother and then returned outside and told Sandra what had happened. The two girls then went back into Sandra's home and told Sandra's mother what had happened. They then went to Susie's home and told Susie's mother what had happened. Susie's mother called the police, and the defendant was arrested later that day.

The defendant denied that anything improper had occurred. He testified that he had called to the children for one of them to come and get the candy and that he had handed it out the screen door to Susie. The effect of the defendant's evidence was to present a question of fact for the jury.

The credibility of witnesses and the weight of their testimony are questions for the jury. State v. Sukovaty, 178 Neb. 779, 135 N. W. 2d 467. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Adams, 181 Neb. 75, 147 N. W. 2d 144.

The testimony of Sandra, Sandra's mother, Susie's mother, and the arresting officer tended to corroborate Susie's testimony as to the material facts and circumstances. This is sufficient. State v. Burton, 174 Neb. 457, 118 N. W. 2d 502. It is not essential that the prosecutrix be corroborated by other witnesses as to the particular act constituting the offense.

The evidence in this case, if believed, was sufficient

to sustain the conviction. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

DENNIS O. COVAULT, APPELLEE AND CROSS-APPELLANT, V. SAUNDRA K. COVAULT, APPELLANT AND CROSS-APPELLEE.
153 N. W. 2d 292

Filed October 6, 1967. No. 36550.

1. **Divorce: Adultery.** Where the evidence in a suit for a divorce establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions.
2. ———: ———. Where a wife is found guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged where he is a fit and proper person to have their custody.
3. **Divorce: Attorney and Client.** Where the adultery of a wife is established she is not ordinarily entitled to an award of an attorney's fee or the costs of the suit.

Appeal from separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Reversed and remanded with directions.

Hal W. Bauer, for appellant.

Kier, Cobb & Luedtke, for appellee.

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

CARTER, J.

This is a suit for a divorce. The plaintiff husband sought the divorce on the grounds of adultery and extreme cruelty. The defendant wife cross-petitioned for a divorce on the grounds of extreme cruelty, prayed for the custody of Susan Carole, the 3-year-old daughter of the parties, for child support and alimony, and for attorney's fees and costs. The trial court decreed an absolute

divorce to the plaintiff on the ground of extreme cruelty, custody of Susan Carole Covault was given to the husband, a division was made of the personal property of the parties, and the costs of the action, including an attorney's fee of $400, were taxed to the plaintiff.

On the appeal, the defendant wife assigned as error the granting of the custody of the minor child, Susan Carole, to the husband. The plaintiff husband has cross-appealed asserting that the trial court erred in failing to find the defendant guilty of adultery, in taxing the costs, including an attorney's fee, to the plaintiff, and in fixing excessive visitation privileges at plaintiff's expense.

The evidence shows that the parties were married on February 17, 1963. On June 23, 1966, the husband found an unmailed letter written by the defendant addressed to one Michael Lisowsky, a single man, indicating a previous adulterous relationship. The evidence further shows that on June 24, 1966, the wife took a vacation trip to a beach in the State of New Jersey. She was there met by Lisowsky. The evidence shows that defendant and Lisowsky went on a trip through Virginia, Florida, Louisiana, Texas, Mexico, Colorado, and intervening states, occupying the same quarters and otherwise consorting together. The expenses of the trip were paid by the defendant by using credit cards of the plaintiff. The defendant asserts that irrespective of these evidences of unmoral conduct, she committed no act of adultery. We dispose of this evidence by stating that this court is not so naive that it will give credence to the story testified to by the defendant. It is beyond belief. The adultery of the defendant was amply established.

Although an overt act of adultery is not shown, the charge of adultery may be established by evidence of circumstances sustaining a finding of guilt. Cook v. Cook, 141 Neb. 294, 3 N. W. 2d 450; Baker v. Baker, 166 Neb. 306, 89 N. W. 2d 35; Houghton v. Houghton, 179 Neb. 275, 137 N. W. 2d 861.

Where a wife is found guilty of adultery, she is ordinarily an unfit person to have the care and custody of a minor child as against the husband she has wronged. Baker v. Baker, *supra;* Houghton v. Houghton, *supra.*

It is the contention of the plaintiff in his cross-appeal that the adultery of the defendant was established and that he was entitled to a decree of divorce on that ground. From this it is argued that the trial court erred in granting a divorce on the ground of extreme cruelty in view of the differences in the awards that can properly be made in these two grounds for a divorce. The point is meritorious and is sustained. Baker v. Baker, *supra;* Houghton v. Houghton, *supra.*

Where the adultery of the wife is established, she will not ordinarily be awarded costs or an allowance of attorney's fees against the husband whom she has wronged. Baker v. Baker, *supra;* Houghton v. Houghton, *supra.*

We conclude that the trial court erred in not granting plaintiff a divorce on the ground of adultery. We conclude also that the trial court was in error in awarding an attorney's fee to the defendant and in taxing the costs of the action to the plaintiff. The trial court correctly found that defendant was an unfit person to have the care and custody of the minor child of the parties and that plaintiff was a fit and proper person to have the custody of the child. We think the trial court properly permitted the defendant the right of visitation except that plaintiff should not have been required to pay the expense of visitations by the defendant not caused by the plaintiff.

We reverse the decree and remand the cause with directions to the trial court to enter a decree in accordance with the holdings of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

PERCY BURRIOUS, APPELLANT AND CROSS-APPELLEE, V. NORTH PLATTE PACKING COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

153 N. W. 2d 353

Filed October 6, 1967. No. 36597.

1. **Workmen's Compensation.** General disabilities which are the normal, usual, and logical consequence of injuries to specific members are not compensable under subdivision (1), section 48-121, R. S. Supp., 1963.
2. ———. It was clearly the intent of the Legislature to fix the amount of the benefits for loss of specific members under subdivision (3), section 48-121, R. S. Supp., 1963, without regard to the extent of the subsequent disability suffered with respect to the particular work or industry of the employee.
3. ———. 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 other parts of the body has developed, he may be compensated under subdivisions (1) or (2) of section 48-121, R. S. Supp., 1963.
4. ———. When an employee meets with an accident resulting in a schedule injury, which accident also accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor.
5. ———. In the absence of unusual or extraordinary other physical injury, the compensation cannot exceed the amount specified in subdivision (3) of section 48-121, R. S. Supp., 1963.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Baskins, Baskins & Schneider, for appellant.

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and John W. Sjostrom, for appellee.

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

McCOWN, J.

This is a workmen's compensation case in which the primary issue is whether the plaintiff's compensation is limited to that provided for a one member schedule

disability, or whether he is entitled to compensation for permanent partial disability.

On February 19, 1964, the plaintiff, who was 62 years of age, stepped on a conveyor belt that fed a hammer grinder. The belt carried his left leg into the grinder. The 8-inch swinging hammers in the grinder were made of heavy steel. The hole on the top of the grinder was about 14 inches square. The plaintiff hung on to the top of the grinder for a few moments until it was shut off by another employee. The only portion of the plaintiff's body that went into the grinder was his left leg. The highest laceration or bruise on the left leg was 8 inches above his knee. The admitting diagnosis at the hospital was injury to the left leg and foot. In addition to multiple bruises and contusions, he sustained a fracture of the distal end of the fibula without significant displacement; a fracture of the tarsal cuboid bone; a chip fracture of the proximal face of the 1st metarsal; and five or six fractures of various phalanges of his toes. All the fractures had satisfactory position. X-rays on the date of the accident showed his left knee joint and lower left femur were normal.

Plaintiff's primary complaint when admitted to the hospital pertained to his left leg, although he also complained of hurting through his neck, left arm, back, and shoulder. Examination of his neck at the time disclosed it was normal. No X-rays of his back were ever requested by his attending physician in the hospital, although a gastro-intestinal X-ray disclosed, as an incidental finding, that there was degenerative arthritis or osteoarthritis present involving the plaintiff's lower thoracic or dorsal spine. X-rays of the left shoulder in May 1964, disclosed a normal left shoulder.

The single judge of the compensation court at the initial hearing entered an order granting plaintiff temporary total disability for a period of 97-4/7 weeks to January 3, 1966, and an award for 15 percent permanent loss of use and function of the left foot. On rehearing,

the three man workmen's compensation court entered an identical award except for a minor change in computation of the weekly amount. On appeal to the district court, that court determined that the findings of fact by the workmen's compensation court were not supported by the record and did not support the award as to the 15 percent permanent loss of use and function of the plaintiff's left foot. The district court found that the plaintiff had a 25 percent permanent loss of use and function of his left foot and in all other respects affirmed the award of the workmen's compensation court. The plaintiff appealed and the defendant cross-appealed.

The procedure applicable here was that on rehearing in the compensation court, a de novo consideration was required. On appeal to the district court on the petition, transcript, and bill of exceptions, the district court was required to examine the record coming to it from the compensation court and render its judgment. On appeal to this court, a consideration de novo was required on the record which came from the district court. Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N. W. 2d 159.

The plaintiff's position is that he has suffered not only a schedule injury to his left foot, but that the accident also aggravated a preexisting arthritic condition in his back, and injured his neck and shoulder. It is argued that he was either injured in other parts of his body, or that the result of the injury to his foot was not the usual or ordinary result, but affected other parts of his body and entitled him to compensation for total permanent disability because he can no longer work at the only kind of work for which he was fitted.

General disabilities which are the normal, usual, and logical consequence of injuries to specific members are not compensable under subdivision (1), section 48-121, R. S. Supp., 1963. We have said that it was clearly the intent of the Legislature to fix the amount of the benefits for loss of specific members under subdivision (3), section 48-121, R. S. Supp., 1963, without regard to the

extent of the subsequent disability suffered with respect to the particular work or industry of the employee. Mead v. Missouri Valley Grain, Inc., 178 Neb. 553, 134 N. W. 2d 243.

Plaintiff also contends that the situation here comes within the rule that 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 other parts of the body has developed, he may be compensated under subdivision (1) or (2) of section 48-121, R. S. Supp., 1963. See Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152.

It is also contended that when an employee meets with an accident resulting in a schedule injury, which accident also accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor. Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805.

We have no quarrel with either of these rules and the critical question here is whether or not the facts bring this case within the ambit of those rules.

In the absence of unusual or extraordinary other physical injury, the compensation cannot exceed the amount specified in subdivision (3) of section 48-121, R. S. Supp., 1963. Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186.

In the case at bar, the orthopedic surgeon to whom the plaintiff was referred by his own physician stated: "With respect to the patient's neck and back, I am not convinced that he has suffered any severe injuries to either of these areas which would give him any permanent-partial disability."

The testimony of all the physicians and surgeons who testified, except for the plaintiff's own doctor, was essentially to the same effect.

The single judge of the workmen's compensation court, the full three judge workmen's compensation court on

rehearing, as well as the district court, all found the plaintiff's permanent partial disability was limited to a partial loss of use and function of his left foot; a single member schedule disability.

On trial de novo, we determine that the district court was correct and its judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF, V. LAWRENCE B. GOLDMAN, DEFENDANT.

153 N. W. 2d 451

Filed October 13, 1967. No. 28593.

1. **Attorney and Client.** The court disbarring an attorney has inherent power to reinstate him. To reinstate a disbarred attorney means to again invest him with the right to practice law, but it is not a revocation or vacation of the order of disbarment.
2. ———. The primary factor in the reinstatement of a disbarred lawyer is whether or not the applicant, notwithstanding his former misconduct, is now fit to be admitted to the practice of law and that there is reasonable ground to believe that this present fitness will permanently continue in the future.
3. ———. In considering an application for the reinstatement of a disbarred attorney, this court owes a solemn duty to the public and legal profession which must be performed without regard to feelings of sympathy, the stigma of disbarment, and the asserted severity of punishment.
4. ———. In addition to proof of existing good moral character, an applicant for reinstatement must have the same qualifications and be otherwise eligible for admission to the bar as in the case of an original application.
5. ———. Under the law of this state, this court is without authority to reinstate a disbarred attorney who is a nonresident of Nebraska, even though all other qualifications for reinstatement are established.

Application for reinstatement. See 127 Neb. 340, 255 N. W. 32, for original opinion. Denied.

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

William J. Whistler and John P. Glynn, Jr., for defendant.

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

CARTER, J.

This is an application by Lawrence B. Goldman for reinstatement as a member of the bar of this state.

Goldman was admitted to the bar of Nebraska in 1921. In 1934, while engaged in the practice of law in Omaha, he was disbarred for violating the rules of professional legal ethics. See State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W. 32. In 1954, Goldman made application for reinstatement which this court denied. In 1963, a second application for reinstatement was made and it, too, was denied. In 1967, a third application was made, the same being the application presently before this court.

The application shows that Goldman has not engaged in the practice of law since his disbarment. He also asserts that he does not intend to practice law in the future and that he desires reinstatement to clear his name and to remove the stigma of the disbarment order. He asserts also that he has been disbarred for a period of 33 years and that such period of time constitutes adequate punishment for the breach of professional ethics committed. In an application for reinstatement to the practice of law, this court owes a solemn duty to the public and the legal profession which must be performed without regard to feelings of sympathy for the applicant. In re O'Connell, 64 Cal. App. 673, 222 P. 625; In re O'Keefe, 62 Mont. 534, 205 P. 667. A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his restoration to the practice of law. The primary concern is: Is the applicant, notwithstanding his

former misconduct, now fit to be admitted to the practice of law and is there reasonable ground to believe that his present fitness will permanently continue in the future? Reinstatement after disbarment should be difficult rather than easy. In re Morton, 75 Cal. App. 497, 243 P. 32.

The court that has disbarred an attorney has the inherent power to reinstate him to the practice of law. Such reinstatement means that he will be again invested with the right to engage in the practice of law, but it is not a revocation or vacation of the order of disbarment. It does not relate back in point of time to the disbarment, but merely invests him with the rights, duties, and obligations of an attorney at law from the date of reinstatement. Where a disbarred attorney, since his disbarment, has demonstrated by rectitude of conduct that he is possessed of moral character sufficient to again be a member of the bar, he may be reinstated. In re Salsbury, 217 Mich. 260, 186 N. W. 404.

The application is supported by a showing that the applicant, while a resident of Oklahoma for many years, has by his good conduct indicated that he has overcome the unethical habits possessed at the time of his disbarment and regained the high moral character required to be admitted to the practice of law. The showing includes the recommendations of eminent judges, lawyers, businessmen, and lay citizens as to his present good character and reputation in the communities in which he has lived since his disbarment. We hold that the proof of good character is adequate to establish that his moral character and ethical conduct is sufficient to warrant reinstatement.

The evidence shows, however, that the applicant is and has been for many years a resident of the State of Oklahoma. It is the law of this state that this court has no authority to reinstate a nonresident to the practice of law in this state. Aside from his moral reformation, an applicant for reinstatement must otherwise be eligible for admission to the bar as in an original appli-

cation. One of the requisites is that the applicant shall be a bona fide resident of the state the same as when first admitted to the bar. See, Ex parte Marshall, 165 Miss. 523, 147 So. 791; In re Salsbury, *supra*.

The Rules of the Supreme Court governing the admission of attorneys provides in part as follows: "An applicant for admission to the bar must be a citizen of the United States and must show that he is a bona fide resident of the State of Nebraska at the time of filing his application." Revised Rules of the Supreme Court of Nebraska, Part II, Rule 2. The requirements for reinstatement being the same as for original admission to the bar, the defendant, irrespective of adequate proof of present good moral character, cannot be reinstated since residence in this state is a necessary qualification. Solely on the ground that applicant is not a resident of the State of Nebraska, we must deny the application of Goldman for reinstatement as an attorney at law in this state. The application, therefore, is denied.

DENIED.

D. E. STAUFFER, APPELLANT, V. LEON WILSON, APPELLEE.
153 N. W. 2d 454

Filed October 13, 1967. No. 36529.

1. **Trial: Appeal and Error.** Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered in this court.
2. **Appeal and Error.** It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong.
3. **Trial: Appeal and Error.** The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.

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

Andrew J. McMullen, for appellant.

Dier & Ross, for appellee.

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

SPENCER, J.

This is a paternity action brought by the plaintiff against the defendant to establish the defendant as the father of a child born out of wedlock to plaintiff's daughter, Patricia Stauffer, who was 17 years of age at the time of trial. The defendant at the time of trial was a high school senior 17 years of age.

A jury was waived and the case was tried to the district court on October 7, 1966. Patricia testified that the defendant had sexual relations with her on three different occasions in 1965, the first time being May 8 and the last being May 15. She denied relations with anyone else during 1965. Defendant admitted having such relations on three different occasions but fixes the date of his first access as June 10, 1965, or more than 1 week after the close of school. Patricia in an earlier deposition had fixed the first occasion as June 2, or the day before the closing of school. She also testified that she did not consult her doctor until August, and that he fixed her due date as March 25, 1966. The doctor's testimony fixes her first visit as August 31, 1965.

The baby weighed 7 pounds 9½ ounces at birth. Patricia's doctor testified that the baby was born on February 13, 1966; was a full-term baby; and that the normal or standard period of gestation is 9 calendar months, or 10 lunar months, or 280 days. In Koepke v. Delfs, 95 Neb. 619, 146 N. W. 962, we said: "The court will take judicial notice of the fact that the period of gestation ordinarily is about 280 days." If the date of May 8 is accepted, the period of gestation would have

been 280 days. If the date of June 10 is accepted, the period of gestation would have been 248 days. Patricia's doctor further testified that if Patricia's testimony as to her last menstrual period was correct, it would have been impossible for her to have become pregnant during the period from May 8 to May 15, 1965.

Plaintiff and her daughter first communicated with the defendant and his family about the situation on November 10, 1965. Defendant and his parents testified to conversations at that time which would raise considerable question herein. These conversations are denied by the plaintiff and her daughter. Blood tests were taken but were inconclusive. The trial court found for the defendant and the plainitff has perfected this appeal.

Plaintiff sets out three assignments of error, but the motion for a new trial filed by the plaintiff alleged only two assignments: (1) That the judgment is contrary to the evidence; and (2) that the judgment is contrary to the law.

The law is well established in this jurisdiction that alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered in this court. Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863. We consider then only those assignments which are within the ambit of plaintiff's motion for new trial.

Is the judgment contrary to the evidence or to the law? No purpose will be served herein by further detailing the evidence. Suffice it to say that it is sufficient to sustain a judgment for the defendant. This was a law action tried to the court without a jury. The credibility of witnesses is a matter for the trial court. It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence this court will review the judgment rendered, will presume that controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong.

Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. State Farm Mutual Automobile Ins. Co. v. Kersey, 171 Neb. 212, 106 N .W. 2d 31.

We cannot say that the action of the trial court herein was clearly wrong. The judgment is affirmed.

AFFIRMED.

IN RE INTERESTS OF TAMMY OWEN, A MINOR CHILD UNDER THE AGE OF EIGHTEEN YEARS. W. R. MULLIKIN, APPELLEE, V. CONNIE OWEN LUTKEHUSE ET AL., APPELLANTS.
153 N. W. 2d 361

Filed October 13, 1967. No. 36539.

1. **Infants.** An appeal from a finding and judgment of the district court by authority of Chapter 43, article 2, R. R. S. 1943, that a child is neglected or dependent is disposed of in this court by trial de novo upon the record.
2. **Parent and Child.** The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties and responsibilities of parenthood, or that they have forfeited that right.
3. ———. Where a parent has been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interest and welfare of the child.
4. **Infants.** A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.
5. ———. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it must be in danger of so becoming in the near future.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Kelly & Kelly, for appellants.

W. R. Mullikin, pro se.

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

CARTER, J.

This is a proceeding under Chapter 43, article 2, R. R. S. 1943, brought by the county attorney of Lincoln County, to have Tammy Kay Owen, a female child born in September 1965, declared to be a dependent and neglected child. After a trial, the district court found Tammy Kay Owen to be a neglected child and committed the custody of such child to the Nebraska Children's Home Society of Omaha, Nebraska, and authorized such society to place the child in a suitable adoptive home and to that end to execute the consent necessary for such adoption. Connie Owen Lutkehuse and Devonna Dennis, mother and maternal grandmother, respectively, have appealed.

At the time the incidents arose resulting in the filing of the petition the child was in care of Devonna Dennis, the maternal grandmother. They were living in a small home adequate for their use. The home was fairly clean and comfortable. Devonna was drawing an allotment under the Aid for Dependent Children program. Such aid had first been granted to Connie Owen, the mother of the child, but it had been terminated and a new allotment made to Devonna because of Connie's abandonment of the child.

The evidence establishes the following facts: Devonna Dennis had the physical custody of Tammy Kay. The child was healthy and appeared to be well cared for, although the home was described as cluttered and not always clean. Devonna was separated from her last husband and between husbands was the mother of two illegitimate children. Connie Owen was the unwed mother of Tammy. She named a certain man as the

father of the child but admitted there were other men who could have been the child's father. Connie was 18 years of age when Tammy was born on September 30, 1965. Connie was away from the home and her child so much of the time that the A.D.C. checks were shifted from Connie to Devonna. A case worker for the Lincoln County public welfare department testified that she found Connie living with a man at a motel in North Platte which was not denied. It was established also that Connie had become pregnant a second time while unmarried, although she married the putative father, Harold Lutkehuse, after this litigation was commenced. There is evidence in the record that Connie has abandoned the child to the care of Devonna. There is also evidence that Devonna kept the child out late at night with her in places which she frequented. There is some dispute in the evidence on the details of Devonna's activities. The trial court heard and saw the parties and concluded that neither Connie nor Devonna were fit persons to have the care and custody of Tammy Kay. The moral character of Connie and Devonna is shown to be very questionable and their reputations over the years are such that a court would risk the best interests of Tammy Kay to give her care and custody to either. The evidence is sufficient to sustain the findings of the trial court.

An appeal from the findings and judgment in a case brought under Chapter 43, article 2, R. R. S. 1943, is heard in this court by a trial de novo upon the record. A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child. State v. Best, 173 Neb. 483, 113 N. W. 2d 650. A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to

perform the duties and responsibilities of a parent, or has forfeited his right to the custody of the child. State v. Gross, 173 Neb. 536, 114 N. W. 2d 16. Where, as here, the parent has been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interest and welfare of the child. Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217; State v. Best, *supra*. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a dependent and neglected child, or it must be in danger of becoming such in the near future. Jones v. State, 175 Neb. 711, 123 N. W. 2d 633. Whether or not a child is dependent and neglected within Chapter 43, article 2, R. R. S. 1943, is a question of fact in each case. Jones v. State, *supra*.

Under the evidence in this case, the fitness of the mother and grandmother is of such a nature as to require the removal of the child from their care and custody for the best interests of the child. The environment in which this little girl would be raised would be such as to risk the serious effects of an unmoral climate. The placing of the child where her surroundings, teaching, and care would be conducive to proper training, including the establishment of adequate physical, mental, and moral standards, is, as the trial court found, to the best interests of the child.

As we have heretofore stated, there are some conflicts in the evidence. The trial court which has seen and heard the witnesses is in a much better position to determine the best interests of the child than is this court. We think the evidence sustains the judgment of the trial court and its judgment is in all respects affirmed.

AFFIRMED.

ROBERT D. REED, APPELLANT, V. LAWRENCE L. REED, APPELLEE.

153 N. W. 2d 356

Filed October 13, 1967. No. 36556.

1. **Trial.** A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence.
2. ———. If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.
3. **Boats and Boating.** Under the State Boat Act of Nebraska, the owner of a motorboat is liable for any injury or damage caused by the negligent operation of the boat if it is being used with his consent. § 81-815.16, R. R. S. 1943.
4. **Boats and Boating: Motor Vehicles.** A motorboat is not a "motor vehicle" within the meaning of the Nebraska guest statute, section 39-740, R. R. S. 1943.

Appeal from the district court for Douglas County: JAMES T. O'BRIEN, Judge. Reversed and remanded.

Matthews, Kelley & Cannon, for appellant.

Gross, Welch, Vinardi, Kauffman & Schatz, for appellee.

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

BOSLAUGH, J.

This is an action for damages brought by Robert D. Reed as plaintiff against Lawrence L. Reed. The plaintiff and the defendant are brothers. The plaintiff was injured on September 2, 1963, while a passenger in a motorboat that was owned and being operated by the defendant. As a result of the injuries sustained in the accident, the plaintiff's right leg was amputated between the knee and the ankle.

The State Boat Act provides that the owner of a vessel shall be liable for any injury or damage occasioned

by the negligent operation of the vessel if being used with the owner's consent, "whether such negligence consists of a violation of the provisions of the statutes of this state or neglecting to observe such ordinary care and such operation as the rules of the common law require." § 81-815.16, R. R. S. 1943.

The plaintiff alleged that the defendant was negligent in operating his boat so as to cause a displacement wave that interfered with the control of other boats; in failing to keep a proper lookout; in failing to keep his boat under proper control; in operating his boat from a dangerous position; and in failing to turn or otherwise attempt to evade the approaching craft.

At the close of the plaintiff's evidence, the trial court sustained the defendant's motion to dismiss the action upon the ground that the plaintiff had failed to prove any negligence. The plaintiff's motion for new trial was overruled and he has appealed.

A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence. Willey v. Parriott, 179 Neb. 828, 140 N. W. 2d 652. If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.

The record shows that the defendant's boat, which was involved in the accident, was a 14-foot plywood inboard boat powered by a 1949 Plymouth automobile engine. There was a steering wheel on the left side of the front seat which operated the rudder and controlled the direction of the boat. The boat had a maximum speed of 31 miles per hour.

On September 2, 1963, which was Labor Day, the plaintiff and the defendant had been water-skiing at Carter Lake. The weather was clear but it was cool and windy. At the time the accident happened, the defendant was operating his boat in a westerly direction at a speed of

approximately 20 miles per hour in the northern part of the lake. Both the plaintiff and defendant were sitting on the back of the front seat, or the deck just behind the front seat, the defendant on the left and the plaintiff on the right.

The defendant, who was called as a witness by the plaintiff, testified that when his boat was still east of the dock he noticed that a boat, identified as the Warner boat, was following his boat. The Warner boat attempted to turn to the right or northwest and cross the wake or displacement wave of the defendant's boat. When the Warner boat struck the right displacement wave, its occupants were thrown out of the boat and into the lake. At that time the Warner boat was 50 to 75 feet, or 4 to 6 boat lengths, to the rear of the defendant's boat and traveling, probably, 10 miles per hour faster than the defendant's boat. The plaintiff estimated the speed of the Warner boat to be 5 to 10 miles per hour faster than the defendant's boat.

The defendant further testified that when the occupants were thrown out of the Warner boat, he saw that the Warner boat was "trapped" in the wake of his boat; that the Warner boat changed its course and headed for his boat; and that it was overtaking his boat "fairly rapidly." The defendant then looked around to the front of his boat and continued on the same course at the same speed and did not look to the rear again until the Warner boat had struck his boat. The defendant estimated that 5 to 10 seconds elapsed from the time that he turned from observing the Warner boat until the collision occurred.

The Warner boat struck the rear of the defendant's boat and came up over it, striking the defendant and knocking him out of the boat. The plaintiff jumped out of the boat, but his right foot struck the propellor of the Warner boat.

The defendant testified that if he had made a sharp turn to the left or right he could have avoided the acci-

dent; that he had time to make a turn; and that there was nothing ahead or on either side which prevented his making a turn.

The evidence which has been summarized, when considered in the light most favorable to the plaintiff, tended to prove the plaintiff's allegation that the defendant was negligent in failing to turn or otherwise attempt to evade the Warner boat which was approaching on a collision course and overtaking the defendant's boat. The motion to dismiss made at the close of the plaintiff's evidence should have been overruled.

The defendant argues that he was confronted with a sudden emergency and is entitled to the benefit of the sudden emergency rule. Although there is some conflict in the evidence concerning the time which elapsed between the time that the occupants in the Warner boat were thrown into the lake and the time when the collision occurred, this presented a question for the jury. There was evidence from which the jury could find that the defendant had sufficient time in which to turn in an effort to avoid the collision.

The defendant further argues that the plaintiff was guilty of contributory negligence as a matter of law sufficient to bar any recovery because he failed to warn the defendant of the approaching Warner boat. The defendant testified that he observed the Warner boat at the time its occupants were thrown into the lake. Until this occurred, there was no occasion to warn the defendant, and after it occurred he was fully cognizant of the situation. The defendant's contention is without merit.

The defendant also contends that the "motor vehicle" guest statute, section 39-740, R. R. S. 1943, is applicable to motorboats and that the plaintiff must allege and prove gross negligence before he can recover damages from the defendant. We do not believe that the Legislature intended to include motorboats within the classification of "motor vehicles" as that term is used in sec-

tion 39-740, R. R. S. 1943. The statute has no application in this case.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. ELIJAH R. EDMONDS, APPELLANT.
153 N. W. 2d 364

Filed October 13, 1967. No. 36561.

1. **Criminal Law.** It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful character that a conviction based thereon cannot be sustained, that a court will be justified in directing a verdict of not guilty.
2. **Banks and Banking.** Where the evidence shows that a drawee bank has closed a defendant's bank account and given written notice thereof to the defendant, and the payee of the check has given personal notice to the defendant of the nonpayment of the check on presentation to the bank without the payment or tender of payment of the check to the payee within 5 days after receiving notice of nonpayment for lack of funds, it is not error to instruct on the presumption set out in section 28-1214, R. R. S. 1943.
3. **Banks and Banking: Automobiles.** Where a defendant charged with making and uttering a "no fund" or "no account" check gave the check as a part payment of the purchase price of an automobile, there is adequate consideration for the check even though delivery of the automobile was not made until the next day when the details of the sale transaction were completed.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Robert L. Morrissey, for appellant.

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

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

CARTER, J.

The defendant-appellant, Elijah R. Edmonds, was prosecuted and convicted for violation of section 28-1213, R. R. S. 1943, prohibiting the making and uttering of a bank check with knowledge that he did not have an account, deposit, or credit in the bank on which it was drawn. The case was submitted to a jury which returned a verdict of guilty. Sentence was imposed by the trial court and the defendant appeals.

On March 18, 1966, defendant went to the place of business of Haley's, Inc., in Nebraska City, Nebraska, for the purpose of purchasing a used automobile. He contacted one Armbruster, a car salesman for Haley's, Inc., and purchased a 1961 model Cadillac automobile for the sum of $1,495. Defendant agreed to pay $350 as a cash payment, the balance to be covered by a chattel mortgage to General Motors Acceptance Corporation. Defendant drew a check bearing the date of March 18, 1966, to Haley's, Inc., for the $350 downpayment on the Iowa State Bank of Hamburg, Iowa. The defendant returned the next day at which time the finance papers were executed and the automobile delivered. The check was returned unpaid to the Otoe County National Bank on March 26, 1966, with a yellow slip attached stating that the check was returned unpaid because the account was closed. The president of Haley's, Inc., telephoned one Wray, one of its car salesmen residing in Hamburg, Iowa, and instructed him to call on the defendant and inform him of the nonpayment of the check. On Sunday morning, March 27, 1966, Wray contacted defendant and told him of the nonpayment of the check. Defendant said he knew the check had not been paid and that he would see Mr. Haley the next day. Wray saw defendant 4 days later, defendant not having seen Haley, and he was told by the defendant that his wife had made a covering deposit. Defendant did not contact Haley the following week and the check was turned over to the county attorney for prosecution.

The cashier of the Hamburg bank testified that on March 16, 1966, defendant's account with that bank was $0.86 and that no deposit was subsequently made. The account was reduced to zero by the assessment of service charges and on March 22, 1966, the account was closed and defendant informed in writing of that fact. The records of the Hamburg bank showed that defendant's account was less than $350 from and after December 27, 1965. From and after February 10, 1966, the account was at all times less than $10.

Defendant testified that he knew that he had no money in the Hamburg bank at the time he gave the check. He stated that he intended to have the money in the bank before the check was presented for payment at the Hamburg bank. He stated that some 30 or 40 days before he gave the check that he had borrowed $500 from the Beneficial Finance Company at Auburn, Nebraska, and that he had $350 in cash in an envelope at home. He testified that he had intended to deposit this money with the Hamburg bank to cover the check, that he had overlooked doing so, and because of his own negligence, he had not made the deposit. He further stated that he later went to the bank to make the deposit and was advised that his account was closed and that the bank would not reopen it. He admits, however, that he did not attempt to pay the amount of the check to Haley's, Inc., until April 12, 1966. On that date he contacted Haley and offered to pay the check if the criminal charge would be dismissed. The county attorney was contacted and defendant was informed that he could pay the check but that the complaint would not be dismissed. Defendant admitted that the only offer of payment included the condition that the charge of fraudulently uttering the "no fund" or "no account" check be dismissed.

The evidence was sufficient to take the case to the jury. The intent to defraud was a question for the jury. It is evident that the jurors did not believe defendant's

story which was within their province to do. Under the evidence adduced, the trial court properly overruled defendant's motions for a directed verdict made at the close of the State's case and at the close of all the evidence. The trial court was also correct in submitting the case to the jury.

" 'It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.' " Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. See, also, Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358.

The defendant assigns as error the giving of instruction No. 9. By this instruction the jury was told that section 28-1214, R. R. S. 1943, provides that in a prosecution against a maker of a no fund check, the making, drawing, uttering or delivering of a check, payment of which is refused by the drawee because of a lack of funds or credit, shall be presumptive evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank, provided such maker shall have not paid the payee thereof the amount due thereon within 5 days after receiving notice that such check shall have been protested, and if such notice of protest, or the drawee's notice of dishonor thereof, shall state that payment of such check was refused because of lack of funds or credit of the maker, then such notice of protest or notice of dishonor shall be presumptive evidence that there was a lack of funds in, or credit with, such bank for the payment of such check. The instruction further states that the presumption is not conclusive, and is rebuttable.

The evidence shows that defendant was advised by the bank in writing of the closing of his account with the bank. He was also advised by the agent of Haley's, Inc., that the check had been returned unpaid for lack

of funds. In addition, the defendant admitted that he knew there were no funds in the bank when he wrote the check. Under these circumstances, the giving of instruction No. 9 was not error.

Defendant further complains that a case was not made by the State because no consideration was given for the check. The check was a part payment on the completed sale of an automobile to him. The fact that the details of the transaction, such as the execution of the finance papers and the delivery of the automobile, were not completed until the next day does not indicate a want of consideration for the check. The giving of the check as a part payment of the purchase price affords the consideration required by the statute.

We have examined the remaining assignments of error and find them to be without merit. We find no error in the record and the judgment is affirmed.

AFFIRMED.

EARA I. NEEMAN, APPELLEE, V. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLANT.
153 N. W. 2d 448

Filed October 13, 1967. No. 36562.

1. **Insurance.** For a garden-variety contract insuring against accidental death the beneficiary may recover upon proof of an accident that was an active, efficient, and precipitating cause of death.
2. ———. In this case of preexisting coronary artery disease, accidental injury, and sudden death caused by acute coronary insufficiency, the evidence of causality is insufficient to sustain a verdict for the beneficiary.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded with directions.

Mason, Knudsen, Berkheimer & Endacott, for appellant.

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

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

SMITH, J.

Plaintiff, beneficiary of a life insurance policy with accident provisions issued by defendant, obtained verdict and judgment for the accidental death benefit. Defendant contends on appeal that the evidence of a causal relationship between accident and death is insufficient. The general circumstances are preexisting coronary artery disease, accidental injury, and sudden death caused by acute coronary insufficiency.

The policy provides in part: "The Company * * * agrees * * * to pay * * * an Additional Benefit * * * upon * * * proof * * * that * * * death was caused directly, independently and exclusively of all other causes, by a bodily injury sustained solely by external, violent, and accidental means * * *. EXCEPTIONS AND EXCLUSIONS: * * * nor shall such Additional Benefit be payable if death results, directly or indirectly, or wholly or partially, (1) from any bodily * * * disease or infirmity * * *."

The insured, Carl Neeman, died in Lincoln, Nebraska, on June 11, 1965, at age 64. His height and weight were 5 feet 6 inches and 168 pounds. Prior to 1964 Carl had been healthy, but in April 1964 chest pains hospitalized him 2 weeks. Dr. Wilbur G. Wiedman, a general practitioner, diagnosed hypertensive cardiovascular disease for which drugs were prescribed. The next month he noted normal blood pressure and improvement.

Severe chest pains necessitated hospitalization of Carl from June 22 to 30, 1964. Dr. Wiedman diagnosed hypertensive cardiovascular disease and coronary insufficiency for which vasodilators were prescribed. He assumed the presence of an arteriosclerotic condition.

About July 15, 1964, Carl returned to his job at Good-

year Tire and Rubber Company. Conditions of work, the operation of a machine which cut stock for belts of different sizes, compelled him to stand. This level of activity appeared safe, although Carl occasionally took a nitroglycerin tablet. A medical examination on August 27, 1964, disclosed blood pressure at 140 over 90 and lung fields, clear. Carl worked until he was hospitalized from February 15 to March 6, 1965, because of flu. The company then put him on hospital leave.

Entering the hospital again on April 19, 1965, Carl complained of severe chest pains which radiated to both arms. Upon arrival at the emergency ward, however, he felt better. Records show blood pressure, 110 over 74; lung fields, clear; heart sounds, normal in rhythm, rate, and intensity; and condition good—"mostly pain-free; probably just angina."

Dr. Wiedman last saw Carl on June 3, 1965, 8 days before the accident. Examination showed blood pressure, 140 over 94; lung fields, clear; and heart sounds, normal. Chest pain which had diminished, occurred with any amount of exercise. The clinical symptoms of heart disease were abnormal for a person at age 64. Carl intended to return to work at the expiration of his leave on July 9. Dr. Wiedman concluded that in spite of the gradual increase of strength and decrease of symptoms, Carl then was unable to tolerate the work.

Carl's activities during the 1-month period preceding his death consisted largely of the following: Training, shoeing, and riding horses; driving a pony and cart in a horse show; and gardening. He tuned a truck motor on the day before the accident, replacing points and plugs. The next morning he arose at 8:30. After breakfast he left the house to transport sawdust to a horse barn, the truck to be loaded by an automatic device. At the barn he spread three bushels of sawdust in a box stall. After a leisurely lunch at home he left to get another load of sawdust which he intended to deliver in the evening. His widow had not noticed during that 1-month period

any speech impediment, dietary difficulty, emotional upset, labored breathing, or pain.

The only eyewitness to the accident was Thomas J. Mehan. His home was located on the south side of Judson Street west of a T intersection formed by the south dead end of Sixty-second Street. It was the third house west of a point south of Carl's home which stood at the northeast corner of the intersection. The Mehan driveway, 50 feet long, declined northward to a point near Judson Street.

About 2:30 p.m., Carl drove the truck east on Judson Street and past Mehan, who was standing on a skateboard at the top of the driveway. Carl's appearance was not remarkable. Mehan then skated for 10 to 15 seconds to the bottom of the slope, where he immediately looked eastward. The truck faced north on Sixty-second Street near the east curb a short distance from the intersection. Without a driver and with the left door open, it was rolling back "a little bit." The wheels were turned so that the front tended to swing away from the curb. In the street Carl was facing the inside of the open door. He was "down in a crouched position pretty low, and the door was just hitting him." The bottom part of the door collided squarely with his face. He fell northward and the open door passed over him. The truck stopped with the left front wheel against his right leg below and near the kneecap. The right rear wheel "might have been a foot or so" from the curb. Carl lay face down, moaning "a little bit." Door and face were stained with blood. If Carl had moved away and then returned to the truck, Mehan would have seen some movement, he testified, because of the short time interval.

Carl died suddenly, probably a few minutes after the accident. An ambulance attendant applied external cardiac massage at the scene and in the ambulance en route to the hospital. At the trial he could not recall whether he had fractured Carl's sternum.

A pathologist, Dr. Frank H. Tanner, had performed an

autopsy on the unenbalmed body. The protocol of the post mortem examination in which grade IV represents the most advanced stage of arteriosclerosis, reads in part as follows:

"GROSS AUTOPSY FINDINGS. * * * *THORAX* * * * In reflecting the anterior thoracic cage, one notices that there is a transverse fracture in the mid-portion of the sternum with a small amount of extravasation of blood in the soft tissues underneath the sternum. This together with a costal cartilage separation in the left side is quite characteristic of injury that may occur in the course of manual cardiac massage. * * *

"*GROSS ANATOMIC FINDINGS* 1. Diffuse, severe coronary arteriosclerosis with old * * * thrombotic and atherosclerotic occlusions of the coronary lumena and with extensive, fibrous scarring * * * of the myocardium. * * * 2. Probable acute coronary insufficiency with sudden death—clinical." (Radiology report: "* * * fracture of the nasal bone with some downward depression of the distal fractured fragments.") "4. Generalized, arteriosclerosis, severe (aorta grade II to III, cerebral vessels grade IV, coronary vessels grade IV). * * * 12. Transverse fracture of sternum, no doubt secondary to external cardiac massage enroute to hospital * * *.

"*NOTE:* * * * this individual suffered some facial soft tissue and bony damage as a result of an accident * * *. I do not believe that the anatomic findings justify any conclusion that the death was associated directly with trauma. There is no evidence of damage to the underlying soft tissues of the brain or meninges. The patient exhibits profound, diffuse, coronary artery disease sufficient to produce fatal, acute, coronary insufficiency at any time. There is evidence of old scarring of the myocardium * * *. I would attribute his death to coronary insufficiency associated with arteriosclerotic heart disease. * * *

"*SUMMARY OF MICROSCOPIC FINDINGS* 1. Severe, diffuse, coronary arteriosclerosis with marked nar-

rowing of the coronary lumina involving all three major branches and with extensive myocardial fibrosis and scarring. (Acute, coronary insufficiency—see gross protocol) 2. Generalized arteriosclerosis with particular involvement of the aorta."

Dr. Stephen W. Carveth, a specialist in thoracic, cardiac, and vascular surgery, testified for the plaintiff. His opinions were based on the protocol and hypothetical facts. He assumed that Carl had been free of pain during the 1-month period before death. No pain was supposedly associated with the cardiovascular responses to energy expenditures at the level of activity described by the widow.

Dr. Carveth attached importance to collateral circulation and to the finding that all three coronary arteries had been open at death. If an occlusion has occurred, it is ordinarily seen on post mortem examination. Carl had been in an advanced stage of the disease but not on his death bed. Dr. Carveth classified him in the middle zone of people age 64. The psychic factor of fright, the collision, or both had induced fibrillation and death. "* * * he experienced a stressful reaction which caused his underlying condition to develop in an arrest or fibrillation and cause his death."

In the opinion of Dr. Tanner, Carl was sitting on a powder keg. Death might have occurred at any time from a variety of causes or from no cause at all. The relative responsibilities of the underlying disease process and the accident were speculative. Dr. Lee Stover, an internist, who had not seen Carl, and Dr. Wiedman also had no opinion.

The quoted provisions of defendant's insurance policy are not the test of causality. For garden-variety clauses the beneficiary may recover upon proof of an accident that was an active, efficient, and precipitating cause of death. See Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675. Set by present medical knowledge and

prevailing social philosophy, the Long test of causality holds.

In combination several facts are prominent: The complaint of chest pain to Dr. Wiedman on June 3, 1965; the short interval between the observations by Mehan; the position of Carl at impact; and the findings on post mortem examination. The evidence is insufficient to sustain the verdict for plaintiff.

The judgment is reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., dissenting.

I do not agree with the majority opinion. To do so would be to ignore the testimony of plaintiff's expert medical witness. The credibility of witnesses is a question for the jury and not this court. The opinion refers to the case of Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675. I agree this case is in point and would apply the rule enunciated therein. We there held that where it was difficult to determine whether the accident or preexisting disease or condition was the motivating or precipitating cause of death, it necessarily becomes a question of fact for the jury.

ADOLPH ROLFSMEIER ET AL., APPELLANTS, V. IMPLEMENT DEALERS MUTUAL INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLEE.

153 N. W. 2d 367

Filed October 13, 1967. No. 36574.

1. **Insurance.** An interpretation of an insurance contract should satisfy reasonable expectations of the insured at the time of the contract.
2. ———. If a contract prepared by an insurer is reasonably open to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the insured will be adopted.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. Affirmed.

Ivan A. Blevens, for appellants.

Kier, Cobb & Luedtke, for appellee.

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

SMITH, J.

The question is whether an automobile theft policy covers a taking of possession from automobile dealers, plaintiffs, by fraud. A thief allegedly delivered a purchase order and a worthless check for the price of the automobile, plaintiffs retaining the certificate of title. The district court dismissed the petition for failure to state a cause of action, and plaintiffs have appealed.

The policy is a combination of a common form and an "Automobile Dealers' Physical Damage Supplement." On the first page of the common form the boxed section shows coverage "D Theft (Broad Form)." In the column "Net Rates" the typed words "See Form" refer to coverage D. The boxed section is preceded by this sentence: "The limit of * * * liability * * * shall be * * * subject to all the terms of this policy having reference thereto." Below the boxed section the space headed "Description of the automobile and facts respecting its purchase by the insured" is blank.

Other relevant provisions found elsewhere in the common form are as follows: "(T)he company Agrees * * * subject to the * * * exclusions * * * and other terms of this policy: * * * Coverage D—Theft (Broad Form): To pay for loss of * * * the automobile * * * caused by theft, larceny, robbery or pilferage. * * * This policy does not apply: * * * (g) under * * * D, to loss due to conversion, embezzlement or secretion by any person in possession of the automobile under a bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance * * *."

The supplement which is inside the common form shows two sales locations, a monthly reporting basis, and a deposit premium of $101.75—the sum appearing on the first page of the policy. Another part of the supplement reads as follows:

"The limit of * * * liability * * * shall be * * * subject to all the terms of this policy having reference thereto. * * * The company will pay for loss * * * caused by * * * theft, larceny, robbery or pilferage * * *. Exclusions: This supplement does not apply * * * to a loss resulting from or occurring after the insured's voluntarily parting with title or possession of any automobile, if induced to do so by any fraudulent scheme, trick, device or false pretense, or from embezzlement, conversion, secretion, theft, larceny, robbery or pilferage committed by any person entrusted by the insured with custody or possession of the automobile * * *."

An interpretation of an insurance contract should satisfy reasonable expectations of the insured at the time of the contract. If a contract prepared by the insurer is reasonably open to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the insured will be adopted. Kent v. Dairyland Mut. Ins. Co., 177 Neb. 709, 131 N. W. 2d 146.

Plaintiffs argue that the exclusionary clause in the supplement does not restrict the theft coverage in the common form. The exclusion is indeed literally limited to the supplement. It is clear, however, that the common form was not designed for automobile dealers, and the typewritten "See Form" invited attention to the supplement. Although the verbiage is not a model of clarity, it falls far short of a lure or trap for an unwary businessman. The substance of the exclusion is frequently found in dealer policies. In the light of the whole contract, recovery by plaintiffs would be a windfall. The loss was not within the risks assumed. See, Boyd v. Travelers Fire Ins. Co., 147 Neb. 237, 22 N. W.

2d 700; Nelson v. Pennsylvania Fire Ins Co., 154 Neb. 199, 47 N. W. 2d 432.

The judgment is affirmed.

AFFIRMED.

FRED PLISCHKE ET AL., APPELLEES, V. CHARLES ARVENNE JAMESON AND GENE B. JAMESON, EXECUTORS OF THE ESTATE OF CHARLES A. JAMESON, DECEASED, APPELLANTS.
153 N. W. 2d 359

Filed October 13, 1967. No. 36587.

SUPPLEMENTAL OPINION

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. On motion for additional directive to trial court. See 181 Neb. 887, 152 N. W. 2d 119, for original opinion. Affirmed as modified.

O. A. Drake, for appellants.

Dier & Ross, for appellees.

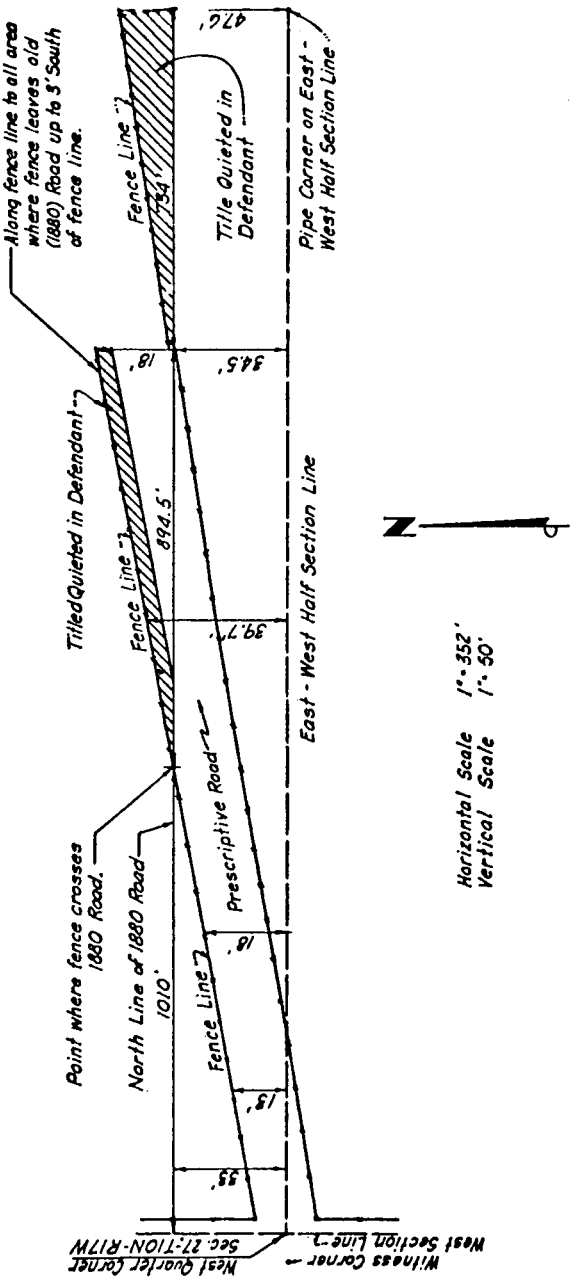
Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

SPENCER, J.

Subsequent to our opinion herein in 181 Neb. 887, 152 N. W. 2d 119, appellees filed a motion for an additional directive as assistance to the trial court in drawing a judgment on the mandate. We sustain said motion, and file this supplemental opinion to make the following changes in the judgment entered by the trial court:

The judgment of the district court, dated December 28, 1966, should be modified by striking paragraph 5 of the findings and amending paragraph 4 of the findings to read as follows:

4. Title should be quieted in the defendant to all land south of the fence line not embraced in the public road or in the prescriptive road. This includes a triangular


Along fence line to all area where fence leaves old (1880) Road up to S'South of fence line.
Fence Line
Title Quieted in Defendant
Pipe Corner on East - West Half Section Line
476'
18'
84.5'
Title Quieted in Defendant
Fence Line
894.5'
39.7'
East - West Half Section Line
Point where fence crosses 1880 Road.
North Line of 1880 Road
1010'
Prescriptive Road
Fence Line
18'
13'
33'
West Section Line
Witness Corner
West Quarter Corner
Sec. 27-TION-R17W
Horizontal Scale 1" = 352'
Vertical Scale 1" = 50'

area along the east 734 feet of the fence and an area up to 3 feet south of the fence from where the fence leaves the public road, which the court determines to be 1,010 feet east of the west section line to a point approximately 734 feet west of the north-south half-section line.

The judgment should be further modified by amending the plat attached to the judgment, as shown by the plat attached hereto, to conform to the findings as amended.

Said judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

IN RE APPLICATION OF HARRIET MILLER FOR A WRIT OF HABEAS CORPUS.

HARRIET MILLER, APPELLANT, V. DEPARTMENT OF PUBLIC WELFARE, STATE OF NEBRASKA, APPELLEE.

153 N. W. 2d 737

Filed October 27, 1967. No. 36551.

1. **Infants: Domicile.** The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents nor upon the domicile of the child. It arises out of the power that every sovereignty possesses as parens patriae to every child within its borders, and residence of the child within the state suffices even though the domicile may be in another jurisdiction.
2. **Process: Appearance.** In a proceeding to declare children residing within the state dependent or neglected children, where summons is personally served on parents, whether resident or nonresident, and the parents appear generally by their counsel at a hearing in the separate juvenile court, the court has complete jurisdiction, and its decree is effective and binding on the parents.
3. **Courts: Infants.** The separate juvenile court of Lancaster County has exclusive jurisdiction as to the custody of neglected, dependent, or delinquent children.
4. ———: ———. The jurisdiction of the separate juvenile court is continuing over any child adjudged a neglected or dependent child and the court has power to order a change in the custody or care of such child if at any time it is made to appear to the

court that it would be for the best interests of the child to make such a change.

5. ———: ———. When a dependent child has been disposed of by placement the person, association, institution, or probation officer with whom placed may, with the assent of the juvenile court, consent to adoption in an adoption proceeding.
6. **Habeas Corpus: Courts.** It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, unless the prior jurisdiction has been terminated.
7. ———: ———. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

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

Clarence A. H. Meyer, Attorney General, E. D. Warnsholz, and Gary D. Gustafson, for appellee.

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

MCCOWN, J.

This is a habeas corpus action brought by the relator, Harriet Miller, to recover custody of her three minor children.

The relator was arrested in Nebraska in November 1958. She was subsequently convicted and sentenced in California on a federal charge involving interception of mail. She was under detention for a period exceeding 4 years. The father of the children was arrested in California September 17, 1958, and after conviction served 42 months of a 5-year sentence. In November 1958, the three children were respectively 6, 4, and 2 years old. Relator had left the children in California with a Mr. Smith when she returned to Omaha in November 1958. The Los Angeles bureau of public assistance had

obtained the three children from Mr. Smith in November 1958, and cared for them during the pendency of the charges against the mother. Early in 1959, on request of the Los Angeles bureau of public assistance, the Lancaster County relief bureau authorized the return of the children to Nebraska after a determination of residence. In March 1959, the children were returned to Nebraska, and after hearing at which they were represented by a guardian ad litem were placed under the juvenile probation office. On April 21, 1961, the separate juvenile court of Lancaster County, Nebraska, after hearing, entered its order placing the custody of the children in the Board of Control, State Welfare Department. An additional hearing was held in the separate juvenile court of Lancaster County, Nebraska, on the 13th day of March 1962. Notice and summons for that hearing were personally served on both the relator and the father in California. The same attorney who had represented them at the 1961 hearing was appointed guardian ad litem and counsel for the relator and the father, and appeared at the 1962 hearing on their behalf. Another attorney was also present at the hearing as guardian ad litem of the children. The separate juvenile court found the children to be dependent and neglected children lacking proper parental care by reason of the fault of their parents; found that the parents have shown themselves unfit to perform the duties of the relationship of parent and child; and determined it to be in the best interests of the children that their care and custody be continued with the Department of Public Welfare. The court incorporated its findings into the order under which the care and custody of the children was committed to and continued in the Department of Public Welfare, State of Nebraska. No appeal was taken from the order of the separate juvenile court.

The three children were individually placed in adoptive home situations under written indenture instruments at various dates between September 25, 1961, and

December 17, 1962. One of the children has since been adopted. A decree of adoption was entered in county court as to another, but after appeal was taken to the district court, the original adoption proceeding was dismissed. No adoption proceeding was instituted with regard to the third child. The foster parents of all of the children have, since the indenture agreements, provided a home and all necessaries of life for the children.

In this habeas corpus proceeding, the district court for Lancaster County, after trial, found generally for the respondent and against the relator, dismissed the application, and denied the writ. The relator has appealed.

The relator alleges that she, her husband, and all the children were residents of and domiciled in California in November 1958; that the children were unlawfully returned to the State of Nebraska; and that the proceedings in the separate juvenile court of Lancaster County in 1962 were illegal and without due process, and that the court did not have jurisdiction to take the custody of the children from her.

The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents nor upon the domicile of the child. It arises out of the power that every sovereignty possesses as parens patriae to every child within its borders, and residence of the child within the state suffices even though the domicile may be in another jurisdiction. Jones v. State, 175 Neb. 711, 123 N. W. 2d 633.

There is conflicting evidence as to the residence or domicile of the parents. Even if the residency of the parents were conceded to be California, however, summons was personally served on each of them, and they appeared generally by their counsel at the hearing in the separate juvenile court. Under such circumstances, the separate juvenile court had complete jurisdiction, and its decree is effective and binding on the parents.

The foregoing is sufficient in itself to support the

judgment of the district court in denying the writ of habeas corpus. The separate juvenile court of Lancaster County has exclusive jurisdiction as to the custody of neglected, dependent, or delinquent children under section 43-230, R. S. Supp., 1965.

Under the provisions of section 43-209, R. S. Supp., 1965, the jurisdiction of the separate juvenile court is continuing over any child adjudged a neglected or delinquent child, and the court has power to order a change in the custody or care of such child if at any time it is made to appear to the court that it would be for the best interests of the child to make such change.

When a dependent child has been disposed of by placement the person, association, institution, or probation officer with whom placed may with assent of the juvenile court consent to adoption in an adoption proceeding. Krell v. Jenkins, 157 Neb. 554, 60 N. W. 2d 613; § 43-209, R. S. Supp., 1965.

It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, unless the prior jurisdiction has been terminated. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts. McFarland v. State, 172 Neb. 251, 109 N. W. 2d 397; Rhodes v. Sigler, 172 Neb. 439, 109 N. W. 2d 731.

The judgment of the district court in denying the application for a writ of habeas corpus was correct and is affirmed.

AFFIRMED.

VELDA F. CLATTERBAUGH, APPELLEE, V. FRANCIS C. CLATTERBAUGH, APPELLANT.

153 N. W. 2d 749

Filed October 27, 1967. No. 36560.

1. **Husband and Wife: Divorce.** A contract between husband and wife, made in consequence of severance of the marital relation and permanent separation, providing for a division of property, and containing mutual releases of rights and obligations relative thereto, will be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable advantage is taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence.
2. ———: ———. Property settlement agreements should not be lightly regarded but should be scrutinized and controlled to the end that the division of the property and other benefits shall not be inequitable, unfair, and unreasonable under the circumstances.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed as modified.

Miller, Morrow & Woodward and Victor J. Lich, Jr., for appellant.

Pilcher, Howard & Dustin, for appellee.

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

SPENCER, J.

This is an action for an absolute divorce and approval of a property settlement. The trial court granted the divorce, approved the property settlement, and allowed plaintiff $1,800 attorney's fees. Defendant has perfected an appeal to this court, contesting the approval of the property settlement and the reasonableness of the allowance of attorney's fees.

Defendant concedes that plaintiff is entitled to an absolute divorce. The evidence conclusively supports

the decree of divorce and no purpose would be served herein by detailing defendant's transgressions.

The parties were married in 1936. Subsequently, defendant worked his way through college, securing a degree in electrical engineering. Defendant over the years has been industrious and has provided for plaintiff to the best of his abilities. In late years, after starting his own business, he has been quite successful. All the property involved in the agreement has been accumulated out of the defendant's earnings. There is some confusion as to the value of this property because of a disagreement as to the value of stock in a corporation which defendant organized. The corporation, which is owned entirely by defendant, operates as a manufacturer's representative and its earnings in a large measure are dependent upon the efforts of the defendant. We determine the property involved in the agreement to have an approximate value of $110,000.

The parties are childless. The plaintiff contends she is in poor health and unable to work. She has a curvature of the spine from an attack of polio as a child. The defendant did not learn of this condition until after marriage. Plaintiff has had no treatment for the condition during the marriage but did testify that she did not learn it was the result of the polio attack until after the marriage.

The effect of the property settlement is to transfer property valued at approximately $71,000 to the plaintiff and to provide additionally permanent alimony in the sum of $300 per month subject to being increased or decreased, depending upon the income of the defendant. The alimony payments are payable during the lifetime of the plaintiff except that they shall terminate on the remarriage of the plaintiff or on the death of the defendant. At the time of the trial herein defendant was 57 years of age and the plaintiff was 50.

The property settlement agreement was prepared in the office of the plaintiff's attorney the day previous to

the filing of the action for divorce. It was prepared in the presence of the parties and the husband of plaintiff's sister, an Iowa attorney. Defendant urges that the property settlement agreement is not fair and equitable to him and was the result of unequal bargaining power or at the least ignorance, passion, or improvidence on his part because he had concluded he could no longer live with the plaintiff and was willing to agree to almost anything to secure a divorce. There can be no doubt that the property settlement was a condition precedent to the plaintiff's agreement to institute divorce proceedings herein. Defendant's counsel aptly labels the agreement as plaintiff's price for a divorce.

While the record suggests defendant did not consult counsel other than his brother-in-law previous to the date of the property settlement, he was a successful businessman who used counsel when necessary in his business. We cannot say on the record presented that he was incapable of protecting his interest. It is apparent that the agreement is weighted in the plaintiff's favor and is probably greater than she might have secured in the absence of an agreement. However, there is nothing in this record to indicate that the contract was signed as the result of any fraud or misrepresentation practiced upon the defendant. It is equally obvious plaintiff would not have agreed to a divorce in the absence of a satisfactory agreement. The mere fact that defendant was not represented by counsel and changed his mind after he consulted with counsel is no more persuasive here than it was in Hubbard v. Hubbard, 176 Neb. 768, 127 N. W. 2d 503. Defendant's action suggests merely that he wants to retain the benefit derived by the making of the agreement but to avoid its burden.

We have previously said: "A contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, and providing for a division of property, and containing mutual releases of rights and obligations relative

thereto, will be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable advantage is taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence." Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790.

Defendant suggests the agreement is not strictly within that part of the rule which provides a presumption that it is fair and valid because it was a condition precedent to the divorce and was entered into the day before the divorce was filed rather than subsequent to the filing of the petition. That point is immaterial on the facts herein. Agreements of this type should not be lightly regarded, but should be scrutinized and controlled to the end that the division of the property and other benefits shall not be inequitable, unfair, and unreasonable *under the circumstances.* Under the circumstances as we find them in the record, we cannot say that an unconscionable advantage was taken of the defendant. However, in view of defendant's age and the fact that plaintiff received two-thirds of the accumulated property, we feel that $300 monthly should be the maximum additional permanent alimony, and the provision for its increase should be eliminated from the decree, but the provision for its decrease should be retained.

Defendant contests the reasonableness of the allowance for attorney's fees. Defendant suggests that he did not seriously contest the grounds for divorce and infers that plaintiff made more of a record than was necessary. Defendant in his answer denied each and every allegation of plaintiff's petition and requested that plaintiff be put upon strict proof as to the grounds for divorce. On the record herein there is no merit to defendant's contention.

For the reasons given, the judgment of the trial court

is affirmed except as to the provision for the increase of the permanent alimony in excess of $300 per month. Plaintiff is allowed $500 attorney's fee in this court.

AFFIRMED AS MODIFIED.

THE FIRST NATIONAL BANK & TRUST COMPANY OF BEATRICE, APPELLANT, V. HENRY E. LEY ET AL., APPELLEES.
153 N. W. 2d 743

Filed October 27, 1967. No. 36565.

1. **Administrative Law.** Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed.
2. **Banks and Banking.** The requirement in the Banking Act that only a corporation may conduct a bank in this state is satisfied if the corporate organization of the proposed bank is complete before the charter is issued.
3. ———. All of the requirements of the Banking Act must be satisfied before the Department of Banking may issue a charter or the certificate provided for in section 8-121, R. S. Supp., 1965, but the department may determine matters which are discretionary in nature before all other requirements of the act have been satisfied.
4. ———. A finding by the Department of Banking in the language of section 8-122, R. S. Supp., 1965, may be adequate in a particular case.

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

Nelson, Harding, Acklie, Leonard & Tate, Luebs, Tracy & Huebner, and Vincent L. Dowding, for appellant.

Clarence A. H. Meyer, Attorney General, Richard H. Williams, William I. Aitken, Bert L. Overcash, and Allen L. Overcash, for appellees.

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

BOSLAUGH, J.

This is a proceeding in error to review an order of the Department of Banking of the State of Nebraska granting a charter to the Beatrice State Bank of Beatrice, Nebraska. The trial court found that the action should be dismissed and affirmed the order of the Department of Banking. The First National Bank & Trust Company of Beatrice, the plaintiff in error, has appealed.

The Banking Act provides that it shall be unlawful to conduct a bank within this state except by means of a corporation organized for such purpose. § 8-114, R. S. Supp., 1965. It further provides that every corporation organized for and desiring to transact a banking business shall, before commencing business, transmit a statement to the Department of Banking containing a certified copy of the articles of incorporation. § 8-120, R. S. Supp., 1965.

The record in this case shows that a preliminary statement of application was filed with the Department of Banking on January 15, 1965, but that the articles of incorporation of the proposed bank were not filed in the office of the Secretary of State until March 22, 1966. The appellant contends that the entire proceeding before the Department of Banking is void because the application was filed by a corporation that had not been completely organized at the time the application was filed.

Section 8-122, R. S. Supp., 1965, prescribes certain requirements that must be satisfied before the Department of Banking may grant a charter. One requirement is that the department, upon investigation, shall be satisfied that the "parties requesting such charter are parties of integrity and responsibility." This language indicates that the application for a bank charter may be made by individuals.

We think that the requirements of the statute are satisfied if the corporation has been fully organized at the time the charter is issued. In this case the order granting the charter was conditional, and the charter

has not been issued. We find no merit in the first contention of the appellant.

The appellant makes several objections to the form of the order of the Department of Banking. The appellant complains that the order is defective in that the issuance of the charter and the certificate described in section 8-121, R. S. Supp., 1965, is not made conditional upon compliance with certain further statutory requirements that have not been satisfied. The particular requirements consist of a statement under oath that no compensation was paid for the sale of the stock, Federal Deposit Insurance Corporation membership, payment in of the capital stock, and minimum surplus and paid-in undivided profit requirements. The appellees concede that these particular requirements have not been complied with, but take the position that they are procedural in nature and may be satisfied after the department has decided that a charter will be granted.

The problem here is one of interpretation of the order of the Department of Banking. If the order is considered to be a determination that all statutory requirements have been satisfied except those requirements set out in the order, then the appellant's contention is correct and the order is defective. But, if the order is considered to be a determination of only those matters which rest in the discretion of the department, then the appellant's contention cannot be sustained.

From a consideration of the entire record, we are of the opinion that the Department of Banking intended its order to be determinative only of those matters which are discretionary in nature, and that the charter and the certificate referred to in section 8-121, R. S. Supp., 1965, will not be issued until all statutory requirements have been satisfied.

The appellants further complain that the findings of fact, which are in the language of the statute, are not sufficient. We have held that such findings of fact are not sufficient in rate cases. See Yellow Cab Co. v. Ne-

braska State Railway Commission, 176 Neb. 711, 127 N. W. 2d 211. But in this type of case, such findings are adequate. See Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752.

The appellant's final contention is that the order of the Department of Banking constituted an abuse of administrative discretion. The appellant's contention is that the evidence is not sufficient to support the finding of the Department of Banking "that the parties requesting such charter are parties of integrity and responsibility, and that the public necessity, convenience, and advantage will be promoted by permitting such proposed bank to engage in business."

The evidence in this case fully sustains the finding of the Department of Banking that the parties requesting the charter are parties of integrity and responsibility. The evidence with respect to public necessity, convenience, and advantage is not as clear.

Beatrice, Nebraska, now has two active, well-managed banks. The need for additional banking facilities is, at best, marginal. The situation is further complicated by the fact that the new bank will be controlled by the same persons who control the largest bank now operating in Beatrice.

We are not here concerned with the policy or wisdom of the order of the Department of Banking. The question of public convenience and necessity is a matter that is committed to the discretion of the department. Although the evidence might be characterized as weak or doubtful, it cannot be said that there is no evidence to sustain the finding of the department as to public convenience and necessity.

Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed. Lynch v. City of Omaha, 153 Neb. 147, 43 N.

W. 2d 589; In re Commercial State Bank, 105 Neb. 248, 179 N. W. 1021.

As we view the record, there is some evidence to sustain the findings of the Department of Banking in this case, and the order must be affirmed.

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

AFFIRMED.

ROBERTA MAKOVICKA, APPELLANT, V. JOHN LUKES, APPELLEE.

153 N. W. 2d 733

Filed October 27, 1967. No. 36569.

1. **Torts.** When one does an act which proves injurious to another, an action in tort may arise in favor of the injured person, although the act was done without malice and no injury was intended.
2. **Negligence.** The doctrine of assumption of risk is applicable where the injured party knows that a danger exists and voluntarily assumes the risk of injury from that danger. The rule does not apply to an unknown and hidden danger.
3. ———. Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.
4. ———. Plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to avert harm to himself or another, or exercise or protect a right or privilege of which the defendant has no right to deprive him.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded.

John McArthur and A. James McArthur, for appellant.

Kier, Cobb & Luedtke, for appellee.

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

McCOWN, J.

This is an action for personal injury allegedly resulting from what is termed a practical joke by the plaintiff, and horseplay by the defendant.

The two families of the plaintiff and defendant had been personal friends for some years. The defendant is a nephew of the plaintiff's husband. On an October evening in 1964, the two families were together at the farm home of the plaintiff and her husband. Following the evening meal, the parents and children were sitting and standing around in the kitchen and living area of the house talking, laughing, and joking with each other. At approximately 8 p.m., after the families had been in the home for approximately an hour and a half, the defendant suddenly picked the plaintiff up in his arms, carried her across the living room, onto the front porch, and out on a concrete slab forming the top of a brick bannister alongside the porch steps. He lost his balance and jumped down to the concrete sidewalk 39 inches below with the plaintiff still in his arms. The plaintiff felt an odd or snapping sensation in her neck, but no pain. Neither the plaintiff nor the defendant were struck by any object, nor did either of them fall down. The defendant placed the plaintiff back on her feet and they both returned to the house. The plaintiff weighed 115 to 120 pounds and the defendant was 6 feet 1½ inches tall and weighed 216 pounds.

The next evening, the plaintiff went to the hospital with a swelling in her neck which was later diagnosed as a branchial cleft cyst. The branchial cleft was congenital, and such a condition and its activation into a cyst are unusual. The cyst was removed December 12, 1964.

The jury returned a verdict for the defendant. Plaintiff assigns as error the giving of an instruction which submitted to the jury the issue of assumption of risk by the plaintiff.

The defendant had, on several previous occasions,

picked the plaintiff up. Plaintiff's testimony was that on previous occasions when the defendant had picked her up, he had given her a bear hug and set her down. There is no dispute that on the evening in question, the defendant gave no indication of his intention to pick the plaintiff up or to engage in any practical jokes or horseplay, and that the plaintiff was surprised by the action. There had been no previous physical contact, touching, or play on the evening in question. The defendant testified that he did not know why he walked out on the bannister and that he had no specific plan in mind when he picked her up. The defendant's own evidence was that the plaintiff was kicking and telling him to put her down, although the clear implication is that these actions were interpreted by the defendant as being playful. The defendant himself testified that on most of the occasions they had been together, he had "given her a hug in some way, or picked her up, or something."

When one does an act which proves injurious to another, an action in tort may arise in favor of the injured person, although the act was done without malice and no injury was intended. Newman v. Christensen, 149 Neb. 471, 31 N. W. 2d 417.

The doctrine of assumption of risk is applicable where the injured party knows that a danger exists and voluntarily assumes the risk of injury from that danger. The rule does not apply to an unknown and hidden danger. Darnell v. Panhandle Coop. Assn., 175 Neb. 40, 120 N. W. 2d 278.

"Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character." Restatement 2d, Torts, § 496D, p. 574.

Restatement 2d, Torts, § 496E, p. 576, states: "(1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk. (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's

tortious conduct has left him no reasonable alternative course of conduct in order to (a) avert harm to himself or another, or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him."

In Schwab v. Allou Corp., 177 Neb. 342, 128 N. W. 2d 835, at page 352, this court said: "Assumption of risk is predicated upon an implied consent to be treated negligently. If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered."

We cannot accept the implication that the passive object of prior practical jokes or horseplay, who did not complain on previous occasions, should be treated as assuming the risk of subsequent practical jokes or horseplay, of which she had no knowledge, simply because she was again the object. Neither can we understand how the plaintiff, having no knowledge of intended horseplay, much less its scope or extent, can be considered an active, voluntary participant who assumes the risk. In the case of assumption of risk: "The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence." Restatement 2d, Torts, § 496D, Comment c, p. 575. Where the defendant himself testifies that he had no specific plan in mind when he picked plaintiff up, it becomes a problem in metaphysics to attribute knowledge of the risks which might be involved to the plaintiff. Under the circumstances here, it was improper to submit to the jury the issue of assumption of risk by the plaintiff.

The defendant also contends that defendant's motion for directed verdict should have been granted in any event because the medical testimony established that any causal connection between trauma and a branchial cleft cyst was purely conjectural and speculative. A thorough review of the medical evidence convinces us that the testimony of plaintiff's doctor was sufficient to take the

issue to the jury. Defendant's motion for directed verdict was properly overruled.

The judgment of the district court is, therefore, reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MARIE E. JOHNSON, APPELLANT, V. WILLIAM GOODIER ET AL., APPELLEES.

153 N. W. 2d 445

Filed October 27, 1967. No. 36572.

1. **Negligence.** As a licensee on the host's premises, the guest generally takes the premises as he finds them, insofar as any alleged defective condition thereof is concerned, and assumes the ordinary risks or dangers incident to the condition of the premises. The host is not required to inspect the premises to discover defects or to maintain the premises in a safe condition for his guest. The guest is expected to take the premises as the host uses them and may not expect that they will be prepared for his reception or that precautions will be taken for his safety in any manner in which the host did not prepare or take precautions for his own safety or the safety of members of his family, or, as sometimes expressed, where one visits the private home of another as a social guest the owner is bound to take the same care of him that the owner takes of himself and other members of his family, and no more.
2. ———. A licensee takes the premises as he finds them, the only duty of the occupier being to give notice of traps or concealed dangers.
3. ———. The perils of darkness usually are held to be assumed by one who voluntarily proceeds into it.
4. ———. Darkness alone calls upon a person to exercise greater caution for his own safety than is ordinarily required. Where light has failed, obstructions have been encountered, and there are no especial circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery.

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

Eugene D. O'Sullivan, Jr., for appellant.

Rickerson & Homan, for appellees.

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

NEWTON, J.

Plaintiff Marie E. Johnson for her cause of action against the defendants William Goodier and Margaret Goodier, husband and wife, alleged, in substance, that she was a guest in the home of the defendants. She sought to go to the bathroom from the kitchen, entered a dark and unlighted room, opened the basement door thinking it was the door to the bathroom, stepped forward, fell down the basement stairs, and was injured. She charges that defendants were negligent in failing to instruct her as to the proper way to enter the bathroom, in failing to inform her of the dangerous condition existing by reason of the location of the basement stairs, and in failing to provide adequate lighting facilities.

Defendants demurred to the petition. The demurrer was sustained and plaintiff elected to stand on her petition. The case is before this court for the purpose of determining whether or not the trial court was correct in sustaining such demurrer.

That plaintiff was what is termed a "social guest" and, consequently, a "licensee," is clear and conceded. The position of a social guest is aptly described in Restatement 2d, Torts, § 330, p. 175. "Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an 'invitee,' within the legal meaning of that term, * * *. He does not come as a member of the public upon premises held open to the public for that purpose, and he does not enter for a purpose directly or indirectly connected with business dealings with the possessor. The use of the premises is extended to him merely as a personal favor to him. The explanation usually given by the courts

for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety, in any manner in which the possessor does not prepare or take precautions for his own safety, or that of the members of his family." In this connection, see, also, Prosser on Torts (2d Ed.), § 77, p. 447.

"As a licensee on the host's premises, the guest generally takes the premises as he finds them, in so far as any alleged defective condition thereof is concerned, and assumes the ordinary risks or dangers incident to the condition of the premises. The host is not required to inspect the premises to discover defects or to maintain the premises in a safe condition for his guest. The guest is expected to take the premises as the host uses them and may not expect that they will be prepared for his reception or that precautions will be taken for his safety in any manner in which the host did not prepare or take precautions for his own safety or the safety of members of his family, or, as sometimes expressed, where one visits the private home of another as a social guest the owner is bound to take the same care of him that the owner takes of himself and other members of his family, and no more." 65 C. J. S., Negligence, § 63 (136), p. 920. See, also, Von Dollen v. Stulgies, 177 Neb. 5, 128 N. W. 2d 115. "The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care." Schild v. Schild, 176 Neb. 282, 125 N. W. 2d 900.

A licensee takes the premises as he finds them, the only duty of the occupier being to give notice of traps or concealed dangers. Von Dollen v. Stulgies, *supra*.

See, also, Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776; Roan v. Bruckner, 180 Neb. 399, 143 N. W. 2d 108.

Many, and perhaps most, homes have basements and inside basement stairs. This situation is so common, and the recognition of such construction so general, that ordinary basement stairs can scarcely be accepted as presenting a dangerous situation or a trap which would require a warning from the occupier to a guest. Under the circumstances, plaintiff's petition fails to state a cause of action and the demurrer thereto was correctly sustained.

There is, however, another ground which would require us to arrive at the same conclusion. The petition indicates that, at the time of the accident, plaintiff was walking in a dark and unfamiliar place and did not stop to turn on lights as she proceeded. The following statement found in Prosser on Torts (2d Ed.), § 77, p. 450, is pertinent here. "The perils of darkness usually are held to be assumed by one who voluntarily proceeds into it; * * *." In Wentink v. Traphagen, 138 Neb. 41, 291 N. W. 884, this court held: "One who voluntarily walks about in total darkness in a strange place must of necessity know that he faces the danger of obstructions, pitfalls, accident, and injury. * * * Darkness alone calls upon a person to exercise greater caution for his own safety than is ordinarily required. * * * Where light has failed, obstructions have been encountered, and there are no especial circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery." In this case, the plaintiff walked in darkness in an unfamiliar place, encountered a door, opened it, and fell down the stairway. It appears that she, too, was guilty of negligence as a matter of law sufficient to bar recovery.

The trial court acted correctly in sustaining the de-

murrer to plaintiff's petition and in dismissing plaintiff's cause of action when she elected to stand upon her petition.

The judgment of the trial court should be affirmed.

AFFIRMED.

IN RE ESTATE OF ESTHER B. DOWNEY, DECEASED. BEATRICE B. RUNDALL ET AL., APPELLANTS, V. DOROTHY WHITESIDE ET AL., APPELLEES.

153 N. W. 2d 736

Filed October 27, 1967. No. 36573.

1. **County Courts: Estates.** A court has discretion in fixing the amount of an appeal bond in a probate proceeding.
2. **Wills: Parties.** A will contestant is not permitted to proceed in forma pauperis without legislative authority.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert V. Hoagland and Johnson & Johnson, for appellants.

Norman Gonderinger, Kennedy, Holland, DeLacy & Svoboda, and Robert A. Skochdopole, for appellees.

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

SMITH, J.

The subject for complaint in this probate proceeding is the $3,000 amount fixed for a statutory bond on appeal to the district court. Appellants, who are will contestants, stood on their tender of a $250 bond, and the district court dismissed the appeal. They argue excessiveness and violations of the Nebraska Constitution—due process and the right to be heard in the court of last resort, Art. I, §§ 3 and 24.

Contestants had moved the county court for a 30-day continuance to give them an opportunity to procure

evidence. The motion was sustained. On the day of trial contestants failed to appear, and the will was admitted to probate. Estimates of estate assets ranged from $150,000 (personal property, $100,000) to $500,000, and the amount of the executors' bond was fixed at $125,000.

The evidence of poverty consists of the affidavit of one contestant. Broad and equivocal conclusions concerning the financial condition of some contestants are illustrated by these excerpts: "* * * they have had a tough time getting along financially. * * * although some of the appellants could probably raise their proportionate share of a $3,000.00 bond, none of them are willing to contribute more than their proportionate share; * * *."

The statute requires a bond conditioned that appellant will pay all debts, damages, and costs. If an appeal has been taken vexatiously or for delay, there is an additional liability for an attorney's fee to the adverse party. § 30-1603, R. S. Supp., 1965. A court has discretion in fixing the amount of the bond. Cf. In re Estate of Grainger, 151 Neb. 555, 38 N. W. 2d 435. There was no abuse.

The constitutional points are not well taken in our view of the record and consequences in other situations, such as contests between indigents. A judicial comparison of financial responsibilities as a criterion of amount would be impracticable. A will contestant is not permitted to proceed in forma pauperis without legislative authority. Cf. In re Estate of Mathews, 125 Neb. 737, 252 N. W. 210.

The judgment is affirmed.

AFFIRMED.

JUDITH A. WOLPA, APPELLEE AND CROSS-APPELLANT, V. WARREN W. WOLPA, APPELLANT AND CROSS-APPELLEE.
153 N. W. 2d 746

Filed October 27, 1967. No. 36581.

1. **Divorce: Adultery.** Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions.
2. ———: ———. Where a wife is conclusively found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged.
3. **Divorce: Parent and Child.** Ordinarily, courts may not properly deprive a parent of his custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or he has forfeited that right.
4. **Divorce: Attorney and Client.** Where adultery of a wife is established, she is not entitled to an award of alimony or attorney's fees.
5. **Divorce: Costs.** The costs of the action in such case are ordinarily taxable to the wife.
6. **Divorce: Adultery.** When a divorce shall be decreed for the cause of adultery committed by the wife, the husband may hold such of her personal estate as the court shall deem just and reasonable under all of the circumstances in the case, and the same shall be determined and decreed by the court at the time of the granting of such divorce.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed in part, and in part reversed and remanded with directions.

J. William Gallup and Schrempp, Rosenthal & McLane, for appellant.

Alfred A. Fiedler, for appellee.

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

SPENCER, J.

Plaintiff and appellee brought this action for an absolute divorce on the ground of extreme cruelty. Defend-

ant and appellant cross-petitioned, alleging adultery on the part of plaintiff. The trial court specifically found plaintiff guilty of adultery and awarded the divorce to defendant on his cross-petition, retained custody of the children of the parties in the court, but granted the mother their care and possession under the supervision of the child welfare division of the Douglas County assistance bureau.

The trial court further decreed that the plaintiff should have the possession and use of the household goods and appliances in the family home, but reserved the right to make an award at a later date. The title to the home was left in joint tenancy, with possession and use in the plaintiff so long as she retained the care and possession of the children and remained unmarried. Defendant was ordered to pay $20 per week child support until further order of the court.

Subsequently, on a hearing on allowance on appeal, the trial court raised the child support to $30 a week, directed the defendant to make the payments on the house of $115 a month, ordered him to pay $100 into court for the benefit of plaintiff in connection with her costs on appeal, and directed the payment of a temporary attorney's fee on appeal to plaintiff's attorney in the amount of $200. Defendant has perfected an appeal to this court and plaintiff has cross-appealed.

The defendant was properly awarded the divorce on his cross-petition. It would serve no useful purpose to detail the evidence sustaining such conclusion. Suffice it to say that the plaintiff was guilty of adultery continued after the filing of the petition herein and until shortly before the trial. Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions. Baker v. Baker, 166 Neb. 306, 89 N. W. 2d 35.

Defendant's appeal questions the action of the trial

court in retaining custody and placing care and possession of the children with the plaintiff under supervision, as well as the disposition of the joint property and the allowances made to the plaintiff. His exceptions are well taken.

Where a wife is conclusively found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged. See, Beck v. Beck, 175 Neb. 108, 120 N. W. 2d 585; Houghton v. Houghton, 179 Neb. 275, 137 N. W. 2d 861. The trial court, undoubtedly relying on those cases, saw fit to retain custody and to grant the care and possession of the children to the adulterous wife. Those cases are not authority for the action herein. In each of them, the father was found to be unfit to have the care and custody of the children. The procedure used in those cases was necessitated by the unsuitability of the father to care for the children. This is not the present situation. There is no evidence which would indicate that the defendant is not a fit and proper person to have the care and custody of his children.

Defendant herein should be given an opportunity to provide an adequate home for his children. It is true he will have to depend upon hired help during working hours. That is usually the situation where a father is given custody of minor children. However, until such time as it is proved that he is unfit to have the custody of his children or their best interests require a change of custody, defendant should have their custody, care, and control. Ordinarily, the relationship of parent and child should not be severed or disturbed unless the facts justify it.

As we said in Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445: "Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right." On

the record herein, defendant should have been granted the care and custody of his children.

We do not understand the allowance made to plaintiff and her attorney for costs and attorney's fees to prosecute this appeal, after the trial court found the plaintiff guilty of adultery and granted defendant an absolute divorce. In the absence of extenuating circumstances, which are not present herein, these allowances cannot be sustained and they are hereby vacated. Where adultery of a wife is established, she is not entitled to an award of alimony or attorney's fees. The costs of the action in such case are ordinarily taxable to the wife. See Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689.

We conclude that the trial court was also in error in awarding any of the property of the parties to the plaintiff other than her clothing and personal ornaments. Section 42-322, R. R. S. 1943, provides: "When a divorce shall be decreed for the cause of adultery committed by the wife, the husband may hold such of her personal estate as the court shall deem just and reasonable under all the circumstances in the case, and the same shall be determined and decreed by the court at the time of the granting of such divorce." Care and custody of the children are awarded to the defendant. He will need the household goods and appliances as well as the home of the parties to provide for them. We find that the title to the real estate constituting the home of the parties, as well as the household goods and all personal property other than the clothing and personal oranments of plaintiff, should be awarded to the defendant.

The judgment of the trial court is affirmed insofar as it grants an absolute divorce to the defendant on his cross-petition. In all other respects, the judgment is reversed and the cause remanded to the district court for the entry of a judgment in conformity with this opinion.

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

EQUITY UNION GRAIN COMPANY, A CORPORATION, APPELLEE, V. BOARD OF EQUALIZATION OF THE COUNTY OF LANCASTER, NEBRASKA, ET AL., APPELLANTS.
153 N. W. 2d 741

Filed October 27, 1967. No. 36584.

1. **Taxation: Corporations.** Ordinarily, a corporation is domiciled for tax purposes in the state of its incorporation; and, in the absence of a statute to the contrary, its intangible personal property has its tax situs in that state, unless a business situs elsewhere has been established.
2. ———: ———. When a foreign corporation is domesticated, there is a domestic resident corporation within each state insofar as the corporation has been created by, and exists under, its laws, and a foreign corporation insofar as it exists and exercises franchises under the laws of another state.
3. ———: ———. Domesticating a foreign corporation in Nebraska, for purposes of taxation, has much the same effect as establishing "a business situs" in Nebraska and its intangible property may have a situs, for taxation purposes, apart from the state of its original incorporation.
4. ———: ———. Before a state, where such corporation has been domesticated or has established a business situs, may tax such intangible property, it must appear to have a reasonable connection with the business of the company in such state in that it has a localized use, is primarily an asset of the local business, and under local management and control.
5. ———: ———. A state has no authority to tax the property of a foreign corporation which is clearly outside the state and forming no part of its domestic business.

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

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Walter D. Weaver, and Janice L. Gradwohl, for appellants.

Crosby, Pansing, Guenzel & Binning, for appellee.

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

NEWTON, J.

This is an action involving the taxation of certificates

of indebtedness owned by plaintiff, Equity Union Grain Company, a corporation. The certificates were assessed and taxed in Lancaster County, Nebraska, and on appeal, the district court ruled that they were not subject to taxation in Nebraska. Defendants appeal.

This is a Missouri corporation, domesticated in Nebraska, with offices in Kansas City, Missouri, Lincoln, Nebraska, and Denver, Colorado, which has seats on the Kansas City and Denver Boards of Trade.

Its stockholders are local farmer-owned cooperative elevators principally in Kansas, Colorado, and Nebraska, with a few in Wyoming, South Dakota, and Iowa.

It deals in grain at all three stations located in Kansas City, Lincoln, and Denver. Each operates independently of the other in buying and selling grain, paying and collecting therefor, and keeps its own set of books. They are somewhat in competition with each other as each issues individual bids on grain.

Local managers responsible only to the board of directors are in charge of the Kansas City and Denver offices. The general manager has charge of the Lincoln office, but no authority over operations elsewhere. Monthly reports are made to the Lincoln office where a general accounting system is maintained.

There are 4 employees in the Kansas City office, 5 in the Denver office, and 30 in the Lincoln office. There are nine members of the board of directors, one from Kansas, and four each from Nebraska and Colorado. Meetings are held at various places, but generally in Lincoln.

Terminal elevators are owned in Lincoln and Kansas City. The Kansas City Terminal Elevator Co. is owned and operated by plaintiff and the Missouri Farmers Association. The certificates of indebtedness in question here were issued by such elevator company, and used as a method of ownership and as collateral for a loan to the elevator company.

Ordinarily, a corporation is domiciled for tax purposes

in the state of its incorporation; and, in the absence of a statute to the contrary, its intangible personal property has its tax situs in that state, unless a business situs elsewhere has been established. See, Peter Kiewit Sons', Inc. v. County of Douglas, 172 Neb. 710, 111 N. W. 2d 734; 84 C. J. S., Taxation, § 130, p. 254.

When a foreign corporation is domesticated, there is a domestic resident corporation within each state insofar as the corporation has been created by, and exists under, its laws, and a foreign corporation insofar as it exists and exercises franchises under the laws of another state. See, § 21-20,122, R. S. Supp., 1965; 20 C. J. S., Corporations, § 1795, p. 18. Domesticating a foreign corporation in Nebraska, for purposes of taxation, has much the same effect as establishing "a business situs" in Nebraska and its intangible property may have a situs, for taxation purposes, apart from the state of its original incorporation. Peter Kiewit Sons', Inc. v. County of Douglas, *supra.*

Before a state, where such corporation has been domesticated or has established a business situs, may tax such intangible property, it must appear to have a reasonable connection with the business of the company in such state in that it has a localized use, is primarily an asset of the local business, and under local management and control. See, Peter Kiewit Sons', Inc. v. County of Douglas, *supra;* 84 C. J. S., Taxation, § 116c, p. 234. A state has no authority to tax the property of a foreign corporation which is clearly outside the state and forming no part of its domestic business. See, 84 C. J. S., Taxation, § 186, p. 345; Marshall-Wells Co. v. Commissioner of Taxation, 220 Minn. 458, 20 N. W. 2d 92.

In the present instance, plaintiff maintains and operates a separate business at the place of its incorporation in Missouri, and another in Denver, Colorado, as well as one in Lancaster County, Nebraska. The Kansas City Terminal Elevator Co., which issued the certificates of indebtedness in question, was purchased and is owned

by plaintiff and its associate, Missouri Farmers Association, is located in Kansas City, Missouri, and is operated in connection with the business of the plaintiff at its Missouri office completely independent of the Lincoln office. The certificates of indebtedness, which are used as evidence of ownership, are subject to taxation in Missouri, are clearly an adjunct of the Missouri branch of plaintiff's business, having no situs for any purpose in Nebraska, and not subject to taxation therein.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY PUTNAM, APPELLANT.
153 N. W. 2d 456

Filed October 27, 1967. No. 36588.

1. **Criminal Law.** For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court.
2. ———. Ineffectiveness of counsel is not inferable from the single fact that only 15 minutes passed between appointment of counsel and arraignment of defendant.
3. ———. A prosecuting attorney ordinarily may agree on recommendations for sentence and disposition of other charges or potential charges against defendant.

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

Leo M. Bayer, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

SMITH, J.

Defendant has appealed from a denial of post convic-

tion relief on an evidentiary hearing. He contends that his plea of guilty to a charge of horse stealing was involuntary and that his appointed counsel rendered ineffective assistance.

Charles F. Fisher, defense counsel, had conferred with defendant for 15 minutes prior to the arraignment on May 24, 1965. During the hearing the court asked defendant whether he understood his right to a jury trial. Defendant answered, "Yes, I guess so." (A judgment on a burglary conviction of defendant by a jury had been reversed the preceding March. State v. Putnam, 178 Neb. 445, 133 N. W. 2d 605.) He also unexpectedly declared, "Well, I enter a plea of nolo contendere." After a recess he pleaded guilty. The next day he was admitted to a state hospital for psychiatric evaluation at his own request. On September 20, 1965, the superintendent recommended that defendant be discharged from the hospital, stating: "Stanley Putnam possesses average, adult, intellectual ability * * *, and he is not mentally incompetent by reason of mental illness."

On October 14, 1965, defendant requested permission to withdraw his plea because he had been in jail on September 19, 1963, the date alleged in the information. The correct time, September 8, 1963, appears in the complaint which is dated September 19, 1963. After correction of the typist's error and a recess defendant pleaded guilty. Having answered questions about threats or promises in the negative, he said: "* * * I am not sorry that I was caught at this. I am sorry that it ever happened."

At the post conviction hearing defendant testified to circumstances surrounding his plea. He had suffered from headaches and nervousness. Fisher had threatened that a charge of recidivism would be filed unless defendant pleaded guilty. Fisher was displaying no interest in the case, and defendant was frightened.

Fisher consulted with the deputy county attorney, who stated that a recidivism charge would be filed unless

defendant pleaded guilty. Defendant was full advised of his rights and available alternatives, including the recidivism charge. Fisher, whose experience and competency are not questioned, was willing to try the case, and he left the decision to defendant.

For post conviction relief on the ground of ineffective assistance it must appear "that counsel's assistance was so grossly inept as to shock the conscience of the court * * *." Busby v. Holman, 356 F. 2d 75. Ineffectiveness is not inferable from the single fact that only 15 minutes passed between appointment of counsel and arraignment of defendant. United States v. Wright, 176 F. 2d 376; People v. Tomaselli, 7 N. Y. 2d 350, 165 N. E. 2d 551.

The propriety of plea discussions and plea agreements depends primarily upon whether they serve the public interest in the effective administration of criminal justice. A prosecuting attorney ordinarily may agree on recommendations for sentence and disposition of other charges or potential charges against defendant. American Bar Association, Standards Relating to Pleas of Guilty, Tent. Dr. § 3.1, p. 60.

The denial of post conviction relief was correct.

AFFIRMED.

KRAFT AND SONS, INC., A CORPORATION, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.
153 N. W. 2d 725

Filed October 27, 1967. No. 36599.

1. **Municipal Corporations: Streets.** An owner or person claiming an interest in property not abutting upon streets or alleys proposed to be vacated by action of the city council 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 such property owner may have to go a more roundabout way to reach certain points does not constitute an injury different in kind from that sustained by the general public, but is one of degree only.

2. ———: ———. An abutting landowner does not have a vested interest in the flow of traffic past his premises and any damage sustained because of the diversion of traffic is not compensable.
3. ———: ———. A property owner may not recover damages for the obstruction of a street or highway unless he has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large.

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

Johnston, Grossman & Johnston, for appellant.

Ralph D. Nelson, Jerry C. Nelson, Carl C. Kopines, Richard R. Wood, Jack B. Lindner, William L. Walker, Earl Ludlam, Cline, Williams, Wright, Johnson, Oldfather & Thompson, and Kier, Cobb & Luedtke for appellees.

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

NEWTON, J.

This is an action brought by Kraft and Sons, Inc., against the City of Lincoln, Nebraska, the University of Nebraska, and others, wherein plaintiff seeks to recover damages for a loss of business alleged to have been sustained by reason of the vacation of a street and the temporary obstruction of another street. For convenience, the City of Lincoln will be hereinafter referred to as city and the University of Nebraska as university.

Defendants demurred to plaintiff's third amended petition. The trial court sustained the demurrers and, plaintiff having elected to stand upon such petition, dismissed the petition.

Examination of the petition reveals that plaintiff operated a gasoline and oil bulk plant and filling station at the northeast corner of the intersection of Fourteenth and W Streets and also operated ancillary filling stations at various locations, all in Lincoln, Nebraska. Fourteenth Street runs north and south through the area occupied by the university. Avery Avenue commences

at Fourteenth Street and originally ran in a westerly direction at a point just south of the university power plant. As it passed the power plant, it jogged to the north and then continued west. W Street commences at a point on Fourteenth Street, approximately the width of the street to the north of the original intersection of Fourteenth Street and Avery Avenue, and thence runs in an easterly direction. A portion of Avery Avenue lying west of Fourteenth Street was vacated by the city at the request of the university. The university owned the property on both sides of the vacated portion of the street and since the vacation ordinance did not reserve title in the city, the vacated street reverted to the university. Avery Avenue was then relocated at a point a short distance to the west of the university power plant and adjacent to the northern edge of plaintiff's property, the land comprising the street as relocated being conveyed to the city by the university. The university then extended its power plant on to the vacated portion of Avery Avenue. At the intersection of Avery Avenue, as originally located, and Fourteenth Street, Fourteenth Street was barricaded for a period of about 5 weeks to permit the installation of certain utility lines. The petition also sets forth certain portions of the city charter, and it is contended that the charter was violated in several respects in the partial vacation of Avery Avenue, and the temporary obstruction of Fourteenth Street.

As mentioned, numerous questions are raised by plaintiff regarding the legality of the city's action in partially vacating Avery Avenue and in permitting the temporary obstruction of Fourteenth Street. We find that a resolution of these questions is not necessary to a determination of this action.

The petition fails to set forth facts showing that plaintiff's business was located upon property abutting upon the vacated street, or that ingress or egress to plaintiff's place of business was entirely blocked off or unreason-

ably impaired. It does reveal that plaintiff was not, in fact, the occupant of property abutting upon Avery Avenue and that access to plaintiff's premises was available at all times from the north on Fourteenth Street, and from the east, on W Street. It was also available at all times, except for a 5-week period, from the south on Fourteenth Street and, after reconstruction of Avery Avenue, from the west on Avery Avenue and Fourteenth Street.

There are certain well-recognized rules applicable to the situation presented. An owner or person claiming an interest in property not abutting upon streets or alleys proposed to be vacated by action of the city council 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 such property owner may have to go a more roundabout way to reach certain points does not constitute an injury different in kind from that sustained by the general public, but is one of degree only. See, Enders v. Friday, 78 Neb. 510, 111 N. W. 140; Lee v. City of McCook, 82 Neb. 26, 116 N. W. 955; Van Valkenberg v. Rutherford, 92 Neb. 803, 139 N. W. 652; Burkley v. City of Omaha, 102 Neb. 308, 167 N. W. 72; Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622; Fougeron v. County of Seward, 174 Neb. 753, 119 N. W. 2d 298.

An abutting landowner does not have a vested interest in the flow of traffic past his premises and any damage sustained because of the diversion of traffic is not compensable. See Painter v. State, 177 Neb. 905, 131 N. W. 2d 587.

A property owner may not recover damages for the obstruction of a street or highway unless he has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large. See, Fougeron v. County of Seward, *supra;* Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513; Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808.

Plaintiff, at all times, notwithstanding the temporary obstruction of Fourteenth Street and the partial relocation of Avery Avenue, was provided with reasonable access to its business site both by its employees and the general public. Although for a short period, while Fourteenth Street was obstructed and Avery Avenue was being relocated and rebuilt, direct access to the south and west was somewhat restricted and traffic was temporarily diverted to a more roundabout way, such inconvenience as plaintiff sustained was not different in kind from that sustained by the general public, but was one merely of degree. It, therefore, appears that the action of the trial court was correct and should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, ET AL., APPELLEES, V. NICKEL GRAIN CO., INC., APPELLANT, IMPLEADED WITH DONALD NICKEL ET AL., APPELLEES.
153 N. W. 2d 727

Filed October 27, 1967. No. 36627.

1. **Eminent Domain: Injunction.** Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain.
2. **Eminent Domain: Judges.** The power conferred on the county judge by the eminent domain act and the duties required of him by that act are not judicial powers and duties but are purely ministerial in character.
3. **Eminent Domain: Streets.** The vacation or closing of a street is not analogous to an eminent domain proceeding to appropriate private property for public use.
4. ———: ———. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages.
5. **Tender.** Where a certain sum of money is tendered by a debtor

to a creditor on the condition that he accept it in full satisfaction of his demands, the sum being in dispute, the creditor must either refuse the tender or accept it. If he accepts it, he accepts the condition also, notwithstanding any protest.

6. **Compromise and Settlement.** One accepting a check, knowing it is offered in full settlement on a disputed account or claim, is estopped to claim that it was not accepted in full settlement.
7. **Equity.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

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

William S. Padley, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and Martin & Stirtz, for appellees State et al.

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

SPENCER, J.

This is an appeal from the entry of a permanent injunction in favor of appellee, State of Nebraska, Department of Roads, and appellee-intervener, Village of Axtell, Nebraska, enjoining appellants from proceeding with an inverse condemnation proceeding for damages to a leasehold interest of Nickel Grain Co., Inc., arising out of the reconstruction of U. S. Highway Nos. 6 and 34 through Axtell, Nebraska.

For convenience hereinafter, the appellee will be referred to as State; the appellee-intervener as village; and the Nickel Grain Co., Inc., as Nickels.

To understand the present controversy, it is necessary that we briefly review certain facts. Condemnation proceedings were started by State against Nickel-Bessel Grain Company, of which Nickels is the corporate successor, for the condemnation of certain property adjoining the highway. By stipulation in that condemnation, certain leasehold interests of Nickels on property

owned by the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as C. B. & Q., was excepted from the condemnation. An award was made in the condemnation of $3,000, which amount was paid to Nickels.

In the construction of the highway, State entered upon the property leased by Nickels from C. B. & Q., changing the grade and use of a part of the premises, to the damage of Nickels. The State had contracted with C. B. & Q. as to the property but had no contract with Nickels, who held the leasehold interest. Subsequently, Nickels filed a claim with the Sundry Claims Board for damages sustained by the appropriation of property covered by the lease and not included in said condemnation.

The itemization provided at the hearing before the Salaries and Claims Committee of the Legislature indicated the total damages claimed to be $156,705.25, broken down as follows:

"RECAPITULATION OF DAMAGES FOR DESTRUCTION OF BUSINESS

"1. Reconstruction of 12,000 bu. wet grain storage tank at only feasible location, inside grain warehouse	$8,970.00	
Less: condemnation award (3,000) minus value of tank and removal cost (1,125)	1,875.00	
		$7,095.00
"2. Repair of dump pit, boot pit, conveyor machinery (leg), and concrete floor in scale house		9,890.00
"3. Construction of corrective drainage to prevent flooding of pits and warehouse caused by highway change		

of grade with inadequate drainage		9,954.00
"4. Loss of profits for 1-year period 5-15-64 to 5-14-65 (based on annual profit, 7-1-62 to 6-30-63)		38,076.14
"5. Continuing expenses (net loss) of corporation during period of 5-15-64 to 5-14-65 when facility was non-operational		35,771.04
"6. Bank loans called, with 5-year term otherwise remaining except for default		
State Securities Company	$55,119.07	
Platte Valley State Bank	20,000.00	
Total	$75,119.07	
"Less: Interest for one year recoverable under item 5, and principal for one year recoverable under item 4	$19,200.00	
		55,919.07
"TOTAL DAMAGES		$156,705.25"

Claimant was allowed $26,939, which is the exact amount of the first three items listed in the claim. A voucher, with the following information, was forwarded by State to Nickels and returned signed by the president of Nickels on behalf of Nickels:

"Property Damage, Highway Construction as evidenced by the claim filed with the Sundry Claims Board and allowed by the

Legislature in LB 905—75th Session	26,939.00
"Upon receipt of warrant in the amount of $26,939.00, I hereby release the State of Nebraska from any further liability with reference to within claim or for any other damages resulting from taking of right of way, highway construction, or any change of grade or drainage in the vicinity of or upon land belonging to, leased, or claimed by the Nickel Grain Co., Inc., or immediately adjacent thereto in Axtell, Nebraska, and relocated Highway US 6 and 34."	

Upon return of the voucher, a warrant was issued for said amount and cashed by Nickels. Subsequently, Nickels filed a petition with the county judge of Kearney County against State, village, and C. B. & Q., seeking inverse condemnation for damages sustained by the interference with its leasehold rights in C. B. & Q. property, pursuant to section 76-705, R. R. S. 1943. The present action was brought against Nickels, the county judge of Kearney County, and the appraisers to enjoin the prosecution of the condemnation proceeding.

The primary question herein is whether injunction is a proper remedy. In Consumers Public Power Dist. v. Eldred, 146 Neb. 926, 22 N. W. 2d 188, we said: "This court as well as the courts of other jurisdictions is committed to the rule that injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain."

Nickels questions the propriety of injunctive procedure herein. There is no merit to his assignment. The power conferred on the county judge by the eminent domain act and the duties required of him by that act are

not judicial powers and duties but are purely ministerial in character. Weiner v. State, 179 Neb. 297, 137 N. W. 2d 852.

The specific complaint against village is that it permitted its streets to be closed without any appropriate procedure of any nature. Nickels lost access from two streets which formerly crossed the highway because of the highway median. However, an access road between the highway and those streets provided access to Nickels from two adjoining streets which crossed the highway. Section 76-705, R. R. S. 1943, does not cover this situation. The village could not be considered a condemner even if it closed or vacated the streets. The vacation or closing of a street is not analogous to an eminent domain proceeding to appropriate private property for public use. See Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622.

Further, as we said in Painter v. State, 177 Neb. 905, 131 N. W. 2d 587: "The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages."

The attempt to apply inverse condemnation as to village was improper and injunction was the proper remedy.

It is likewise obvious that State had defenses which would be initially unavailable, such as claims for damage items which are not compensable in a condemnation proceeding. It also is apparent that there is an improper joinder of parties. The action against C. B. & Q. could only involve damages for breach of a lease. The action against village complains of acts which are not cognizable in an eminent domain proceeding. However, the principal defense of State to the petition is its contention that Nickels has released State from any further lia-

bility for the acts complained of and that the matter is fully settled.

The State appropriated property of Nickels not involved in the prior condemnation. This was done without permission of Nickels, who had an interest which could only be acquired by condemnation or agreement. Nickels elected to file a claim with the Sundry Claims Board, which board made a partial allowance of Nickels' claimed damages. Nickels accepted the award made and executed the release set out above, which certainly purports to be a full and complete release of all damage claims resulting from the highway construction as to any land owned, leased, or claimed by Nickels.

What we said in Larson v. Keith, 122 Neb. 216, 239 N. W. 817, is appropriate here: "It seems to us that the law governing transactions of this character is so well settled it hardly admits of an argument. * * *

" 'Wherein a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demands, the sum due being in dispute, the creditor must either refuse the tender or accept it. * * * If he accepts it, he accepts the conditions also, notwithstanding any protest.' "

Nickels' position is that the allowance made by the Sundry Claims Board covered only the first three items of its claim, and left the other elements of damage for future determination. However, Nickels accepted the award without complaint and with full knowledge that State was tendering the amount in full settlement of any and all claims.

In Larson v. Keith, 122 Neb. 221, 239 N. W. 819, we held: "One accepting a check, knowing it is offered in full settlement on an account or claim, is estopped to claim that deductions in the account were improperly made."

Nickels' claim was allowed by Laws 1965, chapter 358, page 1031. Section 2 of said legislative bill reads as follows: "Sec. 2. The Auditor of Public Accounts is

hereby authorized and directed to draw his warrants, upon the funds in the state treasury herein enumerated, in favor of the several beneficiaries named in this act for the amount set opposite their respective names upon the presentation of proper vouchers therefor. *The several amounts herein appropriated shall be in full of any and all claims of every character and kind owing by the State of Nebraska to each of the beneficiaries respectively in whose favor the appropriations are made. The Auditor of Public Accounts shall not deliver any warrant for any item herein appropriated until a receipt in full shall have been filed by each of the beneficiaries respectively;* and, upon presentation of the warrants aforesaid, the State Treasurer is hereby directed to pay the same out of money in the General Fund or out of money in other funds, as indicated herein, not otherwise appropriated." (Italics supplied.)

Finally, we do not agree with Nickels' contention that State had an adequate remedy at law. In Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150, we held: "An adequate remedy at law means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." To permit the board of appraisers to make an award and to require State to appeal from that award, under the circumstances in this case, would ignore the realities of the situation. Without passing upon the applicability of section 76-705, R. R. S. 1943, we determine that injunction was a proper remedy herein.

For the reasons set out above, the judgment of the trial court is affirmed.

AFFIRMED.

DAVID BOSILJEVAC, APPELLEE, V. READY MIXED CONCRETE COMPANY, A CORPORATION, APPELLANT.
153 N. W. 2d 864

Filed November 3, 1967. No. 36541.

1. **Easements: Negligence.** Where a landowner constructs a private way over his property and for a long period of time acquiesces in its use by members of the general public, or so constructs the private way in connection with a public road as to make it impossible, under all conditions, to distinguish them, it would amount to an implied invitation, at least to the extent that he should anticipate the presence of members of the general public thereon. The inducement or implied invitation is not to come to a place of business fitted up for traffic to which those only are invited who will come to do business with the owner or occupant, nor is it to come by permission, favor, or license, but it is to come as one of the public, and to enjoy a public right. A member of the public using the way is not a trespasser.
2. **Highways: Negligence.** One whom a possessor of land intentionally or negligently misleads into believing that part of his land is a public highway is entitled to expect that the possessor will afford him a security similar to that which he would be entitled to expect were the land actually a highway.
3. ———: ———. The rules regarding the existence of an implied invitation, when it is difficult to distinguish a private road or way from a public road, have their limitations and in instances where the possessor of the land erects a barricade which is readily observable or posts notices indicating the nature of the private way, such rules are not applicable.
4. **Automobiles: Highways.** Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
5. **Automobiles.** Conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances.
6. ———. Ordinarily, conditions such as frost, ice, snow, mist, or fog are not intervening causes excusing the exercise of ordinary care by a driver but are conditions that require a driver to exercise a degree of care commensurate with the circumstances.
7. ———. The same rule has been applied where dust obscured the vision of the motorist.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Reversed and remanded.

Cassem, Tierney, Adams & Henatsch and John B. Henley, for appellant.

McGowan & Troia, for appellee.

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

NEWTON, J.

On June 20, 1961, plaintiff David Bosiljevac and his friend Patrick Mahoney were operating motorbikes during the daylight hours on the outskirts of Omaha intending to go to Hansen's Lakes. They were traveling in a westerly direction on a gravel county road which was dry and dusty. An automobile which left a trail of dust was some distance ahead of them. The automobile was followed by Patrick Mahoney and plaintiff was in the rear 100 to 200 feet behind Mahoney. A private way belonging to the defendant Ready Mixed Concrete Company, a corporation, led off from the county road in a southwesterly direction at a slight angle. Across this private way defendant had stretched a cable approximately ¾-inch in diameter on which were appended a sign or signs. Defendant's evidence was to the effect that there were two of these signs appended to the cable. Plaintiff's evidence was that there was one sign about 4 inches wide and 12 inches long, but his petition alleges it was 5 inches by 18 inches. Exhibits in evidence indicate that the sign or signs bore the words "No Admittance." The northerly end of the cable was attached to a post which was approximately 12 feet due south of the traveled portion of the county right-of-way and the cable extended approximately 30 feet in a southerly direction across the private way to a second post to which it was secured. Following the line of travel, it was approximately 75 feet from the north portion of the cable to the south edge of the traveled portion of the

county road, 100 feet from the center of the cable to the county road, and 125 to 135 feet from the south portion of the cable to the county road. Exhibits in evidence show that a short distance down the private road the defendant's plant, which was of considerable height and bulk, was located and was readily observable from the county road. Plaintiff's friend Mahoney followed the county road past the intersection of this private way, but plaintiff, who was traveling 15 to 20 miles per hour, instead of following Mahoney, turned into the private way, giving as his reason that he wanted to take a short cut and get out of the dust. Patrick Mahoney stated that he had driven down to Hansen's Lakes on several occasions, was familiar with the private way, and observed the cable on this occasion as he drove west in the northern traffic lane on the county road. Plaintiff had been to Hansen's Lakes on two or three previous occasions, but denied familiarity with the private way or the cable barricade, and stated that he did not see the cable until so close to it that he could not avoid striking it. Plaintiff was injured as a result of striking the cable. There was a comparatively wide entrance into the private way from the county road although the county road was a considerably wider road. Evidence was conflicting as to whether or not the surfaces of the two roads were similar in appearance.

A jury trial was had in the district court and at the close of the evidence, a motion of defendant to dismiss plaintiff's petition was sustained. Thereafter, plaintiff's motion for new trial was also sustained and defendant appeals.

Defendant assigns as error the granting of the motion for new trial on the following grounds: First, that the evidence is not sufficient to establish negligence on the part of defendant; and second, that plaintiff was guilty of contributory negligence as a matter of law which bars his recovery.

Plaintiff urges that under the facts of this case, it was

for the jury to determine whether or not plaintiff was an invitee. "Where a landowner constructs a private way over his property and for a long period of time acquiesces in its use by members of the general public, or so constructs the private way in connection with a public road as to make it impossible, under all conditions, to distinguish them, it would amount to an implied invitation, at least to the extent that he should anticipate the presence of members of the general public thereon. The inducement or implied invitation is not to come to a place of business fitted up for traffic to which those only are invited who will come to do business with the owner or occupant, nor is it to come by permission, favor, or license, but it is to come as one of the public, and to enjoy a public right. A member of the public using the way is not a trespasser." 65 C. J. S., Negligence, § 63 (146), p. 933. See, also, Restatement 2d, Torts, § 367, p. 267. "One whom a possessor of land intentionally or negligently misleads into believing that part of his land is a public highway, is entitled to expect that the possessor will afford him a security similar to that which he would be entitled to expect were the land actually a highway." Restatement 2d, Torts, § 367, p. 267.

The rules regarding the existence of an implied invitation, when it is difficult to distinguish a private road or way from a public road, have their limitations and in instances where the possessor of the land erects a barricade which is readily observable or posts notices indicating the nature of the private way, such rules are not applicable. See, 38 Am. Jur., Negligence, § 129, p. 788; Wright v. Salvation Army, 125 Neb. 216, 249 N. W. 549; Bowler v. Pacific Mills, 200 Mass. 364, 86 N. E. 767; Nielsen v. Christensen-Gardner, Inc., 85 Utah 79, 38 P. 2d 743; Chesson v. Nello L. Teer Co., 236 N. C. 203, 72 S. E. 2d 407. In the present case, a cable barricade, upon which was appended a readily visible "No Admittance" sign, had been erected a reasonable distance back from

the public highway and, under such circumstances, the plaintiff must be held to be a trespasser rather than a licensee or an invitee in regard to whom defendant owed only the duty to refrain from willfully or wantonly injuring him. See, Mercer v. Omaha & C. B. St. Ry. Co., 108 Neb. 532, 188 N. W. 296; Malolepszy v. Central Market, Inc., 143 Neb. 356, 9 N. W. 2d 474.

Regarding the question of contributory negligence, the evidence indicates that plaintiff, at the time of the accident, was driving through sufficient dust on the county road to partially obscure his vision and prevent his having a clear view of the private way belonging to the defendant and that he did not see the barricade until too late to avoid it. Whether or not, in view of the fact that plaintiff's friend Mahoney observed the cable as he passed on the northern edge of the county road, plaintiff's vision was actually obscured by the dust or he failed to maintain an adequate lookout is difficult to ascertain and is not material as in either event he would be guilty of contributory negligence barring recovery as a matter of law. Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. See, Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885; Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106; Schwartz v. Hibdon, 174 Neb. 129, 116 N. W. 2d 187. "Conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances." Schwartz v. Hibdon, *supra*. See, also, Huston v. Robinson, *supra*. "Ordinarily, conditions such as frost, ice, snow, mist, or fog are not intervening causes excusing the exercise of ordinary care by a driver but are conditions that require a driver to exercise a degree of care commensurate with the circumstances." Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571. See, also, Willey v. Parriott, 179 Neb. 828, 140 N. W. 2d 652. This rule has been applied where

dust obscured the vision of the motorist. Huston v. Robinson, *supra.*

It appears that defendant's assignment of error should be sustained on both grounds. First, that negligence under the facts of this case cannot be attributed to the defendant; and second, that plaintiff was guilty of such contributory negligence as to bar his recovery. It follows that the order of the district court dismissing plaintiff's petition at the conclusion of the trial was correct and that the order entered, granting a new trial, was erroneous requiring that the judgment be reversed and the cause remanded.

REVERSED AND REMANDED.

McCOWN and SMITH, JJ., dissenting.

We respectfully dissent. Restatement 2d, Torts, § 367, p. 267, states: "A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel." A special note immediately following the section and preceding the comments reads: "This Section deals with a possessor's liability to persons harmed while actually upon his land. It is placed among the Sections dealing with conditions harmful to persons outside of the land because many of the cases dealing with the subject make the liability depend upon the fact that the other reasonably believes that the land is a highway, being misled by the actor's conduct into such belief, and do not treat the actor's conduct as giving the other a license or an invitation to enter. The injured person, being misled by the other's conduct, *is clearly not a trespasser* and, therefore, *he does not fall within any of the classifications under which it is customary to place persons entering the land.*" (Emphasis ours.)

The majority opinion also grounds the finding of con-

tributory negligence of the plaintiff as a matter of law upon the general rule that a driver of a motor vehicle is guilty of negligence if he drives in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. That general rule has many exceptions. One of them involves situations in which the object struck cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568.

It should also be noted that a traveler on a highway need not keep his eyes constantly fixed on the road or path of the highway to look for defects which should not exist, nor is he required to exercise such extreme vigilance as in all events to see defects or obstructions in the road ahead such as a cable stretched across the road. See 40 C. J. S., Highways, § 268, p. 317.

The addition of one 4 x 12 inch sign appended somewhere on a 30-foot cable stretched across a roadway, in our opinion, should not, as a matter of law, convert the plaintiff into a trespasser, nor transform the ¾-inch cable into an object which the driver of a vehicle is required to see. Reasonable minds certainly might differ as to whether either or both the plaintiff or the defendant exercised ordinary care under the circumstances here.

For the reasons stated, we believe that the issues of the defendant's negligence and of the plaintiff's contributory negligence were all questions of fact which should have been submitted to the jury under appropriate instructions.

WILMA VINCENT, SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM J. VINCENT, DECEASED, APPELLANT, V. PETER PAN BAKERS, INC., A CORPORATION, APPELLEE, AND CONTINENTAL BAKING COMPANY, A CORPORATION, APPELLEE.
153 N. W. 2d 849

Filed November 3, 1967. No. 36543.

1. **Courts: Estoppel.** The doctrine of issue preclusion or collateral estoppel recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly.
2. **Negligence: Estoppel.** In a negligence action, employee A v. employer B, a prior determination of common issues of negligence in another action, employee B v. employer A, is ordinarily not conclusive upon employee A.

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

Viren, Emmert & Epstein and Boland, Mullin, Walsh & Cooney, for appellant.

Cassem, Tierney, Adams & Henatsch and Charles F. Gotch, for appellee Peter Pan Bakers, Inc.

Stoehr, Rickerson & Caporale, for appellee Continental Baking Co.

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

SMITH, J.

A collision between two trucks killed both drivers instantly. In this negligence action—driver A's representative v. employer B—plaintiff's petition was dismissed on the ground of issue preclusion or collateral estoppel. A prior determination in another action—driver B's representative v. employer A—was ruled conclusive of common issues concerning driver negligence. Plaintiff has appealed.

In the former action a jury had returned a verdict for driver B's representative, and judgment on the verdict was affirmed as to liability. Lorenzen v. Continental Baking Co., 180 Neb. 23, 141 N. W. 2d 163.

The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466. The employer of plaintiff's decedent having fully litigated the common issues of negligence, the problem is reduced to the effect of the employment relationship.

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

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

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

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

have been adequately represented in the litigation of the matter. * * *

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

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

Preclusion against plaintiff under the circumstances would unfairly deny her an opportunity to assert her rights. See Makariw v. Rinard, 336 F. 2d 333. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

CARTER, J., concurring in the result.

The history of this litigation shows the following facts: On June 21, 1963, a truck belonging to Peter Pan Bakers, Inc., and driven by John C. Lorenzen was in an accident with a truck belonging to Continental Baking Company, being driven by William J. Vincent. The drivers of the trucks were both killed. Each driver was alone in his vehicle. There were no eyewitnesses to the accident.

On September 6, 1963, Betty L. Lorenzen, administratrix of the estate of John C. Lorenzen, deceased, brought an action in the district court for Douglas County against Continental Baking Company and impleaded Peter Pan Bakers, Inc., because of its right of subrogation for workmen's compensation paid for the death of its employee Lorenzen. On September 20, 1963, Wilma Vincent, special administratrix of the estate of William J. Vincent, deceased, brought an action in the district court for

Douglas County against Peter Pan Bakers, Inc. Continental Baking Company was joined as a defendant to have its right of subrogation determined. It is apparent that both actions were pending in the district court at the same time. The Lorenzen case was first tried. No party to either action made any attempt to join the other by stipulation or court order in order to get all parties into court to determine all issues between the parties in a single action. Admittedly a failure to seek a joinder or consolidation of the two cases does not redound to the prejudice of either.

Traditional res judicata could not be properly asserted by the defendant in the second action for the reason that neither the plaintiff nor anyone in privity with her was a party to the first action. It is a fundamental rule that traditional res judicata is not available against one not a party in person or by privity, even if the issues be the same. An employer and employee in actions such as we have before us are not in privity with each other. Each cause of action is the plaintiff's cause.

It is a general rule that every person is entitled to his day in court. The general notion exists that this is an infallible rule without exception. But this is not so. Situations may arise where issue preclusion or collateral estoppel may be applied. It is true that issue preclusion or collateral estoppel are extensions of the rules applicable to res judicata. But such rules are of equal force with the rule that every person is entitled to his day in court. When one applies, the other does not.

If the rule applies in all cases that one not a party to litigation, either in person or by one in privity, as the majority opinion holds, a very anomalous situation could result. In the instant case, the result could well be calamitous from the standpoint of reason, law, and justice. In the first case, the jury found that Vincent was negligent and Lorenzen was not, and this court affirmed this finding on appeal. In the second case, the jury could find that Lorenzen was negligent and Vincent was not,

and result in verdicts and judgments for each against the other's employer on the identical evidence. That an injustice would have been done to one of the employers is self-evident. The law cannot tolerate such a result.

The basic reasoning behind the rule that one not a party to a suit may relitigate the issues is that he has had no opportunity to control his lawsuit and he should be permitted to retry the issues. With this I agree, if, and only if, he has suffered harm in not being able to furnish his own evidence in support of his cause of action. I submit, however, that if there are no new or different issues or evidence, the final judgment in the first litigation should be subject to the defenses of collateral estoppel or issue preclusion. In such a case, a party should not be permitted to relitigate the matter. Under such circumstances, a plaintiff is no more entitled to relitigate the case than is a member of a class in a class suit who was not a party to such suit. If, on the other hand, the issues or evidence are not the same, then the case should proceed to trial under the evidence that is not the same as in the first case. Where the evidence in the second case is substantially different than in the first, judgments obtained are not on the same evidence and may well warrant different verdicts.

Having come to these conclusions, it is my view that the judgment should be reversed on the ground that the motion to dismiss on the theory of collateral estoppel or issue preclusion was prematurely made. A determination of the applicability of collateral estoppel or issue preclusion cannot be made until plaintiff's evidence in the second case has been put in evidence. If at that time it is determined that the issues and evidence are the same as in the first case, the defense of issue preclusion or collateral estoppel is available and the motion should be sustained. If the issues or evidence are substantially different than in the first trial, then the motion should be overruled.

This case appears to be one of first impression in this

state. But the court should not by-pass the problem and adhere to an existing rule that has the potential to do an injustice. It is the duty of this court, that it should not shirk, to provide a procedure that will properly dispose of the litigation without doing an injustice to anyone. I submit that there is nothing presently before the court from which it can be determined that issue preclusion or collateral estoppel is not available or that it would unfairly deny plaintiff the right to relitigate the issues finally determined in Lorenzen v. Continental Baking Co., 180 Neb. 23, 141 N. W. 2d 163.

STATE OF NEBRASKA, APPELLEE, V. BILL SMILEY, DOING BUSINESS AS SMILEY'S CONOCO SERVICE, APPELLANT.

153 N. W. 2d 906

Filed November 3, 1967. No. 36571.

Automobiles: Service Stations. Under the particular facts, the rental of cargo trailers for attachment to passenger automobiles by the operator of a service station was an accessory use customarily incident to the permitted service station business.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and dismissed.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellant.

Ralph D. Nelson and Fred J. Swihart, for appellee.

Heard before CARTER, SPENCER, SMITH, MCCOWN, and NEWTON, JJ.

MCCOWN, J.

The defendant operates a service station located in a "G" local business district under the zoning and use regulations of the City of Lincoln. He was found guilty of an alleged unlawful use of premises in violation of the zoning ordinance because he had approximately six

U-Haul trailers on the service station premises available for rental.

Under the use regulations applicable to defendant's premises, service stations are specifically authorized. Some 20 or more other specifically defined business uses are permitted. The use regulations for the "G" local business district also specifically authorize: "Accessory buildings and uses customarily incident to the above uses, including parking lots."

The stipulation of facts shows that the defendant has been an authorized agent of U-Haul Co., Inc., for approximately 9 years, for the rental of trailers of the type to transport cargo by attaching to passenger automobiles. There are approximately 14 service stations in the City of Lincoln which are engaged in renting such trailers. Of that number, 10 are located in zoning districts where such rental is lawful under the zoning code of the City of Lincoln. There is no showing as to the total number of service stations in the City of Lincoln, nor is there any showing as to the number of businesses other than service stations which engage in the business of renting such trailers. The trailer rental business in Lincoln, Nebraska, must be in association with another business and cannot be self-sustaining. As a part of the rental of these trailers, springs, shock absorbers, hitches, and other items are sold to customers which are installed on automobiles at the service station. At a service station today, many related items of inventory must be available to solicit and keep customers. The trailers are rented to customers who trade at the defendant's service station as well as other people in the community. The trailer rental business is allied to the selling of gasoline, oil, and vehicle accessories and permits the sale of additional items and servicing of additional vehicles. The U-Haul Co., Inc., for whom defendant is a rental agent, inferentially, is of substantial size, and 96 percent of all its dealer agents in the United States are service station operators.

The plaintiff contends that under the Lincoln zoning code, sales and showrooms, "including service facilities and rental equipment," are permitted in several other business, commercial, and industrial zoning districts and, therefore, it must be assumed that the ordinance was intended to prevent equipment rentals in the "G" local business district.

It is the defendant's contention that a service station includes more than the sale of gas and oil for automobiles, and that the rental of cargo trailers for attachment to passenger automobiles is an accessory use customarily incident to a service station.

The issue involved is one of first impression in this court and the parties have located only one case from other jurisdictions directly considering the issue. The plaintiff relies heavily upon that case, Bennett v. Zoning Board of Adjustment, 396 Pa. 57, 151 A. 2d 439. The Pennsylvania court, in the vivid and colorful phraseology of Justice Musmanno, held that under the facts there sale and rental of trailers was not "customarily incidental" to the business of selling gasoline. However, that case involved a situation where the service station itself was already a nonconforming use; where the number of trailers parked on the premises was from 89 to 91; and where the appellant's income from the trailer business was almost $19,000 per year as contrasted to about $22 per month in other gasoline service stations renting trailers. It was specifically stated in that case: "It is apparent from this impressive figure that the trailer business is not merely an incidental part of Bennett's gasoline business but has become an independent enterprise in itself, all in violation of zoning law."

It seems clear that the primary question before us is whether or not, under the facts as stipulated, defendant's use of the premises in keeping six U-Haul cargo trailers for rental, was an "accessory use * * * customarily incident" to the operation of a permitted service station business. Where the provisions of a zoning ordi-

nance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. City of Omaha v. Gsantner, 162 Neb. 839, 77 N. W. 2d 663.

In the present setting and context, what does "customarily" mean, and to what geographical area should the test be applied? It should not be a mathematical determination to be resolved only by computing percentages; neither should it be resolved by what might be termed the habitual or usual mode of operation. The language in Jantausch v. Borough of Verona, 41 N. J. Super. 89, 124 A. 2d 14, quoted in 1 Rathkopf (3d Ed.), The Law of Zoning and Planning, 23-10, is particularly appropriate in discussing the definition of the word "customarily" or "customary" in a zoning use context. "No doubt the degree of use is a factor. * * * The practice should be sufficient to justify the observation that (it) is not unique or rare. It should be appreciable or perhaps substantial. It should be sufficient to constitute a recognized mode of activity in the field, but it need not be the more prevalent one."

There is also a basic question of interpretation as to whether the term "customarily" applies to the time the ordinance was passed or as of the time the litigation arose. It would seem the better policy, particularly in view of the changing character of business operations generally, to apply the test currently as of the time of the litigation. This is particularly true where the activity is in a business zone, as opposed to a residential one; is not prohibited in specific terms; and accessory uses customarily incidental to specifically authorized primary uses are specifically permitted.

Under the stipulated facts here, approximately 14 service stations in the City of Lincoln as of April 1966, were engaged in the business of renting cargo trailers

of the type to be attached to passenger automobiles. All but two were agents of U-Haul Co., Inc. Approximately 96 percent of all U-Haul Co., Inc., dealer agents in the United States are service station operators, and franchises are limited to one station for each 10,000 population. The cargo trailer rental business must be in association with another business and cannot be self-sustaining in Lincoln, Nebraska. Under the facts here, the rental of cargo trailers for attachment to passenger automobiles by service stations is neither unique nor rare, nor can it be called completely unusual or uncommon.

The burden of proof is on the City as complainant to prove that the use of the premises here involved is prohibited by the applicable ordinance. The Lincoln code defines an accessory use as one which is incidental to the main use of the premises. The incidental or accessory use under a zoning law has been defined as a use which is dependent on or pertains to the principal or main use. 1 Rathkopf (3d Ed.), The Law of Zoning and Planning, 23-6. That author also states that incidental use means that it cannot be the primary use of the property and that whenever the accessory use attains such magnitude as to be no longer incidental, it loses its status as an accessory use.

There is no evidence here that the trailer rental business conducted by the defendant involving six trailers is any more or less extensive than the trailer rental business conducted by the other 13 service stations engaged in such rentals in the city. There is no evidence that the defendant's rental income is anything but minor in comparison to the defendant's primary service station income. Neither is there any reasonable inference to be drawn except that the rental business is factually accessory, subordinate, and incidental.

Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and ac-

cepted usage, the setting in which they are employed, and the general structure of the law as a whole. 58 Am. Jur., Zoning, § 11, p. 945. This court must assume that the city council intended exactly what it said.

Under the particular facts, the rental of cargo trailers for attachment to passenger automobiles by the operator of a service station was an accessory use customarily incident to the permitted service station business.

The judgment of the lower court is, therefore, reversed and the cause dismissed.

REVERSED AND DISMISSED.

JAMES E. HEISER, APPELLEE, V. MILDRED L. HEISER, APPELLANT.
153 N. W. 2d 909

Filed November 3, 1967. No. 36595.

1. **Process.** An irregularity in the certificate appearing on the reverse side of a copy of a summons served upon the defendant does not invalidate the service where the defendant was not misled or prejudiced in any way.
2. **Divorce.** In a divorce action where the credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.

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

Charles A. Fisher and Charles F. Fisher, for appellant.

Holtorf, Hansen & Kortum and Leland K. Kovarik, for appellee.

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

BOSLAUGH, J.

This is a divorce proceeding in which the trial court

granted a divorce to the plaintiff husband; awarded custody of the minor children to the defendant wife; made a division of the property; and fixed the amount of child support and other allowances to the defendant. The defendant has appealed.

The assignments of error relate to the ruling on a special appearance of the defendant; the granting of the divorce; and the alleged inadequacy of the allowances which were made.

The plaintiff was residing in Scotts Bluff County, Nebraska, at the time the action was commenced, and the action was filed there. A summons directed to the sheriff of Dawes County, Nebraska, was served upon the defendant in Dawes County by the sheriff of Dawes County. The service was regular in every respect except that the certificate of the sheriff of Dawes County appearing on the reverse side of the copy of the summons, certifying that the copy served was a true copy of the original summons, read "County of Scotts Bluff." By inadvertence, the venue of the printed form of certificate was not changed to read "Dawes" instead of "Scotts Bluff."

The irregularity was of no consequence. The certificate is not required by statute. See § 25-503, R. R. S. 1943. The information appearing on the face of the copy of the summons was correct, and the defendant was not misled or prejudiced in any way. The special appearance was properly overruled. See, 72 C. J. S., Process, § 36, p. 1044; 42 Am. Jur., Process, § 19, p. 20.

The record shows that the parties were married in 1947. They have three adopted children. The plaintiff is a bricklayer earning approximately $5,000 per year. From this amount, certain expenses such as travel, tools, and clothing must be paid.

The petition alleged extreme cruelty. The plaintiff testified that there had been difficulty between the parties during the entire marriage. The plaintiff claims that the defendant threatened him with a gun on one

occasion and with a knife on two occasions. The gun incident was corroborated by the testimony of the oldest child, although his testimony tended to support the defendant's version as to what had happened. The plaintiff's testimony as to the other incidents was not corroborated.

The plaintiff claims that the gun incident happened in February or March 1965, and that the parties separated soon thereafter. There was evidence which tended to contradict this version of the facts, and the defendant claims that the parties had intercourse on a number of occasions after the gun incident. The plaintiff denied that there had been intercourse as claimed by the defendant.

The evidence is in sharp conflict as to what happened between the parties in this case. In such a situation this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Overton v. Overton, 178 Neb. 267, 133 N. W. 2d 7.

From our consideration of the record we conclude that the trial court reached the proper result and that the plaintiff should be granted a divorce from the defendant.

The trial court awarded the family residence in Chadron, Nebraska, all household furniture, a 1958 Oldsmobile automobile, and the common stock in the Chadron State Bank to the defendant. A 1965 Ford automobile, which is encumbered, and a bank account in the Gering National Bank were awarded to the plaintiff. Each party was allowed to retain his own personal property.

The plaintiff was ordered to pay $75 per month for the support of each of the two minor children until they became 21 years of age or are self-supporting. The costs of the action including an attorney's fee in the amount of $200 were taxed to the plaintiff.

We find no error in the division of the property or

the allowances which were made. The defendant is employed and earning approximately $370 per month.

The judgment of the district court is affirmed. The defendant is allowed the sum of $350 for the services of her attorney in this court. The costs of the appeal are taxed to the plaintiff.

AFFIRMED.

MILDRED HACKNEY, APPELLANT, V. ELWOOD KLINTWORTH, APPELLEE.

153 N. W. 2d 852

Filed November 3, 1967. No. 36601.

1. Negligence. A social guest is a mere licensee.
2. ———. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.
3. ———. When we speak of a hidden danger or peril known to the possessor of land, we refer to one that the possessor knows to be dangerous and which he might reasonably expect a guest to encounter.

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

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Ray C. Simmons, for appellee.

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

SPENCER, J.

This is an action for personal injuries brought by Mildred Hackney against Elwood Klintworth, her son-in-law. The trial court sustained defendant's motion for a summary judgment and plaintiff has perfected an appeal to this court.

In support of his motion, defendant offered the depositions of the parties as well as the deposition of his wife, the plaintiff's daughter. They were the only eyewitnesses.

The facts are not in dispute. Plaintiff was visiting defendant's home for Sunday dinner. She arrived about 12:20 p. m., and asked to take a picture of her daughter and son-in-law while the sun was still on the east side of the house. The defendant and his wife stood on their front porch while the plaintiff snapped the picture. The porch is approximately on a level with the lawn and 30 feet from the north-south sidewalk, along the east lot line to which it is connected by a cement walk. When the picture was taken plaintiff was 20 feet away, at an angle. After she snapped the picture, she turned to take one from a further distance. She walked to the northeast corner of the lot another 8 to 10 feet away when her left foot entered a hole or depression and she fell. She extended her right arm forward, hit the sidewalk, and broke her arm. She did not see the hole at any time. The hole was actually on the north lot line 2 feet west of the sidewalk, was round, 6 inches deep, and approximately 6 to 8 inches across. It had been dug several months before by the Fremont city engineer when he located the north lot line of the property. There was a similar hole near the west end of the lot line. Shortly after the hole was dug the defendant removed a lath which had been placed in it by the city engineer, replaced it with an iron stake which was 4 to 5 inches below the level of the lawn, and kicked in some loose dirt from around the hole. He did not have any spare dirt around his yard, did not consider the hole to be dangerous, did nothing further, and had forgotten about it. The area was covered by grass. The lawn had been cut 3 days before the accident.

A preliminary question is the status of the plaintiff, who was a social guest. Is a social guest an invitee or a licensee? The law is well settled a social guest is a

mere licensee. In Roan v. Bruckner, 180 Neb. 399, 143 N. W. 2d 108, we said: " 'Many courts speak of those who receive invitations * * * as social guests. They are however but licensees.' "

The general rule is well stated in Restatement 2d, Torts, § 330, Comment h3, p. 175, as follows: "Some confusion has resulted from the fact that, although a social guest normally is invited, and even urged to come, he is not an 'invitee,' within the legal meaning of that term, as stated in § 332. He does not come as a member of the public upon premises held open to the public for that purpose, and he does not enter for a purpose directly or indirectly connected with business dealings with the possessor. The use of the premises is extended to him merely as a personal favor to him. The explanation usually given by the courts for the classification of social guests as licensees is that there is a common understanding that the guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety, in any manner in which the possessor does not prepare to take precautions for his own safety, or that of the members of his family."

In Presho v. J. M. McDonald Co., 181 Neb. 840, 151 N. W. 2d 451, we held: "The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care." No one could contend that the defendant herein could be charged with willful or wanton negligence. The question therefore arises as to whether on the facts herein he should be held liable because of the failure to warn the plaintiff of the presence of the hole.

The defendant did not consider the hole dangerous, and had forgotten about it. The question, however, is:

Was the survey hole so located that the defendant could have reasonably anticipated that it would be dangerous to the plaintiff or to any other social guest? It was not in any walk or path. It was not so located that it would be crossed as a means of ingress or egress. It was not out in an area of the yard which the defendant might expect social guests to use. It was located on the north lot line, in the northeast corner of the lot, 2 feet west of a paved sidewalk fronting the premises on the east. Was this a hidden peril of which the plaintiff should have been warned? On the facts herein we agree with the trial court that it was not.

The owner of property is not an insurer of the safety of his guests. He is not required to maintain his premises in such condition that an accident cannot possibly happen. Plaintiff, for her own convenience or purpose, and without any instruction or direction from the defendant, walked diagonally across defendant's lawn to the lot line and stepped into the hole. Does defendant have to warn guests of every defect on his property of which he at one time had knowledge, or only of those he knows to be dangerous which he would reasonably expect the guest to encounter? If we adopt the former, we will in effect eliminate the distinction between the duty to a licensee and an invitee.

This exact situation has not previously been covered in our cases, some of which might suggest we apply a rule of gross negligence in licensee cases except where there is a failure to warn of a hidden peril, and there only slight negligence may be involved. It is a maxim not to be disregarded that general expressions in opinions are to be taken in connection with the case in which such expressions were used as they relate to the facts in that particular case. When we speak of a hidden danger or peril known to the possessor of land, we refer to one that the possessor knows to be dangerous and which he might reasonably expect a guest to encounter. That is not the present situation. Even if we assume that defend-

ant should have known the hole to be dangerous, we do not feel it was one he should reasonably expect a guest to encounter.

There is some divergence in the cases over the country on this exact situation, but we are not ready to hold a host liable merely because he may know of a defect in his property. Many of the cases denying liability follow Comeau v. Comeau, 285 Mass. 578, 189 N. E. 588, 92 A. L. R. 1002, which involved a social guest injured as the result of the broken condition of the concrete in a passageway leading to his host's home. There the guest was denied recovery on the theory the host was chargeable at most with passive rather than active negligence in failing to correct the condition causing the injury.

A case much stronger than the present one is Scheibel v. Lipton, 156 Ohio St. 308, 102 N. E. 2d 453, which involved a depression 2 to 3 feet wide and 8 inches deep, located in defendant's lawn about 2 feet south of a private paved walk, which extended from the front entrance to defendant's driveway. There was no walk directly from the front entrance to the street. The depression had been caused by the removal of a bush several months previous to the accident. Plaintiff, who had never been to defendant's home before, drove there to pick up his wife shortly before midnight. He parked his car at the curb and rather than using the driveway and the walk, went directly across the lawn to the front entrance. On his attempt to return by the same route, he stepped into the hole and sustained personal injuries. The Ohio court, in holding that a verdict should have been directed for the defendant, said: "Was there a condition in this lawn, known to the hosts, which involved an unreasonable risk? There was a 'saucer shaped' depression but it was not located in the walk which was provided and which, we believe, the hosts could reasonably assume would be used. The depression was out in the lawn and we do not believe that there was any invitation by the hosts to leave the paved walk and go across

the lawn. That is what the plaintiff did. He reached the front door, then descended the steps to the paved walk, left the walk and proceeded across the lawn. Such conduct cannot be said to have been within the reasonable expectations of the hosts. It can hardly be said that the 'saucer shaped' depression was a trap or a condition involving unreasonable risk. It had been in the lawn for several months. The hosts and their children had lived with it. There was no evidence that anyone had ever been injured by it. It was not, in our judgment, such a condition as to require a warning by the hosts or the burning of flood lights to disclose it."

In Walker v. Williams, 215 Tenn. 195, 384 S. W. 2d 447, the property owner repaired a screen door in such a manner that it offered less resistance to being pushed open than before. This was known to the owner but not to the guest, who was the mother-in-law of the owner and a frequent visitor in the home. She pushed on the door with the usual force and fell down the steps. The Tennessee court held the repair did not constitute a trap, and sustained a directed verdict for defendants.

On the record herein, we cannot say that the defendant violated any duty owed to plaintiff as a licensee sufficient to create a jury question, and the motion for summary judgment was properly sustained. The judgment is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

WALTER RANKIN, APPELLANT, V. CITY NATIONAL BANK OF CRETE, A CORPORATION, APPELLEE.
153 N. W. 2d 869

Filed November 3, 1967. No. 36604.

1. **Trusts.** In order to create a trust, it must clearly appear that such was the intention of the parties.
2. ———. Ordinarily a trust is not created where the transac-

tion is as consistent with another relationship as with that of a trust.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Affirmed.

Perry, Perry, Sweet & Witthoff and Sherwood & Sherwood, for appellant.

John E. Mekota, for appellee.

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

BOSLAUGH, J.

This is an action to recover $9,000 alleged to be due the plaintiff, Walter Rankin, from the defendant, City National Bank of Crete. The trial court found generally for the defendant and dismissed the action. The plaintiff has appealed.

The plaintiff is a turkey grower who lives near Oxford, Nebraska. In September 1964, the plaintiff sold some 72,970 pounds of tom turkeys to Midwest DeLux Foods Co., a processor which operated a plant at Crete, Nebraska. According to the plaintiff, the tom turkeys were loaded on trucks and weighed at Oxford, Nebraska, on September 18 or 19, 1964, and then hauled to Crete, Nebraska. At Crete the turkeys were to be processed and inspected. The weight of any condemned turkeys was to be subtracted from the live weight, and Midwest was to pay the plaintiff $.215 per pound for the net weight. The plaintiff claims that the turkeys were to remain his property until he was paid.

The plaintiff was indebted to Supersweet Feeds for feed and supplies furnished to the plaintiff, and this indebtedness was secured by a mortgage to Supersweet upon the tom turkeys sold to Midwest.

The plaintiff and his wife had stopped in Crete, Nebraska, on September 5, 1964, and talked with Fred W. Kerst, the president of the defendant bank. The plaintiff had a $7,486 check that he had obtained from Mid-

west, payable to the plaintiff and Supersweet, for hen turkeys that the plaintiff had sold to Midwest the preceding week. Kerst told the plaintiff that the bank would cash the $7,486 check when it was properly endorsed. Kerst also told the plaintiff that Midwest was able to borrow upon warehouse receipts up to 75 percent of the value of turkeys which had been processed and placed in storage.

On September 18, 1964, the $7,486 check had not been presented so Kerst called the plaintiff and talked with his wife. There is a dispute in the evidence as to when this telephone conversation took place, but we find that it took place on September 18, 1964. Kerst again told Mrs. Rankin that the defendant bank would pay the $7,486 check when it was presented. The $7,486 check arrived at the bank on September 19, 1964, and was paid.

The plaintiff claims that the tom turkeys were sold by Midwest to Charles Keller, a broker in Chicago, Illinois. On October 17, 1964, Keller sent a check in the amount of $9,000, payable to the defendant, and the following letter to Fred W. Kerst, the president of defendant:

"Enclosed is our check in the amount of $9,000.00 which represents an advance on the sale of all turkeys stored for the account of Midwest De Lux Foods Co. in the Fulton Mkt. Cold Storage Co., Chicago, Illinois, and released to the order of Charles Keller.

"We are paying the entire Loan, Interest, and all Warehouse charges on Monday, October 19, to date, as sale is being consumated (consummated) on that date. After receipt of all above details and weights from warehouse we will send accounting in full with balance due of approximately $2.000.00 plus.

"Super Sweet Feed Co. has notified us that there are certain growers whose turkeys are involved in this deal and who are obligated to said Feed Co. We presume that Super Sweet Feed Co. have already contacted you. We are sending copy of this letter to Mr. Hanson who

represents Super Sweet Feeds in Des Moines, Iowa.

"Our reason for making this check payable to your bank is primarily to protect all parties interested, including ourselves.

"Please send us a bill for any services or expens (expense) involved.

Thanking you for your interest in this transaction I am,

"Respectfully,
/s/ Charles Keller
Charles Keller

CK:lk

"P. S. Anything to the contrary or for further information please phone writer collect.

"P. P. S. The 16,000 lbs. of Canner Type Turkeys stored in Crete Storage Corp., Crete, Neb. for the account of Midwest De Lux Food Co. is not involved in the above transaction."

On October 23, 1964, Keller again wrote to Kerst as follows:

"Enclosed is our check in the amount of $2,668.46 which is the Final Accounting for balance due on all turkeys received from Midwest De Lux Foods Company.

"As per our telephone conversation, I am confirming authority given you to deliver our check #30932 in the amount of $9,000.00, and also our enclosed check to Midwest De Lux Foods Company after proper endorsements gauranteeing (guaranteeing) clear title to merchandise, as outlined in said telephone conversation. Same endorsement can appear on both checks.

"Please advise if any bank charges for your services.

"Thanking you for your interest and many courtesies extended I am,

"Respectfully,
/s/ Charles Keller
Charles Keller

CK:lk"

Kerst obtained the endorsement requested by Keller

and deposited the $9,000 check enclosed with the letter of October 17, 1964, in the account of Midwest.

The plaintiff never received payment from Midwest for the tom turkeys delivered to Midwest on September 18 or 19, 1964. The plaintiff has paid Supersweet the amount due it which was secured by the mortgage upon the tom turkeys sold to Midwest.

The plaintiff's theory of the case is that the letter of October 17, 1964, from Keller to Kerst created a trust in favor of the plaintiff, and that the defendant became liable to the plaintiff when it deposited the check in the account of Midwest instead of disbursing the funds to the plaintiff. The plaintiff's theory of the case is dependent upon the interpretation to be placed upon the letter from Keller dated October 17, 1964.

In order to create a trust, it must clearly appear that such was the intention of the parties. Crancer v. Reichenbach, 130 Neb. 645, 266 N. W. 57. Ordinarily a trust is not created where the transaction is as consistent with another relationship as with that of a trust. O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N. W. 2d 507.

The letter upon which the plaintiff relies lacks the certainty that is required for the creation of a trust. We think that the letter from Keller to Kerst, dated October 17, 1964, was intended to constitute the defendant bank an agent for Keller for the purpose of making payment for turkeys purchased from Midwest. The letter evidences concern over the fact that some of the turkeys were mortgaged, and it was Keller's desire to protect himself against the mortgage lien in the transaction. This interpretation is confirmed by the letter of October 23, 1964, in which Keller directed the bank to deliver the $9,000 check to Midwest upon obtaining an endorsement guaranteeing clear title to the merchandise. It is clear from this letter that Keller considered the $9,000 check held by the defendant to be subject to the control and direction of Keller. The testimony of Kerst is to the same effect.

The determination that the Keller letter of October 17, 1964, did not create a trust makes it unnecessary to consider the plaintiff's further contention that he is subrogated to the rights of Supersweet. It is unnecessary to consider the other assignments of error.

The judgment of the district court is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. HOLIDAY, APPELLANT.
153 N. W. 2d 855

Filed November 3, 1967. No. 36611.

1. **Statutes: Criminal Law.** The right of accused to a hearing on revocation of probation has no constitutional basis and exists only by virtue of statute.
2. **Criminal Law.** Probation may not be revoked except upon a proper charge and probative evidence of violation.
3. ———. The accused is entitled to a fair and impartial hearing, but not to a formal trial or trial by jury, nor must the violation of probation be proved beyond a reasonable doubt.
4. ———. Under the Nebraska statutes, probation, or the continuance of probation, is not a matter of right vested in the convicted individual, but is subject to the sound discretion of the court in the imposition of conditions, duration of probation, and determination of a violation of such conditions. No formal trial is required nor is the assignment or presence of counsel required, although the probationer may appear by counsel if he so desires. It is sufficient if it appears that probationer was afforded a fair and impartial hearing, that reasonable grounds for revocation of probation existed, and that there was not an abuse of the discretionary powers vested in the court.
5. ———. If the court is to revoke probation for a violation occurring within the probationary period, procedure to that end must be instituted within the probationary period, or within a reasonable time thereafter.
6. **Indictments and Informations: Criminal Law.** It is sufficient if an information is filed within the probationary period or within a reasonable time thereafter and the fact that hearing on such information was delayed is not ordinarily material.

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

Richard M. Duxbury and David L. Crawford, for appellant.

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

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

NEWTON, J.

Defendant was convicted of obtaining property by false pretenses in the district court for Lancaster County, Nebraska. Without pronouncing sentence, the court thereupon suspended proceedings and placed the defendant upon probation for a period of 2 years upon certain conditions. Within 60 days thereafter, an information was filed in the district court charging defendant with a violation of the order of probation. Hearing upon the information was not had until after the expiration of the 2-year period of probation and after a period exceeding the maximum sentence for the crime charged had elapsed. Following a hearing on the information, the district court found that the defendant had been guilty of violating the order of probation, revoked probation, and pronounced sentence. Defendant informed the court that he was an indigent and requested the appointment of counsel to represent him at the hearing on the information charging a violation of the probationary conditions. The appointment of counsel was denied.

Defendant now contends that an indigent, upon request therefor, is entitled to appointment of counsel to represent him in a revocation of probation proceeding.

Section 29-2218, R. R. S. 1943, provides: "* * * the court may, in its discretion, enter an order, without pronouncing sentence, suspending further proceedings and placing the accused on probation * * *."

Section 29-2219, R. R. S. 1943, provides in part: "(3)

The court or a magistrate thereof may (a) modify the conditions and the period of probation * * *, (b) in case of the violation of such probationary conditions, upon motion and showing by affidavit of the county attorney, issue a warrant for the arrest of the probationer, (c) at any time discharge the probationer, and (d) in case of the violation of such probationary conditions, impose any penalty which it might have imposed before placing the defendant on probation; * * *."

It appears to be the majority rule that the right of accused to a hearing on revocation of probation has no constitutional basis and exists only by virtue of statute. See, Annotation, 29 A. L. R. 2d 1074; Gilmore v. United States, 129 F. 2d 199; Escoe v. Zerbst, 295 U. S. 490, 55 S. Ct. 818, 79 L. Ed. 1566; Brown v. Warden, U. S. Penitentiary, 351 F. 2d 564.

Appellant cites Sellers v. State, 105 Neb. 748, 181 N. W. 862, and later cases citing the Sellers case, as authority for the proposition that in a proceeding for the revocation of probation, defendant is entitled to a full and formal hearing, to the assistance of counsel, and, if indigent, to the appointment of counsel for him. The Sellers case does not so hold. It arose under a former statute which did not, as does our present statute, authorize initiation of such a proceeding by motion. It was then the rule that a verified information should be filed specifically stating the conduct constituting a violation of the probationary conditions. The court simply held that the accused had not been prejudiced by the use of a motion instead of an information to commence such proceeding when he had had timely notice of hearing, the assistance of counsel, and a fair and impartial trial. The court *did not hold* that these things were normally essential in a proceeding of this type.

The Nebraska statutes treat the entire matter of the granting and revocation of probation as a discretionary proposition. They do not even specifically require a hearing on revocation of probation, but leave the matter

of determining the advisability or necessity for such revocation entirely to the sound discretion of the court. It is, however, apparent that the court must, by some means, satisfy itself of the truth or falsity of the charge of violation of the probationary conditions and as a result, this court has ruled that probation may not be revoked except upon a proper charge and probative evidence of violation. See Moyer v. State, 144 Neb. 673, 14 N. W. 2d 220. The court has thus implemented the statute to insure against any possibility of an abuse of discretion. In Phoenix v. State, 162 Neb. 669, 77 N. W. 2d 237, it was stated that the accused is entitled to a fair and impartial hearing, but not to a formal trial or trial by jury, nor must the violation of probation be proved beyond a reasonable doubt.

It is apparent that Nebraska, like a majority of other jurisdictions, has recognized the distinction existing between a criminal prosecution and a hearing on revocation of probation.

" 'Prosecution' is the processing of a criminal judicial proceeding; it refers to the means by which the criminal law is to enforced, and may be defined as a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime." 22 C. J. S., Criminal Law, § 1 f, p. 8. Here guilt has been established by final conviction.

"Probation is not a matter of right, but a matter of grace and clemency granted to deserving accused whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted, the statutes ordinarily vesting discretion in the trial court whether or not to grant probation in a case coming within their operation. The power is not to be exercised as a matter of favor or grace, but only in accordance with the public interest." 24 C. J. S., Criminal Law, § 1571(2), p. 457.

"Except as statute may provide otherwise, no formal

charge or hearing is necessary before the court may revoke a suspension or probation and impose sentence." 24 C. J. S., Criminal Law, § 1572(4), p. 500. See, also, Phoenix v. State, *supra.*

Under the Nebraska statutes, probation, or the continuance of probation, is not a matter of right vested in the convicted individual, but is subject to the sound discretion of the court in the imposition of conditions, duration of probation, and determination of a violation of such conditions. No formal trial is required nor is the assignment or presence of counsel required, although the probationer may appear by counsel if he so desires. It is sufficient if it appears that probationer was afforded a fair and impartial hearing, that reasonable grounds for revocation of probation existed, and that there was not an abuse of the discretionary powers vested in the court. This is in accord with the prevailing federal practice. See, Burns v. United States, 287 U. S. 216, 53 S. Ct. 154, 77 L. Ed. 266; Welsh v. United States, 348 F. 2d 885.

Defendant also contends that revocation is not permissible after the period of probation has expired and after the maximum sentence for the crime charged has elapsed. In Phoenix v. State, *supra,* it was held that if the court is to revoke probation for a violation occurring within the probationary period, procedure to that end must be instituted within the probationary period, or within a reasonable time thereafter. In this case, such proceedings were instituted during the probationary period by the filing of an information. The fact that the hearing on such information was delayed is not material although it is explained by the defendant's own statements showing that he had been elsewhere imprisoned during much of the time that elapsed.

We find no merit in defendant's contentions and the judgment of the district court should be affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

HIGHWAY EQUIPMENT & SUPPLY CO., A CORPORATION, APPELLEE, V. DEWEY L. JONES ET AL., APPELLANTS.
153 N. W. 2d 859

Filed November 3, 1967. No. 36612.

1. **Trial: Appeal and Error.** In an appeal from a judgment in a law action tried by the court without a jury, this court will not disturb findings of fact based on conflicting evidence unless such findings of fact are clearly wrong. The credibility of witnesses and the weight to be given their testimony in such cases are for the trier of fact.
2. **Bills and Notes: Guaranty.** Where the guarantor of a promissory note is compelled to pay the principal's debt, the law raises an implied promise by the principal to reimburse the guarantor and upon payment of the debt by the guarantor, such guarantor has a cause of action against the debtor for the amount due under the guaranty.
3. **Usury.** The usurious character of a transaction is determined as of the date of its inception and, if it is usurious in its inception, no subsequent transaction will cure it.
4. ———. Where a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original transaction.
5. ———. In such a case, the taint of usury attaches to all consecutive obligations or securities growing out of the original usurious transaction, and none of the descendant obligations, however remote, are free from it if the descent can be traced.

Appeal from the district court for Cass County: WALTER H. SMITH, Judge. Affirmed in part, and in part reversed and remanded with directions.

John L. Mattox and R. J. Obbink, for appellants.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

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

CARTER, J.

This is an action on a promissory note in the principal sum of $3,798.37, brought by the plaintiff, Highway

Equipment & Supply Co., against the defendants, Dewey L. and Buck E. Jones. Defendants asserted usury as a defense and also that the original indebtedness was the result of misrepresentation and fraud in the sale of a power shovel by plaintiff to defendants. A jury was waived and, after trial, the district court found for the plaintiff for the amount due on the note, including interest and charges. The defendants have appealed.

On March 8, 1962, the defendants executed a note payable to the State Securities Company in the amount of $3,798.37. The note was endorsed by the plaintiff by which it guaranteed the payment of the note. The defendants defaulted on the note after making one payment of $422 thereon. On December 11, 1963, the State Securities Company demanded payment of the note by the plaintiff pursuant to its guaranty. Plaintiff paid the amount due on the note, including interest and charges, the same being $3,630.04. The State Securities Company then endorsed the note as follows: "Pay to the order of Highway Equipment & Supply Co. Without recourse." The note was delivered to the plaintiff and on January 16, 1964, plaintiff brought this action against the defendants for the $3,630.04 it was required to pay on its guaranty.

The history of the transaction resulting in the execution of the note in suit is substantially as follows: Dewey L. Jones and his son, Buck E. Jones, were engaged in the quarrying of rock for industrial purposes. They were in need of a power shovel in the quarrying of rock to eliminate excessive hand labor. Some time prior to April 12, 1961, the defendants were contacted by one Ratliff, a salesman for the plaintiff company, concerning their needs. He recommended a used Michigan C-16 power shovel which the plaintiff had at its place of business in Lincoln. On April 11, 1961, the two defendants inspected the power shovel, ran the motor, and generally examined the machine. On April 12, 1961, defendants entered into a contract to purchase the power shovel for the sum of $5,500 and a time sale differential

of $526. A downpayment of $500 was made, the balance to be paid in monthly installments. Under date of April 17, 1961, defendants were notified by letter by plaintiff that plaintiff's claim for $5,526 had been assigned to the First Continental National Bank & Trust Company of Lincoln. Under date of June 3, 1961, defendants were notified by letter by plaintiff that the contract was assigned to the State Securities Company and that future payments should be made to that company. The record shows that five monthly payments were made to the State Securities Company between July 3, 1961, and October 17, 1961. In the spring of 1962, defendants came to the office of the plaintiff to discuss the payment for the power shovel. On March 8, 1962, the defendants went to the State Securities Company and executed the note here sued on which was guaranteed by the plaintiff.

It is the contention of the defendants that after the purchase of the power shovel, the plaintiff delivered it to them at the place of their quarry operation. They assert that the power shovel never operated properly, that it was continually breaking down, and that it was misrepresented as to its condition. There is evidence that the machine was recently painted and that cracks in the frame and castings were filled with paint and unobservable. On the other hand, the machine was inspected by the defendants before its purchase. The defendants admit long experience in the use and operation of similar equipment. They admit the running of the motor during their inspection but state they were unable to test the boom and shovel and the mobility of the machine because it was surrounded by other heavy equipment that prevented more inspection and testing than was done. They did not demand the opportunity to further test the machine and elected to purchase it on the limited inspection made. The record discloses no evidence of misrepresentation or fraud. The only evidence that could possibly be construed as such is the

statement that the machine was suitable for defendants' needs which defendants concede if it was in proper repair. There is no evidence of warranty or representation of condition or performance. We necessarily conclude that defendants purchased the power shovel on the inspection they made. The findings of the trial court, hearing the case without a jury, were correct.

The defendants assert that the note in suit is usurious. It is the contention of defendants that the contract of sale between plaintiff and defendants provided for a sale price of $5,500 and a time sale differential of $526. This contract was first assigned to the State Securities Company and later, on March 8, 1962, the note in suit was executed payable to State Securities Company with a signed endorsement by the plaintiff guarantying its payment. It follows, defendants contend, that the substitution of the note with plaintiff's endorsement for the assignment of the contract is merely a change in the form of the obligation only and the defense of usury is as available to one as the other. Plaintiff contends, however, that the State Securities Company is licensed under the Industrial Loan and Investment Companies Act, Chapter 8, article 4, R. R. S. 1943, and that the time sale differential charged by the State Securities Company is authorized and permitted by that act. It follows, it is contended, that the time sale differential charged is valid even though the money was borrowed to pay a usurious debt.

The record shows that the State Securities Company is an industrial loan and investment company, holding a license as such. The terms of the note as regards the interest charged is within the maximum charge permitted by section 8-418, R. R. S. 1943, but is in excess of the 9 percent per annum allowable to a nonlicensee under the Industrial Loan and Investment Companies Act, section 8-418, R. R. S. 1943.

It is contended by the plaintiff that the note in suit and the proceeds thereof were used by the defendants

to extinguish a preexisting indebtedness to the plaintiff and the fact that the preexisting indebtedness was or may have been based on a usurious contract between plaintiff and defendants does not have the effect of tainting the note with usury. It is the general rule that a loan of money to a person who uses it to pay off a usurious obligation is not tainted with the usury of the usurious obligation. Steen v. Stretch, 50 Neb. 572, 70 N. W. 48. See, also, Nelson v. General Credit Corp., 166 Neb. 770, 90 N. W. 2d 799; Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19. These holdings are based on the theory that the subsequent lender in no manner became a party to the usurious loan and is innocent of any participation in the execution and payment of a usurious contract. This is made clear in the opinion in Steen v. Stretch, *supra*.

The evidence shows that the contract of sale of the power shovel between plaintiff and defendants contained a time sale differential of $526 which is alleged to be interest in excess of 9 percent per annum. Plaintiff is not a licensed industrial loan and investment company and is not permitted to charge the rates of interest set forth in section 8-418, R. R. S. 1943. Nor is plaintiff permitted to charge interest in excess of 9 percent per year. Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528; General Motors Acceptance Corp. v. Mackrill, 175 Neb. 631, 122 N. W. 2d 742. The contract showing on its face a time sale differential in excess of 9 percent per annum was assigned to the State Securities Company. The defendants discussed the payments due under this contract with the then president of the plaintiff corporation on March 8, 1962, and on the same day defendants went to the State Securities Company and executed the note in suit, the note being endorsed and guaranteed by the plaintiff corporation, the endorsement bearing no date. It is the contention of defendants that the note and endorsement were a part of the same transaction, that the note was not a bona fide, distinct, and separate loan or transaction,

and that its purpose was to exact a greater charge than was otherwise permitted. Under these circumstances, it is contended that the note, subsequently paid by the plaintiff under its liability as guarantor, is tainted with the usury of the contract of sale of the power shovel and is not avoided by the change in the form of the obligation so far as plaintiff is concerned.

The evidence shows that the contract of sale was usurious on its face. Plaintiff assigned the contract to State Securities Company as security for a loan. There is no evidence that the assignment was without recourse. Payments due under the sale contract became in default and, after a discussion with plaintiff, defendants agreed to continue making payments. They went from plaintiff's place of business to the State Securities Company on the same day and executed the note in suit to put the obligation in good standing. The original contract was not delivered to the defendants on the giving of the note, nor was a receipt given as payment of the contract price. Thereafter, plaintiff guaranteed the note by endorsement. There is no evidence of any payment of money by State Securities Company for the note. The evidence sustains a finding that the note was given as a renewal of the obligation of the sale contract which had been assigned as security for a loan. Under such circumstances, there was no payment of the obligation of the usurious contract within the rule announced in Steen v. Stretch, *supra,* and similar cases.

The assignment of the usurious contract to the State Securities Company and its subsequent renewal by that company does not operate to purge the renewal note of the usury in the sale contract.

The legal effect of an assignment of a usurious contract as security and its renewal in note form, guaranteed by the seller in the original contract of sale, is that the original seller will pay the obligation if the purchaser under the usurious contract and the maker of the note does not. This is not a transaction involving the ex-

tinguishing of the indebtedness by a bona fide, distinct, and separate loan so as to purge the original contract of usury.

In any event, under the law of this state, the usury in the original contract of sale follows into the renewal note. "When a void contract is renewed by the giving of a renewal or substituted contract, the invalidity follows into and becomes a part of the latter contract, making it subject to the defense of invalidity to the same extent as was the original obligation." Nelson v. General Credit Corp., *supra*. Plaintiff contends that this rule is not applicable for the reason that in that case the relation of principal and agent existed between the parties. But this is not a controlling factor.

In Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57, we quoted the following with approval: "We think, as stated in Cuneo v. Bornstein, 269 Mass. 232, 168 N. E. 810, that: 'The statute was passed as a protection to the borrower; it was intended to make the statute effective and to prevent its evasion by indorsing notes given for such loans to third parties. It would afford little protection to a borrower if the notes given contrary to the statute would be valid in the hands of a holder in due course. In our opinion the word "void" was used in its technical sense; the notes were void * * *.'"

In State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215, this court cited with approval the following from 55 Am. Jur., Usury, § 96, p. 390: "Since the usurious character of a transaction is determined as of the date of its inception, if a contract is usurious in its inception no subsequent transaction will cure it. Hence, where a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation. The taint attaches to all consecutive obligations or securities grow-

ing out of the original usurious transaction, and none of the descendant obligations, however remote, are free from it if the descent can be traced."

The trial court misapplied the law in holding, under the established facts, that the renewal of the amount due under the usurious contract of sale had the effect of purging the renewal note of the taint of usury.

The penalty for usury at the time the usurious contract of sale was entered into was the loss of principal, interest, and charges. In 1963, a special session of the Legislature changed the penalty for usury to a loss of all interest and charges, such change in penalties to apply retroactively to all transactions not reduced to final judgment on the effective date of the act. Legislative Bill No. 17, 1963 Special Session, now sections 45-137, 45-138, 45-154, 45-155, and 45-155.01, R. S. Supp., 1965. The constitutionality of this act was sustained in Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N. W. 2d 907.

We therefore hold that plaintiff is entitled to judgment for the principal amount of the original contract of sale less all payments made, including all interest and charges paid thereon. While the action is one at law and the findings of fact have the effect of a jury verdict, the error of the trial court is one of law and clearly wrong. The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff in accordance with the holdings of this opinion.

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

THE J. R. WATKINS COMPANY, A CORPORATION, APPELLANT, V. DELL K. WILEY ET AL., APPELLEES.
153 N. W. 2d 871

Filed November 3, 1967. No. 36617.

1. **Pleading.** A pleading includes an attached exhibit that is incorporated by reference.
2. **Pleading: Limitations of Actions.** The tolling effect of a pleading upon the statute of limitations is unchanged by an amended pleading that amplifies the prior statement.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Reversed and remanded.

Moyer & Moyer and Mapes & Mapes, for appellant.

McFadden, Kirby & Swoboda, for appellees.

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

SMITH, J.

The district court dismissed plaintiff's amended petition because the statute of limitations had run. The question on appeal is whether the original petition interrupted the operation of the statute.

The named defendants are Dell K. Wiley and six others. The original petition alleges an indebtedness of all defendants for the balance due plaintiff on account of merchandise sold by plaintiff to Dell alone. The sales were allegedly made in accordance with a written agreement of plaintiff and all defendants. An attached facsimile is incorporated into the petition by reference. It shows a contract between plaintiff and Dell for requirements and a contract of suretyship in which the other defendants agreed as follows:

"In consideration of the execution of the foregoing agreement by (plaintiff) * * * and the sale and delivery by it to (Dell) * * * of goods * * *, as therein provided, we, the undersigned sureties, * * * unconditionally promise * * * to pay for said goods * * * at the time and place, and in the manner in said agreement provided."

Dismissal of the amended petition which amplifies suretyship was correct, it is argued, because the original petition "completely fails to set forth any surety relationship." The argument disregards the exhibit. A pleading includes an attached exhibit that is incorporated by reference. Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686. The tolling effect of a pleading upon the statute of limitations is unchanged by an amended pleading that amplifies the prior statement. Muenchau v. Swarts, 170 Neb. 209, 102 N. W. 2d 129.

Plaintiff's amended petition preserves the identity of the cause of action alleged originally. The judgment of dismissal is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES ROY RANSOM, APPELLANT.
153 N. W. 2d 916

Filed November 3, 1967. No. 36622.

1. **Criminal Law: Evidence.** The requirements for the admission of a confession or statement secured from a defendant during in-custody interrogation are that he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.
2. **Criminal Law.** After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.
3. **Criminal Law: Evidence.** The rule is that where the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or

threats, the confession is voluntary and may be received in evidence.

4. ———: ———. The general rule is that in criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issues in the case.
5. **Indictments and Informations.** An allegation of ownership of a building is not necessary to allege the offense of burglary as long as the building is sufficiently identified for the purpose of showing that the property involved is not the property of the accused, and showing that the accused did not have the right to enter the premises.
6. **Criminal Law.** A sentence imposed within the limits of the statute will not be disturbed unless there appears to be an abuse of discretion.

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

John O. Anderson, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

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

WHITE, C. J.

Defendant, 21 years of age, was sentenced to 2 years imprisonment on a jury conviction for burglary and now appeals, asserting the improper admission of a confession in evidence, error in refusing to permit cross-examination of the sheriff, and failure of proof as to the location and ownership of the burglarized schoolhouse.

Defendant argues at length that the requirements of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, had not been met and therefore the confession is inadmissible. The requirements for the admission of a confession or statement secured from a defendant during in-custody interrogation are comprehensively stated in Miranda v. Arizona, *supra*, as follows: "* * * the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can

be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

The trial court held a hearing on the admissibility of the confession, outside the presence of the jury, and strictly in conformity with the constitutional requirements set out in Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205; State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. The record reveals, without dispute, that prior to the interrogation concerning the crime and constituting the confession, Freddie Marsh, the sheriff of Box Butte County, Nebraska, had a series of questions and statements written on a sheet of paper which were read to the defendant verbatim and to each one of which he separately answered as follows:

(1) "I would like to advise you that I am Freddie Marsh, Sheriff of Box Butte County, Nebraska. Do you understand that? Yes."

(2) "You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that? Yes."

(3) "Any thing that you may say can and will be used against you in Court. Do you understand that? Yes."

(4) "You have the right to consult with a lawyer and have the lawyer yith you during the questioning? Do you understand that? Yes."

(5) "If you cannot afford a lawyer the Court will

appoint one to represent you. Do you fully understand that? Yes."

(6) "Knowing your rights in this matter, are you willing to make a statement to me now? Yes."

(7) "Do you willingly waive and do without the services of an Attorney at this time? Yes."

After the oral interrogation, on December 6, 1966, the sheriff took the defendant's written statement or confession contained in exhibit 1. Preceding this written statement or confession in exhibit 1, the same questions and answers set out above were recited in writing and each one of the above answers was separately initialed by the defendant. Besides the above statements and questions and answers, the record establishes without dispute that the sheriff informed the defendant that he had a right to stop when he wanted to during the questioning and after it had started.

Defendant's contentions are refuted by the undisputed evidence in this record. A comparison of the requirements set out in Miranda and the questions and answers admittedly given by the defendant leaves no room for dispute that there was a voluntary and intelligent waiver of his privilege against self-incrimination. We shall not attempt to answer all of the facets of the defendant's argument in this respect. He argued that he was not aware of his right to counsel during the interrogation and that the warning did not advise him as to when he could get legal services. But warning No. 4 in the above questions and answers clearly told him that he had a right to consult a lawyer during the questioning and question No. 7 explicitly waived his right to do without the services of an attorney "at this time." The contention is made that he was not afforded an opportunity to exercise his right to remain silent throughout the interrogation. The defendant was advised that he had a right to remain silent and to not make *any* statements or answer *any* questions propounded to him; that he had a right to consult with a lawyer *during* the ques-

tioning; and the defendant himself testified that the sheriff told him that he could stop any time that he wanted to.

We come to the conclusion that the defendant knowingly and intelligently waived his rights and agreed to answer questions and make a statement within the meaning of Miranda.

Defendant also contends that the confession was not otherwise voluntary. The rule is that where the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence. State v. Erving, 180 Neb. 824, 146 N. W. 2d 216. The defendant was 21 years of age, had the equivalent (except for an English course) of a high school education, had previously been convicted of a felony and served time in the Nebraska Penal and Correctional Complex after a trial in which he was represented by an attorney, and his testimony in this case reveals a memory of and an intelligent understanding of all of the proceedings and incidents surrounding the taking of his statement and confession. The record reveals no improper inducements or threats, nor is there any question of any coercive physical or mental abuse presented. The defendant was returned, after waiving extradition, to Alliance, Nebraska, late in the afternoon of December 5, 1966, and his statement and confession were taken about 3 o'clock the next afternoon on December 6, 1966. There is no evidence of any improper treatment, inducements, threats, or physical or mental abuse of the defendant during this period of time. Defendant's contention in this respect seems to be that the fact that he was in jail, that law enforcement officers were present at the time he was interrogated, and that they were interrogating him about the commission of this specific burglary, was sufficient to make the statements and con-

fession involuntary. If this were true, no in-custody interrogation by law enforcement officers would be voluntary. There is no merit to this contention.

Defendant contends that his cross-examination of the sheriff was too restricted in that he was not allowed to show that statements made by other parties implicating him as an accomplice were obtained by trickery, cajolery, and other illegal procedures. We think this evidence is clearly too remote. It was outside the scope of direct examination and had nothing whatever to do with the procedure used to obtain the statements or confession in this case from this defendant and whether or not his confession and statements were voluntary. We further note that the evidence in this case establishes that there were no promises, coercion uses, or threats made to this defendant and the defendant himself so testified. This court long ago established the general rule that in criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issues in the case. Scherer v. State, 168 Neb. 127, 95 N. W. 2d 329; Burlingim v. State, 61 Neb. 276, 85 N. W. 76.

The prosecution here was for burglary of a schoolhouse close to Alliance, Nebraska. The evidence clearly shows that the schoolhouse was located in Box Butte County, Nebraska, and was located approximately 1½ miles east of Alliance on a state highway; and that there were no other schoolhouses within 3 or 4 miles. This was clearly sufficient to establish the venue of the offense. The fact that it was not established in the exact words recited in the information is not important. The location was established as being in Box Butte County and sufficiently definite to advise the defendant of the place and location of the alleged offense. See Gates v. State, 160 Neb. 722, 71 N. W. 2d 460. An allegation of ownership of a building is not necessary to allege the offense of burglary as long as the building is sufficiently identified for the purpose of showing that the property involved is

not the property of the accused, and showing that the accused did not have the right to enter the premises. Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677; Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

It is contended that the sentence of 2 years is excessive. The maximum sentence under the statute is for 10 years. The defendant had previously been convicted of a felony. Defendant having received only $3.10 of the $6.20 of the loot taken contends that his sentence should be reduced because the enterprise was not as lucrative as expected. This is a burglary case and we know of no rule which limits the seriousness of the offense in proportion to the amount of property taken. A sentence imposed within the limits of the statute will not be disturbed unless there appears to be an abuse of discretion. State v. Redden, 181 Neb. 423, 149 N. W. 2d 98; Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY C. FLEMING, APPELLANT.
154 N. W. 2d 65

Filed November 10, 1967. No. 36552.

Criminal Law: Evidence. An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jurors, should not be admitted.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded.

Donald R. Grant, for appellant.

Ralph D. Nelson and Fred J. Swihart, for appellee.

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

SPENCER, J.

Defendant was convicted by a jury of operating a motor vehicle while under the influence of alcoholic liquor. He has perfected an appeal to this court, setting out six assignments of error. We sustain the first assignment of error, and deem it unnecessary to consider the others.

The first assignment of error is as follows: "The Court erred in overruling Defendant's motion for mistrial made during testimony of Officer Jerry L. Thomas."

After the defendant's arrest, he was transported to a hospital for the purpose of drawing blood for a blood test. The objection is directed at an alleged statement made by the defendant to the police officers on the way to the hospital. The questioned testimony is as follows: "Q Did anything take place on the way to the hospital? A We talked to Mr. Fleming. Q Do you recall the conversation? A We asked him if he was drunk and if he felt he was drunk, and he stated yes, he felt he was out of it. He also stated, 'Do you fellows realize what you're going to cost me?' MR. GRANT: I'm sorry, I didn't hear that. A I beg your pardon. He also stated —he asked us if we realized what we were going to cost him. MR. GRANT: Oh. A And we asked him to explain, and he stated that he had been arrested prior for drunk driving."

Defendant immediately moved for a mistrial. This motion was overruled, and the jury was instructed to disregard the statement.

A previous arrest for drunken driving is clearly irrelevant evidence, and in this trial must be considered prejudicial. In McKay v. State, 90 Neb. 63, 132 N. W. 741, 39 L. R. A. N. S. 714, Ann. Cas. 1913B 1034, we said: "An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which

at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted."

As we view the record, the admonition to disregard the statement does not eliminate the prejudice. The poison has been injected; the damage has been done. The statement cannot be entirely removed from the minds of the jurors. The defendant was being tried for drunken driving. The statement of previous arrest for drunken driving and "what you're going to cost me" involved the same type of offense, and obviously suggests a repetitive offense as well as a conviction. The statement could have no legitimate bearing on the question of the guilt or innocence of the defendant in the present trial, yet it puts the defendant at a distinct disadvantage and weakens his presumption of innocence. The motion for a mistrial should have been sustained.

For the reasons given the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MAY PLUMBING COMPANY, A PARTNERSHIP, APPELLEE, V. WILLIAM SHAVER ET AL., APPELLEES, IMPLEADED WITH CATHERINE M. SHAVER, APPELLANT.
153 N. W. 2d 911

Filed November 10, 1967. No. 36568.

1. **Mechanics' Liens.** The object of the mechanic's lien law being to secure the claims of those who have made improvements within its terms, it should receive a liberal interpretation to give full effect to its provisions.
2. **Pleading.** A party who stands on a general demurrer to a pleading thereby admits the material facts averred, and must take all the consequences which result from such admission.
3. ———. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated.

4. **Mechanics' Liens.** The word "owner" as used in our mechanic's lien law is not limited in its meaning to an owner of the fee, but means the owner of any interest in the lands and includes every character of title, whether legal or equitable, fee simple, or leasehold.
5. **Actions: Pleading.** So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the matter of stating the plaintiff's case.

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

Luebs, Tracy & Huebner, for appellant.

Wagoner & Grimminger, for appellee May Plumbing Co.

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

MCCOWN, J.

Defendant Catherine M. Shaver has appealed from a judgment foreclosing a mechanic's lien against her. The lien was for labor and materials furnished by the plaintiff for a residence of defendant Catherine Shaver and her husband. The residence was located on a leasehold. The petition to foreclose the mechanic's lien specifically alleged that the labor and materials were ordered by and placed on the premises at the direction of the defendant William Shaver. The petition for foreclosure of the lien named both Shavers as defendants, as well as several other parties, including lessors and mortgagees, and summons were issued and served on all defendants within the statutory 2-year period. However, William Shaver was served by leaving the summons at his usual place of residence. A special appearance was filed for both Catherine Shaver and William Shaver 4 days after the filing of the petition for foreclosure. Some years later, the special appearance of William Shaver was sustained on a showing that he was

a nonresident of the State of Nebraska at the time of purported service of summons on him, but the special appearance of Catherine Shaver was overruled. Thereafter, Catherine Shaver filed a demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action against her. That demurrer was overruled in 1965. On the same day, plaintiff's motion to amend the petition by adding the name "Catherine M. Shaver" to that of her husband as a contracting party was overruled. An alias summons was served on William Shaver in 1966 when he was again a resident of Nebraska, but a special appearance was again sustained and the action was dismissed as to him. Trial was had in September 1966. Catherine Shaver elected to stand on her demurrer. Plaintiff introduced evidence and rested. The court overruled plaintiff's motion to amend the petition to conform to the proof and entered judgment against Catherine Shaver for $3,584.34 with interest, and foreclosed the mechanic's lien against her.

Catherine Shaver contends that the court did not have jurisdiction since it obtained no personal jurisdiction over William Shaver; that any mechanic's lien expired 2 years after the lien was filed for the same reason; that the petition does not state facts sufficient to constitute a cause of action against her; and also that the judgment is not supported by competent evidence of ownership in the defendant Catherine Shaver. Her basic premise is that the action here to foreclose a mechanic's lien should be treated as an action in personam against William Shaver alone because the affidavit filed with the original lien claim designated him as owner, but the petition for foreclosure did not in specific terms allege the exact nature and extent of any ownership of the property. We cannot agree.

The contentions, however, necessitate a rather full review of the facts. The unexplained delay of several years has complicated the matter unduly, but we do not attempt to place specific responsibility for it.

The affidavit attached to the initial mechanic's lien filed in 1955 designated William Shaver as being the debtor and identified William Shaver as an owner. We have held that if the owner of real estate is not named in the affidavit the omission is not fatal. Wakefield v. Latey, 39 Neb. 285, 57 N. W. 1002.

The petition for foreclosure identified the labor and materials as used in the construction of a dwelling house located on specifically described lots known as part of Kuester's Lake in Hall County. It also alleged that William Shaver ordered the material and labor; that they were furnished at the direction of the defendant William Shaver in the construction of the dwelling house; that they had not been paid for; and that no action at law was pending. The petition also alleged that on June 21, 1957, some 4½ months prior, a divorce decree was entered in a divorce proceeding between the defendants Catherine and William Shaver, and that they remained husband and wife pending the decree becoming final. The petition then alleged that the parties Catherine Shaver and William H. Shaver were joined as husband and wife and parties defendant.

In addition, the petition specifically alleged that William and Catherine Shaver had made, executed, and delivered a certain mortgage on the specific lots described and that both of them had also executed and delivered an assignment of money to the mortgagee in an amount equal to or greater than plaintiff's lien. The petition also specifically requested the court to order the money held by the mortgagee under the assignment paid to the clerk of the court. The petition also alleged that other defendants claimed certain interests in the premises and prayed judgment and foreclosure against all defendants and also for application of the funds held under the assignment.

The petition for foreclosure discloses that it was to foreclose a mechanic's lien on specifically described property in which the defendant Catherine Shaver had

some ownership interest; that Catherine Shaver and William Shaver were husband and wife; and that by execution of an assignment, she might be deemed to have acknowledged or acquiesced in the creation of the lien, or the agency of her husband.

The pleadings of other defendants and the evidence at the trial established that the property described was a leasehold interest; that William Shaver and Catherine Shaver, husband and wife, were lessees; and that the assignment executed by both Shavers was specifically with reference to the plaintiff's lien. There was also introduced in evidence a property settlement agreement in the divorce suit between William and Catherine Shaver which specifically provided: "The lease to the residential property at Kuester Lake shall be assigned to Catherine M. Shaver and she shall have the right to occupy the same as her home and she shall make all payments on the encumbrance against said property and title thereto shall vest in her with full right of disposition."

The property settlement agreement was approved and the divorce decree entered and was still effective on October 4, 1957, when the petition to foreclose the lien here was filed. The record does show that the Shavers appeared before the judge on December 14, 1957, at which time they stated to the court that they had effected a reconciliation and the divorce decree was set aside but was never journalized.

The evidence also reveals specifically that the plaintiff told both William and Catherine Shaver that he would take the particular job on a time and material basis; that they were living in the property at the time; that a Russ Larson was the contractor and that plaintiff received orders from both Shavers too; and that Catherine Shaver made inspections of the work with the plaintiff.

This court has held that a mechanic's lien may attach to a leasehold interest. Grantham v. Kearney Mu-

nicipal Airport Corp., 159 Neb. 70, 65 N. W. 2d 325. In that case this court also said: "The object of the mechanic's lien law being to secure the claims of those who have made improvements within its terms, it should receive a liberal interpretation to give full effect to its provisions."

Section 52-104, R. R. S. 1943, provides that: "* * * when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit is finally determined and satisfied."

Where a defendant elects to stand on his demurrer, every fact well pleaded must be taken as true. A party who stands on a general demurrer to a pleading thereby admits the material facts averred, and must take all the consequences which result from such admission. Panebianco v. City of Omaha, 151 Neb. 463, 37 N. W. 2d 731.

A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. Naeve v. Shea, 128 Neb. 374, 258 N. W. 666.

In Gilchrist v. Wright, 167 Neb. 767, 94 N. W. 2d 476, this court stated: "Whether or not a husband is the agent of the wife in contracting an indebtedness resulting in the filing of a mechanic's lien against her property is a question of fact to be determined as other like questions."

The word "owner" as used in our mechanic's lien law is not limited in its meaning to an owner of the fee, but means the owner of any interest in the lands and includes every character of title, whether legal or equitable, fee simple, or leasehold. Bohn Mfg. Co. v. Kountze, 30 Neb. 719, 46 N. W. 1123, 12 L. R. A. 33; 36 Am. Jur., Mechanics' Liens, § 84, p. 68.

Under the circumstances of this case, the defendant Catherine Shaver could reasonably be said to have acquiesced in the action of her husband in making an expressed or implied oral contract which would bind whatever interest she had in the property. The evidence

established, and the court properly found, that she not only acquiesced, but herself participated in the contract and the carrying out of the work on a residence occupied by her husband and herself.

The case of Muenchau v. Swarts, 170 Neb. 209, 102 N. W. 2d 129, permitted the plaintiff in a mechanic's lien foreclosure to amend his petition after the expiration of the 2-year period to show that his contract was with a subcontractor rather than the owner as originally alleged. This court held that the identity of the cause of action had been preserved; that it was to recover by way of a mechanic's lien foreclosure upon the same property for the same items; and did not state a separate and distinct cause of action. This court held that: "So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case." See, also, J. R. Watkins Co. v. Wiley, *ante* p. 242, 153 N. W. 2d 871.

A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous. Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257.

Under the circumstances here, the judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE LEE LIVINGSTON, APPELLANT.
153 N. W. 2d 925

Filed November 10, 1967. No. 36591.

1. **Criminal Law: Constitutional Law.** Pretrial interrogation of a criminal suspect by law enforcement officers, without in-

forming him of his right to legal counsel, of his right to remain silent, and of the fact that his statements may be used against him, does not constitute prejudicial error in the absence of proof that the statement or confession was used in evidence at the trial.

2. **Criminal Law.** A plea of guilty, if understandingly and voluntarily made, is conclusive. Such a plea, so made, eliminates all questions as to the admissibility of evidence.

3. ———. Where a defendant in a criminal case is shown to have less than average intelligence but is mentally competent under the law, his comparative intelligence is a matter that may be considered by the trial court in determining the sentence to be imposed.

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

Richard H. Hansen, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

CARTER, J.

This is a proceeding under the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965, by which the defendant, Jesse Lee Livingston, asserts that his conviction and sentence to 6 years' imprisonment for forcible rape were invalid and void on constitutional grounds. After an evidentiary hearing, the trial court found the evidence was insufficient to sustain any relief and relief was denied. Defendant has appealed.

The defendant was charged with forcibly raping one June I. Killian on March 28, 1965. Defendant entered his plea of guilty to the charge and, after a presentence investigation, the trial court imposed a sentence of imprisonment for a term of 6 years. On January 9, 1967, the defendant filed his amended motion to vacate the sentence and conviction on two primary grounds: First, that confessions were obtained from the defendant by a

member of the police department of the city of Lincoln without a showing that he fully understood the nature of his act; and, second, that a member of the police department was guilty of misconduct in failing to protect the constitutional rights of the defendant who was alleged to have a low mentality.

The evidence in the record shows that the defendant voluntarily called at the police station after he was informed by his brother that the police were looking for him. After so doing, he was interrogated by two police officers about a series of rape and molestation cases that had occurred in the community, including the rape case to which he subsequently entered a plea of guilty. The first officer who interrogated him and obtained his written confession testified that he informed the defendant that he had the right to an attorney, that he did not have to answer any questions unless he wished to do so, that anything he said could be used against him in court, and that any written statement he gave could be so used. The written statement given repeated these warnings. He was asked if he understood these warnings completely and he said he did. He was asked in the statements if he wished to give them after being so warned and he said he did. He read the statements, made one correction in his own handwriting, and signed the confessions. Before entering his plea of guilty, he was carefully interrogated in the presence of the trial court as to whether or not his rights had been adequately protected. On ascertaining that his rights had been properly safeguarded, he was asked if he desired to waive any and all rights remaining to him and he said he did, that he desired to plead guilty. Only after this meticulous investigation of the conduct of the case did the trial court accept his plea of guilty. It is made clear by the record that the defendant entered his guilty plea after having a full and complete explanation of his rights, constitutional and otherwise. It is the law of this state that a plea of guilty, if understandingly and

voluntarily entered, is conclusive. State v. Decker, 181 Neb. 859, 152 N. W. 2d 5.

The defendant complains of the manner in which written confessions were obtained from him. He claims that he was not advised that he was entitled to an attorney, that he was coerced by the mere fact of numerous interrogations, and that food was improperly kept from him. While these claims were not proven and the most that can be said is that the evidence thereon is in conflict, even if the complaints were established it can avail the defendant nothing. The confessions were not used as evidence against him. The defendant understandingly and voluntarily entered a plea of guilty. Under such circumstances, a plea of guilty eliminates all questions as to the admissibility of evidence. State v. Decker, *supra;* State v. Silvacarvalho, 180 Neb. 755, 145 N. W. 2d 447.

It is further contended that defendant was imposed upon because he appears to be of less than average intelligence. The evidence shows that he attended school only as far as the sixth or eighth grades. He was 22 years of age at the time of the post conviction hearing. He testified to his remorse for having committed the act. The record shows that he knew that he was violating the law when he committed the act from the very manner of its commission. He stated that he understood his rights and the procedure in which he was involved. The mere fact that the defendant had a less than average mentality does not have the effect of exculpating him from his criminal act. No contention is here advanced that defendant had such a low mentality that he did not know that he was committing a crime. The trial court withheld sentence until a presentence investigation was made. The trial court concluded that defendant was mentally competent, that he was capable of forming an unlawful intent, and that he committed the crime knowing full well of its unlawfulness. The trial court came to this conclusion after careful interrogation

of the defendant and investigation of his past. Where a defendant in a criminal case is shown to have less than average intelligence but is mentally competent under the law, his comparative intelligence is a matter that may be considered by the trial court in determining the sentence to be imposed. This court is not in position to question the judgment of the trial court in such a situation.

We conclude that defendant's plea of guilty was freely and voluntarily made, that his rights were fully protected, that he understood the seriousness of his crime and the penalty therefor, and that his case was fairly and impartially handled. We find no basis for post conviction relief and the judgment of the district court is affirmed.

AFFIRMED.

SMITH and McCOWN, JJ., dissenting.

Violations of right to counsel may have occurred at the hearings for arraignment and sentence. Defendant has defective intelligence, but the degree of impairment is not clear. We doubt that he waived his right intelligently. See, Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357; Moore v. Michigan, 355 U. S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167. The district court denied a post conviction motion for a psychological examination of defendant. The ruling was plain error for which the judgment should be reversed.

MULLER ENTERPRISES, INC. (EDWARD D. HEIMAN, SUBSTITUTED THEREFOR), APPELLANT, V. SAMUEL GERBER ADVERTISING AGENCY, INC., ET AL., APPELLEES.
153 N. W. 2d 920

Filed November 10, 1967. No. 36613.

1. **Contracts.** A contract for a commission for providing a scheme for insurance advertising and for finding an insurance company to participate, containing no terminable date, is enforc-

ible for such time as the advertising agency uses the scheme in its advertising with the found insurance company.

2. ———. Such a contract is executory insofar as the advertising agency is concerned and the duration of the obligation is commensurate with the agency's performance which it may terminate at any time by refusing the advertising.
3. ———. When a contract has been performed by one of the parties thereto, the law will not permit injustice to him by permitting the other party to retain the benefit without compensation unless compelled by some inexorable rule.
4. **Appeal and Error.** The finding on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different.

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

Foulks, Wall & Wintroub, for appellant.

Howard B. Westering, for appellees.

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

CARTER, J.

This is a suit for an accounting on a finder's contract and a scheme for advertising and selling insurance policies direct by mail. The trial court found that the balance due on the contract to the plaintiff is $1,559 and that nothing was due under the terms of a second contract. The plaintiff has appealed.

The evidence shows that Muller Enterprises, Inc., entered into a written contract with Samuel Gerber Advertising Agency, Inc., to find an insurance company who would pay the agency $10 for each closure obtained and $5 for each renewal, Muller to receive 10 percent of the amounts received by the Gerber agency as his commission for originating the scheme and finding an insurance company who would join in the plan. Muller produced the Service Life Insurance Company and, after negotiation, an advertising contract was en-

tered into between the insurance company and the advertising agency on the basis that the agency would receive $10 for each insurance closure and $5 for each renewal produced by the advertising program. The finder's contract was dated December 8, 1960, and commissions were paid to Muller to the extent of $1,653 for closures, but no renewals, for a period of about 14 months, when the Gerber agency refused to make further payments. Muller brought suit. It was determined by this court that the finder's contract dated December 8, 1960, was valid, that commissions were due on all closures but not on renewals, and that the amount due and owing to December 31, 1963, was $10,926.80, for which amount the judgment was affirmed. The evidence further shows that the Gerber agency and the insurance company entered into a new advertising contract on February 27, 1964, which the trial court found to be a bona fide and independent contract which would not be subject to the finder's contract between Muller and the Gerber agency. This finding by the trial court was held to be error as being without the issues, and was reversed. The evidence, holdings of the court, and the disposition made are set out in Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913.

In 1966, a second appeal in this case came to this court. Muller Enterprises, Inc. v. Gerber, 180 Neb. 318, 142 N. W. 2d 593. It is shown by the opinion of the court in that appeal that on April 30, 1965, Muller filed an application for a further hearing to determine the amount of the Gerber agency's liability arising subsequent to December 31, 1963, all payments due prior to such date having been included in the judgment affirmed on the first appeal. Muller caused garnishment process to issue thereafter against the Service Life Insurance Company and the First National Bank of Omaha. The Gerber agency moved to quash the garnishment process. The trial court sustained the motion to quash, holding that it had no jurisdiction to adjudicate this controversy with-

out considering the second contract between the Gerber agency and the Service Life Insurance Company. This holding was reversed by this court and the cause remanded for further proceedings with leave to file additional pleadings if necessary to terminate the controversy. On the filing of the mandate in the district court on the second appeal, a hearing was held and a judgment entered, from which judgment the present appeal is taken.

It is made clear in the record that the judgment for $10,926.80, affirmed on the first appeal, covered all amounts due from the Gerber agency to Muller to December 31, 1963. The evidence shows that since that date, the Gerber agency has received payment for 1,559 closures in the amount of $15,590, resulting from the Gerber agency's advertising under the contract of December 8, 1960. The parties agree that Muller is entitled to 10 percent of this amount, to wit: $1,559, and the judgment of the trial court for that amount is accordingly correct.

On February 27, 1964, the Gerber agency and Service Life entered into a second advertising contract which was made effective retroactively to January 1, 1964, the date that commissions to Muller were calculated, reduced to judgment, and affirmed on the first appeal. It is the contention of Muller that he is entitled to a commission of 10 percent of the amounts paid under the second contract by virtue of his agreement with Gerber bearing the date of December 8, 1960. The Gerber agency asserts that the second advertising contract was separate, independent, and unrelated to the contract of December 8, 1960. It appears that the nature of these two contracts should be briefly restated.

Muller was a promoter of ideas for merchandising insurance. He formulated a scheme of advertising an insurance policy in newspapers, magazines, and periodicals in which advertising a coupon which, when filled out and mailed to Service Life accompanied by $1, would insure

the applicant for 60 days for the risks described in the advertising. Muller approached the Gerber agency with this idea, agreed to find an insurance company who would accept the scheme and pay the Gerber agency $10 for each closure and $5 for each renewal. For this service, Muller was to receive from the Gerber agency 10 percent of the closure fees received by it from the insurance company. Muller provided the name of the Service Life Insurance Company. After some negotiations, the general plan was accepted and the contract of December 8, 1960, entered into. Under this contract, the Gerber agency contracted and paid for the advertising, and received the contracted amounts for each closure and renewal. That Muller is entitled to 10 percent of each $10 closure fee resulting from the contract of December 8, 1960, is no longer in dispute, the same having been finally determined by litigation.

The second advertising contract entered into by the Gerber agency and Service Life on February 27, 1964, provides in substance that the contract was to be effective on January 1, 1964, or at such earlier date as may be permitted by a final order of court in the pending litigation between Muller Enterprises and the Gerber agency. The Gerber agency is to create advertising copy and designs and select the advertising media in which it is to appear, all under the direction of Service Life. The insurance company agrees to pay all costs of preparation, printing, and distribution, plus 15 percent as compensation for the Gerber agency.

It is the contention of the Gerber agency that the contract of December 8, 1960, was an improvident one and that an increase in the contract price was necessary to produce a profit. The evidence shows that the net taxable income of the Gerber agency was small in 1961, 1962, and 1963, and the salary withdrawn by Samuel Gerber, the president of the Gerber agency, was very modest during those years. Officers of Service Life testified that the insurance company desired a new con-

tract on a more conventional manner of handling to get the control of advertising in the insurance company. A further reason was that changes in policy coverage were contemplated as well as the necessity to increase the premiums on the direct mail policies. The testimony of these officers is that the new contract of February 27, 1964, was motivated by business purposes and the hope that each party might gain by entering into it.

It is the contention of Muller that one of the purposes of the contract of February 27, 1964, if not the primary one, was to eliminate Muller and his commission contract for 10 percent of the earnings of the Gerber agency contract with Service Life.

No date or event was designated as fixing the termination date of the contract of December 8, 1960. On this point, we said on the first appeal: "The contract is executory on Gerber's part and it seems to us that it clearly contemplates that the duration of the obligation is commensurate with Gerber's performance, which he may terminate at any time." In that opinion, we further said: "Gerber's own wishes determine this. His only obligation is to pay Muller 10 percent for as long as he himself performs the contract. If it becomes unprofitable or onerous, all he has to do is quit. He reserved exclusive control of the time element himself when he drew the contract and he cannot be heard to complain of the fact that he himself did not terminate it. To hold otherwise would be to permit the receipt of continuous benefits under a contract without payment of the corresponding obligation." Under the contract of February 27, 1964, the Gerber agency continues to use the scheme of advertising the sale of insurance policies by mail with the insurance company found by Muller, even though the method of payment of the advertising has been changed and a different manner of determining the Gerber agency's commission is employed. The Gerber agency still reaps the benefit of Muller's scheme with the insurance company found by him. As long as this

situation exists, even though the form of the contract between the Gerber agency and Service Life be changed, the obligation of the Gerber agency to Muller to pay a 10 percent commission continues to exist. It is not contended that Muller has not fully performed his part of the contract, in fact, it was determined by the first appeal that Muller had fully performed. Muller is entitled to receive his 10 percent commission so long as Muller's scheme is used by the Gerber agency in its advertising business with Service Life. This was determined on the first appeal and was supported therein by the following authorities: Raymond v. White, 119 Mich. 438, 78 N. W. 469; Phelps v. Shawprint, Inc., 328 Mass. 352, 103 N. E. 2d 687; Silver v. Graves, 210 Mass. 26, 95 N. E. 948. In the last-cited case, the court said: "When a contract has been executed on one side, the law will not permit the injustice of the other party retaining the benefit without paying unless compelled by some inexorable rule." There is no difficulty arising in this case as to the uncertainty or indefiniteness of the contract. So long as the Gerber agency uses the benefits of its contract with Muller in its advertising for Service Life, Muller is entitled to the benefits of his contract with the Gerber agency bearing date of December 8, 1960. The issue was raised, authorities cited, and finally determined by the first appeal to this court. See Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913. It has become the law of the case. Gable v. Pathfinder Irr. Dist., 163 Neb. 349, 79 N. W. 2d 708.

The contention of the Gerber agency that its contract with Service Life under date of December 8, 1960, was unprofitable and that a new contract was required at a higher commission in order for it to handle the advertising business of Service Life cannot have the effect of terminating, nor authorize the termination, of the contract with Muller under date of December 8, 1960. Nor do the motivations of Service Life in desiring a more conventional contract giving it more control over the

kind and cost of advertising have the effect of terminating the contract between the Gerber agency and Muller. Until the Gerber agency's contract with Muller is terminated in the manner herein indicated, and in the manner stated in our opinion on the first appeal, the obligations to Muller in his contract are enforcible.

The evidence shows that Service Life has paid a minimum amount of $208,723 to the Gerber agency for advertising under the contract of February 27, 1964. The liability, however, is a continuing one until such time as the contract of December 8, 1960, with Muller is terminated. For these reasons, we reverse the judgment of the district court and remand the cause with directions to determine the amount due Muller on the basis of 10 percent of commissions earned by the Gerber agency, and enter judgment therefor, leaving for future determination any amounts that may become due subsequent to the entry of such directed judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

WALTER B. MORRISSEY, JR., APPELLEE, V. BONNIE JEAN MORRISSEY, APPELLANT.
154 N. W. 2d 66

Filed November 10, 1967. No. 36614.

Divorce: Adultery. Where a wife is found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor child as against the husband she has wronged who is without fault.

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

Kelly & Kelly, for appellant.

Luebs, Tracy & Huebner, for appellee.

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

SPENCER, J.

Plaintiff and appellee brought this action seeking an absolute divorce and the custody of an infant child. Defendant and appellant filed an answer and cross-petition, but made no serious effort to prove the allegations of her cross-petition. The trial court granted plaintiff an absolute divorce and awarded him the care and custody of the child. Defendant perfected an appeal to this court. The only issue presented by defendant on appeal is the question of the custody of the child.

The award of the divorce and custody is correct and must be sustained. On the record herein the defendant is an unfit person to have the care and custody of the minor child.

The record would indicate that the defendant is a disturbed individual, destructive to herself and to those close to her. The report of her treating psychiatrist states: "In the best interests of the child I think custody should not reside with the mother." This finding is sufficient to justify the decree entered by the trial court. However, in view of some subsequent proceedings, we make further findings herein.

Plaintiff's petition, without specifically mentioning the word adultery, alleges gross misconduct, extreme mental cruelty, and such specific conduct as to completely destroy the objects and purposes of matrimony. The evidence sustains a finding of adultery. Defendant admitted that she told her husband she was in love with her doctor employer. She admitted that they had met on several occasions, and she told plaintiff the doctor's wife had caught them at a motel in Hastings, but she denied any improper conduct at any time. On the occasion of the motel incident, defendant and the doctor registered at the motel in Hastings under the name of Mr. and Mrs. Bob Dudek. They had been trailed from Grand Island to that point by a detective employed by the doctor's wife. To accept the explanation offered by the defendant would strain the credulity of this court.

Although no overt act of adultery is shown, there are sufficient circumstances proved to justify a finding of adultery.

Where a wife is found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor child as against the husband she has wronged who is without fault. See, Wolpa v. Wolpa, *ante* p. 178, 153 N. W. 2d 746; Covault v. Covault, *ante* p. 119, 153 N. W. 2d 292.

The judgment awarding an absolute divorce and the care and custody of the minor child to the plaintiff is affirmed.

AFFIRMED.

FRED KOZLOSKI, APPELLEE, V. MODERN LITHO, INC., APPELLANT, IMPLEADED WITH FIREMAN'S FUND INSURANCE CO., INC., APPELLEE.

154 N. W. 2d 460

Filed November 24, 1967. No. 36575.

1. **Negligence.** Negligence is ordinarily defined as the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken.
2. **Negligence: Damages.** In order to impose liability for injury to an invitee, the dangerous condition must have been known to the owner or occupant or have existed for such time that it was his duty in the exercise of ordinary care to know of it.
3. **Negligence: Liability of Landlord.** A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonably prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises.
4. **Negligence.** There is negligence only where no care is exercised to avert a risk to others which reasonably should be apprehended.
5. ———. Generally speaking, no one is bound to guard against or take measures to avert that which, under the circumstances,

a reasonably prudent person would not anticipate as likely to happen.

6. ———. One may not be said to be negligent because he fails to make provision against an accident which he could not be reasonably expected to foresee.

7. ———. An owner has a legal duty to exercise ordinary care to keep his premises safe for an invitee, but he is not an insurer.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded.

Haney, Walsh & Walentine, for appellant.

Matthews, Kelley & Cannon, for appellee Kozloski.

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

NEWTON, J.

This is an action for personal injuries received on Thursday, January 16, 1964, when plaintiff slipped and fell on ice adjacent to the front door of the business establishment where he was employed. Plaintiff was an employee of Associates Discount Corporation which rented the west portion of a building owned by Modern Litho, Inc., hereinafter called defendant. Defendant occupied the remainder of the building, which faced south and abutted on the north line of the public street.

On trial to a jury, verdict was rendered and judgment entered for plaintiff. Defendant appeals.

Viewing the evidence from the standpoint most favorable to plaintiff, the following facts appear. The front doorway to the building was for the common use of all occupants and was recessed 10½ inches from the street line. The door threshold and the sidewalk sloped slightly to the south towards the street. Plaintiff entered through this door about 7:45 a.m. and about 9:00 a.m. started to leave the building by the same door to go to the bank. There was a patch of glaze ice on the sidewalk in front of the door which extended into and covered most of the threshold or recessed area. The remainder of the

walk was free of ice. Plaintiff slipped and fell on this ice and received serious injuries to an ankle. He had not noticed the ice on entering the building or as he was leaving, although two other fellow-employees had observed it on entering the building that morning. Evidence as to its visibility was conflicting. It had snowed on the preceding Saturday night, and early Sunday morning, but this snow had been shoveled off promptly, and there had not been any further precipitation. The weather had been consistently cold since the storm until Wednesday, the day before the accident, when there had been some thawing, and had turned cold again Wednesday night. Evidence relating to whether the tenant had any responsibility for the care of the walk and doorway entrance was conflicting, but the Associates Discount Corporation had refused to execute a lease to the west portion of the premises until a clause requiring it to assume such duties was stricken.

No ice on the walk or adjacent to the door was observed prior to the morning of the accident, nor had anyone ever observed ice in that area during the preceding year and a half. There was no explanation for the appearance of ice in that area on the present occasion, although there was testimony that there had been a very small quantity of snow against the wall of the building in one spot which was not otherwise located with reference to the doorway.

Defendant's employees generally entered the building by another door referred to as the "garage" door. It does not appear that any of them had entered the building on the morning in question by the door used by plaintiff, or had any knowledge of the icy condition encountered by plaintiff, and no complaint had been made by plaintiff's fellow-employees who were aware of the icy condition mentioned.

After both parties had rested, defendant moved the court to direct a verdict for defendant, or, in the alternative, to dismiss plaintiff's petition and enter judgment

for defendant. The overruling of this motion is assigned as error.

Is the evidence sufficient to establish negligence on the part of the defendant? Clearly, the icy condition to which plaintiff attributes his fall was known to exist for a period not exceeding an hour and one half prior to plaintiff's injury, and then only by plaintiff's fellow-employees. Defendant did not have knowledge of the condition complained of. Can it then be logically said that defendant *should* have known of such condition, or was reasonably charged under the existing circumstances with a duty to inspect the premises and ascertain such condition?

Subsequent to the Saturday night snowstorm, the walks had been cleared and there had not been any further precipitation. The building was occupied Monday, Tuesday, and Wednesday preceding the accident, and following the snowstorm, during which time no ice appeared. It is not contended that there was ice on the morning of the accident any place on the sidewalk except in front of the door. The threshold of the door and the sidewalk sloped and drained toward the street so that any snow which may have remained adjacent to the building, and to one side or the other of the door, would have, when melted, drained toward the street and not into the door threshold which was higher than the sidewalk.

Counsel for plaintiff states: "To the writer, in Nebraska in the wintertime, the possibility of ice should occur to one charged with its removal without anyone drawing a picture. Especially is this true when there had been snow on the ground for days, and on the preceding day there had been a thaw and a re-freeze. At least, it was within a jury's province to so conclude." If this be true, considering Nebraska's changeable winter weather, a landlord who failed to thoroughly inspect his premises for ice each and every winter morning, regardless of any unusual circumstances, in the event of

an accident, would always be open to a charge of negligence.

"Negligence" is ordinarily defined as the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken. Here it is charged that within the hour and one half elapsing immediately prior to the accident, an ordinarily prudent person would have inspected the premises, discovered, and remedied the icy condition in the doorway, yet the circumstances were not such as would put an ordinarily prudent person on notice of the possible existence of such a condition or apprise him of the necessity for an inspection of the premises. "In order to impose liability for injury to an invitee, the dangerous condition must have been known to the owner or occupant or have existed for such time that it was his duty in the exercise of ordinary care to know of it." 65 C. J. S., Negligence, § 63 (54), p. 770. See, also, Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565. A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonably prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises. See England v. Salamon (Mo. App.), 324 S. W. 2d 765. " 'There is negligence only where no care is exercised to avert a risk to others which reasonably should be apprehended.' " Schild v. Schild, 176 Neb. 282, 125 N. W. 2d 900. "Generally speaking, no one is bound to guard against or take measures to avert that which, under the circumstances, a reasonably prudent person would not anticipate as likely to happen." 38 Am. Jur., Negligence, § 24, p. 669. "One may not be said to be negligent because he fails to make provision against an accident which he could not be reasonably expected to foresee." Anderson v. Moser, 169

Neb. 134, 98 N. W. 2d 703, 81 A. L. R. 2d 956.

An owner has a legal duty to exercise ordinary care to keep his premises safe for an invitee, but he is not an insurer. Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868.

The basis of the present action is, in essence, that the defendant failed to inspect his premises, discover the ice in question, and either remedy the situation or give warning thereof. It hinges entirely on the duty to inspect. When does such a duty arise? It must be borne in mind that this is an action founded upon negligence and as such is subject to the general rules of negligence. In accordance with the rules above set forth, it must, therefore, appear that under the circumstances existing in this case, a person of ordinary prudence would have taken the precaution of making such inspection. We do not believe that the facts justify such a finding.

It conclusively appearing that defendant did not have actual notice of the icy condition of which plaintiff complains, and that no circumstances existed which would have put an ordinarily prudent person on notice of the possibility of the existence of such a condition so as to reasonably require an inspection of the premises, it is evident that there is not sufficient evidence to support plaintiff's allegations of negligence, and that defendant's motion for directed verdict or, in the alternative, for a dismissal of plantiff's petition should have been sustained.

For the reasons stated, the judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's cause of action.

REVERSED AND REMANDED.

WHITE, C. J., dissenting.

In my opinion the following facts, either directly or inferentially, justify the trial judge's submission and the jury finding of negligence in this case:

(1) Easterly, the defendant's foreman, was specifically charged with the duty of removing ice from the

premises, including the approaches. Easterly and the defendant's president both testified to this fact. He had specific tools and materials for the job and had used them before.

(2) Plaintiff, a business invitee, slipped and fell on thin glare ice covering the sloping threshold to the doorway on defendant's premises at 9 a.m. in the morning.

(3) Easterly, although present the day before, and at 7 a.m. on the morning of the accident, made no inspection nor took any action whatsoever with reference to the doorway or the threshold leading to it.

(4) For several days prior to the accident there were snow piles in the vicinity of the threshold and doorway (Bundy an employee of plaintiff had scooped the snow).

(5) A general 4-inch snow had covered the area and the buildings, roofs, ledges, and other accessible places 4 days before the accident. This condition remained the same under constant freezing conditions until 2 p.m. the preceding (Wednesday) afternoon. The temperature then went above freezing and melting conditions prevailed from 2 p.m. to 11 p.m. and then the temperature went below freezing until the time of the accident.

(6) No artificial conditions or independent agency created the thin glare ice. It resulted from a foreseeable sequence of natural weather conditions.

(7) The formation of thin glare ice on pavement or concrete from moisture condensation or melting during intermittent freezing temperatures in wintertime Nebraska is so well known and common that the jury could take judicial notice of it as a matter of common knowledge.

(8) Conditions foreseeably resulting in the formation of the ice at the entryway were known or should have been known by Easterly from 2 p.m. the preceding afternoon until the time of the accident.

(9) The main entranceway was heavily trafficked. (There were only two.)

(10) The glare ice was present at the entranceway

10 hours before the accident, and for 2 hours after the 7 a.m. opening of the building.

The above facts and reasonable inferences therefrom support a finding of negligence on Easterly's part. Specifically commanded to perform this duty, he was charged with knowledge of probable icy and dangerous conditions at the entranceway of this business building. He should have known about them when he arrived at 7 a.m. but in any event, his 2-hour lag in performing his duty was evidence of negligence, if not inexcusable. A dog may be permitted the first bite before the owner is responsible but a maintenance man should not be permitted a first accident before he is required to remove or warn of glare ice at a heavily trafficked business building entranceway.

The majority opinion is a lucid and persuasive argument on the merits. But it does not reach the question of whether the facts and circumstances are directly and inferentially sufficient to find that the defendant was charged with knowledge of probable icy conditions, and the consequent duty to inspect, remove, or warn.

BOSLAUGH and MCCOWN, JJ., concur in this dissent.

IN RE ESTATE OF JOHN A. SASS, DECEASED.
ESTHER SASS ET AL., APPELLANTS, V. WILLIAM F. SASS, ADMINISTRATOR OF THE ESTATE OF JOHN A. SASS, DECEASED, APPELLEE.
154 N. W. 2d 456

Filed November 24, 1967. No. 36578.

1. **Courts: Executors and Administrators.** The county court has and retains jurisdiction to review and discipline an administrator or executor for breach of fiduciary duty until there has been full compliance with all judgments, orders, and decrees and until the estate has been placed in the hands of the distributees.
2. ———: ———. Orders of a probate court adjusting or correcting accounts of an administrator, made while he was acting as

such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Reversed and remanded.

Fitzgerald, Brown, Leahy, McGill & Strom, William J. Brennan, Jr., and C. L. Robinson, for appellants.

Thomas Zacek, Ronald E. Reagan, and Boland, Mullin, Walsh & Cooney, for appellee.

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

WHITE, C. J.

The district court, on jurisdictional grounds, sustained a motion to dismiss an appeal from a county court order dismissing a petition to remove an administrator and surcharge him for specifically alleged breaches of his trust. We reverse the judgment and remand the cause.

Defendant administrator, brother of deceased, was appointed October 21, 1952, and filed his first inventory, in response to a demand by the widow, Esther, about 10 years later, in 1962. The assets are one-third of the corporate stock of Sass Brothers, Inc., of which defendant is president and owner of two-thirds of the stock, real estate in Springfield, Nebraska, on which a store owned by the corporation is located, and other inconsequential items. On May 6, 1965, the county court entered a decree entitled "Decree on Final Account," which provides in part as follows: "The Administrator is ordered to retain in his possession the assets of said estate until such time as payment is made of the court costs amounting to $124.85, to the Administrator for the payment of the premium on his official Administrator's Bond in the amount of $1,310.00, to Webb Warren as his Appraiser's fee of the assets of said estate in the amount of $100.00, to Alois Gramlich as his Appraiser's fee of the assets of said estate in the amount of $100.00, to William F. Sass

as Administrator's fee in the amount of $1,500.00, and to Thomas Zacek and George B. Boland as attorneys' fees in the amount of $3,500.00."

The estate assets (except for a Willys station wagon and household furniture) have not been distributed nor any of the court costs and expenses of administration paid. On September 2, 1965, the heirs and appellants herein filed a petition in county court for removal of the defendant administrator and asking for an accounting, alleging breach of his duty as trustee, a conflict of interest, negligence, waste, and interest for his failure to deliver assets to them. The county court, without a hearing on the merits, on December 3, 1965, dismissed the petition on jurisdictional grounds because a final order and decree had been entered on May 6, 1965. This appeal resulted.

The district court dismissed the appeal on motion, holding, in effect, that the decree of May 6, 1965, was a final order unappealed from, and that there was no jurisdiction in the county or district courts to hear the petition on its merits.

This decision and holding of the district court was in error for two reasons, either one of which is sufficient to establish jurisdiction in the county court and the district court on appeal:

(1) The county court has and retains jurisdiction to review and discipline an administrator or executor for breach of fiduciary duty until there has been full compliance with all judgments, orders, and decrees and until the estate has been placed in the hands of the distributees. In In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829, it is said: "This court recently held in In re Estate of Jurgensmeier, supra, 'In carrying out this statutory authorization, it is to be remembered that county courts are without general equity jurisdiction, but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction (and render to the parties inter-

ested in the assets of the estate such relief as their respective situations may justify). In re Estate of Frerichs, 120 Neb. 462, 233 N. W. 456; In re Estate of Wilson, 97 Neb. 780, 151 N. W. 316.' See, also, 34 C. J. S. 965, sec. 840; 33 C. J. S. 1011, sec. 79; Dame, Probate and Administration (3d ed.) 12-15, secs. 13, 14, and 15. *Such jurisdiction and authority of the county court continue until the executor or administrator has fully complied with all its judgments, orders, and decrees and the estate has been placed in the possession of those to whom it devolves.* In re Estate of Wilson, 98 Neb. 852, 154 N. W. 717; In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694; 3 Woerner, American Law of Administration (3d ed.) 1756, sec. 506, and 1963, sec. 572; Woerner, American Law of Administration (3d ed.) 513, sec. 150; Dame, Probate and Administration (3d ed.) 578, sec. 567." (Emphasis supplied.) This precise holding was recently affirmed in Eden v. Asa, 178 Neb. 651, 134 N. W. 2d 600.

(2) The decree of May 6, 1965, was not a final order. It requires retention of the assets of the estate, it does not settle the estate, it requires additional collections of money or the sale of property for the payment of administration expenses and an accounting therefor, it does not settle the accounts of the administrator for the entire period of administration, and it does not discharge the defendant administrator. The record reveals that up to the date of appeal the assets have been retained, there has been no report of collections or expenses since December 30, 1963, nor payment of the costs and expenses of administration or accounting therefor, nor any further action on the part of the administrator.

The argument is that, as notice had been given of final settlement of the estate, the order at such hearing must be final in all particulars. But the effect of the order must be determined from the order itself. In In re Estate of Wilson, 98 Neb. 852, 154 N. W. 717, paraphrasing the language of the above case as applicable here, the administrator was not discharged, he had to

transact further business and receive and pay out funds. The estate had no cash assets. And yet the decree expressly ordered the administrator to retain possession of the assets until the costs and expenses were paid. This leads the appellee administrator to take the flat position that it was the duty of the heirs to pay the costs and expenses and that the administrator had no power or duty to "raise such funds, and pay these expenses." This position, of course, is untenable as it was the duty of the administrator to pay such costs and expenses and to sell such assets as necessary to accomplish this purpose, under the authorization and approval of the county court. The record reveals that over 2 years have elapsed since the entry of the order and nothing has been done, the assets remain undistributed, no costs or expenses have been paid, rents have been collected, and the administrator has not been discharged or filed any further report. The order of May 6, 1965, although purporting to be final, was in no sense a final decree or order as to the accounts of the administrator. Orders of a probate court adjusting or correcting accounts of an administrator, made while he was acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge. In re Estate of Wilson, *supra;* In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694.

The district court was in error in sustaining the motion to dismiss. Without dispute, the petition filed herein in the county court and the district court stated a cause of action which, if proved, would warrant appropriate relief for breach of the administrator's fiduciary duties during the whole (over 14 years) period of his administration. The judgment of dismissal is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT EUGENE WHITED, APPELLANT.
154 N. W. 2d 508

Filed November 24, 1967. No. 36593.

1. **Criminal Law: Trial.** This court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Evidence: Appeal and Error.** Unless timely objection is made, an objection to incompetent evidence is presumed to have been waived and may not be asserted for the first time on appeal.
3. **Criminal Law: Evidence.** Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not material and, on objection or motion, should be excluded or stricken, if they are not otherwise relevant to the issues.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Joseph A. Troia, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

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

CARTER, J.

The defendant was convicted in the district court for Douglas County of the crime of burglary. Defendant was sentenced and an appeal was thereafter perfected to this court.

The evidence shows that one Zielinski was serving as a night watchman for the Rosen-Novak Company at 2034 Farnam Street, Omaha, Nebraska, during the night of September 14, 1966. While he was sitting in an automobile in a showroom adjoining the office, Zielinski heard a disturbance. He then saw a man enter the office with a prying bar and begin to enter the cash register. Zielinski took a description of the man and called the

police. Two cruiser police cars approached the Rosen-Novak place of business, one from the front and the other from the rear. Patrolman Bloemer arrived at the front of the building and was told by Zielinski that the burglar was wearing a gray sweater, dark trousers, with no hat or cap. He was further described as light-complected and a kind of a "baldy fellow." Bloemer repeated the description to Patrolman Sgroi who had approached the rear of the place of business. Sgroi said he had seen such an individual so dressed as he came into the alley. He left in his police car and returned with the defendant whom Zielinski promptly identified as the burglar he had seen entering the cash register. That defendant fit the description given by Zielinski is quite evident. A pry bar was found a short distance from the rear door of the burglarized building which, when compared with the door, appeared to be the one used or similar to the one used in gaining entry. The pry bar was found along the route taken by the defendant when he was first observed by Patrolman Sgroi. The defendant denied that he entered the Rosen-Novak building. He testified that he was in the Sportsman's Bar from 7 p.m. to 11:30 p.m., at which latter time he left by the rear door. The Sportsman's Bar was three-fourths of a block east of the Rosen-Novak building, the rear doors of each leading to the same alley. Defendant testified that he was requested to leave the Sportsman's Bar. The bartender remembered the incident but had no recollection of the date on which it occurred. Defendant testified that he had been convicted of five previous felonies. The evidence was conflicting and the determination of the facts was for the jury.

"This court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Bundy, 181 Neb. 160, 147 N. W. 2d 500.

Defendant urges that his privilege against self-incrimination was jeopardized to his prejudice. The evidence shows that a police officer testified that he was present at the interrogation of the defendant and that the latter was informed that he did not have to say anything, that if he did talk it could be used against him later on, and that he was entitled to a lawyer and at public expense if he was indigent. The defendant did not confess or make a statement. It was contended that the testimony that constitutional warnings were given under such circumstances leaves an inference of guilt because the defendant had remained silent.

No objection was made to this evidence at any time during the trial. It is fundamental that unless timely objection be made, an objection to incompetent evidence is presumed to have been waived and may not be asserted for the first time on appeal. Combs v. Owens Motor Co., 121 Neb. 5, 235 N. W. 682; State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81.

A defendant's privilege against self-incrimination is a valuable right. It is contended that the evidence of the giving of the constitutional warnings necessary to the use of statements and confessions is evidence, when no statements or confessions were made, that constitute a violation of that right by placing the defendant in a position where he must testify to avoid any adverse inference by his failure to do so. The effect of admitting the constitutional warnings under the circumstances shown might cause the jury to infer guilt from the silence of the defendant or from his failure to give a reason for his silence although none was requested. On the other hand, the constitutional warnings are required as foundational proof for the admission of voluntary statements and confessions of a defendant. Where no statements or confessions are offered or received in evidence, the foundational requirements for such are not material and should be excluded or stricken from the evidence. Under some circumstances, such evidence may

be prejudicial to the defendant by developing an inference of guilt by the mere silence of the defendant. While it is not necessary to determine the issue here in view of the defendant's failure to object, the foundational requirements for the use of voluntary statements and confessions are not material where no such statement or confession is offered or received and, on objection or motion, they should be excluded or stricken if they are not otherwise relevant.

We find no prejudicial error in the record and the judgment of the district court is affirmed.

AFFIRMED.

STATE EX REL. AGRICULTURAL EXTENSION SERVICE ET AL., APPELLANTS, V. HARM J. MILLER ET AL., APPELLEES.
154 N. W. 2d 469

Filed November 24, 1967. No. 36628.

1. **Administrative Law: Counties.** Under section 2-1604, R. R. S. 1943, it is a ministerial and mandatory duty of the county board to set aside in the general fund an amount equal to the county extension budget submitted by the Agricultural Extension Service of said county.
2. ———: ———. Under section 2-1606, R. R. S. 1943, the county Agricultural Extension Service has the exclusive power to prepare and adopt its budget provided that it shall be in an amount not to exceed $7,500 or an amount equal to a four-tenths mill levy on the dollar upon the assessed value of all the taxable property in such county.
3. **Counties: Statutes.** Counties and county boards can only exercise such powers as are expressly granted by statute.
4. **Statutes.** Where general and special provisions of a statute are in conflict, the general law yields to the special.
5. **Mandamus.** A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.
6. **Mandamus: Statutes.** Where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and

the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action at law.

Appeal from the district court for Gage County: JOSEPH ACH, Judge. Reversed and remanded.

Leslie H. Noble, for appellants.

Arnold E. Wullschleger, for appellees.

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

WHITE, C. J.

This is a mandamus action. The county board of Gage County refused to approve and to set aside in the general fund of the county a budget of $11,100 which had been adopted by the board of directors of the Agricultural Extension Service of Gage County, Nebraska, and submitted to the county board. The district court refused to compel the appropriation and the Agricultural Extension Service appeals. We reverse the judgment and remand the cause.

Section 2-1604, R. R. S. 1943, provides for a county election on the question: "Shall an appropriation be made annually from the general fund of the county for the support of agricultural extension work?" In 1940, pursuant to this section and the referendum statutes of the State of Nebraska, the electors of Gage County approved such appropriation and agricultural extension work, and the county board has made an appropriation and approved such budget submitted by the Agricultural Extension Service in all subsequent years up to the fiscal year of 1966-1967 which budget is in issue here. The county board reduced the Agricultural Extension Service budget, prepared by its board of directors, by reducing salaries of three extension agents, mileage expenses, and the salary of an office assistant.

Section 2-1604, R. R. S. 1943, after providing for a county election authorizing an appropriation for agri-

cultural extension service, provides as follows: "If a majority of the votes cast on this question are in favor of the appropriation, the county board *shall annually set aside in the general fund of the county an amount equal to the county extension budget;* Provided, that such sum shall not exceed seventy-five hundred dollars, or an amount equal to a four-tenths mill levy on the dollar upon the assessed value of all the taxable property in such county, except intangible property, whichever is the greater. As claims are approved by the board of directors and filed with the county clerk, the county board shall order warrants to be drawn upon the general fund of the county in payment of such claims." (Emphasis supplied.) No argument is made, nor could one be made, that the Legislature has not manifested its intent in clear, unambiguous, and mandatory language. By its terms the county board is required to set aside in the general fund of the county an amount equal to the county extension budget. No authority is granted to reduce, alter, or amend the county extension budget. It is elementary that a county board has only such powers as the Legislature grants, and its power herein is therefore restricted, as it is authorized and required only to set aside in the general fund the amount of the county extension budget. By the express terms of section 2-1606, R. R. S. 1943, the county extension budget is that budget which is prepared and submitted by the president and secretary of the extension service to the county. This is different than the method provided by law for the preparation of the general county budget, which is prepared by the county clerk or special board appointed by the county board. (See, §§ 23-901 to 23-920, R. R. S. 1943.) Although further analysis might suggest doubt, we point out that the clause "shall annually set aside in the general fund of the county" would be redundant and superfluous if we were to hold that the clause "an amount equal to the county extension budget" meant a budget prepared, adopted, or approved

by the county board because the county board is required to set aside in the general fund the amounts of the general county budget. We feel that this statute was carefully drawn to avoid the contention that the county board had any control over the county extension budget. Here the electorate itself directly authorizes a special board to adopt a county extension budget for agricultural services and simply provides for its integration into the county general fund and its tax consequences. The county board, of course, has a general duty and power to coordinate and to reduce, alter, or amend the county budget as submitted by the county clerk or a board appointed by it for that purpose in order to keep county expenses within the statutory mill limitation. Here, we point out, the Legislature provided for the electorate to directly approve a separate entity to fix the amount of money to be spent on county agricultural extension services and limit the levy to four-tenths of a mill. It was the obvious intent to place the limitation on the mill levy in the law itself and not vest it in the county board under its general budget-making powers. The statutory scheme is abundantly clear and the county board's duties are clearly mandatory and ministerial in nature and require the exercise of no discretion or quasi judicial action. This is further manifested by the requirement of mandatory approval of all claims approved by the board of directors of the Agricultural Extension Service on file with the county clerk.

The county board contends, although without further argument, that its power to reduce and alter the county extension service budget flows from section 23-908, R. R. S. 1943, which provides: "The county board shall consider the budget document, as submitted to it by the budget-making authority, of the county, and may, in its discretion, revise, alter, increase or decrease the items contained in the budget, * * *." This section of the statute clearly refers to the budget-making authority of the county consisting of either the county clerk or a

board designated by the county board. It has no application to a budget prepared by the county extension service under express authorization of the specific statute involved here, section 2-1606, R. R. S. 1943. As we have pointed out this conclusion is also reached from the analysis of the clear meaning and intent of the statute, section 2-1604, R. R. S. 1943, providing for the appropriation to the county extension service. There is no inconsistency between these two sections of the statute. Were that true, we would come to the same conclusion because the special statute setting up the Agricultural Extension Service would control over the general budget law as provided in section 23-908, R. R. S. 1943. Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860; State ex rel. Strom v. Marsh, 162 Neb. 593, 77 N. W. 2d 163.

The act required by the county board is clearly ministerial in nature and it is mandatory that it performs it. The word "shall" needs no further exploration. A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. § 25-2156, R. R. S. 1943. It is also apparent that no adequate remedy of law exists in this situation. The Agricultural Extension Service, in order to properly administer its functions, has the right and duty to compel the appropriation and the honoring of its approved claims. It is not suggested that the Agricultural Extension Service, as distinguished from the individual claimants, has any adequate or enforceable remedy of law to compel the performance of these duties other than in mandamus. Any remedy of law, by appeal or otherwise, of course, would prevent the exercise of the functions of the Agricultural Extension Service and render it impotent for an undetermined period of time. Where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and

dilatory action at law. State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341; State ex rel. Butler County Agricultural Society v. Coufal, 1 Neb. (Unoff.) 128, 95 N. W. 362.

The district court was in error in refusing to grant the writ of mandamus. The judgment of the district court is reversed and the cause remanded with directions to issue the writ.

REVERSED AND REMANDED.

HAROLD EUGENE HUFFMAN, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

154 N. W. 2d 459

Filed November 24, 1967. No. 36636.

Criminal Law. A person who has been twice convicted of crime, sentenced and committed to prison, is a habitual criminal even though the sentences imposed may have been served during a continuous period of imprisonment. § 29-2221, R. R. S. 1943.

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

Harold Eugene Huffman pro se.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of breaking and entering with intent to steal and sentenced to 15 years' imprisonment. The judgment was affirmed by this court upon appeal. State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321. The defendant now asks to be discharged from custody upon the ground that his sentence in 1966 as a habitual criminal was unauthorized.

In 1958, the defendant was convicted of breaking and entering with intent to steal, robbery, and escape from custody. He was sentenced to imprisonment for 1 year for breaking and entering, 3 years' imprisonment for robbery, and imprisonment for 1 year for escape from custody. The sentences for breaking and entering and escape from custody were concurrent. The sentence for robbery was nonconcurrent and commenced at the termination of the 1-year sentence for breaking and entering.

The defendant contends that the 1958 convictions will not support his sentence as a habitual criminal because his imprisonment was continuous and, in effect, amounted to one 4-year sentence. His contention cannot be sustained.

The statute provides that "Whoever has been twice convicted of crime, sentenced and committed to prison" shall be deemed a habitual criminal. § 29-2221, R. R. S. 1943. The defendant was thrice convicted of crime, sentenced and committed to prison. It is of no consequence that the defendant was imprisoned continuously from the start of the 1-year sentences until the end of the 3-year sentence. Commonwealth v. Richardson, 175 Mass. 202, 55 N. E. 988.

The petition failed to state grounds for relief in habeas corpus and the writ was properly denied. The judgment of the district court is affirmed.

AFFIRMED.

EMMA (JANICEK) RADIL, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
154 N. W. 2d 466

Filed November 24, 1967. No. 36642.

1. **Eminent Domain: Appeal and Error.** Section 76-715.01, R. R. S. 1943, provides that in an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within

30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943.

2. **Appeal and Error: Statutes.** 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.

3. **Statutes: Constitutional Law.** Before a law can be determined to be unconstitutional, the express provision of the Constitution which the law contravenes must be pointed out.

Appeal from the district court for Garfield County: WILLIAM F. MANASIL, Judge. Affirmed.

Vogeltanz & Kubitschek, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and Ted L. Schafer, for appellee.

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

CARTER, J.

This is an appeal from an order of the district court for Garfield County dismissing condemnee Radil's appeal from the award of the appraisers in a condemnation proceeding.

The manner of perfecting an appeal to the district court from an award by appraisers in a condemnation proceeding is fixed by section 76-715.01, R. R. S. 1943. This provision provides: "The party appealing from the award for assessment of damages by the appraisers in any eminent domain action shall, within thirty days of the filing of the award, file a notice of appeal with the county judge, specifying the parties taking the appeal and the award thereof appealed from, and shall serve a copy of the same upon all parties bound by the award or upon their attorneys of record. Service may be made by mail, and proof of such service shall be made by an affidavit of the appellant filed with the county judge

within five days after the filing of the notice stating that such notice of appeal was duly mailed, or after diligent search that the addresses of such persons or their attorneys of record are unknown." The foregoing statute was enacted in its present form in Laws 1965, chapter 454, section 1, page 1447, effective November 18, 1965.

The record shows that the return of the board of appraisers was filed with the county judge on June 23, 1966. The notice of appeal and undertaking were filed by the condemnee on July 11, 1966. On August 3, 1966, proof of service of a copy of the notice of appeal was filed showing that on August 1, 1966, a copy of the notice of appeal was mailed to the Department of Roads of the State of Nebraska. It is not disputed that a copy of the notice of appeal was not served on the Department of Roads within 30 days after the return of the board of appraisers, but was in fact served 8 days after the date required by section 76-715.01, R. R. S. 1943.

Section 76-715.01, R. R. S. 1943, provides that an appeal from the award of appraisers may be taken by filing a notice of appeal specifying the parties taking the appeal and the award appealed from, and serving a copy of the notice of appeal on all parties bound by the award within 30 days after the filing of the return of the appraisers. This is in addition to the undertaking required by section 76-716, R. R. S. 1943.

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. Brown v. City of Omaha, 179 Neb. 224, 137 N. W. 2d 814. It is fundamental that an appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by statute. Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120. In the instant case, the condemnee failed to serve a copy of the notice of appeal within the time fixed by section 76-715.01, R. R. S. 1943,

a mandatory step to invoke the jurisdiction of the district court on appeal. The appeal to the district court was not taken in the manner provided by the statute and, consequently, the district court was without jurisdiction to hear the merits of the purported appeal.

The condemnee contends that the amendment requiring that a copy of the notice of appeal be served on all parties bound by the award within 30 days after the filing of the appraisers' return is arbitrary, unreasonable, and capricious, and therefore unconstitutional. The condemnee does not point out any provision of the Constitution that the amendment contravenes. In Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397, we said: "'* * * before a law can be determined unconstitutional, the express provision of our constitution which the law contravenes must be pointed out.' State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804."

The former statute required the timely filing of a notice of appeal and the filing of an undertaking to lodge jurisdiction in the district court. The 1965 amendment added a further provision, a requirement that a copy of the notice of appeal be served on all parties bound by the award. These provisions are mandatory and must be complied with in perfecting an appeal to the district court. The language is clear and definite, and not arbitrary, unreasonable, and capricious within any constitutional provision or rule of law with which we are familiar. The failure to comply with the mandatory provision of the statute to serve a copy of the notice of appeal on the Department of Roads within 30 days after the filing of the appraisers' award is fatal to the acquiring of jurisdiction by the district court to hear the appeal.

The trial court came to this conclusion and its conclusion was correct. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH F. CARREAU, APPELLANT.

154 N. W. 2d 215

Filed November 24, 1967. No. 36644.

1. **Post Conviction.** Where from the files and records in a post conviction action it is clear that the motion raises no issue as to the defendant's constitutional rights, the court may properly deny an evidentiary hearing.
2. **Post Conviction Evidentiary Hearing.** The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may properly be denied.

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

Mark A. Buchholz, for appellant.

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

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

SPENCER, J.

This is an appeal from the denial of post conviction relief. Essentially, the appeal attacks the denial of a post conviction evidentiary hearing. The defendant predicates his claim for relief on the following allegations of his pleading: "I. Defendant contends that he is not Guilty as charged in this matter. * * * II. Defendant contends that duress was used by the State to force the defendant to enter the plea of Guilty falsely by the coercive method of charging defendant with two separate charges of uttering a forged instrument and charged on each count the defendant with being an habitual criminal thus threatening and intiminating (sic) the defendant into falsely entering a plea of Guilty."

Defendant is obviously suggesting preliminary plea

bargaining. There is nothing in this claim which would vitiate defendant's plea. The present posture of our law recognizes the propriety of plea discussions and agreements, if properly conducted. The tentative draft of the American Bar Association's project on minimum standards for criminal justice, "Standards Relating to Pleas of Guilty," provides: "3.1 Propriety of plea discussions and plea agreements. (a) In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel." This has been the law in this jurisdiction.

Competent counsel was appointed for defendant before his arraignment in county court, and defendant was represented by counsel at all essential stages of his subsequent prosecution. The record before us suggests that the defendant, a recidivist above average intelligence, was fully cognizant of the effect of the procedure employed.

The record shows that the county attorney examined the defendant thoroughly as to his understanding of the waiver of his rights and the consequences of a guilty plea. The following examination by the trial court is of particular moment herein: "COURT: How does the Defendant plead to the Information? DEFENDANT CARREAU: Guilty. COURT: Now, do you make this plea voluntarily? DEFENDANT CARREAU: Yes. COURT: Has there been any promise or threats of any kind imposed upon you to induce you to plead guilty? DEFENDANT CARREAU: No. COURT: Are you pleading guilty here this morning to this Information because you presently have a belief that you are guilty of this

offense? In other words, you believe you are guilty—DEFENDANT CARREAU: Yes, sir. COURT: —and that is why you are pleading guilty? DEFENDANT CARREAU: Yes, sir. COURT: Is there anything about the offense that isn't clear to you? DEFENDANT CARREAU: No. COURT: Uttering a forged instrument. Is the term—'uttering'—means passing. That's been explained to you, has it? DEFENDANT CARREAU: Yes, sir."

It is obvious that defendant was dissatisfied with the sentence imposed. The sentence, which was one-half of the maximum, was well within the limits of the statute. We determine that the plea of guilty herein was voluntarily and understandably entered by the defendant while he was represented by counsel, and to permit a defendant to withdraw his plea of guilty after sentencing under such circumstances would be a perversion of proper judicial procedure.

There is no merit to defendant's claim that he should have been permitted an evidentiary hearing. Where, as here, from the files and records in a post conviction action it is clear that the motion raises no issue as to the defendant's constitutional rights, the court may properly deny an evidentiary hearing.

In State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217, we said: "The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may properly be denied." See, also, State v. Ronzzo, 181 Neb. 16, 146 N. W. 2d 576.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEWEL A. HOUP, APPELLANT.

154 N. W. 2d 465

Filed November 24, 1967. No. 36668.

1. **Criminal Law: Larceny.** A verdict in a larceny case which does not determine the value of the property stolen will not support a sentence.
2. **Criminal Law: New Trial.** The trial court may set aside such a verdict on its own motion and order a new trial.

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

Edward F. Carter, Jr., for appellant.

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

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

BOSLAUGH, J.

The defendant was charged with larceny of a grain semitrailer "of the value of approximately $2,000.00." The jury was instructed that in order to convict the defendant, the State must prove and the jury find that the trailer was of the approximate value of $2,000. On April 18, 1967, the jury returned a verdict finding the defendant "guilty as charged in the information." The jury did not "ascertain and declare in its verdict the value of the property stolen" as required by section 29-2026.01, R. S. Supp., 1965.

On April 20, 1967, the defendant moved for an order discharging him from custody. This motion was overruled.

On April 28, 1967, the trial court, on its own motion, set aside the verdict and ordered that the defendant be tried again. The defendant then perfected an appeal to this court.

In a majority of states the verdict returned in this

case would be sufficient. See Annotation, 79 A. L. R. 1180. However, the rule in this state has been that a verdict in a larceny case which does not determine the value of the property stolen will not support a sentence. Lee v. State, 103 Neb. 87, 170 N. W. 359. We have held that such a verdict confers no authority upon the trial court to enter a judgment or sentence. McCoy v. State, 22 Neb. 418, 35 N. W. 202.

The defendant's theory is that the trial court had no authority to set aside the verdict on its own motion and order a new trial; that the verdict had the effect of an acquittal; and that the defendant is entitled to be discharged because he cannot "be twice put in jeopardy for the same offense." Art. I, § 12, Constitution of Nebraska.

In a similar case the Supreme Court of Iowa held that such a verdict is the equivalent of a mistrial, and that the trial court may set aside the verdict on its own motion and order a new trial. In State v. Redman, 17 Iowa 329, the court said: "And we understand the settled doctrine to be, that where the verdict is a *nullity* (or so *defective* that no judgment can be rendered upon it), the defendant may again be put upon his trial, certainly where the verdict was intended to be one of conviction, for in such case it is rather a *mistrial* than a legal putting in jeopardy. 1 Bish. Cr. Law, § 673. * * * From these cases, and from a general examination of the authorities, we feel safe in laying down this general rule: *that where the verdict, especially if intended to be a verdict of guilty, is so defective and uncertain that the court does not know for what offense to pass judgment, it may be set aside by the court, even against the defendant's objection, and the proceeding is no bar to another trial.* This is good sense. The defendant, in the case before us, has never been acquitted. The jury did not intend to acquit him. They expressly found him guilty. If the court had pronounced judgment against him, and he had appealed to the appellate court, under

the authorities above referred to, it would not have discharged him, but remanded him for a new trial. It has never been adjudged that, in such a case, he could successfully plead once in jeopardy. The course taken below amounts to the same thing; and is, as we have shown, well warranted by the authorities."

The verdict in this case was the equivalent of a mistrial. It was within the authority and discretion of the trial court to set aside the verdict and order a new trial. The motion to discharge was properly overruled. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VIRGIL D. RILEY ET AL., APPELLANTS.
154 N. W. 2d 741

Filed December 1, 1967. No. 36530.

1. **Criminal Law: Evidence.** It is a fundamental rule that the evidence of the commission of other crimes or being tried for other crimes (with exceptions) is incompetent, irrelevant, and immaterial and ordinarily prejudicial to the rights of a defendant.
2. ———: ———. The "other-crimes" rule is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime.
3. ———: ———. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
4. **Evidence: Appeal and Error.** Evidence admitted without objection cannot be considered as grounds for error.
5. **New 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 this court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

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

Donn E. Davis, for appellant.

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

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

WHITE, C. J.

The only question involved in this case is whether the district court should have sustained a motion for a mistrial because of the admission, over objection, of certain fingerprint records of the defendants in evidence.

The defendants, Henry Reichel and Virgil D. Riley, were jointly tried and convicted by a jury of burglary and subsequently sentenced by the district court to a term of years in the Nebraska Penal and Correctional Complex. The defendants appeal. We affirm the judgment.

The evidence, presented almost entirely by the prosecution, is undisputed. The defendants, in clean clothes, were observed in a tavern in Lincoln, Nebraska, between 9 p.m. and 12 p.m. on the evening of Saturday, July 9, 1966. Early in the morning of July 10, 1966, both a window in the laboratory complex and in the lunch room of the Northwestern Metal Company building in Lincoln, Lancaster County, Nebraska, were broken in. Inside the lunch room a candy machine was broken open, and a 7-Up machine had been "jimmied open." In the office of the building, several tools, including crow bars, a screw driver, and a piece of the handle from the vault were found on a table near the vault which someone had attempted to break into. At approximately 3:30 a.m., two police officers, Louis Harroun and Richard

Kucera, were ordered to the Northwestern Metal Company plant. A burglar alarm was ringing when they arrived and shortly thereafter the officers noticed a car near the plant traveling at a high rate of speed. No other cars were moving in the vicinity. This car was followed for a few blocks at a high rate of speed, officer Harroun stopped it, and discovered the defendants, Henry Reichel and Virgil D. Riley, in the car with Reichel driving. Both men were perspiring freely and their clothes were badly soiled with black dirt or dust, and Reichel had a rip in the back of his trousers. Inside the plant is a smelter and an officer of the corporation described this process as a dirty operation involving dust and smoke which sometimes requires the use of respirators by employees. On July 10, 1966, at about 4:20 a.m., a few minutes after the apprehension of the defendants, Kenneth Smith, a police officer, made an examination of the candy and 7-Up machines which had been broken into. On the candy machine he found and collected a latent palmprint of identifiable quality (exhibit 22). On the 7-Up machine he found and collected two identifiable latent fingerprints (exhibits 23 and 24).

A Lincoln police officer, Stanley P. Gushard, a qualified fingerprint expert who was the identification officer of the Lincoln police department in charge of the criminal records and the identification bureau, testified that a known fingerprint of the defendant Henry Reichel taken at the county jail subsequent to his arrest (exhibit 21) and a known fingerprint of Henry Reichel taken from the Lincoln police department's files (exhibit 26) were made by the same person whose fingerprint was found on the 7-Up machine which had been broken into (exhibit 23). As to the defendant Riley, Gushard testified that he had taken a set of fingerprints of Riley about 1964 (exhibit 25). He testified that these known fingerprints in exhibit 25 were made by the same person whose fingerprints were found on the 7-Up machine and identified as exhibit 24.

Defendants objected to exhibits 25 and 26 and moved for a mistrial substantially on the grounds that they tended to show prior criminal activity on the part of the defendants, and each of them, and were therefore incompetent, irrelevant, immaterial, and prejudicial to the rights of the defendants.

It is, of course, a fundamental rule that the evidence of the commission of other crimes or being tried for other crimes (with exceptions) is incompetent, irrelevant, and immaterial and ordinarily prejudicial to the rights of a defendant. Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151; Balis v. State, 137 Neb. 835, 291 N. W. 477; Leo v. State, 63 Neb. 723, 89 N. W. 303. The record in this case is wholly devoid of any evidence or proof submitted to the jury of prior commission of crimes by either of the defendants or that they were charged with any previous crimes. The most that can be said of exhibits 25 and 26, which were fingerprint records obtained from the files of the Lincoln police department, one having been taken in 1964, is that they infer that the defendants had some prior contact with the police. It is only by suspicion, surmise, and conjecture that a conclusion of any prior criminal activity could be reached. There is no legal inference of the commission of another crime or being charged with another crime from the fact that a police identification department has on record the fingerprints of a person. Fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification. See Annotation, Evidence-Finger, Palm, or Footprint, 28 A. L. R. 2d 1115. With reference to a similar contention that photographing and fingerprinting by a police identification department were prejudicial because of evidence of being regarded as a criminal by the police department, the court said in Bridges v. State, 247 Wis. 350, 19 N. W. 2d 529, as follows: "In this age and particularly in these times it is a matter of common knowledge that it has become customary and con-

sidered proper in private business and industry, as well as in public service and institutions, to take photographs and fingerprints of individuals, who are connected therewith or engaged or detained therein, for their identification for many other purposes or respects than in criminal matters. It is commonly known that such photographing and fingerprinting is a matter of daily practice and the usual method of identification used in the police service in populous communities of persons arrested,—but not yet convicted,—for violations. The use of that practice and method is considered to be for the common good and the rights of police authorities to resort thereto has been recognized in most jurisdictions, and such use thereof is, in itself, not considered a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation or stigma it can never amount to as much as that caused by the publicity attending the arrest on a sensational charge to which innocent men may have to submit. United States v. Kelly (2 Cir.), 55 Fed. (2d) 67, 83 A. L. R. 122; Shaffer v. United States, 24 App. D. C. 417; Downs by Swann, 111 Md. 53, 73 Atl. 653, 23 L.R.A. (N. S.) 739; Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A, 739. Consequently there is no occasion to conclude that the proof of photographing and fingerprinting was prejudicial to defendant."

Defendants rely almost exclusively on a 1929 California case. People v. Van Cleave, 208 Cal. 295, 280 P. 983. The defendants do not cite and we are unable to find any other prior or subsequent case that bars the admission into evidence for identification purposes of a fingerprint record taken prior to the arrest of a defendant for the offense charged. Not only was this case decided in a different time perspective when fingerprint identification was closely associated with serious criminal activity or offenses, but the California court in this case held, under the circumstances of that case, that the evidence was completely irrelevant to any of the issues

in the case, the defendant having admitted making the fingerprint in question. The court also held that since the case was an extremely close one on the facts, that the reception of such evidence was prejudicial. It is also noted that this was a 4 to 2 decision with two judges dissenting.

The defendants' contentions must be rejected for an even more important reason. As already noted, fingerprint identification evidence is probably the most highly relevant evidence of identification possible in our society. Without question, the fingerprint identification evidence in this case, even though cumulative with respect to the defendant Reichel, was extremely relevant. Even if we assumed that there was an inference of prior criminal activity to be deduced from the prior fingerprint identification records on file with the police department, nevertheless this evidence was clearly admissible. The "other-crimes" rule is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime. Where such evidence, however, is in fact relevant the "other-crimes" rule does not apply. As recently as in State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167, we stated the rule as follows: "The defendant cites cases holding that a mistrial should be granted where evidence of other crimes is brought into the record. It is not necessary to discuss these cases here. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes."

In the above case a police officer testified, in a burglary case, that part of the property found in the automobile where the defendant and others were found, was turned over to the Iowa law enforcement authorities. Our court held, as is true in the present case, that:

"There was no direct evidence of another crime but only an inference thereof as stated by defendant's counsel." Other cases supporting this distinction and this rule are Peery v. State, 165 Neb. 752, 87 N. W. 2d 378; and State v. Rand, 238 Iowa 250, 25 N. W. 2d 800, 170 A. L. R. 289. There is no merit to this contention of the defendants.

Defendants also complain of the cumulative effect of testimony of various police officers that they knew or were acquainted with the defendants. Courtroom identification of the defendants was established in this manner. This testimony was all admitted without any objection whatsoever and of course could not be grounds for error. Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868; Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83. But again this testimony was necessary and absolutely essential to lay the foundation for the identification testimony of the police expert on identification and by the different officers who identified the defendants near the scene and who took defendant Reichel's fingerprints in the county jail. There was no proof or inference from this testimony that the defendants had committed or had been charged with committing a prior criminal offense. And, as we have seen, even if it did lend itself to speculation that the defendants had prior contact with the police, this testimony was highly relevant and necessary for foundation purposes and therefore admissible.

Despite all of this, defendants argue that the cumulative impact of this testimony was such as to deny the defendants a fair trial. A sufficient answer to this is that the undisputed evidence in this case, consisting almost entirely of the prosecution's evidence, overwhelmingly and unequivocally points towards the defendants' guilt. Even if we were to hold, which we do not, that there was error in the record in this case, an examination of the entire case and the record herein conclusively show that there has been no substantial miscarriage of justice.

It therefore follows that the judgment should be affirmed. See § 29-2308, R. R. S. 1943.

Complaint is made of the form in which some of the exhibits were submitted to the jury. The record demonstrates that the trial court, before the submission of the exhibits to the jury, carefully and properly excluded and excised from the fingerprint exhibits any possible prejudicial information contained therein or the suggestion that there was such information attached to such exhibits in their original form. We note that the trial court also carefully gave an instruction protecting the rights of each defendant with reference to testimony introduced against the other defendant.

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

AFFIRMED.

McCOWN and SMITH, JJ., concurring in result.

The evidence established that defendant Reichel's palm print and fingerprints had been separately taken after his arrest in 1966. Both of these were identified and connected with the latent prints at the scene of the crime. The prosecution later introduced an additional fingerprint record of Reichel taken from the police files and likewise identified and connected it. The majority opinion concedes that the additional fingerprint identification as to Reichel was cumulative, but holds it "extremely relevant" and admissible. Where the fingerprint identification had already been established by proper evidence, the later introduction of additional fingerprints from the police files not only was cumulative, but the purpose of its introduction might reasonably be said to have been directed at the inference of prior criminal activity and prior police contact rather than fingerprint identification. Under such circumstances, it was extremely "irrelevant" rather than "relevant" and it should have been inadmissible. This court should not even indirectly imply an approval of such procedure. In "a close case" or in a case in which the purpose as

to evidence of "other crimes" is more clear, the majority holding on this issue is probably insupportable. People v. Van Cleave, 208 Cal. 295, 280 P. 983.

STATE OF NEBRASKA, APPELLEE, V. CHARLES R. CARR, APPELLANT.
154 N. W. 2d 526

Filed December 1, 1967. No. 36586.

1. **Criminal Law: Evidence.** Statements made by a defendant at the scene of the crime, immediately after his arrest and while an investigation is in progress to determine whether he was involved in the crime, are admissible in evidence if otherwise shown to be voluntary.
2. ———: ———. Evidence which tends to show that a footprint found at the scene of the crime was made by the defendant's shoe is admissible without proof of a known footprint.
3. **Trial: Evidence.** An instruction stating that circumstantial evidence is proof of facts and circumstances from which another fact may be "presumed or inferred" is not erroneous.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

A. Q. Wolf, Wilbur L. Phillips, and Colleen R. Buckley, for appellant.

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

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

BOSLAUGH, J.

The defendant, Charles R. Carr, was convicted of breaking and entering with intent to steal. He has appealed from a sentence to 12 years' imprisonment as a habitual criminal. While the appeal was pending the defendant sought post conviction relief which has been denied. See State v. Carr, 181 Neb. 251, 147 N. W. 2d 619.

The record shows that the Minne Lusa Furniture Mart in Omaha, Nebraska, was burglarized on April 20, 1964. The police discovered the crime in progress during a routine check of the building. The defendant was observed running from the rear of the building. He was apprehended approximately 4 blocks away and returned to the scene of the crime. There he was identified as the man seen running from the furniture mart.

The principal assignment of error relates to the admission in evidence of statements made by the defendant after he had been taken into custody. The police officers testified that the defendant first stated that his name was Charles Davis and that he lived at 2918 Spaulding. Both statements were untrue.

The officers further testified that the defendant said that he had been out for a ride with Timmy Moore; that Moore had parked near the furniture mart; and that the defendant got out of the car and started walking home because he didn't belong in the neighborhood.

The defendant contends that the statements were inadmissible because they were obtained in violation of the rule stated in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. The rule is applicable here because the trial in this case commenced on September 21, 1964.

In Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882, the United States Supreme Court stated: "Apart from its broad implications, the precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial, '[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his

absolute constitutional right to remain silent * * *.' "

The statements which are in question in this case were made by the defendant at the scene of the crime immediately after he had been taken into custody. The police officers were then in the process of investigating the crime and the defendant was questioned for the purpose of identification and to determine whether he was involved in the crime. Although the defendant had been taken into custody, the investigation had not "begun to focus on a particular suspect."

There is no evidence in this case that the defendant requested and was denied an opportunity to consult with his lawyer.

We think that the testimony of the police officers concerning the statements of the defendant made immediately after his arrest was admissible.

The State produced evidence which tended to show that a footprint found at the scene of the crime was made by the defendant's shoe. This evidence included photographs of the footprint and the shoe, the shoe itself, and testimony of witnesses who observed and compared the footprint and the shoe. The defendant contends that this evidence should not have been received because the State failed to produce a known footprint for comparison with the footprint found at the scene of the crime.

Evidence which shows that a footprint found at the scene of a crime corresponds with the shoe of the defendant is generally admissible as evidence tending to connect the defendant with the crime. State v. Burch, 195 Iowa 427, 192 N. W. 287, 31 A. L. R. 198; 29 Am. Jur. 2d, Evidence, § 377, p. 427; Annotations, 31 A. L. R. 204, 35 A. L. R. 2d 856. There must be evidence which tends to identify the defendant with the footprint, but there is no requirement that a known footprint be submitted for comparison with the footprint found at the scene of the crime. The defendant's contention is without merit.

The defendant objects to instruction No. 14 which was a cautionary instruction on circumstantial evidence. The instruction defined circumstantial evidence as being proof of facts and circumstances from which another fact may be "presumed or inferred." The defendant argues that the instruction is erroneous because it suggests that the guilt of the defendant may be presumed.

Although the instruction given may be subject to some criticism, it was not erroneous. Similar statements have been approved by this court many times. See, Morgan v. State, 51 Neb. 672, 71 N. W. 788; Wakeley v. State, 118 Neb. 346, 225 N. W. 42.

The judgment of the district court is affirmed.

AFFIRMED.

HELEN I. SUMMERVILLE, APPELLANT, V. SCOTTS BLUFF COUNTY, NEBRASKA, APPELLEE.
154 N. W. 2d 517

Filed December 1, 1967. No. 36609.

1. **Waters: Boundaries.** The meander lines of a river as established by the original government survey are not boundary lines unless made so by the instrument of conveyance and the waters themselves constitute the real boundary.
2. ———: ———. Unrestricted grants of the government bounded on streams and other waters are to be construed according to the laws of the state in which the lands lie.
3. ——: ———. Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of the island formerly under waters of the stream as far as the thread of the stream.
4. **Public Lands: Patents.** When a second patent is issued pursuant to a resurvey covering land covered by a prior patent or patents based on the original government survey, the question which patent conveyed title to the land covered by the later patent must be determined by a court of competent jurisdiction.
5. **United States: Public Lands.** The United States is not an indispensable party where the issue to be determined in the case

involves only the right of possession between two claimants of surface rights to the same land whose claims arise under different patents from the United States, where the United States has no present right of possession.

6. **Public Lands: Parties.** This court has no jurisdiction to determine the title of the United States government to public land where the United States is not a party to the action and no judgment or decree which could be entered in such case could in any manner be binding upon the United States.

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

Atkins, Ferguson & Nichols, for appellant.

James W. Ponder, Jr., and Van Steenberg, Winner & Wood, for appellee.

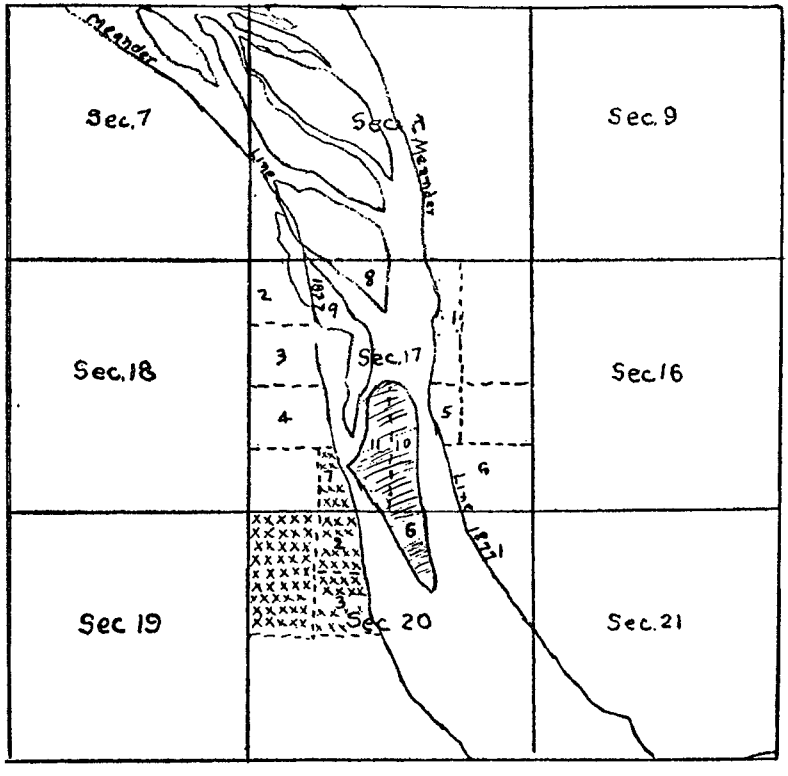
Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

Plaintiff commenced an action against Scotts Bluff County and the United States of America to quiet title to an island in the North Platte River. Thereafter, a motion was filed to dismiss the United States from the action on the ground that the complaint alleged no basis for jurisdiction and that the court had no jurisdiction over the United States in any unconsented suit and that there was no statutory consent. The motion was granted and the United States was dismissed as a party.

By amendment, the action became one for an injunction against the defendant Scotts Bluff County to restrain the defendant from entering or trespassing upon the island or interfering with the plaintiff's use thereof and involves the right to possession as between plaintiff and defendant.

For purposes of clarity, the following sketch of the area involved is incorporated.



xxxx Plaintiff's land..

The Island.

The second amended petition alleged plaintiff's ownership of the riparian land designated as Lot 7, Section 17; and Lots 2 and 3, Section 20; all in Township 22 North, Range 55 West of the 6th P.M., Scotts Bluff County, patented by the United States to plaintiff's predecessors in title; that the land formed a continuous part of the west bank of the North Platte River at the time of the original government survey in 1877; that Lots 10 and 11 of Section 17 and Lot 6 of Section 20 constitute an island which

was formed by process of accretion and reliction subsequent to the 1877 government survey; that the island did not exist at the time of the original government survey in 1877; that plaintiff and her predecessors in title have been in possession of the island since its formation; that the defendant Scotts Bluff County claimed its interest in the island by virtue of a patent issued by the United States of America to the County of Scotts Bluff on April 6, 1966, and that such patent was void and was issued in derogation of patents issued by the United States to plaintiff's predecessors and other riparian owners; and that the defendant Scotts Bluff County had erected a fence around the island and had removed plaintiff's cattle and treated plaintiff and her husband as trespassers and indicated its intention to continue to do so.

The prayer of the plaintiff was for an injunction against defendant Scotts Bluff County restraining it from entering or trespassing upon the island or interfering with plaintiff's use of it. The demurrer of Scotts Bluff County was overruled and a temporary injunction was granted to the plaintiff.

The defendant's answer alleged that the island was omitted from the field notes and plats of the survey of the United States in 1877 and that it was at that time a well-defined body of public land bounded by well-defined channels in the river; that the island was not formed by a process of accretion and reliction; that a supplemental survey and plat was made by the United States and approved by it September 1, 1937; that the island remained public land of the United States until April 6, 1966, when patent was issued to the defendant county; and that plaintiff and her predecessors have not been in exclusive possession since formation.

It is undisputed that the North Platte River is a nonnavigable stream; and that the original government survey made in 1877 established meander lines of the river and disclosed no islands in the area in question.

Patents from the United States government based on that survey were issued to all riparian owners at all points on both sides of the river in the area involved between 1890 and 1897 except for Lot 7, Section 17, which was patented to plaintiff's predecessors in title in the year 1918.

In 1935, the United States government conducted a resurvey of this area and surveyed and platted the island into the lots indicated. Various other supplemental surveys had been made and plats of survey delineating islands in the North Platte River were approved by the government in 1922, 1927, 1934, and 1937. The survey made in 1935 was approved in 1937 and is the one involved here. Sometime after 1937, a Joseph Carmichael filed a homestead application for the island which was rejected by the land department. The plaintiff's husband directed at least two letters of protest to the land department in 1942 directed at the Carmichael application. He advised the land department not only that he was the owner of the riparian land on the west bank and entitled to the accretion land, but that the island itself was pasture which plaintiff and her husband had fenced, had paid state and county taxes on and had improvements on, and that there was a mortgage on one of the lots of the island. The land department denied the Carmichael homestead application, apparently on the ground that the land was not suitable for agriculture, but advised the plaintiff's husband that the records of their office showed Lot 6, Section 20 to be vacant land of the United States and that any use or occupation would be considered a trespass against the United States.

Thereafter, apparently sometime prior to 1965, the defendant Scotts Bluff County applied for a patent to the island and on March 22, 1965, a proposed classification issued from the Bureau of Land Management classifying the land as recreational land. A protest was filed by the plaintiff but denied by the Bureau of Land Man-

agement. Patent to the island issued to defendant Scotts Bluff County on April 6, 1966.

After trial, the court found that it did not have jurisdiction to determine title to the island for the reason that the United States was not a party to the action, but that it did have jurisdiction to determine rights of possession as between the parties; and that for the purpose of determining the right to possession only, and for no other purpose, the court assumed that the 1966 patent granted to the defendant was valid and by reason thereof, the defendant was entitled to possession of the island. The temporary injunction was therefore dissolved, permanent injunction was denied, and costs were taxed to the plaintiff. We reverse the judgment.

The crux of the issue here is whether the island was in existence as a permanent body of land, separate and distinct from the mainland and above mean high water, at the time of the original survey of 1877, or whether, if there were then any such island or islands, their omission constituted constructive fraud on the United States.

Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of the soil formerly under the waters of the stream as far as the thread of the stream. Kinkead v. Turgeon, on rehearing, 74 Neb. 580, 109 N. W. 744, 121 Am. S. R. 740, 7 L.R.A.N.S. 316; Krumwiede v. Rose, 177 Neb. 570, 129 N. W. 2d 491. As recently as Hartwig v. Berggren, 179 Neb. 718, 140 N. W. 2d 22, this court reaffirmed the rule that the meander lines of a river as established by the original government survey are not boundary lines unless made so by the instrument of conveyance. This rule was established by the Supreme Court of the United States as early as Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428. That case held that the meander lines running along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for and not for the purpose of limiting the title of the grantee to such mean-

der lines, and that the waters themselves constitute the real boundary. In that case, it was stated: "It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters."

In Whitaker v. McBride, 197 U. S. 510, 25 S. Ct. 530, 49 L. Ed. 857, the Supreme Court of the United States, in affirming a determination of this court, McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966, specifically held that the question of the title of the riparian owners is one of local law and unrestricted grants of the government, bounded on streams and other waters, are to be construed according to the law of the state in which the lands lie, citing Hardin v. Jordan, *supra.*

The defendant Scotts Bluff County relies upon cases which either relate to situations in which existing land was erroneously described as being water or covered by water, or situations where an island in a navigable river was actually in existence at the time of the survey, or where the amount of land omitted from the survey was such as to indicate mistake amounting to fraud or constructive fraud upon the United States. Typical of cases cited by defendant in this connection is Scott v. Lattig, 227 U. S. 229, 33 S. Ct. 242, 57 L. Ed. 490, 44 L.R.A.N.S. 107. There was no dispute there that the particular island involved was not only in existence at the time of the survey, but was widely separated from the shore, and was fast dry land in a navigable river.

It seems clear that the broad implications of Hardin v. Jordan, *supra,* have been modified where there was a showing that an island was left unsurveyed by fraud or mistake or circumstances amounting to constructive fraud on the United States. We have been cited to no case which has yet held that land actually under water

in the bed of a nonnavigable stream, meandered by the original government survey, becomes land reserved to the United States simply because a sizeable but still unstable island developed within 58 years after the survey. See, also, Clark on Surveying and Boundaries (2d Ed.), § 172, p. 168, § 267, p. 304, and cases there cited.

It therefore becomes material and necessary to consider the issues raised by plaintiff's petition and defendant's answer with regard to whether or not the island was in existence as a permanent body of land, separate and distinct from the mainland and above mean high water, at the time of the government survey in 1877.

The defendant county's evidence rests almost entirely upon the field notes of the 1935 survey which indicated that the island was, at that time, of approximately equal elevation with the average mainland banks, although it had channels and low places. The field notes also show that the surveyor relied heavily on the fact that timber had been cut and removed from the island for some years and that several cottonwood stumps indicated an age of 53 years as of 1935. There was no note made as to where these stumps were located on the island. The surveyor concluded that the island was in existence "prior to the disposal of the shore lands and is public land erroneously omitted from the original survey." The only other evidence of the defendant on this issue was that of a forrester who had taken a core from one cottonwood tree in the east central part of the island in November 1966, which he found to be then 77 years old. The forrester conceded that it was possible that even the one tree might not necessarily have been above the surface of the water throughout the years and that it is possible that it started on a sandbar. In either event, taking the defendant's evidence at its best, it established only that one or possibly a few cottonwoods began to grow at some point between the meander lines of the river sometime between 1882 and 1889, either 5 years or 12 years after the original government survey.

The actual testimony of the plaintiff's witnesses demolished the conclusion expressed in the surveyor's opinion in the field notes of the 1935 survey. The eyewitness testimony introduced by plaintiff shows without question that before the construction of irrigation dams and reservoirs and modern bridges, the river was approximately ½ mile wide, carrying a full stream between its banks. Some temporary structures to dam and divert the stream at a point almost immediately above the property involved here were commenced as early as 1895. The evidence is undisputed that as late as 1915, in the spring freshet season, the river was full bank to bank, and in the summertime when it was low, there were only toeheads and sandbars and small channels. These toeheads were described as islands of less than 1 acre. Up to 1915, there were no obstructions in the river at this general location except toeheads and sandbars.

A reference of the Supreme Court of the United States in the case of Whitaker v. McBride, *supra,* as to small islands in the main Platte River at the time of an earlier survey is appropriate. "Possibly they may have been regarded as having no stability as tracts of land but as mere sandbars, which are frequently found in Western waters, and are of temporary duration, existing to-day and gone to-morrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyors."

It must be concluded on the basis of the evidence in this case that not only was there no permanent body of land, separate and distinct from the mainland and above mean high water in 1877, but there was not even persuasive evidence that there was a shifting sandbar in the location at that time.

The defendant contends that the plaintiff has not exhausted her administrative remedies and that the actions of the Land Department or Bureau of Land Management established good and paramount title and right of pos-

session in the defendant. We think that the case of Lakelands, Inc. v. Chippewa & Flambeau Improvement Co., 237 Wis. 326, 295 N. W. 919, best answers defendant's argument: "The plaintiff bases its right to recover on the proposition that the allotment of the United States government pursuant to the proceedings instituted by Ilg for resurvey and replatting of the land bordering on the lake gave good and paramount title to the allottees. This would doubtless be correct if the title so passed were established by the judgment of a court of competent jurisdiction. But no such result follows from a determination of the land department of the United States government, or from a resurvey by such department, or from patents issued pursuant to such a resurvey. When a second patent is issued pursuant to a resurvey covering land covered by a prior patent based on the original government survey, the question which patent conveyed the title to the land covered by the later patent must be determined by the judgment of a court of competent jurisdiction." It was pointed out that the trial court in that case assumed that the patents issued pursuant to the resurvey proceedings were primary.

In discussing the question of how large a tract of land left unsurveyed within or beyond a meander line will be held invalid as constructive fraud upon the government, that court stated: "But the question whether the acreage is so great as to constitute a constructive fraud is a judicial question not determinable by the United States Government Land Department."

The defendant contends also that the United States is a necessary and indispensable party. The United States has retained mineral rights and a right of reverter in defendant's patent, and has also reserved as to one of plaintiff's patents, a right-of-way for ditches and canals constructed by the United States. As the lower court found, it had no jurisdiction to determine the title of the United States government to public land since the United States is not a party to the action, but it did

have authority to determine the right of possession as between plaintiff and defendant. Section 25-323, R. R. S. 1943, provides in part: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others or by saving their rights; * * *."

This case involves only the right of possession between two claimants of surface rights to the same land whose claims arise under different patents from the United States, where the United States is not a party, and has no present right of possession. No judgment or decree which this court can enter in this case could in any manner be binding upon the United States or affect its title or rights where it is not a party. See McBride v. Whitaker, *supra*.

Title to the riparian lots originally patented to plaintiff's predecessors was acquired by warranty deed to plaintiff and her husband dated February 16, 1942. That deed specificaly stated: "* * * the intention also being to convey any accruning (sic) lands thereto described as lots 10, Eleven and Six (10-11-6) or any other island or islands that first parties may be lawfully entitled to by virtue of the law of the United States of (sic) the State of Nebraska, or by common usage in connection with or by virtue of ownership of the above described lands, said accruning (sic) lands or islands being located in the river bed of the North Platte River." It is virtually undisputed that the plaintiff has had continuous adverse possession of the island as against all persons except the United States during the period since 1942 and until the defendant's attempts to dispossess her. Title by prescription may be acquired to an island in a river or stream which otherwise would belong to a riparian owner. Hartwig v. Berggren, *supra*.

The trial court correctly found that it had jurisdiction to determine as between plaintiff and defendant which was entitled to possession of the island, but erroneously determined the right of possession.

The judgment of the district court is therefore reversed and the cause remanded with instructions to enter an injunction against the defendant Scotts Bluff County restraining it from interfering with the plaintiff's possession and use of the real estate involved. The judgment should specifically provide that it shall not affect any rights of the United States of America, and that all its rights are specifically excepted and reserved to the United States.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

JOHN F. STEVENS, APPELLANT, V. JOSTEN-WILBERT VAULT COMPANY, APPELLEE.
154 N. W. 2d 764

Filed December 1, 1967. No. 36608.

1. **Workmen's Compensation.** The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support a claim.
2. ———. A workmen's compensation award cannot be based on possibility or speculation, and, if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover.

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

Munro, Parker, Munro & Grossart, for appellant.

Knapp & Tarrell and Tye, Worlock, Tye & Jacobsen, for appellee.

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

NEWTON, J.

This is a proceeding under the Workmen's Compensation Act. Plaintiff was severely injured while in the employ of defendant. It is not disputed that he received

compensable injuries to his back and chest. Plaintiff has received an award entitling him to compensation for 88 weeks of temporary total disability and 212 weeks for a 25 percent permanent partial disability of his body as a whole. Plaintiff's assignments of error are devoted exclusively to his contention that he received injuries to his right shoulder, right hip, and left wrist which have resulted in permanent injuries to his right arm, right leg, and left wrist, entitling him to compensation for the rest of his life for a permanent partial disability.

Plaintiff's testimony reflects some degree of loss of use of the three members mentioned. Two medical experts were called by plaintiff and no evidence whatsoever was introduced by defendant. Plaintiff's local or family doctor, who treated him following his injury, testified that plaintiff had sustained a fracture of the left arm just above the wrist and that there was some arthritis in the wrist as a result of the injury, resulting in a 5 to 10 percent functional, permanent disability. He stated that he based his opinion in this regard on the fact that the range of motion in plaintiff's wrist was now more limited than it had been before the accident, but conceded that he had never measured the range of motion either before or after the accident. He further testified that, in his opinion, plaintiff had sustained a 20 to 30 percent permanent partial disability of his body as a whole.

The other medical expert called by plaintiff was an orthopedic surgeon who had been called in to assist in the treatment of plaintiff's injuries. He testified that two operations were performed on plaintiff's chest which resulted in a 5 percent permanent functional loss of use of the right arm although the right arm had not itself sustained any direct injury. This loss of use of the arm was attributed to the chest injury and the postoperative effect on the muscles of the shoulder. Regarding the left wrist, he agreed that there was some slight functional disability of a permanent nature due to arthritis resulting from injury to the wrist. He stated that he meas-

ured the wrist for loss of motion and that there was no measurable loss; also, that any injury to the wrist was of so slight a nature that he could not set a percentile figure on such disability. Regarding the arthritis in the hip resulting from plaintiff's injuries, he stated that it would likely need treatment intermittently, but that there was no measurable disability in the hip and again failed to place a percentile figure on the extent of such disability. He further stated that, in his opinion, plaintiff, as a result of the injuries to his body as a whole, was 20 to 25 percent permanently partially disabled.

"The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery." Hula v. Soennichsen, 178 Neb. 484, 134 N. W. 2d 47. See, also, Hardin v. Moorman Manuf. Co., 179 Neb. 869, 140 N. W. 2d 820. "The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support a claim." Hula v. Soennichsen, *supra*. "A workmen's compensation award cannot be based on possibility or speculation, and, if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover." Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808. See, also, Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410; Snowardt v. City of Kimball, 174 Neb. 294, 117 N. W. 2d 543.

In the present case, it appears that plaintiff may have sustained some slight residual injuries to his left wrist and right hip, but in neither case is there sufficient evidence upon which to base an award. As to the wrist, one medical expert said there was some loss of motion, but conceded that he had made no measurements thereof. The second medical expert, who was, as an orthopedic surgeon, better qualified to pass upon the extent of the injury, did measure the wrist for loss of motion and specifically stated that there was none. One doctor did not testify to any permanent injury to the hip and the second said there was no measurable disability. In other words, the sum and substance of this testimony is that

there was no measurable disability resulting to either the hip or the wrist and no percentile figure of disabiilty was given. Under such circumstances, it would be sheer speculation for this court to attribute a 5, 10, or 15 percent functional disability to these members. No error appearing, the judgment of the district court should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARIL ANN FUGATE, APPELLANT.
154 N. W. 2d 514

Filed December 1, 1967. No. 36618.

Post Conviction Evidentiary Hearing. Record examined and held to show that pretrial statements of defendant were voluntary.

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

Merril R. Reller, John McArthur, and A. James McArthur, for appellant.

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

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

BOSLAUGH, J.

This is a second appeal in a proceeding under the Post Conviction Act.

Upon consideration of the defendant's motion and the files and records in the case, the district court originally found that the defendant was not entitled to any relief. Upon appeal from that order we held that the defendant should have an opportunity to present any evidence that she might have, in addition to that then appearing in the record, relating to the voluntariness of her pretrial

statements. The cause was remanded to the district court for the purpose of an evidentiary hearing upon that issue. See State v. Fugate, 180 Neb. 701, 144 N. W. 2d 412.

An evidentiary hearing was held and the defendant was permitted to introduce additional evidence relating to her statements. The trial court again found that the defendant was not entitled to any relief and dismissed the proceedings. The defendant has appealed.

The defendant, who was then 14 years old, was a companion of Charles Starkweather during a series of killings in and around Lincoln, Nebraska. Two of the victims were her mother and stepfather. The defendant was convicted of first degree murder in the killing of Robert William Jensen.

The statements in question were made by the defendant before she was represented by counsel. The question to be determined is whether the statements may be held to be voluntary when the "totality of the circumstances" is considered. In determining this question we have considered all of the files and records in the case.

The defendant and Starkweather were apprehended in Wyoming on January 29, 1958. William S. Romer, a deputy sheriff, was driving between Casper and Douglas when he happened upon Starkweather wrestling with a motorist over possession of a gun. The defendant ran to Romer's automobile and began telling Romer about the killings. At the recent hearing the defendant testified: "When I ran to this man, I tried to tell him (Romer) what I had seen, and I was so frightened he (Starkweather) was going to kill me then." The defendant gave similar testimony during the trial. Upon direct examination she testified: "Q- How did you feel when they got you into the, when you got into Mr. Romer's car? A- I was trying to tell him everything that happened at once. I was trying to tell him about my family, about him killing the young ones, about him

killing the teenagers, and about him killing Mr. Meyer, and the people in the Ward house, and that he killed that man, I tried to tell him all of it at once, it just came out of me."

This testimony is significant because it characterizes the attitude of the defendant at that time and demonstrates the voluntary nature of her statements.

While the defendant was being held in the jail in Wyoming, she received a telegram from her sister, Barbara, which stated: "Tell everything you possibly can. Will help you when you return home. Our home is always open to you. We love you very much. Bob and Barbara Von Busch."

In regard to this telegram, the defendant testified upon direct examination: "Q- Do you remember that it said 'Tell everything that you possibly can?' A- Yes, sir, I do. Q- Have you done that ever since? A- Yes, sir I have."

Barbara Von Busch testified that her telegram to the defendant reflected the way that Barbara has felt at all times.

While the defendant was being held in the Wyoming jail she was told that first degree murder charges were pending against her and Starkweather at Lincoln, Nebraska, and that she was to be brought back for trial on that charge or another similar charge. She signed a waiver of extradition and arrived in Lincoln, Nebraska, on Friday evening, January 31, 1958.

During the trip back to Lincoln, the defendant volunteered information about the killings to Gertrude B. Karnopp. Mrs. Karnopp was the wife of the sheriff of Lancaster County, Nebraska, and the matron in charge of female prisoners. The evidence shows that the statements the defendant made at that time were volunteered.

On Saturday morning, February 1, 1958, the defendant was interviewed by Dale E. Fahrnbruch, a deputy county attorney. The defendant was being held at the State Hospital near Lincoln because the county jail had

no facilities for her detention. The interview was conducted in the presence of Mrs. Karnopp; Eugene Masters, the assistant chief of police; Dr. Vance Rogers, the president of Wesleyan University; and Dr. Edwin A. Coats, the acting assistant superintendent of the hospital. During the interview Mr. Fahrnbruch identified himself and told the defendant that she had been charged with first degree murder in the killing of Carol King but that she might be prosecuted for another killing; that she had a right to a lawyer but that Mr. Fahrnbruch had no way of providing her with a lawyer; that it was up to her to obtain a lawyer at that time, but that if she was bound over to the district court for trial and did not have sufficient funds, a lawyer could be appointed for her; that his purpose was to find out what the facts were; that anything she said could be used against her in court; and that she did not have to talk with him if she did not want to do so.

There was a second interview with the defendant on the following morning in the presence of Mrs. Karnopp and Dr. Coats. During the afternoon the defendant's father and sister Barbara were at the hospital and talked with the defendant.

That evening a question-and-answer statement was taken by Mr. Fahrnbruch in the presence of Audrey Wheeler, a court reporter; Mrs. Karnopp; and Dr. Coats. The statement was completed the following day, Monday, February 3, 1958. The defendant was taken before the county judge that afternoon and a preliminary hearing was set for March 8, 1958.

On February 5, 1958, the transcribed question-and-answer statement was read to the defendant in the presence of Mrs. Karnopp; Mr. Masters; Edmund E. Belsheim, the Dean of the Nebraska Law School; and William D. Blue, an attorney. The defendant conferred with Dean Belsheim and Mr. Blue before the statement was read to her, and they advised her not to sign the statement or make any written corrections and that whatever cor-

rections were made should be made orally. The statement was then read to the defendant and a number of corrections were made orally by her.

The question-and-answer statement is the principal statement of the defendant which was admitted against her. The record abounds with evidence that the defendant answered the questions freely and that there were no promises, threats, or other inducements made to her. There is an entire absence of evidence to show coercion unless the fact that the defendant was 14 years of age, had been charged with murder, and was unrepresented by counsel is sufficient to establish involuntariness as a matter of law.

The record in this case shows a painstaking effort on the part of the authorities to treat the defendant fairly and accord her every right that she was entitled to under the law as it existed and was understood at that time. There was no incommunicado, secret, or prolonged interrogation of the defendant. There is no credible evidence of any inducement of any nature being made to the defendant. The defendant herself has testified that she tried to "tell everything that you possibly can" as she was advised to do by her sister.

We believe that the "totality of the circumstances" in this case shows that the statements of the defendant were voluntarily made. The defendant has not been deprived of "that fundamental fairness essential to the very concept of justice." The defendant is not entitled to relief under the Post Conviction Act.

The judgment of the district court is affirmed.

AFFIRMED.

TRUCK INSURANCE EXCHANGE ET AL., APPELLEES, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT, IMPLEADED WITH JANICE NELSON ET AL., APPELLEES.
154 N. W. 2d 524

Filed December 1, 1967. No. 36645.

Automobiles: Insurance. An automobile which has been serviced by a filling station operator and is being driven to a parking place on the filling station premises is not being "used in an automobile business" within the exclusionary provisions of an automobile liability insurance policy.

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

Healey & Healey, for appellant.

Baylor, Evnen, Baylor & Urbom and Robert T. Grimit, for appellees Truck Ins. Exchange et al.

Kanouff & Edstrom, for appellees Nelson et al.

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

NEWTON, J.

This is an action under the Uniform Declaratory Judgments Act. On the evening of Friday, November 9, 1962, Terrence A. Naughton left his automobile at a filling station operated by Louis R. and William Tennison who, together with their insurer, Truck Insurance Exchange, are plaintiffs herein. Naughton stated he would call for the car sometime Sunday, and was informed by Louis R. Tennison that they would service the car, and keep it inside the station at night. Gas was placed in the car on Friday evening and it was then driven inside the station where it remained overnight. The following morning servicing of the car was completed. In order to enable the plaintiffs Tennison to use the "rack," the car was driven outside and because there were numerous other cars on the lot, it had to be driven out of the

driveway onto U. S. Highway No. 77 and then into another driveway before it could be parked on the filling station premises. As Louis R. Tennison drove the car out onto the highway, a collision occurred with an automobile owned by the defendants Alden and Myrtle Nelson, and Janice and Myrtle Nelson sustained personal injuries. The Naughton automobile was insured by the defendant State Farm Mutual Automobile Insurance Company and the Nelson automobile, by the Employers Mutual Casualty Insurance Company.

Plaintiff, Truck Insurance Exchange, admits liability to the defendants Nelson, but its policy contained the following clause: "The insurance afforded by this policy shall not apply to any loss covered by any other insurance but shall be excess insurance over such other insurance," and it contends that primary liability to the Nelsons lies with the defendant State Farm Mutual Automobile Insurance Company within the limits of its policy, and that said plaintiff is liable only for the excess. State Farm Mutual Automobile Insurance Company denies liability due to the following exclusions contained in its policy: "This insurance does not apply under: * * * (c) coverages A and B, except as to the named insured, to the owned automobile while used in an automobile business * * *." "Automobile Business" means "the business of selling, repairing, servicing, storing or parking of automobiles." Coverages A and B deal with bodily injury liability and property damage liability. It contends that when Louis R. Tennison completed servicing the Naughton automobile and proceeded to drive it to a parking place that the automobile was being "used in an automobile business" within the exclusionary clauses.

On trial in the district court, the court found generally for plaintiff Truck Insurance Exchange, and entered judgment to the effect that the policy issued by Truck Insurance Exchange constituted excess insurance over that afforded under the policy issued by State Farm Mutual Automobile Insurance Company.

The clear meaning of the exclusions in the State Farm Mutual Automobile Insurance Company policy is that an automobile is "used in an automobile business" when it is used in "the business of selling, repairing, servicing, storing or parking of automobiles." In the present instance, plaintiffs Louis R. and William Tennison were engaged in the business of servicing automobiles. In connection with such business, it was necessary to occasionally move and park the vehicles being serviced. They did not have authority to use the Naughton vehicle for their own purposes in the furtherance of their business as filling station operators, but only to service and care for it. Under such circumstances, can it be logically said that the automobile was being used in the business operated by the Tennisons as servicemen? We do not think so. The Naughton automobile was not being used in the business of servicing automobiles or of furnishing services to the Tennisons' customers, but was the object or subject of such service. See, Hammer v. Malkerson Motors, Inc., 269 Minn. 563, 132 N. W. 2d 174; Trolio v. McLendon, 9 Ohio St. 2d 103, 224 N. E. 2d 117; LeFelt v. Nasarow, 71 N. J. Super. 538, 177 A. 2d 315; McCree v. Jenning, 55 Wash. 2d 725, 349 P. 2d 1071; Allstate Ins. Co. v. Skawinski, 40 Ill. App. 2d 136, 189 N. E. 2d 365; Goforth v. Allstate Ins. Co., 220 F. Supp. 616; Chavers v. St. Paul Fire & Marine Ins. Co., 188 F. Supp. 39; National Farmers Union Property & Cas. Co. v. Farmers Ins. Group, 14 Utah 2d 89, 377 P. 2d 786; Pirkle v. American Liberty Ins. Co., 247 F. Supp. 1018; St. Paul Fire & Marine Ins. Co. v. Thompson (Ala.), 189 So. 2d 866; Wilks v. Allstate Ins. Co. (La. App.), 177 So. 2d 790, writ refused, 248 La. 424, 179 So. 2d 18; Western Alliance Ins. Co. v. Cox (Tex. Civ. App.), 394 S. W. 2d 238; American Fire & Cas. Co. v. Surety Indem. Co., 246 S. C. 220, 143 S. E. 2d 371; Case v. Fidelity & Casualty Co. of New York, 105 N. H. 422, 201 A. 2d 897; 7 Appleman, Insurance Law and Practice, § 4372, p. 341.

No error appearing in the record, the judgment of the trial court should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. FOWLER, APPELLANT.
154 N. W. 2d 766

Filed December 1, 1967. No. 36667.

1. **Criminal Law: Trial.** The otherwise valid conviction of a defendant properly represented by counsel at a criminal trial is not rendered void or voidable solely because at a pretrial police interrogation, the defendant was denied counsel, and was not warned of his absolute right to remain silent.
2. ———: ———. Pretrial interrogation of a criminal suspect by police, without warning him of his constitutional right to remain silent, and without granting his request for counsel, does not constitute prejudicial error, in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in evidence at the trial.
3. **Post Conviction Evidentiary Hearing.** Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised before granting a full evidentiary hearing.

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

Donald H. Bowman, for appellant.

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

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

NEWTON, J.

This is a post conviction proceeding. Defendant was convicted on his plea of guilty to a forgery charge. He

was represented by an attorney appointed by the court at both his preliminary hearing and his appearance in the district court.

In the present proceeding, defendant charges that there was an infringement of his constitutional rights in that prejudicial statements were elicited from him by the police in the interim between his arrest and his appearance for a preliminary hearing. He contends that prior to such questioning, he was not informed of his constitutional rights and upon request was denied an opportunity to obtain counsel.

At the time of defendant's appearance in the district court, his constitutional rights were carefully and conscientiously explained to him in the presence of his attorney and were waived with the advice and consent of his attorney. The plea of guilty was then entered. Sentence was temporarily suspended until a presentence investigation could be made following which sentence was pronounced.

It is the contention of the defendant that under these circumstances, the court erred in refusing to give him an evidentiary hearing in the present proceeding. The following rules of law have been repeatedly laid down by this court: "The otherwise valid conviction of a defendant properly represented by counsel at a criminal trial is not rendered void or voidable solely because at a pretrial police interrogation, the defendant was denied counsel, and was not warned of his absolute right to remain silent. * * * Pretrial interrogation of a criminal suspect by police, without warning him of his constitutional right to remain silent, and without granting his request for counsel, does not constitute prejudicial error, in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in evidence at the trial. * * * Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records

show, and whether any substantial issues are raised before granting a full evidentiary hearing." State v. Silvacarvalho, 180 Neb. 755, 145 N. W. 2d 447. See, also, State v. Snyder, 180 Neb. 787, 146 N. W. 2d 67; State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217; State v. Decker, 181 Neb. 859, 152 N. W. 2d 5.

It is clear that on the record in this case, the defendant's allegations were not sufficient to entitle him to an evidentiary hearing and the judgment of the district court should be affirmed.

AFFIRMED.

COMMERCIAL SAVINGS & LOAN ASSOCIATION, A CORPORATION, APPELLEE, V. HOLLY DEVELOPMENT, INC., ET AL., APPELLEES, IMPLEADED WITH MERRILL GOFF ET AL., APPELLANTS.
154 N. W. 2d 510

Filed December 1, 1967. No. 36670.

1. **Judgments.** An application to vacate a default judgment is a matter of discretion for the trial court. The burden of showing an abuse of discretion is upon the party adversely affected by the court's order.
2. ————. Where an application to vacate a default judgment is occasioned by the fault, negligence, or want of ordinary diligence on the part of the applicant shown to have been served with summons, he will not ordinarily be permitted to deny the correctness of the judgment or renew the controversy.
3. **Judgments: Attorney and Client.** An applicant ordinarily cannot procure the setting aside of a default judgment against him on the ground of his mistaken belief that he had retained or arranged for an attorney to protect his interests. He must see to it that the attorney accepts his employment, otherwise his failure ordinarily constitutes inexcusable negligence.
4. **Judgments.** An applicant seeking to vacate a default judgment taken against him must not only exhibit a defense to the action, but he must also show that such judgment was the result of fraud, accident, or mistake, unmixed with fault, negligence, or want of reasonable diligence on his part.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Haney, Walsh & Wallentine, for appellants.

Fitzgerald, Brown, McGill & Strom and William J. Brennan, Jr., for appellee Commercial Sav. & Loan Assn.

Ross & O'Connor, for appellees Holly Development, Inc., et al.

Gaines, Spittler, Neely, Otis & Moore, for appellee Allen.

McCormack, McCormack & Brown and Patrick L. Cooney, for appellees Epsen et al.

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

CARTER, J.

This is an appeal from an order of the district court for Douglas County refusing to set aside a default judgment to permit certain defendants to file an answer and defend on the merits.

The action was begun by Commercial Savings and Loan Association to foreclose a mortgage on a residence property described as 4941 Browne Street. Merrill Goff and Dorothy P. Goff were made parties defendant to the action. They were husband and wife. A summons was served personally on Merrill Goff and on Dorothy P. Goff by leaving a certified copy at her usual place of residence. On February 7, 1967, a decree of foreclosure was entered, the default of the Goffs being noted in the decree. On March 28, 1967, the defendants Goff filed an application to set aside the default judgment taken against them, attaching thereto the answer they proposed to file if the decree was set aside.

The evidence shows that the Goffs purchased the residence at 4941 Browne Street on May 8, 1959, from Holly Development, Inc., of which Ernest J. Banse and

Joanne M. Banse were the president and secretary, respectively. Joanne M. Banse was the daughter of Dorothy P. Goff and Ernest J. Banse was the husband of Joanne M. Banse and the son-in-law of Dorothy P. Goff. Banse delivered the deed from Holly Development, Inc., to the Goffs and at the same time requested the Goffs to sign numerous documents allegedly connected with the transaction. The Goffs, trusting Banse, signed the documents. Without their knowledge, they signed a deed, bearing the same date as the Holly Development, Inc., deed, conveying the residence to Banse and his wife in joint tenancy. The notary who acknowledged the deed signed by the Goffs testified that she knew the relationship of the Goffs to Banse but had never met them. At the instance of Banse, her employer, she placed her signature and notarial seal on the acknowledgment of the deed outside of their presence.

The evidence shows that Banse was to make the payments to Commercial Savings and Loan Association on its first mortgage lien. The Goffs paid Banse $150 per month, monthly checks in such amount for the period May 1961 to June 1966 are shown by the record. The Goffs moved into the property in May 1959 and remained until July 1, 1966, after which they resided at 5021 North Fiftieth Street. On December 15, 1965, the Banses sold the house and delivered a deed to Edward J. Epsen and Michael McCormack for a consideration of $6,000.

On September 29, 1966, the Commercial Savings and Loan Association filed its petition to foreclose its first mortgage lien and on the same day a summons was issued. On October 4, 1966, Dorothy P. Goff was served with summons by leaving a certified copy at her usual place of residence. On November 21, 1966, an alias summons was served personally on Merrill Goff. Mrs. Goff testified that she did not receive the copy of the summons left at her usual place of residence and infers with considerable reason that the summons was taken and retained by Banse who was at that time residing with

the Goffs. On November 21, 1966, or the day following, Merrill Goff discussed his summons with Mrs. Goff and, being concerned, they questioned Banse about the matter. Banse informed them that it was a mistake and he would have August Ross, an attorney, look after their interests. He purported to telephone Ross in their presence. This call proved to be a false one, Ross testifying that he did not talk with Banse by telephone and that he was never requested by anyone to represent the Goffs. It is plain, however, that both of the Goffs knew of the pendency of the action on November 22, 1966, long before the default decree was taken against them. Banse subsequently departed Omaha without leaving a forwarding address. The record bears out the conclusion that Banse was not a man of integrity and was completely untrustworthy. The Goffs understood this, which is borne out by the fact that Mrs. Goff consulted a lawyer about it in August 1966. The Goffs moved out of the house at 4941 Browne Street on July 1, 1966, and into a residence at 5021 North Fiftieth Street. Mrs. Goff testified that Banse had agreed to sell the house at 4941 Browne Street and use the proceeds to reduce the cost of the house at 5021 North Fiftieth Street. The evidence further shows that on August 2, 1966, Michael McCormack and Thomas Ryder of the county attorney's office called on Mrs. Goff, showed her the deed from the Goffs to the Banses dated May 8, 1959, and asked her if the signatures were those of herself and her husband. She said: " 'They are ours.' " She raised no question as to the validity of the deed and by her silence lulled McCormack into a sense of security.

The evidence reflects that the Goffs knew that Banse was untrustworthy long before the default decree was taken. Mrs. Goff knew that the legal title to the 4941 Browne Street property was in the name of the Banses in August 1966, according to her own admission. When questioned about the signatures of herself and husband, she admitted the validity of the signatures and raised no

question of fraud or deceit. She admitted that Banse was to sell the house and apply the proceeds on the home subsequently purchased, and the Goffs moved from the house without asserting any claim of ownership in them. It is true they were the victims of a misplaced trust in their son-in-law, Banse, but on discovery of his unwarranted conduct, they did nothing until the house was advertised for sale by decree of the court. Their extreme negligence forecloses any right to have the decree set aside. There is no evidence whatever that other parties to the suit in any way contributed to the difficulties of the Goffs. The purchasers from Banse paid $6,000 for the house in good faith without objection by the Goffs although opportunity to object was afforded. The failure of the Goffs to answer and assert any rights they may have had was the result of their own negligence and theirs alone.

The vacation of a default judgment rests in the discretion of the district court. The burden rests on the person adversely affected by the court's order to affirmatively establish an abuse of such discretion. In the early case of Orr v. Seaton, 1 Neb. 105, this court said: "Whether a default shall be opened, is a question addressed to the discretion of the court. The Supreme Court will not interfere with its exercise, unless it is oppressive."

"A court of equity will not grant relief against a judgment taken by default where the applicant, shown to have been duly served with summons, failed to avail himself of an opportunity to defend, such failure not being the result of fraud, accident, mistake, or the like. * * * Where a judgment by default is obtained against a party by his own neglect, it constitutes no ground for equitable intervention that his adversary obtained more relief than he was entitled to." 49 C. J. S., Judgments, § 348, p. 703.

"The general rule is that one who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear

and defend the suit. * * * 'A defendant ordinarily can not procure the setting aside of a judgment against him on the ground of his mistaken belief that he had retained an attorney to protect his interests; he must see to it that the attorney understands and accepts the retainer; otherwise, his failure to pay personal attention to the case is inexcusable negligence.'" Dempsey v. Gibson (Tex. Civ. App.), 100 S. W. 2d 430.

In Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255, this court said: "But the vacation during the same term, of judgments by default, is so largely a matter of discretion for the trial court that this court will decline to interfere unless there appears to have been a clear abuse of discretion." See, also, Barney v. Platte Valley Public Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335.

In a case resembling the one at bar, it appears that Mary and Isaac G. S. Cleland borrowed $6,500 from the Hamilton Loan & Trust Company and gave two real estate mortgages as security for the loan. Later the loan company brought a suit to foreclose one of the mortgages and caused a summons to be personally served on Mrs. Cleland. She did not appear and default was entered against her. The land was sold at judicial sale and the sale confirmed. A writ of possession issued and Mrs. Cleland commenced action to set aside the default, alleging she never signed the mortgage and that she supposed the writ was issued in a suit to foreclose a mortgage given to one Deitz to which she had no defense. The court found that her signature on the mortgage was a forgery and that the notarial certificate of her acknowledgment was false. In denying relief, this court said: "It is an inflexible rule that a party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action and also show that such judgment is the result of fraud, accident, or mistake, unmixed with fault or negligence on his part. A judgment will not be set aside on the

application of a party who has, by his own laches, failed to avail himself of an opportunity to defend. This salutary rule rests on principle and authority, and its rigid enforcement is necessary for the repose of society, by preventing litigation from becoming interminable. (Duncan v. Lyon, 3 Johns. Ch. [N. Y.] 351; Center Township v. Marion County, 110 Ind. 579; Bankers Life Ins. Co. v. Robbins, 53 Neb. 44; Funk v. Kansas Mfg. Co., 53 Neb. 450; Sargeant v. Bigelow, 24 Minn. 370; Langley v. Ashe, 38 Neb. 53; Norwegian Plow Co. v. Bollman, 47 Neb. 186; Pope v. Hooper, 6 Neb. 178.) In the last mentioned case the rule is stated in the syllabus as follows: 'In an original action in equity to vacate a judgment or decree, if the ground of complaint is not the result of fraud on the part of the plaintiff, or some circumstance beyond the control of the defendant, but is occasioned by the fault, negligence, or want of ordinary diligence on the part of the defendant, he will not be permitted to deny the correctness of the judgment or decree, or renew the controversy.' " Cleland v. Hamilton Loan & Trust Co., 55 Neb. 13, 75 N. W. 239.

The evidence shows that the Goffs were served with summonses in accordance with statute and that each had actual knowledge of the pendency of the suit against them on November 22, 1966, prior to the taking of the default judgment against them on February 7, 1967. Their failure to appear and assert any defense they may have had was due to their own negligence and indifference, and affords reason enough for the refusal of the trial court to deny the application of the Goffs to vacate the default decree. Service of summons cannot be ignored with impunity. A party seeking relief from a judgment taken against him by default must not only exhibit a defense to the action, but he must also show that the rendition of the judgment was not due to his failure to take proper steps for his own protection as a reasonable foresight of consequences would naturally suggest. A default judgment will not ordinarily be set

aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.

The denial of the application to vacate the default decree by the trial court was not an abuse of discretion under the facts shown and the judgment of the court pursuant thereto was correct.

AFFIRMED.

SMITH, J., participating on briefs.

IDA M. APPLEGATE, APPELLANT, V. WOODROW E. APPLEGATE, APPELLEE.
155 N. W. 2d 337

Filed December 8, 1967. No. 36476.

1. **Divorce.** It is impossible to lay down any general rule as to the degree of corroboration in a divorce action as each case must be decided on its own facts and circumstances.
2. **Divorce: Appeal and Error.** A divorce action is for trial de novo in this court.
3. **Trial: Evidence.** Where the evidence is irreconcilable and in direct conflict we cannot ignore the fact that the trial court had an opportunity to observe the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Murphy, Pederson & Piccolo, for appellant.

Robert E. Roeder, for appellee.

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

SPENCER, J.

On November 14, 1963, appellant Ida M. Applegate sued appellee Woodrow E. Applegate for separate main-

tenance. Appellee cross-petitioned for an absolute divorce. Trial was held on November 1 and 2, 1965, and on January 10 and 11, 1966. Appellee was granted an absolute divorce on his cross-petition and appellant perfected an appeal to this court.

Appellant's previous marriage terminated in a divorce in 1959. She married appellee, who had not previously been married, on September 12, 1960. She left appellee at El Paso, Texas, April 13, 1963. Both parties separately returned to North Platte and lived apart until the latter part of June 1963, when they went to Colorado together. They finally separated after an extensive argument on July 21, 1963.

At the time of the marriage appellant was 50 and appellee was about 48 years of age. Before marriage appellee discussed his health and financial condition with the appellant. In 1953 the Mayo Clinic determined that the appellee had multiple sclerosis. Subsequently and previous to the marriage he had prostate surgery on two occasions. Appellee, who was very comfortably situated, had inherited substantial ranch holdings from his parents. At the time of the trial he was drawing social security because of disability. Appellant's net worth at the time of the divorce was $35,000.

It will serve no useful purpose to review the evidence in detail herein. Appellant's counsel devotes 42 pages of her brief to that purpose. Appellant's evidence, much of which is uncorroborated, would indicate that she was subjected to extreme cruelty, both mental and physical, which forced her into a state of nervous hysteria and required her to live apart from the appellee. It is impossible to lay down any general rule as to the degree of corroboration in a divorce action as each case must be decided on its own facts and circumstances. Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321. Appellee's evidence, on the other hand, would indicate that appellant was guilty of extreme cruelty and left the appellee without justification. We think it sufficient to here state

that we have carefully examined the record and, while there is an irreconcilable conflict therein, we are of the opinion that the conclusions reached by the able trial judge are supported by a clear preponderance of the evidence. The trial court granted appellee an absolute divorce and awarded appellant a 1962 Ford camper, $15,000 alimony, $3,500 attorneys' fees, and costs. Appellant had been receiving $350 per month temporary support during the pendency of the action. Allowances pending appeal were denied.

A divorce action is for trial de novo in this court. Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99. However, where the evidence is irreconcilable and in direct conflict, we cannot ignore the fact that the trial court had an opportunity to observe the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. Humann v. Humann, 180 Neb. 719, 144 N. W. 2d 723. This rule is particularly applicable herein.

Appellant's social conduct since July 21, 1963, considered in the light of her own counsel's suggestion of her conduct before her marriage to the appellee, affords some criteria to assess appellant's conduct herein. If we were to depend solely upon a cold record, we could easily conclude that appellant desires the financial benefits of a questionable marriage relationship without the responsibility for any of its burdens.

While it is true the appellee has a substantial income, appellant is not without some means. Appellee has paid temporary support of approximately $10,000 during the pendency of this action. Appellant was given a camper which cost $5,000, and $15,000 alimony. This increased her net worth in excess of $50,000. Considering the source of appellee's property, and the fact that appellant terminated the marriage relationship, we feel that the trial court was very fair with the appellant and see no reason to further burden the appellee.

The judgment of the trial court is affirmed, and costs are taxed to the appellant.

AFFIRMED.

LESLIE C. LANDMESSER, JR., APPELLANT, V. COUNTY OF CHEYENNE, NEBRASKA, ET AL., APPELLEES.
154 N. W. 2d 760

Filed December 8, 1967. No. 36596.

Trial: Evidence. On the evidence in this personal injury action plaintiff's claim against the individual defendants should have been submitted to the jury.

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. Affirmed in part, and in part reversed and remanded.

Barney, Carter & Buchholz and Herbert M. Brugh, for appellant.

Clinton & McNish and John Peetz, Jr., for appellees.

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

SMITH, J.

Plaintiff unwittingly detonated a tear gas projectile that had been fired during a police operation 3 days earlier, and the explosion injured him. In this action the city of Sidney and the county of Cheyenne, Nebraska, are defendants allegedly responsible for the behavior of the individual defendants. At the trial negligence, contributory negligence, and governmental immunity from liability were controverted. The court dismissed the action against all defendants at the close of plaintiff's evidence-in-chief. On appeal the topics for discussion are contributory negligence, exclusion of evidence, and governmental immunity.

This type of missile, known as a barricade piercing projectile, has a percussion fuze, tail fins, and an approxi-

mate length of 9 inches. It is lobbed from a 37 millimeter firearm, and impact detonation ruptures the shell, freeing the chemical. On the case but not on the shell a warning appears in substance as follows: To fire directly at any person may cause serious injury or death.

During the evening of June 15, 1964, the officers were attempting to remove the husband of Ramona Rhoden from her home in Sidney. Four projectiles were lobbed toward the house, but only two exploded. After the husband's surrender a routine collection of debris was made. Recovering one unexploded shell, the officers overlooked the other which lay under a curtain on a hallway floor. They finished the operation without a shell count or further search in spite of a similar experience of Sidney policemen the preceding year.

When Ramona returned home on the morning of June 17 or 18, 1964, she found the projectile. According to her, she then telephoned defendant Myron Peter, communications officer on duty at the Sidney police station, that she had found a bomb. He said that it was harmless, that "the only thing it could possibly do was burn your hands if there was any tear gas in it." Advising her to throw it in the trash, he also said that the police junked "them" at the dump. According to Myron, "She said she had a gas shell * * * that had been there for two or three days." Without asking for further description, Myron assumed the object to be a case or a spent projectile. Aware of a possibility of burns but unaware of any explosive property, he said he did not know whether the object was dangerous. The information was not logged.

In the afternoon of June 18, 1964, Ramona and her 4-year-old son, Mikie, visited Lily Langdon at the latter's home in Sidney. Four young men—plaintiff, 19 years of age, Jim and Jerry Langdon, and Bob Rankin—were also present. They saw Mikie playing outside with the projectile. Ramona subsequently handed it to them. The projectile had a bent fin and an appearance of cor-

rosion. Jerry handled it like a club. All hurled it in the air 30 feet. Plaintiff and Bob, curious about the odor of tear gas, began disassembly. Having unscrewed the tail fins and removed the firing pin and spring, they tried unsuccessfully with a stick to open a supposed valve. Plaintiff finally held with one hand the shell nose on a porch floor and with the other hand a punch in the shell cavity. Bob lightly tapped the punch once with a hammer, and the projectile exploded.

Plaintiff, who had completed 1 year of college, owned a firearm; and he knew the functions of primer, firing pin, and hammer. The evidence does not necessarily prove, however, that a prudent man in the position of plaintiff would have recognized a risk of injury. The claim against the individual defendants should have gone to the jury.

Plaintiff offered evidence concerning a statement that Ramona had made upon handing the shell to the young men. In response to a question she had related to them the substance of her conversation with Myron. The evidence was unsuccessfully offered to show state of mind. The characteristics of the shell were not common knowledge, and plaintiff was not required to know them. The conversation was relevant, the hearsay rule inapplicable, and the exclusionary ruling erroneous. See, Restatement 2d, Torts, § 290, p. 47; McCormick on Evidence, § 228, pp. 464, 465.

As to the individual defendants the judgment is reversed and the cause remanded. On the question whether the city and the county are immune from liability the court is divided evenly. For that reason the judgment of dismissal is affirmed as to the public entities.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

GERALD E. ROLFSMEYER ET AL., APPELLANTS, V. SEWARD COUNTY ET AL., APPELLEES.
154 N. W. 2d 752

Filed December 8, 1967. No. 36602.

1. **Waters.** Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.
2. **Waters: Drains.** The owner of land may collect diffused waters, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow by nature.
3. ———: ———. When diffused surface waters gather in volume in velocity or flow into a natural depression, draw, gulch, or drainway, such waters are not subject to the rule that they may be dammed, repelled, or diverted without liability as in the case of diffused surface waters.
4. **Evidence: Appeal and Error.** It is the duty of this court on review of the findings made by a trial court, when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto.
5. **Trial: Evidence.** When there has been a conflict in the evidence, this court, on review will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.

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

Russell A. Souchek, for appellants.

Byron J. Norval, Ivan A. Blevens, and Dredla & Dredla, for appellees.

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

WHITE, C. J.

The issues in this case ultimately revolve around the

question of where the natural drainway of the surface waters which entered into and arose on the plaintiffs Rolfsmeyers' land was located.

This is an action in equity wherein it is alleged that the defendant, County of Seward, Nebraska, had removed culverts from the county road bordering plaintiffs' land and raised said road forming a dike which blocked the natural drainageway of plaintiffs' land causing flooding and erosion. Plaintiffs generally sought an injunction requiring the defendant County to open the drainageway by appropriate culverts and the deepening of the ditches along the roadway. The County of Seward and the defendant property owners joined herein generally deny the allegations of the plaintiffs' petition and cross-petition alleging that the plaintiffs had diverted water from the natural drainageway on the plaintiffs' land and that such water was being diverted to, onto, and across the county road and onto the lands of the defendant private property owners, Havlats, Siedhoffs, and Francls. The defendants, in their answers, allege that the natural watercourse and the natural surface drainage were entirely on the plaintiffs' own property; and they generally ask for equitable relief requiring the plaintiffs to remove all dikes, levees, or other obstructions across said natural drainageway or waterway, that they be restrained from obstructing the natural drainageway and from diverting the surface waters on their land onto the land of the defendants, and for other equitable relief. The trial court found generally in favor of the defendants, granting them relief on their cross-petitions and also granting some relief to the plaintiffs. Plaintiffs have appealed.

As we have suggested the issue in this case is almost entirely factual. No question as to the law is presented or is necessary for decision. The record is extremely voluminous and the facts are quite complex in nature and may be better understood in perspective by a preliminary view of the elementary principles of the law

involved in this case. The law in Nebraska with reference to diffused surface waters and natural drainageways is well settled. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195; Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732. With reference to such waters, the owner of land may collect diffused waters, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow by nature. Linch v. Nichelson, 178 Neb. 682, 134 N. W. 2d 793. And when diffused surface waters gather in volume in velocity or flow into a natural depression, draw, gulch, or drainway, such waters are not subject to the rule that they may be dammed, repelled, or diverted without liability as in the case of diffused surface waters. Nichol v. Yocum, *supra*.

Plaintiffs are the owners of the northeast quarter of Section 31, Township 9 North, Range 4 East, Seward County, Nebraska. This we shall hereafter refer to as the Rolfsmeyers' land. Defendants Welsch owned a quarter section immediately to the west of Rolfsmeyers' land, which we will refer to as the Welsch land. Defendants Havlat owned the land abutting Rolfsmeyers' land on the north side across the county road and the Havlat land also abuts the eastern half of the Welsch quarter. The lands owned by the defendant Helen Siedhoff Francl and farmed by defendants Siedhoff abuts the Rolfsmeyers' land on the east. A county road runs east and west on the north side of Rolfsmeyers' land and the Welsch land, separating these lands from the Havlat land. At the northeast corner of Rolfsmeyers' land, this road turns and goes in a southeasterly direction on an old railroad grade. This county road has no culverts or

other openings or passages for the flow of water from the south to the north.

Prior to 1953 the lane to the improvements on Rolfsmeyers' land ran southward from the county road on the north along the north-south centerline of the Rolfsmeyers' land. This lane and the location thereof will be referred to as the old "in road." In 1953 the plaintiffs built a new lane some 700 feet west of the old "in road" and this lane will be referred to as the new "in road." The new "in road" parallels the old "in road" through the north portion of Rolfsmeyers' land.

The evidence of the plaintiffs Rolfsmeyers is that the water which now flows onto their property from the west has two natural drainageways. The largest amount enters the Rolfsmeyers' land about 600 feet south of the northwest corner of the Rolfsmeyers' land draining some 240 acres to the west principally from the Welsch quarter. There is evidence that some of the water from this drainage, as it entered the Rolfsmeyers' land, drained northeast to and across the county road in the area of the new "in road" and west of it. Plaintiffs' evidence tends to show that the balance of this water along with the drainage from the Rolfsmeyers' land itself drained easterly across the new "in road" where two culverts are now located to a low area near the north-south centerline of the Rolfsmeyers' land. This low area is on or near the old "in road" and is now marked by a telephone line. From this low point the water, according to the plaintiffs' testimony, drains northeasterly for a short distance and then in a northerly course across the county road to the Havlat land. There is testimony that a natural ridge had existed on the Rolfsmeyers' land beginning about 100 feet west of the northeast corner of said land and running north and south across the north half of the land, preventing water draining on the Rolfsmeyers' land from the west proceeding any further to the east.

A lesser amount of water from about a 10-acre tract

in the northeast corner of the Welsch quarter drains northward to the county road, down the graded ditch on the south of this road, and onto the Rolfsmeyers' land. It seems undisputed, with reference to this small amount of water, that the natural drainage was across the county road northward instead of to the east. The court required the County to install a small culvert to drain this water to the north and to erect a ditch block to the east. This issue appears to be minor. The decision of the court in this respect is unappealed from and will not be further discussed.

Plaintiffs' evidence tends to show that commencing in 1942 and at certain times since then, the defendant County has removed two culverts then existing, graded up the road, which at the northeast corner of the Rolfsmeyers' land was level with the land, some 3 or 4 feet, and that the County has also placed an additional accumulation of dirt on the south shoulder of the county road of some 2 or 3 feet. The contention is that this latter with the elevated grade creates a dike preventing water from both sources from draining in its natural path and forcing the water to run southeasterly across the plaintiffs' land to the 48-inch culvert under the county road on the old railroad grade. This forced drainage, it is contended, has made a portion of the Rolfsmeyers' land unfit for crops and has caused severe erosion. This damage has been compounded, it is contended, by the failure of the County to properly maintain and keep clear the south road or grader ditch of the county road up to the northeast corner of the Rolfsmeyers' land and then southeastward to the culvert of the old railroad grade. Relief is asked to provide for drainage of the road to the north of the Rolfsmeyers' land by way of culverts, digging out the grader ditch, etc.

Defendants' evidence, which is most convincing and persuasive, is that the general drainage of the Welsch quarter was eastward from a ditch which entered the Rolfsmeyers' land at a point about 800 feet south of the

northwest corner of the Rolfsmeyers' land. This drainage was and has been in substantially the same direction and course as claimed by the plaintiffs except that: (1) The water did not drain in part northward to and across the county road onto the Havlat land at the new "in road," and (2) from the point east of the old "in road" where the plaintiffs allege the natural drainage was northward onto the Havlat land, the defendants' evidence is that the natural drainage was southeasterly to the culvert under the old railroad grade.

The evidence is convincing, and almost undisputed, that when the plaintiffs constructed the new "in road" 700 feet further to the west of the old "in road" that this created a dike in the natural drainageway and that the culverts installed by the plaintiffs were almost completely inadequate to handle the natural drainage of the water to the east. The defendants' evidence shows, and we believe it is established, that the plaintiffs had constructed a ditch on the west side of this new "in road" forcing the water northward to the county road and the Havlat land. We now reach the situation with reference to the drainage of the water east of the new "in road" and after it reaches the old "in road." It is this contention that forms the main dispute in this case. The defendants' evidence is that the plaintiffs are diverting water east of the old "in road" by means of a ditch, forcing the water to flow north to the county road and the Havlat land and that this was not the natural drainage of the water. The evidence is undisputed that along the old "in road" a short distance south of the county road there was a "low, wet place," that the owner covered with cement at one time so that it could be crossed with less difficulty. The evidence is also undisputed that the plaintiffs have cut through the north bank or slight ridge that forms the edge of the drainage course across their land close to where it borders the county road. Besides the voluminous other evidence on this point, we view as significant, as the trial court did after an in-

spection of the premises, that the fact that the plaintiffs have had to keep open this ditch running north to the county road is evidence that this is not the course of the natural drainage. The evidence in this case is convincing that the natural drainageway extends entirely across the land of the plaintiffs near its northern edge, but not extending to the county road and only a very small portion of the water naturally goes over on the north bank of the drainageway to the county road in times of excessive moisture. We also point out that the drainageway coming from the Welsch land to the dike on the new "in road" is actually large enough and definite enough to meet all of the qualifications of the legal definition of the term "watercourse." In fact, the plaintiffs have themselves constructed and made several terraces to bring the water from the south to this drainageway. The evidence shows, and the trial court found, that the water east of the new "in road" also follows a definite course across the plaintiffs' land from the two culverts to the area of the telephone line that marks the line of the old "in road." The drainageway, the evidence shows, has definite shape and has a plainly visible course with definite banks. The north bank is a slight ridge and beyond that for a short distance there is a natural drainageway of the water into the south ditch of the county road, but this is of minor significance with reference to the issues and decision in this case. We come to the conclusion, as the trial court did, that the drainageway after it leaves the two culverts and goes east from the new "in road" proceeds northeast towards the county road but it does not go to the county road or across it, but turns east and southeast on plaintiffs' land and east to the old railroad culvert on the old railroad grade.

With this factual resolution of the case on the basic issue, the decision in this case seems to be clear. Of particular significance in this case in the light of the nature of the issues and the conflicting testimony as to the actual topography of the land, is the fact that the

trial court made a detailed and lengthy inspection of the premises in question. The trial court is required to consider any competent and relevant facts revealed thereby, and its findings and decision in the district court properly reflect its observations and findings based thereon. It is the duty of this court, on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto. Webb v. Lambley, 181 Neb. 385, 148 N. W. 2d 835; Wiese v. Klassen, 177 Neb. 496, 129 N. W. 2d 527. Also, we point out that to the extent there has been a conflict in the evidence in this case, this court, on review, while required to reach independent conclusions on questions of fact, will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. Webb v. Lambley, *supra;* Onstott v. Olsen, 180 Neb. 393, 142 N. W. 2d 919. Further analysis of the evidence is perhaps unnecessary. We do point out, however, that the plaintiffs admit that the old driveway they used would become submerged with water as the water drained toward the east and that to remedy this situation they constructed the new driveway or the new "in road" approximately 700 feet further to the west on higher ground and installed the culverts to permit the water to proceed eastward. By a clear preponderance of the evidence, the natural drainway involved in this action commenced on the west, coming from the Welsch property, flowed through, upon, and out of the Rolfsmeyers' land in a state of nature. The exhibits introduced and the evidence tend to show that this situation has existed for a period of over 60 years with reference to this property. The trial court found in its judgment that the water coming from the Welsch land runs in a natural watercourse and drainageway across the Rolfs-

meyers' land from its point of entry to the two culverts in the new "in road," thence east and northeast to the low point in the old "in road," thence northeast towards the county road, and thence turns east and southeast without leaving the county road and leaves the Rolfsmeyers' land on the east at the culvert in the old railroad grade. The trial court further found that the above drainage had a north bank, north of which diffused surface water flowed northward, and which bank had been cut at two different points by the plaintiffs forcing water to flow northward from the drainage flowing east. In its judgment the trial court found and required the plaintiffs to close the ditches and restore the north bank of the natural drainageway on this property and to provide suitable openings for the passage of the water through the new "in road" or dike. The detailed findings and requirements in this respect need not be repeated here. They are in all respects correct and are affirmed. With respect to the areas east of the new "in road" on plaintiffs' property, the court ordered the plaintiffs to fill the ditch that they have cut through the north bank of the drainageway near the old "in road," required them to desist from cutting through the slight ridge that forms the north bank of the drainage course across their land, and determined that they should be required to let the water drain to the east. The trial court carefully protected and preserved the plaintiffs' rights as has already been seen in requiring the County to take steps to protect the natural drainage from the small acreage on the Welsch property that did drain to the north. The court also required the County to take care of the diffused surface water that does actually flow north into the south ditch of the county road from the small area north of the north bank or ridge of the natural drainageway. It required that the County should build an outlet for it by building and maintaining a ditch along the south side of the road and to the culvert under the railroad grade or alternatively, requiring the County to install

and maintain a small culvert through the county road near the northeast corner of plaintiffs' land or both. It becomes unnecessary to review the other findings of the district court in this case. They are in all respects approved and affirmed.

The plaintiffs also assign error for failure of the court to grant a motion for a new trial because of newly discovered evidence. The record shows that the two new witnesses upon which this contention is based were either relatives or well known to the plaintiffs and their evidence easily discoverable during the period of almost 2 years that this case was pending before trial. There obviously is no merit in this contention.

Plaintiffs also assert error in the taxing of the costs to the plaintiffs in this case. This is an equity case and the taxing of costs rests in the sound discretion of the court. It is true that some relief was granted to the plaintiffs in this case but the relief granted was comparatively minor and incidental in nature. We further note that defendants were granted affirmative relief in this case. In light of these circumstances, we find no abuse of discretion in the trial court's findings and determining that the plaintiffs should bear the burden of the costs of this litigation against the neighboring landowners and the County in which they failed to sustain the burden on the major issue involved in this case.

The judgment of the district court is in all respects affirmed and all costs in this court are taxed to the plaintiffs.

AFFIRMED.

CARTER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. THOMAS A. ALVAREZ, APPELLANT.
154 N. W. 2d 746

Filed December 8, 1967. No. 36637.

1. **Criminal Law: Appeal and Error.** By the provisions of section 29-2308, R. R. S. 1943, the Supreme Court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence.
2. ———: ———. In determining the question as to whether or not a sentence shall be reduced, the Supreme Court is performing a judicial function and it should perform such function without regard to considerations of sympathy, mercy, or public opinion.
3. ———: ———. In all cases arising under section 29-2308, R. R. S. 1943, substantial reason supported by the evidence must be found to cause either an affirmance or reduction of a sentence.
4. **Capital Punishment: Statutes.** Whatever repugnance individuals may feel toward capital punishment must be laid aside in obedience to the law of the state and in deference to the judgment of the sentencing court.
5. **Capital Punishment: Constitutional Law.** The death penalty by electrocution as a punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions.
6. **Criminal Law: Statutes.** The fixing of minimum and maximum penalties as punishment for crime is for the Legislature with which this court is powerless to interfere.
7. **Capital Punishment: Evidence.** Whether or not a sentence of death will be imposed, and is necessary under the law, is a question to be determined from the nature of the crime and all the facts and circumstances bearing upon the issue in the particular case.
8. ———: ———. In determining if a sentence of death is to be reduced to life imprisonment, mental abnormality of the convicted person is to be considered, but mental abnormality is not necessarily a controlling factor. The nature and extent of the abnormality is the primary factor.
9. ———: ———. In determining if a sentence of death is to be reduced to life imprisonment, the court should consider the age of the defendant, his previous history and environment, his cooperativeness with law enforcement officers, a plea of guilty if there be one, and any other mitigating factors; but the weight to be given to such evidence is for the sentencing court when considered with all the circumstances of the case.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

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

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

CARTER, J.

This is an appeal from the assessment of the death penalty in a first degree murder conviction after a plea of guilty.

The defendant was a young, single man of Mexican origin of the age of 19 years. He was a strong, able-bodied man, very interested in sports with a special interest in boxing. On September 14, 1966, he was employed by Lincoln Landscaping, Ltd., and was assigned to the doing of yardwork at the Rohman home immediately north of the home of Mary O'Shea, the victim of the murder. The record shows that the defendant entered the O'Shea home, physically assaulted Mrs. O'Shea, raped her while she was in an unconscious condition, and, when she showed signs of regaining consciousness, strangled her with a cord which he cut from a window drape, took some valuable rings from her finger, left the scene, and was arrested by the police while on his way to the bus station to take a bus to Denver, Colorado.

The defendant states in his confession that he was trimming trees in the Rohman yard when Mrs. O'Shea returned from transporting one of her children to school after the noon hour. He says that she invited him into the house for a cup of coffee and began to visit with him about his girl friends. Without any provocation on his part, he says, she began screaming "rape" and threatened to call the police. He struck her several times, reduced her to a state of unconsciousness, removed her clothing,

raped her, and strangled her to death as previously related. The evidence further shows that John O'Shea, age 5, and a little girl, Abbie Druliner, accompanied Mrs. O'Shea when she took her older son to school and returned with her. John stated that when the three of them entered the home, the defendant was hiding near the refrigerator and he jumped out, grabbed his mother, began choking her, and knocked her to the floor. In view of the subsequent events, the statements of the defendant that Mrs. O'Shea brought sex into the conversation and made advances into this area is wholly unworthy of belief. This conclusion is supported by statements in the report of Dr. Charles A. Rymer, a psychiatrist, which were given him by the defendant, as follows: He has had sexual relations with many girls continuously since age 13, he is the father of a 3-month-old son, presently has two girls pregnant in Denver, Colorado, and has been recently suspected of murdering a young girl working as a babysitter in Denver and released for lack of proof. We have been unable to find any mitigating circumstances for the murder in the facts establishing the murder itself.

The main contentions of the defendant in support of a reduction of his sentence of death to life imprisonment are the poor environment in which he was raised and an assertion of psychiatric condition resulting in a decompensation of his mental faculties.

The record shows that the defendant was an illegitimate child. His mother has been married three times and the defendant was unable to get along with any of his stepfathers, and lived with his maternal grandmother in his early youth. He attended school until the middle of the 12th grade when he dropped out of school. In some subjects he did quite well; in most he was a poor student. His school records show on one report that he missed 30 days of school. He was a mild mannered young man most of the time, but at times was not. He seems to have developed a tendency to engage in fight-

ing with little or no provocation. He was arrested many times for minor offenses. He resented any form of discipline, and restrictions imposed on him, by law or otherwise, were an anathema to him. Out of this grew a belief by some that he was abnormal and was a fit subject for psychiatric treatment. Several psychiatric physicians have examined him since the murder on September 14, 1966, with varying results. There is evidence submitted that while he was serving in the Navy before the murder, his conduct was such that he was subject to psychiatric examination. There is evidence in the record that he attempted suicide on three occasions. These matters were all considered in evaluating his psychiatric condition. A brief review of these evaluations seems necessary.

In March 1966, defendant was given a psychiatric evaluation by a United States Navy physician, the report of which contains the following: "Emotionally Unstable Personality with strong antisocial tendencies as manifested by fluctuating moods, suicidal gestures to get out of an undesirable situation, inability to tolerate restrictions, inability to postpone gratification of immediate desires and apparent inability to profit from experience or punishment. * * * There is no indication for psychiatric treatment or hospitalization. It is also noted that he is fully responsible for all his actions and that any future acting out should be considered a misconduct and treated as such." David Levine, Ph.D., Professor of Psychology, evaluated the defendant and stated in part in his report: "On the basis of this evaluation, it is my judgment that he is mentally competent to assist in his defense and that he understood the nature and consequences of his behavior at the time of the crime. * * * He is not mentally retarded and there are no signs or organic brain damage. * * * My own approach to these scores on the MMPI [Minnesota Multiphasic Personality Inventory] (that is, a very high Schizophrenic Score and a very high faking score) is to look at other tests for cor-

roborating evidence. I gave Alvarez the Rorschach, the Sentence Completion, and the Wechsler Bellevue, Form II, and could find no evidence which would lead me to consider his high schizophrenic score on the MMPI valid. The most reasonable conclusion is that he was faking on this test. His responses to the Rorschach were quick (a reflection of his impulsivity, I believe), but they were realistic, conventional, and almost stereotyped." Dr. Charles A. Rymer, a psychiatric physician, evaluated the defendant's mentality. In his report, he says in part: "The mental examination reveals no deviation which might be considered as representing any type of psychosis. His intellectual rating is that of a dull normal. As to the details of his crime it would be my impression that he is well aware of the fact that he did kill his victim and that he did rape her. The story as related by him appears to be logical and coherent, although the details may vary in some degree. As a result of this examination it is my opinion that Mr. Alvarez is mentally competent, that he knows the difference between right and wrong, and he knows that he committed a murder. It is my opinion, based upon the history, that he has been accountable in the past for his behavior and was accountable for his behavior on September 14, 1966."

The defendant was examined on behalf of the defendant by Nathan Greenbaum, Ph.D., and Dr. Stanton L. Rosenberg, psychiatrist, who filed a joint report of their evaluation of the defendant. We summarize their report by quoting the following from it: "Indeed, we can understand this entire episode as a form of temporary insanity, during which he was not in command of his mental faculties, did not and could not know the nature of the act, and was not capable of knowing that what he was doing was wrong. As indicated in our preliminary report of December 2, 1966, while he is capable in retrospect of acknowledging the wrongness of his act and the concomitant remorse, he was not capable at the time of commission of the act, by virtue of his temporary insan-

ity, to determine right versus wrong or to act in consonance with any such knowledge of right versus wrong." The report shows that the history affording the basis for its conclusion was obtained from the defendant, his mother, and previous records. The statement of facts contains much that does not appear in any of the statements given to other psychologists and psychiatrists. It is odd, indeed, that much of the historical evidence was not revealed to other psychiatrists who examined the defendant. It is apparent that defendant, at the time of this examination, was able to recall more self-serving facts as to his mental condition previous to the murder than he had been able to do at previous psychiatric examinations.

We here call attention to the fact that the defendant entered his plea of guilty after consulting with his legal counsel. There was no trial. After the acceptance of the plea, the sentencing of the defendant was delayed until a thorough presentence investigation could be made. Police investigation reports, statements, confessions, character references, and reports of psychiatrists and psychologists were accumulated and submitted to the trial court. Opportunity to cross-examine witnesses or to comment on the contents of the presentence investigation was neither required nor afforded. The sentencing court evidently examined the 198-page report and available exhibits and came to the conclusion that the case was one calling for the assessment of the death penalty. A careful review of this lengthy investigation report does not indicate that the trial court failed to exercise the responsibility lodged in it by section 28-401, R. R. S. 1943.

The defendant asks this court to reduce the sentence from death to life imprisonment under the authority of section 29-2308, R. R. S. 1943, which provides in part: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive,

and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence." We point out that this statute does not authorize this court to reduce criminal sentences as a matter of grace, but, on the contrary, such sentences may be reduced only when they are found to be excessive. The issue is a judicial one and not one that may be exercised at will.

It is first contended the defendant, in entering a plea of guilty, saved a trial and the costs thereof, and that he is entitled to some compensation in the form of mitigation of punishment. That a plea of guilty sometimes warrants a reduction of the degree of a crime or the term of the sentence to be imposed is undoubtedly true. But a court is not bound to mitigate the punishment when the circumstances do not justify it. If such a mandatory rule existed, every person guilty of crime could avoid the maximum penalty by simply pleading guilty. The motivation for the guilty plea in this case is not known to us. We hazard a guess that defendant reasoned that he had a better chance for a life sentence with the court by pleading guilty than he would have after a verdict of guilty by a jury. But in any event, the trial court may or may not give consideration to a guilty plea, dependent on the circumstances of the case. Defendant contends that he cooperated fully with the police. This appears to be true after he found out they had evidence of his guilt. Before that, however, he denied the crime or any connection with it. Here again the trial court may consider the fact of cooperation with law enforcement officers, but it is not bound to do so. It is also urged that the trial court abused its discretion in sentencing the defendant to death when such penalty was not demanded by the prosecution. There may be many reasons or none at all why the prosecuting attorney does not demand the death penalty. The sentence rests with the trial court and the failure of the prosecutor to demand the death penalty in no manner limits the

responsibility of the trial court to fix the sentence in accordance with the law and the evidence.

Defendant contends that his emotional and mental instability, as shown by the presentence investigation, requires a reduction of the sentence to life imprisonment. We point out that the commission of every crime of the nature here shown indicates a degree of abnormality. The commission of a brutal killing, without provocation, of a woman unknown to the defendant necessarily shows some emotional instability. The differentiation of this type of mental decompensation with that indicating mental irresponsibility for crime involves a close examination of the facts. The viciousness of the crime is enough for some to establish sufficient mental instability to justify a reduction of sentence. But the very viciousness and brutality of the crime does not of itself give rise to judicial leniency.

There is much said about three alleged suicidal attempts, but they do not indicate serious attempts by the defendant to take his own life. They do indicate that they were "suicidal gestures to get out of an undesirable situation," as found by at least one of the examining psychiatrists. It is argued that the fact that multiple killings were not involved is a matter for consideration and the cases of Starkweather v. State, 167 Neb. 477, 93 N. W. 2d 619, and Sherman v. State, 118 Neb. 84, 223 N. W. 645, are noteworthy examples. But the imposition of the death sentence is not applicable only to multiple killings. Such a sentence may be imposed in a single killing where the crime was so gruesome and vicious, and the defendant so depraved in character as to authorize a death sentence. The case is controlled by Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, and MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, 323 U. S. 804, 65 S. Ct. 559, 89 L. Ed. 642. In the last-cited case, we said: "The crime here committed is so gruesome and depraved in character that a reduction of the sentence prescribed by the jury and imposed

by the trial court would amount to a holding that capital punishment will never be enforced in this state, irrespective of the legislative enactments on the subject." The quotation has application to the case before us.

It is argued here that the death penalty is a relic of an uncivilized past, that it is now, in our modern society, a cruel and unusual punishment, that it has no deterrent effect, that public opinion is opposed to it, and that the death penalty is not necessary. These contentions will be briefly commented upon. The death penalty by electrocution as punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions. In re Kemmler, 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 519; Malloy v. South Carolina, 237 U. S. 180, 35 S. Ct. 507, 59 L. Ed. 905. That such punishment is the relic of an uncivilized past is purely a matter of opinion. The assertion that capital punishment has no deterrent effect is an unsupported claim. No one can know the extent of the deterrent effect of such punishment. In any event, the fixing of the minimum and maximum punishment for crime is a legislative function with which this court is powerless to interfere. This court has attempted over the years to maintain a consistent application of the act. The repugnance that some individuals may feel toward capital punishment must be put aside in obedience to the law of the state. The views of the public as shown by statistics purporting to support them are of no avail in the determination of questions of law. It is urged here that it is not necessary to impose the death penalty in the instant case. The trial court determined that it was and this court finds adequate support for that finding in the evidence. The legislative act providing for the death penalty clearly indicates that the death penalty was to be imposed in certain cases, otherwise such penalty would not have been provided for in the statute. The interpretations of the statute by this court sustain the judgment

of the trial court. The decision of the trial court involves a most serious responsibility and a great deal of soul-searching. The trial judge, in imposing the death sentence as being required by the law of this state, evidences the integrity in the enforcement of the law that his oath of office imposed upon him. We are unable to find any reason for interfering with the judgment of the trial court under the evidence presented.

The judgment of the district court is in all respects affirmed and Friday, March 22, 1968, between the hours of 6 o'clock a.m., and 6 o'clock p.m., of said day, is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM LOSIEAU, APPELLANT.
154 N. W. 2d 762

Filed December 8, 1967. No. 36643.

1. **Searches and Seizures: Post Conviction Evidentiary Hearing.** An illegal search and seizure issue cannot be considered in a post conviction review where the circumstances of the search and seizure were fully known to the defendant at the time of the trial resulting in his conviction.
2. **Habitual Criminals and Subsequent Offenders.** Under the habitual criminal law, prior convictions may be used as the basis for enhancing the penalty for a subsequent felony conviction, even though they have previously been used for such purpose on a prior habitual criminal conviction.

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

Ray C. Simmons, for appellant.

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

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

McCOWN, J.

Under the Nebraska Post Conviction Act, the defendant has appealed from the overruling of a motion to vacate a January 1962 conviction and 20-year sentence for breaking and entering and habitual criminal.

The bulk of defendant's contentions in the motion as amended involve the claim that certain evidence introduced at the trial was the fruit of a unlawful search and seizure and inadmissible under the rule of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933.

The original trial here was several months after the decision in Mapp v. Ohio, *supra*. Experienced and able trial counsel had filed a motion in the trial court to suppress the evidence and had objected to its introduction when offered, and also represented the defendant on appeal to this court. The original conviction was affirmed, State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775. The unlawful search and seizure issue was not raised on the appeal. Under the comparable federal statute, it has been almost universally held that ordinarily an alleged illegal search and seizure issue may not be successfully raised in a proceeding which constitutes a collateral attack on the sentence, but must be presented in the appeal from the conviction. In Cox v. United States, 351 F. 2d 280 (8th Cir.) 1965, the court affirmed dismissal of a motion to vacate without an evidentiary hearing and stated: "Likewise, the illegal search and seizure issue cannot be considered on a § 2255 motion where, as here, the circumstances of the search and seizure were fully known to the defendant at the time of his trial resulting in his conviction." See, also, Springer v. United States, 340 F. 2d 950 (8th Cir.) 1965.

This court has repeatedly held that a proceeding under our Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

We hold that an illegal search and seizure issue cannot be considered in a post conviction review where the circumstances of the search and seizure were fully known to the defendant at the time of the trial resulting in his conviction.

The defendant also contends that to allow a conviction to be used more than once to support a habitual criminal charge is a misinterpretation of the Constitution, a cruel and unusual punishment, and places the defendant twice in jeopardy. The record shows that a conviction and sentence for stealing an automobile on August 3, 1945, and a conviction and sentence for burglary and habitual criminal on October 9, 1952, both from Douglas County, Nebraska, were the basis for the conviction on the habitual criminal charge on which the 20-year sentence was imposed in the present breaking and entering conviction in Dodge County in 1962. The defendant contends that completion of a sentence for a felony where the penalty has been enhanced because of the habitual criminal conviction should "wipe the slate clean."

Our habitual criminal law does not set out a distinct crime but provides that the repetition of criminal conduct aggravates the crime and justifies heavier penalties. Rains v. State, 142 Neb. 284, 5 N. W. 2d 887. It does not punish a defendant for his previous offenses, but for his persistence in crime. Taylor v. State, 114 Neb. 257, 207 N. W. 207. We see no reason why a first conviction under the habitual criminal law which increases the penalty for the felony conviction with which it is associated should be treated as wiping the slate clean and permitting the defendant to start over again as though he had never been convicted of any felony. Where the very purpose of the habitual criminal act is to penalize the repetition of criminal conduct, we find nothing unfair, much less unconstitutional, in using the same criminal conviction as the basis for the increased punishment for a subsequent felony conviction.

The issue is one of first impression in this state. Other jurisdictions studied, with the exception of Texas, seem to make no such distinctions as defendant contends for. More recent Texas cases indicate that the precedents relied on by defendant have been substantially distinguished. A habitual criminal conviction and the serving of the increased sentence on the third felony conviction does not pardon or condone, much less erase, all three convictions.

We hold that under our habitual criminal law, prior convictions may be used as the basis for enhancing the penalty for a subsequent felony conviction, even though they have previously been used for such purpose on a prior habitual criminal conviction. See, State v. Gaskey, 255 Iowa 967, 124 N. W. 2d 723; 25 Am. Jur., Habitual Criminals, § 19, p. 269.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JIM WARD, ALSO KNOWN AS JIMMIE LEE WARD, APPELLANT.
154 N. W. 2d 758

Filed December 8, 1967. No. 36666.

1. **Indictments and Informations: Probation and Parole.** A formal information and arraignment conforming to criminal procedure is not required for revocation of probation. Technical formality and preciseness of charge are unnecessary.
2. **Probation and Parole: Evidence.** Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that the defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of probation.

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

Lindsay & Lustgarten and Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

The defendant pleaded guilty to fraudulently issuing an insufficient fund check and was placed on 2 years' probation. The order provided that the defendant should abstain from the use of alcoholic beverages and not violate the laws of any state. Thereafter an information alleging violation of the probation order was filed. On September 27, 1966, the trial court found that the probation order had been violated and extended the probation period for 6 months.

A second information alleging violation of probation was filed on March 30, 1967. After hearing, the probation was revoked and the defendant sentenced to 1 year's imprisonment. The defendant has appealed from this judgment.

The information filed on March 30, 1967, failed to allege the 6 months' extension of the probation period. The defendant contends that the court lacked jurisdiction because the information failed to show on its face that the violation alleged had occurred within the period of probation.

The information specifically alleged the conduct constituting the violation of probation. This was sufficient. A formal information and arraignment conforming to criminal procedure is not required for revocation of probation. Sellers v. State, 105 Neb. 748, 181 N. W. 862. Technical formality and preciseness of charge are unnecessary. Carr v. State, 152 Neb. 248, 40 N. W. 2d 677.

The defendant further contends that the evidence was insufficient to sustain the revocation.

The second information charged that on March 13, 1967, the defendant drove while under the influence of alcoholic liquor. The State proved that the defendant

had pleaded guilty to a charge of operating a motor vehicle while under the influence of alcoholic liquor on the date alleged. This evidence was sufficient to sustain a finding that the defendant had violated the terms of his probation as alleged.

Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that the defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of probation. Sellers v. State, *supra*.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. HOWARD LEROY WILLIAMS, APPELLANT.

155 N. W. 2d 189

Filed December 22, 1967. No. 36430.

1. **Burglary: Evidence.** Where evidence of the finding and identification of a tool of the nature commonly used in breaking and entering is received without objection, the subsequent admission of a photograph showing such instrument at the scene of the offense is not prejudicial.
2. **Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.
3. ———. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received.
4. **Criminal Law: Evidence.** Where an accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is competent.
5. ———: ———. This court, in a criminal action, will not inter-

fere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.

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

Robert W. Haney, for appellant.

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

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

NEWTON, J.

This is an appeal from the conviction by a jury of the defendant on a charge of attempted burglary. The evidence of the State discloses that at about 4 a.m. on the morning of November 6, 1964, two police officers, while cruising about with the lights on their automobile turned off, approached an establishment referred to as Al's Bar. There was a lighted telephone booth adjacent to Al's Bar and there were two street lights, one across the street and one about half way up the street in the same block, about three or four doors from Al's Bar. They observed two individuals standing in front of the door of Al's Bar when they were about 100 yards away. One of the officers stated that the defendant seemed to be pulling at the door to Al's Bar or shaking it and that he observed some object in the defendant's hand which could have been a crowbar although he could not identify it as such. As the officers approached to within about 75 yards, the individual with the defendant, who was identified as one Charles Green, walked rapidly away. The defendant stepped over in front of the adjacent telephone booth and stopped. Both were then apprehended. The officers, on examining the door to Al's Bar, found that it had two locks, both of which had been "broken, or pried off, or forced off" by some

type of instrument and the door could be readily pulled open. There were marks on the door and on the door jamb adjacent to the locks made by an instrument of some type. The second officer stated he had not been able to observe anything in the defendant's hand as they approached "because he never turned flush." There was about a 6-inch space between Al's Bar and the telephone booth and in this area, the officers found a crowbar. A very short time later, pictures were taken of the door to Al's Bar from both inside and outside and of the front of the building showing the relative position of the door to Al's Bar and the telephone booth.

The defendant testified that he had been to several taverns or nightclubs during the preceding night and early morning hours. Shortly before his apprehension, he had decided to go to Johnny Watson's jitney joint which was located in a building adjacent to Al's Bar. When he got there, he did not enter Johnny Watson's place, but walked by it to the telephone booth with the intention of calling his mother to tell her he would not be home. He entered the booth twice and called his home but received a busy signal. He went back out on the sidewalk with the intention of calling again in a short time, encountered Charles Green, and was standing there visiting with him when apprehended. He denies that he had ever touched the door to Al's Bar although he might have stood in front of it. He further stated that he had encountered Charles Green once earlier in the evening at one of the taverns or nightclubs that he had attended and that after his arrest, the police came back with the crowbar which they placed in the cruiser.

Defendant contends that error was committed when exhibit 1, the picture showing the door to Al's Bar and the telephone booth, was admitted in evidence because it also showed the crowbar lying between the two buildings. Objection was made to the introduction of this picture and to the introduction of the crowbar itself, the latter objection being sustained by the trial court. Evi-

dence of the officers to the finding of the crowbar and its identification was not objected to and error cannot now be predicated upon the admission of such testimony. See, State v. Snell, 177 Neb. 396, 128 N. W. 2d 823; State v. Homan, 180 Neb. 7, 141 N. W. 2d 30. In view of this evidence, the admission of exhibit 1 could not be considered prejudicial. The exhibit does serve to clarify the relative positions of the telephone booth, the door to Al's Bar, and the space between the building housing the bar and the telephone booth. The relative location of these buildings was very material in view of the testimony of the officers as to defendant's position when first observed and in view of his own testimony regarding his movements. "A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description." Davis v. State, 171 Neb. 333, 106 N. W. 2d 490. "Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received * * *." Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201. The evidence of the officers, if believed, would indicate that they had interrupted the defendant and Charles Green in the act of breaking into Al's Bar. The defendant was seen directly in front of the door, pulling on it, and had some object or instrument in his hand which the officer could not identify. As the officers approached, he stepped over toward the telephone booth in the vicinity where the crowbar was found and he could have then readily disposed of whatever he had in his hand in the area between the telephone booth and the building occupied by Al's Bar. Under such circumstances, it is a reasonable inference that the crowbar which was found was the object seen in the defendant's hand and was disposed of by him at the place where it was found as the officers approached. It is not contradicted that the crow-

bar was found immediately adjacent to the scene of the crime. The circumstances are sufficient to warrant a reasonable inference that the defendant had used the crowbar and deposited it there. The inference of it having been in defendant's possession is sufficient to have warranted the admission of the crowbar, let alone the picture objected to. "* * * where an accused is identified as having been at or near the scene of a crime about the time of its commission evidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is competent." Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677.

Defendant also contends that the evidence is insufficient to sustain a finding of guilt. On examination of the evidence which has been above set forth, we believe there was sufficient evidence to justify the submission of this case to the jury. "This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Eberhardt, 179 Neb. 843, 140 N. W. 2d 802. See, also, Buckley v. State, 131 Neb. 752, 269 N. W. 892. It might properly be pointed out in this respect that where individuals attempting a burglary are interrupted while in the process of breaking and entering, the door has been forced, an instrument of some type is seen in the hands of one of them, and a crowbar, such as is frequently used for such purposes, is found in the immediate vicinity where it could readily have been disposed of as the officers approached, it would ordinarily be difficult to obtain stronger evidence against one caught red-handed in the commission of such an offense.

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

AFFIRMED.

SMITH, J., participating on briefs.

COUNTY OF SAUNDERS, APPELLEE, V. CLARENCE N. MOORE, JR., ET AL., DOING BUSINESS AS MIDWAY TRAILER PARK, INC., APPELLANTS.

155 N. W. 2d 317

Filed December 22, 1967. No. 36589.

1. **Zoning.** A nonconforming use is an "existing use" which is contrary to the zoning regulations. A permitted use is not a conforming use.
2. ———. An "existing use" means the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose.
3. ———. An "existing use" for business purposes ordinarily means a construction or use of the premises so that they are adaptable for the business purpose and the actual employment of the building, room, or land within the scope of the purpose.
4. ———. A contemplated or intended use standing alone is not sufficient to constitute a nonconforming use.
5. ———. To obtain a vested interest in a nonconforming use, a person, prior to the effective date of the regulation or ordinance making such use nonconforming and while violating no existing law or regulation, must cause either substantial construction to be made thereon or incur substantial liabilities relating directly thereto, or both.
6. ———. A property owner who claims rights by virtue of a nonconforming use has the burden of proof to establish such nonconforming use.
7. ———. A permit to use land for a use then permissible under zoning regulations may be revoked, changed, or altered unless substantial construction is made or substantial liabilities incurred relating directly thereto, or both.

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

Paul E. Watts, for appellants.

Robert E. Sullivan, for appellee.

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

WHITE, C. J.

This is an action in equity by plaintiff, County of Saunders, Nebraska, to enjoin the defendants, Clarence

N. Moore, Jr., and Ardis D. Moore, from operating, constructing, or maintaining the use of their property as a trailer court or camp. The property, consisting of approximately 14 acres, is located some distance south of the village of Yutan, County of Saunders, Nebraska.

The trial court found in favor of the plaintiff, granted the injunction, and the defendants have perfected their appeal to this court. We affirm the judgment.

Defendants acquired the property in question in 1964. In April 1966, the defendants, doing business as Midway Trailer Park, Inc., had made plans to convert the property from agricultural land into a trailer court. The County Board of Supervisors of Saunders County, Nebraska, adopted zoning regulations for Saunders County effective September 6, 1966, which zones the property in question as R-1 (residential district). Trailer courts or camp grounds were permitted only in areas zoned C-1 (highway commercial district).

The issue in this case is whether the defendants, prior to the effective date of Saunders County zoning regulations (September 6, 1966), had acquired a vested interest in an existing nonconforming use permitting them to continue and complete, or partially complete, the project irrespective of the zoning regulations.

A nonconforming use is an "existing use" which is contrary to the zoning regulations. And a permitted use is not a nonconforming use. Board of Commissioners v. Petsch, 172 Neb. 263, 109 N. W. 2d 388; 101 C. J. S., Zoning, § 180, p. 936. The general rule is, and this court has held, that an "existing use" means the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose. An "existing use" for business purposes ordinarily means a construction or use of the premises so that they are adaptable for the business purpose and the actual employment of the building, room, or land within the scope of the purpose. Board of Commissioners v. Petsch, *supra;* 101 C. J. S., Zoning, § 184, p. 940; Chayt v. Board

of Zoning Appeals, 177 Md. 426, 9 A. 2d 747; Haller Baking Company's Appeal, 295 Pa. 257, 145 A. 77. With exceptions, not pertinent here, a vested interest in a nonconforming use under zoning regulations is a property right, and any statute or law purporting to take away that right is invalid. Board of Commissioners v. Petsch, *supra;* City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828.

A contemplated or intended use standing alone is not sufficient. Board of Commissioners v. Petsch, *supra;* City of Omaha v. Glissmann, *supra.* To obtain a vested interest in a nonconforming use, a person, prior to the effective date of the regulation or ordinance making such use nonconforming and while violating no existing law or regulation, must cause either substantial construction to be made thereon or incur substantial liabilities relating directly thereto, or both. City of Omaha v. Glissmann, *supra.* The rule to be deduced from the above authorities is that preliminary contracts or work which are not of a substantial nature and contracts or work consistent with the zoning ordinances and regulations are not considered to be substantial construction or liabilities relating directly to the intended use which has become nonconforming because of the change or adoption of the regulations or ordinances. Board of Commissioners v. Petsch, *supra;* City of Omaha v. Glissmann, *supra.* See, also, 101 C. J. S., Zoning, § 186, pp. 943, 944 (Building or Use in Course of Construction); Meuser v. Smith (Ohio), 143 N. E. 2d 757, 141 N. E. 2d 209.

The defendants in this case affirmatively pleaded the existence of a nonconforming use in their answer. The burden of proof is upon the property owner who claims rights by virtue of a nonconforming use. 101 C. J. S., Zoning, § 363, p. 1207; Colabufalo v. Public Bldgs. Commissioner of Newton, 332 Mass. 748, 127 N. E. 2d 564.

The critical date for the test of the use of the property is September 6, 1966. Much of the apparent conflict in the testimony in this case was resolved on cross-

examination of the defendant Clarence N. Moore, Jr., since defendants were unable to sustain the burden of proof in establishing the conditions and uses of the property on September 6, 1966. Also, the trial court's findings and judgment were based upon a visual inspection of the premises. The evidence shows that on September 6, 1966, there was one electric pole on the northeast corner of the property with electrical wires running into it, a well, and some preliminary work done by a road grader marking out roads. There were no trenches, water or sewer pipes either on the property or installed, no poured concrete, or trailer houses present. There was one trailer house on the premises sometime in August 1966. As late as October 12, 1966, more than a month after the effective date of the act, there were no trailer houses on the property, but there were three poles with wires running from pole to pole. The road work was done by a Mr. Cunningham without cost. The trial court, after an inspection of the premises, found that this consisted of making "very shallow marks on the ground and was little more than scraping off the weeds and making an outline of a road or street." There is some evidence as to gravel placed on a portion of the road but the evidence is that it was not in existence on September 6, 1966.

Defendants had plans for 110 trailer lots costing approximately $500 each. They asserted that 14 trailer stalls were totally completed on September 6, 1966; that 36 were 75 percent completed; and that the remaining 60 stalls were 50 percent completed. The evidence, including the cross-examination of the defendant, Clarence N. Moore, Jr., shows that the stalls were not only not completed but there was no effective installation work accomplished at all. Water, electrical, telephone, and sewage connections, concrete pouring and concrete parking facilities, and planned lot fencing were not available on this date or installed. The property was staked by the defendants with the stakes protruding some 6 or

8 inches but weeds had prevented the stakes from being visible on September 6, 1966. We conclude from the evidence, as the trial court did, that there were no developed facilities available to accomodate any trailers and that the parking of any trailers on the property would be little other than parking trailers on open farm land which is adjacent to a well and an electrical source.

Radio advertising was contracted for after September 6, 1966; an original advertising sign reading, "Midway Trailer Park" had been destroyed and a second sign was installed on September 5, 1966, which read, "Midway Heights." Defendants alleged that they had expended funds and incurred liabilities totalling approximately $6,350 prior to September 6, 1966. On cross-examination it appeared that the amount actually spent was around $3,000 and the defendant, Clarence N. Moore, Jr., could not fix the dates as occurring before or after September 6, 1966. The record only shows that the defendants made an advance of $1,075 on an electrical line extension agreement, which amount was refundable upon compliance with the terms of the agreement, paid $950 to have a well installed, and purchased a tractor grader for $250. The evidence with relation to any contracts for laying the water and sewer pipes is, at best, uncertain, indefinite, and equivocal. It does appear that whatever work was done in this respect was completed and paid for after September 6, 1966. Further elaboration of the evidence is unnecessary to support the conclusion we come to in this case. From a full examination of the record in this case, we conclude that the defendants have not sustained their burden of proof to establish a nonconforming use of the property in question. We feel, on the other hand, that on September 6, 1966, the effective date of the zoning regulation, the use of this property was not that of a trailer court. The use of the property standing alone on that date would not make known to the neighborhood that the land was being

used as a trailer court, within the meaning of the rule laid down in Board of Commissioners v. Petsch, *supra*. In any substantial sense there was no construction or direct adaptability of the land for the intended purpose, and no employment of the land within the intended purpose. The defendants had not engaged in substantial construction nor incurred substantial liabilities directly relating to the establishment of a trailer park as a nonconforming use. City of Omaha v. Glissmann, *supra*. It is our conclusion, as it was the trial judge's, that everything that was actually done or performed on the property by September 6, 1966, and every use that was actually made of the property up to that date could be referred to as a conforming use just as well as it could be referred to as a nonconforming use. It is true, as the defendant Clarence N. Moore, Jr., testified, that the premises could be used as a trailer court as a nonconforming use because the water could be bucketed to the trailers, because the electricity could have been hooked up by temporary wires and cables, and because the sewage could have been run into a ditch down into a pit. But, as we have seen, the existing use must be an actual one, and it must be nonconforming use, otherwise property owners could claim a nonconforming use in any activity, business, or enterprise that required the use of water, sewer, and electricty. Almost all of the work and liabilities which had been incurred prior to September 6, 1966, were adaptable to and consistent with conforming uses. The small amount of construction and work which could be said to be nonconforming was very unsubstantial in nature and far short of compliance with the applicable rules set out herein. The defendants, on September 6, 1966, had not acquired a vested interest in a nonconforming use.

Defendants seek to compare this case with that of Board of Commissioners v. Petsch, *supra*. In Board of Commissioners v. Petsch, *supra*, it was undisputed that there was an established nonconforming use; that trailer

houses were actually making use of the property; and that power, telephone, water, and sewer services were connected up and installed and extended throughout the property. The issue in that case was whether the use could be extended throughout the area of a 3-acre tract. The issue in this case is whether there was an existing vested nonconforming use on September 6, 1966, and as we have seen, the defendants have failed to meet their burden of proof to establish such interest.

An issue is made by the defendants that the county had approved the project in April 1966 and that, therefore, the defendants were entitled to complete it. The evidence conflicts in this case as to whether any authorization of the county was orally revoked in July 1966. We do not need to decide this factual issue because it is not controlling. If a permit is obtained to use land for a use then permissible under zoning regulations and substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked, then the right to such use becomes established as a permissive nonconforming use. City of Omaha v. Glissmann, *supra*. This follows the general rule that a permit may be revoked where no vested right has been acquired thereunder before the subsequent change in the zoning laws or regulations is made which prohibits the permitted use or construction. The mere issuance of a permit gives no vested rights to the permittee nor does he acquire a property right in the permit. See, 101 C. J. S., Zoning, §§ 243, 244, pp. 1006, 1007, 1008. There is no merit to this contention.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILBER L. SEARS, APPELLANT.
155 N. W. 2d 332

Filed December 22, 1967. No. 36592.

1. **Criminal Law: Constitutional Law.** Where the totality of the circumstances surrounding a confrontation made prior to June 12, 1967, shows that it was not unnecessarily suggestive and conducive to irreparable mistaken identification, it is not a denial of due process of law.
2. **Judgments: Evidence.** A judgment will not be reversed because of the admission of irrelevant evidence which was not prejudicial.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Michael McCormack, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of burglary and sentenced to 10 years' imprisonment as a habitual criminal. His motion for new trial was overruled and he has appealed.

The record shows that the Charles Trofholz residence near Omaha, Nebraska, was burglarized at about 4 p.m. on September 26, 1966. The crime was in progress when a neighbor boy, Allen Kerr, called at the Trofholz home to see one of the Trofholz boys. As Allen approached the front door of the Trofholz home, the door opened and the defendant started out. When the defendant saw Allen, the defendant "jumped back in" the house and left by a rear door. Allen saw the defendant run or "trot" around the east side of the house and then enter a Plymouth automobile and drive away.

A few minutes later Allen and his brother Brian saw the Plymouth automobile pass in front of the Trofholz

residence. Brian went around the block and saw the Plymouth automobile parked to the west of the Trofholz home with the defendant sitting in the driver's seat. The defendant drove away and Brian memorized the license number.

The defendant was traced to 4870 Saratoga Street through the registration number of the Plymouth automobile. The defendant and Raymond Badami were apprehended by sheriff's officers near this address at about 6:30 p.m.

The defendant and Badami were then taken to the vicinity of the Trofholz home where the defendant was identified by both Allen and Brian.

At the time the identification was made, the defendant and Badami were seated in the rear of an automobile. Two sheriff's officers dressed in plain clothes were seated in the front of the automobile. Allen and Brian were brought out to the automobile, separately, and asked to look at two suspects and state whether they had ever seen them before. Both Allen and Brian identified the defendant while he was seated in the automobile. The defendant was later placed in front of the headlights of the automobile and viewed by both boys. After the identification had been made, Badami was released.

Allen and Brian testified at the trial and identified the defendant as the man whom they had seen at the Trofholz home at the time of the burglary.

The defendant's principal assignments of error relate to the identification of the defendant made by Allen and Brian. The defendant contends that the confrontation which took place after the defendant had been arrested was a denial of the defendant's constitutional right to due process of law.

The rule stated in United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, is not applicable in this case because the confrontation took place be-

fore June 12, 1967. Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199.

Where the totality of the circumstances surrounding the confrontation shows that it was not "unnecessarily suggestive and conducive to irreparable mistaken identification," the defendant has not been denied due process of law. Stovall v. Denno, *supra*. We think the evidence shows that the confrontation made in this case was not a denial of due process. The assignments of error are without merit.

The defendant further complains that the prosecuting attorney was guilty of misconduct by introducing testimony which was irrelevant. A deputy sheriff testified that he had received subpoenas for Diane John and Vicky John at 4807 Saratoga Street, but that the subpoenas could not be served at that address and had not been served. Captain Shears, another sheriff's officer, testified that he had interviewed Diane John and Vicky John and obtained statements from them as a part of his investigation. The defendant argues that the testimony of Captain Shears was irrelevant and was intended to create an inference that Diane John and Vicky John had implicated the defendant. At best, the argument is speculative.

The testimony of Captain Shears was received without objection or motion to strike, and the defendant did not move for a mistrial. Although the evidence may have been irrelevant, it was not prejudicial. If the error had been preserved, a reversal would not be required. Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649.

The evidence was clearly sufficient to sustain the judgment of the district court which is affirmed.

AFFIRMED.

REGINA ANN KLEIN, APPELLEE AND CROSS-APPELLANT, V. RALPH RICHARD KLEIN, JR., APPELLANT AND CROSS-APPELLEE.
154 N. W. 2d 879

Filed December 22, 1967. No. 36605.

Divorce: Evidence. In a divorce action where the credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Burbridge & Burbridge and Getscher & Getscher, for appellant.

Spencer & Hoch, for appellee.

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

SMITH, J.

Plaintiff wife was awarded an absolute divorce and custody of two children, the district court dismissing defendant's cross-petition. On appeal and cross-appeal the issues relate to cause for divorce, moral fitness of plaintiff, and adequacy of allowances.

The district court allowed plaintiff (1) $12.50 a week for each of the children, who were 4 and 5 years of age; (2) permanent alimony of $1,000 payable in monthly installments of $25; and (3) $350 for attorney's fees. It awarded to her the furniture, and to defendant two automobiles, a 1956 Studebaker and a 1963 Buick. It imposed on him the duty to save plaintiff harmless from loss on an indebtedness of $2,000 approximately.

At the time of trial defendant resided at the home of his parents, both of whom were employed away from the house. He worked as a quality control auditor for $2.08 an hour. Plaintiff worked in a grocery store. In

addition to temporary custody of the children of the parties, she had custody of two children, ages 8 and 10, by a previous marriage.

Defendant had occasionally laid violent hands on plaintiff. The nature of plaintiff's social relations with a named man was controverted in the evidence, reasonable inferences depending on credibility of witnesses. The district court found that her conduct had not reached extreme cruelty which was alleged in the cross-petition. The trial court having observed the witnesses, we accept the findings. See Heiser v. Heiser, *ante* p. 216, 153 N. W. 2d 909. The custody award and the allowances are correct, and the judgment is affirmed. Plaintiff is allowed $350 for legal services of her attorney in this court. Costs of appeal are taxed to defendant.

AFFIRMED.

DONA HOHENSEE, APPELLANT, V. GWENDELL HOHENSEE, APPELLEE.

154 N. W. 2d 878

Filed December 22, 1967. No. 36620.

Divorce: Attorney and Client. Attorneys' fees in divorce proceedings will ordinarily be denied where no reasonable justification appears for the position taken by the party claiming them.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed.

Wagener, Marx & Youngs and James M. Winter, for appellant.

Kier, Cobb & Luedtke, for appellee.

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

SMITH, J.

Plaintiff wife has appealed from a decree awarding

defendant an absolute divorce and custody of three minor daughters. It is argued that she is entitled to an absolute divorce and custody.

At the trial the elder children, 15 and 13 years of age, expressed custodial preferences for defendant. The court found that both parents would be proper custodians and that the children should remain together. For the welfare of the children and in their best interest, the court concluded, custody should be given to defendant.

The plight of plaintiff is lamentable. We trace the cause of divorce, extreme cruelty, to a disorder of her personality. In September 1965 a psychiatrist diagnosed passive-aggressive personality characteristics and paranoid and schizoid personality tendencies. Her condition, however, required no institutional treatment. The psychiatrist testified in November 1966, that she was capable of caring for the children, but he did not testify to remission of the disorder. Nothing is to be gained from a description of her behavior. The judgment is correct, but we find her unfit to have custody of the children because of her personality disorder.

Plaintiff requests an allowance for legal services on appeal. Attorneys' fees in divorce proceedings will ordinarily be denied where no reasonable justification appears for the position taken by the party claiming them. Williams v. Williams, 168 Neb. 135, 95 N. W. 2d 205. In spite of our sympathy for plaintiff we think that the general rule applies, and the request is denied.

After the appeal had been taken the trial court ordered that: (1) Monthly payments on the judgment for permanent alimony be suspended pending our decision; (2) defendant pay on a mortgage indebtedness the monthly installments as temporary support; and (3) defendant deposit $480 out of which certain court costs of plaintiff were to be paid. See Overton v. Overton, 178 Neb. 267, 133 N. W. 2d 7. Defendant is entitled to credit such mortgage payments against his liability for permanent alimony. Costs on appeal are taxed against

him, but he is entitled to credit for items paid out of the deposit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD J. KOSINSKI, APPELLANT.
155 N. W. 2d 335

Filed December 22, 1967. No. 36687.

Trial: Appeal and Error. Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the jury could not have been misled, a claim of prejudicial error in the instructions is not available.

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

Kelly & Kelly, for appellant.

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

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

CARTER, J.

This is an appeal by Richard J. Kosinski from his conviction in the district court for Hall County for a second offense of driving an automobile during the suspension of his operator's license. The only assignment of error is the claim of error in the giving of instruction No. 6 by the trial court.

The evidence sustains a finding by the jury that defendant was arrested for driving without an operator's license on a graveled road in Lincoln Park within the corporate limits of the city of Grand Island. No contention is advanced that the evidence is insufficient to sustain a conviction. The correctness of instruction No. 6 is the only issue before the court.

Instruction No. 6 is as follows: "A highway is defined as 'A way open to the public at large without distinction, discrimination, or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand, and the duty of public maintenance on the other.'" The claimed error is that the instruction makes no reference to and is not limited to the operation of a motor vehicle upon the streets, alleys, or highways. It is asserted that the failure of the trial court to include in the instruction any reference to the movement of vehicular traffic on a street or highway makes it fatally defective for noncompliance with section 60-401, R. S. Supp., 1965, which provides in part: "(6) street or highway includes the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right or easement, for purposes of vehicular traffic; * * *."

By instruction No. 5 the trial court informed the jury in part as follows: "(a) That on or about September 3, 1966, the defendant, Richard J. Kosinski, operated a motor vehicle upon the streets, alleys or highways of Hall County, Nebraska; (b) That at said time the defendant, Richard J. Kosinski's driver's license had been suspended or revoked by the State of Nebraska, and he had not obtained a new license." This instruction clearly shows that defendant was charged with operating a motor vehicle upon the streets, alleys, or highways of Hall County, Nebraska. The jury clearly understood the nature of the charge and could not have been misled by the claimed deficiency in instruction No. 6. It is a fundamental rule that in determining the correctness of an instruction, all the instructions must be considered together. The applicable rule is stated in McIntosh v. State, 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798, wherein it is said: "This court has repeatedly held that the

charge to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the jury could not have been misled, that error will not lie for some defect in some instruction." As a whole, the instructions make it clear that instruction No. 6 dealt with the use of streets, alleys, or highways by vehicular traffic.

Complaint is further made that instruction No. 6 uses different words than those contained in section 60-401, R. S. Supp., 1965, and amounts to a fatal departure from the language of that statute. The answer to this is that section 60-401, R. S. Supp., 1965, does not purport to be an all-inclusive definition of a street or highway; all it purports to do is to make it clear that a street or highway includes its full width between property lines. The definition of a street, alley, or highway as used in the statute is proper for the definition of the court when its meaning becomes involved in litigation.

The evidence sustains a finding that the thoroughfare in Lincoln Park is entered from Capital Avenue in the city of Grand Island. It is used generally by the public and is owned and maintained by the city. It sustains a further finding that defendant was operating his automobile without an operator's license on the traveled portion of the road although there is conflict in the evidence on this latter point. There is no error in instruction No. 6 when considered with other instructions given. There is no prejudicial error in the record and the judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

PHILIP C. ANDERSON ET AL., APPELLANTS, V. NORBERT TIEMANN ET AL., APPELLEES.
155 N. W. 2d 322

Filed December 22, 1967. No. 36810.

1. **Constitutional Law.** Each and every clause in a constitution has been inserted for some useful purpose.
2. **Constitutional Law, Construction of.** Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction.
3. **Statutes: Courts.** Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.
4. **Constitutional Law: Taxation.** The constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective; and the provisions of L.B. 377, of the 1967 Legislature, with reference thereto are valid.
5. **Statutes: Taxation.** The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor constitute a violation of the requirements of a representative form of government.
6. **Administrative Law: Constitutional Law.** The rule-making authority granted to the Tax Commissioner by L.B. 377, of the 1967 Legislature, is a valid and lawful delegation of authority, and does not violate the Constitution of Nebraska nor of the United States.
7. ———: ———. L.B. 377, of the 1967 Legislature, constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor of the United States.
8. ———: ———. L.B. 377, of the 1967 Legislature, does not unconstitutionally delegate judicial power to the Tax Commissioner.
9. **Constitutional Law: Taxation.** Article VIII, section 1, of the Constitution of Nebraska, does not prohibit a graduated state income tax.
10. ———: ———. A franchise tax based upon or measured by the income of a corporation is not a property tax within the meaning

of Article VIII, section 1, of the Constitution of Nebraska.

11. ———: ———. A tax classification, although discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.
12. **Constitutional Law: Citizens.** The privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.
13. **Constitutional Law: Taxation.** The allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth Amendment.
14. **Constitutional Law: Statutes.** L.B. 377, of the 1967 Legislature, contains but one general subject, taxation, and does not violate Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subject.
15. **Constitutional Law: Courts.** This court will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future.

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

Ray C. Simmons, for appellants.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellees.

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

MCCOWN, J.

The plaintiffs seek a declaratory judgment holding L.B. 377, sections 14 through 137, enacted by the 1967 Legislature, unconstitutional and totally void insofar as it relates to the state income tax, and enjoining the defendants from enforcement. Plaintiffs include domestic

corporations and both resident and nonresident individuals. Defendants are various officials of the State of Nebraska. Issues were joined on a demurrer, stipulation of facts, and a later motion for summary judgment. The district court held that sections 14 to 137, L.B. 377, were valid in all respects, with one exception dealing with a portion of section 115 which was held invalid but severable, and dismissed the plaintiffs' petition.

L.B. 79 of the 1965 session of the Nebraska Legislature provided for the submission of a constitutional amendment on a state income tax to a vote of the people. That constitutional amendment was submitted to and approved by the electorate at the general election in November 1966. The amendment to Article VIII provides: "Sec. 1B. When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States."

L.B. 377, designated as the "Nebraska Revenue Act of 1967," contains three general subdivisions. Sections 2 through 13 are designated (a) Sales and Use Tax; sections 14 through 124 are designated (b) Income Tax; and sections 125 through 137 are designated (c) General Provisions.

Section 14, the first section of the income tax subdivision, expressly provides in part: "Any term used in sections 14 to 124 of this act shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United States relating to federal income taxes, and the rules and regulations issued under such laws, *as the same may be or become effective, at any time or from time to time, for the taxable year.*" (Emphasis

added.) Other sections of the act make similar references.

The plaintiffs' first contention is that those provisions of L.B. 377 which attempt to make future laws of the United States relating to the federal income tax automatically effective as a part of the state income tax law are unconstitutional. Such action by the Nebraska Legislature is challenged as an unlawful delegation of legislative power to the United States in violation of Article II, section 1, and Article III, section 1, of the Constitution of Nebraska.

It is conceded that the Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227.

In 1935, this court held that a statute appropriating funds to be expended under the terms and conditions provided by an act of the Congress of the United States to be passed in the future, is an unconstitutional attempt on the part of the Legislature to delegate legislative authority to the Congress of the United States. Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492. That case has not been overruled, and remains law in this jurisdiction, except as it may be affected by the constitutional amendment quoted above. The constitutional amendment having been adopted subsequent to the Smithberger case necessitates an interpretation of the constitutional amendment and a determination as to whether that amendment granted the Legislature the authority, in adopting a state income tax law, to adopt future laws of the United States as they may be or become effective.

The plaintiffs' position is that the words "based upon" in the constitutional amendment connote only something already in existence or effect. The argument is that since the Legislature already possessed power to adopt existing laws of the United States by reference, nothing was changed by the constitutional amendment

and, in effect, it was a useless gesture. We cannot agree.

The term "base" in Webster's Seventh New Collegiate Dictionary is defined as: "The point or line from which a start is made in an action or undertaking" or "The fundamental part of something." Webster's Twentieth Century Dictionary, unabridged (2d Ed.), contains among others, the definitions: "The foundation or most important element, as of a system or set of ideas" and "Anything from which a start is made; basis."

The specific language of the amendment standing alone does not expressly state that future changes are to be included nor does it restrict the application to present laws only. Judicial interpretation is, therefore, required.

On the basis of the legislative history of L.B. 79 of the 1965 Legislature which submitted this amendment to the people, the trial court specifically found that: "* * * it was the intent of the legislature that power be given it by the Amendment to adopt the laws of the United States *with future changes.* The statements of two Senators support this and no statement is contained in the legislative history before the Court expressing a contrary intention."

This court has also recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose. Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction. Carpenter v. State, 179 Neb. 628, 139 N. W. 2d 541.

In State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63, this court stated: "Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid."

The cumulative effect of all these considerations is

convincing. We think the clear purport and intent of the constitutional amendment was to grant the Legislature the authority to do exactly what it did. We hold that the constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective; and the provisions of L.B. 377 with reference thereto are valid.

The plaintiffs also contend that any such delegation of legislative authority to the United States violates the requirements of a representative form of government imposed by the enabling legislation admitting this state to the Union. By implication, the argument is that even though there was specific state constitutional authority, an adoption of future laws of the United States would still constitute an unconstitutional delegation of legislative authority. The additional implication is that such delegation implies an abdication or waiver of the sovereignty of the state and is, therefore, constitutionally prohibited.

Insofar as the briefs indicate, this is a case of first impression on the issue of whether a state can, by constitutional amendment and subsequent legislative action, adopt present and future income tax laws of the United States, and essentially make the claims for state income tax contingent upon, and correlative with, the establishment of liability for federal income tax. However, the general issue was considered by the 9th Circuit Court of Appeals in the case of Alaska Steamship Co. v. Mullaney, 12 Alaska 594, 180 F. 2d 805 (1950). Although Alaska was at that time a territory, under its organic act, it had the privilege of legislating, including the levying and collecting of taxes and revenue, in much the same manner as a state. The legislative design of basing the income tax on the federal income tax law as then in existence or thereafter amended, and calcu-

lating the state income tax as a percentage of the federal income tax was essentially the same. The court in that case stated: "We think it is far from clear that any invalid delegation is attempted. There are of course many cases which have held attempts by a legislative body to incorporate provisions into its enactments by reference to future acts or amendments by other legislatures, to be invalid. But where it can be said that the attempt to make the local law conform to future changes elsewhere is not a mere labor-saving device for the legislators, but is undertaken in order to attain a uniformity which is in itself an important object of the proposed legislative scheme, there are a number of precedents for an approval of this sort of thing. * * * The effort of the Alaska legislature to make its territorial income tax machinery conform to the federal act, and to preserve and continue such conformity, makes sense. It makes for convenience to the taxpayer and for simplicity of administration. (Citing cases.) A similar coordination has been recommended by students of income tax problems for adoption by the states generally. Since the attainment of this uniformity was in itself a major objective of the Alaska legislature, in enacting that the local law must conform, the Alaska legislature, which alone could make this decision, was itself acting, and was not abdicating its functions, nor, in our opinion, making an invalid delegation to Congress."

Since Alaska became a state, its Supreme Court has approved the basic foundation of the Alaska act, "* * * which was to make the state's claim for income taxes contingent upon the establishment of liability for federal income taxes." The court also referred to "the prime objective of the Alaska statute which was aimed at convenience to the taxpayer and simplicity of administration." Hickel v. Stevenson (Alaska), 416 P. 2d 236 (1966).

The constitutional amendment with which we are dealing does not require, but only authorizes, the Legis-

lature to base a state income tax law upon the laws of the United States. In connection with a state income tax law, we think it permits the Legislature to use all, part, or none of the laws of the United States as it may determine from time to time appropriate insofar as it may be lawful and practicable to do so. It does not preclude the Nebraska Legislature from repealing its own present enactment or adopting a completely different method of imposition of its income tax, and the Legislature retains the complete legislative power to make all such decisions. The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor constitute a violation of the requirements of a representative form of government.

The plaintiffs' next major issue involves the contention that L.B. 377 unconstitutionally delegates legislative authority and judicial powers to the Tax Commissioner. Section 119 of L.B. 377 provides in part: "(1) The Tax Commissioner shall administer and enforce the income tax imposed by this act and he is authorized to make such rules and regulations and to require such facts and information to be reported, as he may deem necessary to enforce the income tax provisions of this act; Provided, that such rules, regulations and reports shall not be inconsistent with the laws of this state or the laws of the United States."

The laws of the United States adopted by reference in L.B. 377 include the Internal Revenue Code, Regulations of the Internal Revenue Department, and court decisions interpreting them. See Estate of Willett v. Commissioner of Internal Revenue, 365 F. 2d 760 (5th Cir. 1966).

The dividing line between constitutional and unconstitutional delegation of legislative power under the decisions of many states, including our own, is difficult to determine exactly. For an extensive discussion of dele-

gation of legislative power and a review of cases on the issue at both federal and state levels, see Louis L. Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev., part I at page 359 and part II at page 561.

This court has held: "The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments." Lincoln Dairy Co. v. Finigan, *supra*. That case also reiterated the rule stated by this court in Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N. W. 2d 221: "The exercise of a legislatively-delegated authority to make rules to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations is not an exclusive legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended. Consequently, the courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred."

L.B. 377 imposes express limitations on the rule-making authority granted to the Tax Commissioner. The rules and regulations are restricted in character to those which are to enforce the income tax laws of this state and including by reference the laws of the United States relative thereto. The rules and regulations must also be consistent with both state and federal laws.

Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of con-

tinuous decision. The federal income tax structure comprises a comprehensive, cumulative, and currently functioning body of law in the income tax field. In the area of state income taxation, whether based on federal law or otherwise, it is quite apparent that the complicated and continuous task, if it is to be done at all, must be delegated. Where the Legislature has settled the guiding principles and standards of policy, and has provided the precision and due process which can obviously not be fully obtained in the basic legislation, the act should be upheld. The rule-making authority granted to the Tax Commissioner by L.B. 377 of the 1967 Legislature, is a valid and lawful delegation of authority, and does not violate the Constitution of Nebraska nor of the United States.

The plaintiffs' contentions with respect to unconstitutional delegation of legislative power extend also to the provisions of L.B. 377 which require the State Board of Equalization and Assessment to set the rate of tax on or before November 15 of each year for the taxable year beginning during the subsequent calendar year. Section 15 of L.B. 377, in at least five subsections, explicitly sets out the computations to be made by the state board, the method and manner in which the computations shall be adjusted and determined, and the specific standards to be used in setting the rate of tax. The discussion as to delegation of legislative authority to the Tax Commissioner and the rules set out above also apply with respect to the delegation of authority to the State Board of Equalization and Assessment. L.B. 377 constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor the United States.

Basically the same issues are involved with respect to delegation of judicial power. Article V, section 1, of the Constitution, vests judicial power in the tribunals therein named but also gives to the Legislature the power

to create other courts inferior to the Supreme Court. However, L.B. 377 does not create a court but does grant to a state official or administrative body quasi judicial powers. Powers of the same general nature and character are conferred upon many administrative bodies. Such duties are of a quasi judicial nature and yet such bodies are almost invariably held to be administrative. See Dawson County Irr. Co. v. McMullen, 120 Neb. 245, 231 N. W. 840. The conferring upon state agencies or officers, of executive or administrative functions requiring the exercise of quasi judicial powers, does not conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. This is particularly true where such powers and duties relate to matters which are peculiarly affected with a public interest and where provision is made for appeal from decisions of such officers or agencies to the courts. L.B. 377 does not unconstitutionally delegate judicial power to the Tax Commissioner.

The plaintiffs also contend that a state income tax based upon the amount of federal income tax is a graduated tax because the federal tax is graduated, and, therefore, it is not levied uniformly and proportionately as required by the Constitution of Nebraska. It should only be necessary to point out that the same constitutional section, Article VIII, section 1, specifically provides that taxes other than property taxes may be authorized by law. The specific constitutional amendment dealing with a state income tax, even if interpreted as limiting the legislative authority to existing federal law, would permit a graduated income tax even if there were otherwise a question.

Plaintiffs also contend that the "franchise tax" is a property tax, is not levied by valuation uniformly and proportionately, and is invalid because of a 1966 constitutional amendment prohibiting the state from levying a property tax for state purposes. Section 34 (2) of L.B. 377 imposes a tax: "* * * for the privilege of ex-

ercising its franchise or doing business in this state in a corporate capacity * * * according to or measured by its entire net income derived from all sources within this state for the taxable year." Although referred to as a "franchise" tax, where such a tax is based upon or measured by the income of a corporation, it is almost universally held to be an excise tax or privilege tax and not a property tax within the meaning of similar constitutional provisions of other states. See Annotation, 71 A. L. R. 256. The constitutional objections raised by the plaintiffs as to validity on these issues cannot be sustained. L.B. 377 does not violate Article VIII, section 1, of the Constitution of Nebraska, requiring taxes to be levied by valuation uniformly and proportionately upon all tangible property and franchises, and prohibiting the state from levying a property tax for state purposes.

The plaintiffs likewise contend that the provisions of section 15 (3) of L.B. 377 which allow a "food sales tax credit" only to residents violates both the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment. So far as we can determine, this is a case of first impression in this country as to the validity of such a "food sales tax credit."

It is clear that the food sales tax credit, although set out in the income tax portion of the Nebraska Revenue Act of 1967, is actually a part of the sales tax rather than the income tax. Section 15 (3) provides that the food sales tax credit of $7 per qualified individual resident is not only allowed as a credit against the income tax payable, but is also allowed as a refund to the extent that the food sales tax credit exceeds the income tax payable by the resident individual for the taxable year. It also specifically provides that a resident individual, with exceptions for individuals who are patients in or inmates of institutions exempt from the tax, shall be conclusively presumed to have paid "retail sales and use taxes imposed by this state equal to the maximum food

sales tax credit allowable." It also provides for credits or refunds for "sales taxes" allowable by the subsection to be claimed on income tax returns, "or in the case of an individual not having tax liability in this state on such forms or claims for refunds as the Tax Commissioner shall prescribe."

The sales and use tax subdivision of L.B. 377, section 8 (2) (a), provides that if any sales or use tax amount has been paid more than once or been erroneously or illegally collected or computed, the excess amount collected or paid may be credited on any sales, use, or income tax amounts then due and payable from the person and any balance may be refunded.

The act itself establishes that the food sales tax credit is intended as a basic sales tax provision rather than an income tax provision.

While the legislative history of the amendment which added the food sales tax credit to L.B. 377 is not clear, a legislative policy is spelled out in the act to allow the credit or refund to be taken or claimed on the individual's state income tax return insofar as income tax returns may be required. For remaining cases, the refund is to be claimed on other forms. Sound administrative reasons would support this legislative policy decision. A legislative determination to substitute the food sales tax credit in lieu of the exemption of certain foods from the provisions of the general state sales tax likewise seems evident. It is undisputed that the state could exempt or exclude foods or food products from the general sales tax if it so desired. The question remains whether the Legislature can constitutionally substitute a food sales tax credit and limit its application to residents.

It would seem reasonable for the Legislature to determine that generally a state sales tax on food for personal use will be paid almost universally by residents of the state, while purchases of such foods in the state by nonresidents are ordinarily minimal. It is also easy

enough to see practical legislative and administrative reasons for the policy of a food sales tax credit in lieu of exempting certain foods from the operation of the general state sales tax. Under an ordinary or common exemption of specified or defined foods from a general sales tax, the Legislature and Tax Commissioner would have the problems of defining and describing the specific foods or food products which were to be exempted and which were not. Retailers charged with the collection of the tax would have the difficult task of separately computing and determining which food items were exempted and which were not. Merely the separate tabulation of taxable and nontaxable items would be a monumental task and additional expense for all concerned. The amount of tax involved would be minimal compared to the legislative, administrative, collection, and enforcement problems involved. For a discussion of such problems with sales and use taxes see, Pierce, Administration and Collection Problems, 9 Vanderbilt L. Rev. 281.

The power of a state to make reasonable and natural classifications for purposes of taxation is clear and unquestioned. "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. * * * Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." Allied Stores of Ohio, Inc. v. Bowers, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480.

"Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the

many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." Toomer v. Witsell, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460.

Cases cited by the plaintiffs in support of their position here are either property tax cases or income tax cases involving personal exemptions, all involving no discernible reasonable basis for discrimination except residence. No sales tax cases are cited by any of the parties. Viewed as a form of state sales tax exemption, the classification between residents and nonresidents as to the credit or refund of sales taxes on food for personal use is supported by valid independent reasons other than mere residence.

Even if it be assumed that the food sales tax credit is a part of the income tax rather than the sales tax, the result should be no different. A credit or deduction on income tax for sales taxes paid on food for personal use should logically be treated as a personal expense deduction, as opposed to a business expense deduction. Obviously, all Nebraska sales taxes, including those on food, are deductible when they are properly a part of a business expense deduction, or part of a deduction for expenses incurred in connection with property held for the production of income. Such business expense deductions are available to both residents and nonresidents. A credit or deduction for sales taxes on food for personal use should, therefore, be classified as incurred in personal or nonincome producing activities. The allowance of such credits or deductions constitute an exception to the general principle that personal living expenses are not allowed as deductions for income tax purposes. In the case of such personal credits or deductions, the state may appropriately allow them to residents but exclude them from deductions allowed to nonresidents. Goodwin v. State Tax Commission, 146 N. Y. S. 2d 172,

286 App. Div. 694 (1955). The holding in the Goodwin case stems from Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460, and Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445, both decided in 1920. The principle which supports such differentiation is the principle which limits both the taxable income and the deductible expenses of nonresidents to those connected with sources within the taxing state. The rule of the Goodwin case has also been adopted by other states since that time. See Berry v. State Tax Commission, 241 Or. 580, 397 P. 2d 780 (1964).

In our opinion, there are substantial reasons for the disparity of treatment between residents and nonresidents and the classification is not discriminatory nor arbitrary. Many facts support this classification, whether the credit, refund, or deduction be viewed from the aspect of a sales tax or an income tax. The Legislature may have been of the opinion that food purchases for personal use are so closely related to the state of residence, particularly with respect to the imposition of a state sales tax, that any exemption, credit, deduction, or refund should be allowed only by the state of residence and not by every other state in which some part of a taxpayer's income might be found and taxed. The wisdom of such a legislative policy is a matter for legislation rather than judicial decision. We hold that the allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth Amendment.

Plaintiffs also contend that L.B. 377 provides for a sales tax, use tax, income tax, and a franchise tax, thereby violating Article III, section 14, of the Nebraska Constitution, which provides: "No bill shall contain more than one subject * * *." If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title

fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution. Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548.

The various taxes provided for in L.B. 377, designated as the Nebraska Revenue Act of 1967, are closely related and germane to each other and are all to be administered by the Tax Commissioner. The various taxes are clearly stated in both the title as well as the body of the act and together comprise and constitute components of the tax structure of this state. This court holds that the provisions of L.B. 377 contain but one general subject, taxation, and that it does not violate the Constitution of Nebraska.

There are other constitutional objections raised by the plaintiffs in their briefs. Essentially, these objections do not go to the validity of the income tax as a whole, or do not present justiciable issues as to these plaintiffs. This court has repeatedly held that it will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626.

The finding and judgment of the lower court that section 115 was partially invalid to the extent it purported to make a violation of regulations of the Tax Commissioner a misdemeanor, but holding the particular invalidity severable, was correct.

The memoradum opinion of the district court evidences a thorough and comprehensive consideration of the issues involved. The judgment of the lower court was correct in all respects and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. HOLIDAY, APPELLANT.
155 N. W. 2d 378

Filed December 29, 1967. No. 36611.

SUPPLEMENTAL OPINION

Criminal Law: Probation and Parole. An indigent defendant is entitled to legal counsel at public expense on a hearing for the revocation of an order of probation and the imposition of a deferred sentence under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. On motion for rehearing. See *ante* p. 229, 153 N. W. 2d 855, for original opinion. Reversed and remanded.

Richard M. Duxbury and David L. Crawford, for appellant.

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

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

CARTER, J.

This case is presently before the court on a motion for rehearing. On November 3, 1967, we released our opinion in this case, holding that in a proceeding to revoke an order of probation where sentence had not been previously imposed, "no formal trial is required nor is the assignment or presence of counsel required, although the probationer may appear by counsel if he so desires." State v. Holiday, *ante* p. 229, 153 N. W. 2d 855. It is not questioned that the defendant requested and was denied legal counsel at public expense by the trial court.

On November 13, 1967, the Supreme Court of the United States, in Mempa v. Rhay and Walkling v. Washington State Board of Prison Terms and Paroles, 389 U. S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336, held that a

lawyer must be afforded in such a proceeding whether it be labeled a revocation of probation or a deferred sentencing in order to comply with the Sixth Amendment to the Constitution of the United States made applicable to the states by the Fourteenth Amendment to the Constitution of the United States.

The present case has not become final. Finality is indicated in Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601, note 5, as follows: "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Mapp v. Ohio."

The Mempa and Walkling cases are therefore applicable to the present case. By this supplemental opinion we withdraw that part of our former opinion in conflict with the Mempa and Walkling cases and hold that defendant was entitled to legal counsel at public expense in the hearing to revoke the order granting probation to the defendant. The judgment is reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MILTON HOWARD, APPELLANT.
155 N. W. 2d 339

Filed December 29, 1967. No. 36624.

1. **Courts: Ex Post Facto.** Where a law or rule of court relates to a matter of procedure only and no substantial right is taken away, the law is not ex post facto.
2. **Evidence: Due Process of Law.** The knowing use of false testimony or the permitting of false testimony to stand when the prosecution knows the same to be false ordinarily constitutes a denial of due process of law when it is material to the guilt or innocence of the accused or to the penalty to be imposed.
3. **Evidence: Witnesses.** The recantation of testimony given at

a criminal trial by an accomplice, in the absence of knowledge by the prosecution that it was false, ordinarily involves only a question of credibility to be determined from all the evidence and circumstances.

4. **Criminal Law: Evidence.** A defendant in a criminal action may not properly complain of the admission of evidence, allegedly incompetent, to which no objection was made.

5. ———: ———. In a criminal prosecution, the State may not make use of evidence unconstitutionally obtained to make a case for the jury. But a case having been so made, the State may use evidence unconstitutionally obtained to impeach the credibility of the defendant on collateral matters not ultimately involved in the issue of guilt.

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

Joseph L. Krause, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

CARTER, J.

This is an appeal from an order of the district court for Douglas County denying a motion to vacate a conviction and sentence for first degree murder under the provisions of the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965.

The defendant was convicted of first degree murder, a sentence of life imprisonment imposed, and an appeal taken to this court which was affirmed in Howard v. State, 174 Neb. 90, 116 N. W. 2d 7, 375 U. S. 876, 84 S. Ct. 151, 11 L. Ed. 2d 121. The facts are recited in that case and they will not be repeated here except as necessary in disposing of the present appeal. The evidence discloses and the jury found that the defendant procured Jerry Erving and Donald Williams to kill one Edward Ellis. In carrying out the killing, Dorothy Elliott was also killed, she being the companion of Ellis at the time of the murders. Defendant, Erving, and Williams are

serving life sentences for the crime. It is contended here that defendant Howard was deprived of his constitutional rights, requiring that he be granted a new trial.

On November 3, 1965, defendant filed a motion to vacate and set aside defendant's sentence and for the release and discharge of defendant or, in the alternative, to grant him a new trial. Counsel who drafted the motion was, on November 26, 1965, appointed by the court to represent the defendant. On December 3, 1965, the trial court issued an order to the county attorney to show cause why an evidentiary hearing should not be had. After a hearing, the court found that many of the allegations raised no issue under the Post Conviction Act for the reason that they were or should have been raised in the direct appeal from his conviction, or related to periods of time disconnected from the present case, or related to matters involving no constitutional rights. We find no error in this ruling. The trial court did find that an evidentiary hearing should be granted to determine the merits of certain contentions advanced by the defendant which might involve a violation of his constitutional rights. The evidentiary hearing commenced on July 28, 1966, and was completed at a session of court commencing on September 29, 1966. On January 13, 1967, the trial court entered its order with extensive and comprehensive findings denying relief under the Post Conviction Act.

It is contended that the changing of Supreme Court Rule 7(d) on June 2, 1961, to permit the trial court to certify the bill of exceptions in the original trial on the death of the official court reporter, constituted an ex post facto law and denied the defendant due process of law under applicable provisions of the state and federal Constitutions. The evidence shows that shortly after the trial and conviction of the defendant the official court reporter died. Under the existing rules of this court, the transcript of the evidence was required to be certified by the official court reporter, but no provision was made

to cover the contingency of his inability to prepare and certify the bill. This court amended the rule to provide that in such cases the bill of exceptions should be prepared under the supervision of and be certified by the trial judge. It is this amendment of the rule that the defendant contends is ex post facto as to him and deprived him of a constitutional right. The record shows that defendant's counsel was given every opportunity by the trial court to offer amendments to the bill and to object to any misstatements of the evidence in the proposed bill before it was certified by the trial court. Defendant did not avail himself of this opportunity. The trial court, after a hearing, found that the proposed bill fairly, accurately, and truly reflected the testimony of the witnesses, the objections of counsel, and the rulings of the court. The trial court thereupon certified the bill in accordance with the amendment, Rule 7d2 of the Rules of the Supreme Court. The court's finding and subsequent certification of the bill thereupon became final and conclusive.

The question before us involves a question of procedure. It is a general rule that questions of procedure involving no substantial right are not ex post facto laws within the meaning of the Constitution. Watts v. State, 229 Ind. 80, 95 N. E. 2d 570. Alterations of a law or rule which do not make a criminal act of that which was not criminal when done, which do not aggravate an offense or change the punishment and make it greater than when committed, which do not alter the rules of evidence by requiring less or different evidence than required at the time of the commission of the offense, and which do not deprive the accused of any substantial right or immunity possessed by him at the time of the commission of the criminal act charged, are not ex post facto within the meaning of the Constitution. Kring v. Missouri, 107 U. S. 221, 2 S. Ct. 443, 27 L. Ed. 506. The contention that the defendant was deprived of a constitutional right by the manner in which the transcript

of the evidence was prepared and certified on the appeal from defendant's conviction for first degree murder is without merit.

Defendant assigns as error the finding of the trial court that perjured testimony was not knowingly used by the State in procuring the conviction of the defendant for first degree murder. Counsel for the defendant appears to assume that the recantation of the evidence of an accomplice who testified for the State is ipso facto sufficient to require a new trial. While such a result is not necessarily true, such a situation requires a consideration of the evidence and surrounding circumstances.

In December 1959, the defendant Howard was arrested and charged in the district court of the United States with the sale of narcotics. His preliminary hearing was set for December 28, 1959. One Edward Ellis was to have been a witness for the government against Howard. On December 27, 1959, Ellis and Dorothy Elliott were found murdered in the Ellis apartment. Donald Williams and Jerry Erving were implicated and Williams confessed that he and Erving had committed the murder at the instigation of Howard and the agreement to pay $1,000 to them by Howard. Williams testified for the State against Howard. In due time, Howard, Williams, and Erving were convicted of first degree murder and the three are serving life sentences for the murders. Subsequently, Williams recanted his testimony. He now says that he alone murdered Ellis and Elliott, that Howard had nothing to do with the murders, and that he was coerced by two assistant county attorneys into giving the perjured testimony. The two assistant county attorneys testified that Williams' confession was wholly voluntary, that they checked out his confession with several known facts and found it to be consistent with them, and that the charge of coercion by them is without foundation and wholly false.

The evidence shows that Williams and Erving were addicted to the use of narcotics and had been engaged

with Howard in their unlawful sale. Williams' testimony at the trial of Howard and Erving for murder showed Howard's motive for the murder of Ellis was to eliminate him as a witness against him in the federal court on the narcotics charge. The evidence of Williams that Howard was willing to pay $1,000 for the elimination of Ellis did not stand alone. Another witness, Rudolph Williams, no relation to and not to be confused with Donald Williams, testified to overhearing a conversation between the defendant and a person later charged as an accomplice in which the name of Ellis and $1,000 were linked together. This evidence was not contradicted.

It is the knowing use of false testimony or the permitting of false testimony to stand when the prosecution knows the same to be false that is condemned. Otherwise, recantation testimony is admissible only to impeach the credibility of the witness. Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874, 363 U. S. 851, 80 S. Ct. 1631, 4 L. Ed. 2d 1733. The contention that the evidence of Donald Williams given on the murder trial of Howard was false is based solely on his own statement that it was coerced by two assistant county attorneys and known to be false by them. This was flatly denied by them and raises a question of credibility for the court. We point out that Donald Williams when first interrogated denied any connection with the deaths of Ellis and Elliott. Subsequently he admitted the perpetration of the murders and implicated Erving and Howard. On the trial, under oath, he reiterated the facts showing the guilt of Howard, Erving, and himself. Subsequently, when all were confined at the same place of imprisonment, when additional punishment could not be assessed, when associated with those with whom he had collaborated in violating the law and against whom he had testified, and, finally, having little respect for the integrity imposed by an oath, the determination of his credibility when weighed against that of two reputable

members of the bar in the service of the state, affords an appropriate basis for a finding, first, that his evidence on the trial was voluntary and not procured by coercion and threat, and, second, that he is not worthy of belief in the absence of corroboration. The language of Bute v. Illinois, 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986, cited in Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561, 339 U. S. 923, 70 S. Ct. 612, 94 L. Ed. 1346, seems applicable here: " 'Doubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the State's attorney. They were state officials lawfully chosen to discharge serious public responsibilities under their oaths of office.' " The defendant has failed to carry the burden of proof in establishing that the prosecution knowingly used false evidence procured by coercion in securing the conviction of Howard, and, we think, the defendant has failed to establish the falsity of his evidence given on defendant's trial for murder. The trial court had ample evidence before it to sustain its finding that the recantation of Williams was false, under the circumstances shown, and that defendant failed to establish by a preponderance of the evidence that any constitutional right of the defendant was infringed.

The defendant contends that his constitutional rights were violated because of the use of statements during the trial that were unconstitutionally obtained. The evidence shows that Jack Fitch, a court reporter, was called by the State as a rebuttal witness for the purpose of impeaching the defendant. The defendant was asked on cross-examination if he had not made inconsistent statements in a specified interview in the county jail which he denied. Fitch, who had reported the interview, was called and testified to the statements made by the defendant at that time. Defendant asserts that these statements were unconstitutionally obtained and that their use for impeachment purposes was a violation of his constitutional rights. Fitch testified that at the

time of taking the statement, the defendant did not have a lawyer representing him, he was not asked about a lawyer, and that no one advised defendant of his constitutional rights. The record shows, however, that no objection was made to the testimony elicited from Fitch. It was not assigned as error in the motion for a new trial nor was it assigned as error in this court on appeal from the murder conviction. The error, if any, was under these circumstances clearly waived and is not available to the defendant in a post conviction action. A party will not be permitted to withhold objection to incompetent evidence and take his chances on a favorable verdict and, when the verdict is adverse, be permitted to raise it for the first time and assert it as a basis for a new trial. In United States v. Curry, 358 F. 2d 904, the court said: "Defense may not remain silent in hopes that trial court will fall into reversible error where possible error could have been passed upon and cured, if need be, by a properly timed objection." In any event, the evidence of Fitch was an impeachment of the defendant on a collateral matter not ultimately involved in the issue of guilt and was not erroneous under the holdings of Walder v. United States, 347 U. S. 62, 74 S. Ct. 354, 98 L. Ed. 503, and United States v. Curry, *supra*. In the Walder case, the court said: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment." In the Curry case, the court said: "Thus the government may not make any use of evidence which has been suppressed in order to make out a case which is strong enough to have the jury pass upon guilt or innocence. And, likewise, the defendant's denial of the elements of the crime may not be disputed

by evidence which is the fruit of illegal action. See Agnello v. United States, supra. But once the government has presented a prima facie case without using such evidence, it may use the suppressed evidence to challenge the truth and reliability of the defendant's assertions as to collateral matters." In addition to the foregoing, we point out that Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, are not retroactive by their own terms and are inapplicable to the instant case which was tried in May 1960.

We have examined other assignments of error set out in the defendant's brief. They were fully considered by the trial court and its findings of fact and conclusions of law correctly dispose of each of the contentions advanced. The contention of defendant that he has not been afforded due process of law has no basis in fact or law and, as the trial court found after a comprehensive review of the law and facts, it is wholly without merit. We have found no error in the record and the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROGER M. LITTLE ET AL., APPELLANTS, V. BOARD OF COUNTY COMMISSIONERS OF CHERRY COUNTY, NEBRASKA, ET AL., APPELLEES.
155 N. W. 2d 351

Filed December 29, 1967. No. 36626.

1. **Statutes: Municipal Corporations.** "Village," as used in section 17-201, R. R. S. 1943, applies to villages in the ordinary and popular sense of the term.
2. ———: ———. The word "village" suggests a small urban community. This ordinarily means an assemblage of residences, less than a town or city, urban or semiurban in character, and having a density of population greater than usually found in rural areas.

3. ———: ———. An "inhabitant" within the intent of section 17-201, R. R. S. 1943, is one who actually and permanently resides in the area embraced in the petition for incorporation.

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

John C. Coupland and Nelson, Harding, Acklie, Leonard & Tate, for appellants.

Spittler & O'Kief, for appellees.

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

SPENCER, J.

This is an appeal from the denial of a writ of mandamus to require the county board of Cherry County to form the Village of Valentine Motel, pursuant to section 17-201, R. R. S. 1943. An appeal from an order dismissing the petition in error for review of the order of the county board denying incorporation of the Village of Valentine Motel is to be found at 179 Neb. 655, 140 N. W. 2d 1.

Appellants list 11 assignments of error, but the sole question presented by the appeal is whether the district court erred in finding that the jurisdictional requirements of the act relating to incorporation of a village had not been met.

Section 17-201, R. R. S. 1943, previous to the 1961 amendment, is as follows: "Any town or village containing not less than one hundred nor more than one thousand inhabitants, incorporated as a city, town or village, under the laws of this state, and any city of the second class that shall have adopted village government as provided by law, shall be a village, and shall have the rights, powers, and immunities hereinafter granted, and none other; Provided, all county seat towns shall have the powers and immunities as hereinafter granted. *Whenever a majority of the taxable inhabitants of any town or village, not incorporated under any laws of this*

state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village, and such county board or majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of one hundred or more are actual residents of the territory described in the petition, the board shall declare the proposed village incorporated, and enter the order of incorporation upon its records, and designate the metes and bounds thereof. Thereafter the said village shall be governed by the provisions of law applicable to the government of villages. The county board shall, at the time of the incorporation of said village, appoint five persons, having the qualifications provided in section 17-203, as trustees, who shall hold their offices and perform all the duties required of them by law until the election and qualification of their successors at the time and in the manner provided in sections 17-202 and 17-601." (Italics supplied.)

Appellants' petition was filed with the county clerk December 30, 1961, at 10 o'clock p.m. For the purposes of this appeal, appellees concede that the petition was filed before December 31, 1961, the exception provided by the 1961 amendment to section 17-201, R. R. S. 1943, so that the 1961 amendment is not involved herein.

The area embraced in the petition is a 7-acre tract bordering the southeast city limits of Valentine on the east. On the date of the filing of the petition, and at the time of the hearing herein, the entire tract was owned by The Valentine Motel, Inc., a Nebraska corporation, which was organized to operate a motel and trailer park. All stock in the corporation was owned by Alice T. Little, wife of the relator Roger M. Little.

On December 1, 1961, the only structures located on the property were a wellhouse and two mobile homes,

one owned by relator Roger M. Little and one by the corporation. Water mains, sewer lines, and a sewage lift station were installed, as well as an underground electrical installation, underground telephone lines, and coaxial cable for television. The sewer facilities were an extension of the facilities of the city of Valentine. Lots were laid out for 33 mobile homes. During the month of December 1961, several mobile homes were moved onto the premises. The record indicates that in most instances the mobile homes were moved from other trailer parks at the expense of the corporation, and with the agreement that no rent would be charged for the space occupied by the mobile unit until April 1, 1962. At the time of the hearing before the county board of Cherry County, most of the mobile homes were still on their wheels. There was no business activity of any nature in the area other than the operation of a trailer park.

The petitions purporting to be signed by 57 claimed residents alleged that the signers were a majority of the taxable inhabitants of the territory described by the petition, and that there were more than 100 actual residents in said area. It is to be noted that the county board must be satisfied on three points: That the area is a town or village, not incorporated under the laws of this state; that a majority of the taxable inhabitants of the proposed village signed the petition; and that inhabitants to the number of 100 or more are actual residents of the area described in the petition. While the statute provides that a majority of the board shall be satisfied, it must be understood that if the requirements have been met the board cannot arbitrarily determine otherwise.

Here, each member of the county board made a personal inspection of the area before the hearing by the board on January 9, 1962, and from that inspection and the evidence, denied the petition because the area was not a village and did not contain 100 actual inhabitants as of December 30, 1961.

Appellants argue that a village is a creation of the

Legislature; that the Legislature sets the standards for incorporation of a village; and that the only requirements are two: 100 or more actual residents, and a majority who desire incorporation.

It appears to us that the statute clearly presupposes the existence of a town or village. Otherwise, the italicized portion of the statute above would be mere surplusage. As early as 1895, in State ex rel. Hammond v. Dimond, 44 Neb. 154, 62 N. W. 498, this court, in construing essentially the same language in the then-existing statute, held it "applies to villages in the ordinary and popular sense of the term, * * *." It suggests a small urban community. This ordinarily means an assemblage of residences, less than a town or city, urban or semi-urban in character and having a density of population greater than usually found in rural areas.

As will be developed later, it is not necessary to define the term "village" more adequately herein. Suffice it to say that we believe it means more than a trailer park owned and operated as a business by a corporation.

Black's Law Dictionary (4th Ed.), p. 921, defines "inhabitant" as follows: "One who resides actually and permanently in a given place, and has his domicile there." We adopt this definition as applicable herein, and determine that there were not 100 inhabitants in the area sought to be incorporated on December 30, 1961.

The testimony of relator Roger M. Little would indicate 117 actual inhabitants at the time the petition was filed. This figure cannot be sustained from the record. Of those embraced in relator's figure of 117, the Gene Hofeldt family of five are included. They occupied a rented trailer which on December 30, 1961, was moved from another trailer park into the area. They left the area the next day, December 31, 1961. They certainly could not be considered inhabitants for any purpose. The Douglas Miller family of four were not inhabitants on December 30, 1961. Douglas Miller stayed at the Valentine Motel the evenings of December 30 and 31,

1961, without charge. The Valentine Motel adjoins the area sought to be incorporated, but actually is in the city of Valentine. On January 1, 1962, the Millers moved a mobile home into the area. They moved from the area April 6, 1962. No rent was charged for the period of their occupancy. The Eugene Vass family of three did not move a trailer into the area. Eugene Vass also stayed in the Valentine Motel December 30 and 31, 1961, without charge. Any rental agreement, if any, the Vass family may have had with the corporation was terminated January 5, 1962. The Harold R. Wescott family of eight also stayed in the Valentine Motel the evening of December 30, 1961, without charge. They were furnished an unoccupied trailer in the area sought to be incorporated on December 31, 1961, and moved their own trailer from Kilgore, Nebraska, January 4, 1962. While the Millers, Vasses, and Wescotts may have intended to reside in the area, they were not inhabitants as of December 30, 1961. There are others we feel who could not be considered inhabitants, but those enumerated are sufficient to show the inadequacy of the petition. We realize that residence is usually a matter of intent, but to be considered an inhabitant within the intent of section 17-201, R. R. S. 1943, the petitioners must actually and permanently reside in the area embraced in the petition.

We further observe that on December 30, 1961, the corporation had no written contracts with any of the claimed residents. Most of them paid no rent. They were on the property under an oral agreement that no rent would be due and payable until April 2, 1962. There is no evidence in this record which would indicate that any of these individauls were obligated to stay on the property thereafter. As a matter of fact, the Orville A. Morlang family of five moved into the area December 28, 1961, and moved off March 20, 1962. The Melford C. Osborne family of four moved onto the property December 18, 1961, and left on April 2, 1962. The Gordon Oakes family of four moved onto the property December 8, 1961,

and left on April 3, 1962. The Lawrence M. Schneider family of seven moved onto the property December 26, 1961, and left March 1, 1962. The Douglas Miller family of four referred to above left the property April 6, 1962. Of the 117 alleged inhabitants, 65 were not on the property 6 months later. It is plainly evident that many of the claimed residents were induced to temporarily reside in the area rent free in an attempt by the corporation to keep the area from being annexed by the city of Valentine. The writ of mandamus was properly denied.

There is no merit to the assignments of error urged by appellants. The judgment of the trial court is affirmed.

AFFIRMED.

RALPH WARMBIER, APPELLEE, V. ORVAL ZEURLEIN, APPELLANT.
155 N. W. 2d 364

Filed December 29, 1967. No. 36647.

1. **Automobiles: Negligence.** The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor, or because of the gross negligence of the owner or operator in the operation of such motor vehicle.
2. **Negligence.** There is no fixed rule for the ascertainment of what constitutes gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances of each case.
3. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute means great or excessive negligence, or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
4. ———: ———. The burden of proof is upon the guest who seeks to recover to prove by a preponderance of the evidence that the owner and operator of the automobile in which he was

a guest was guilty of gross negligence. Failure to so prove or the fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of the guest.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and dismissed.

Rickerson & Homan, for appellant.

Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

SPENCER, J.

This action is a guest-passenger case brought to recover damages for injuries as a result of the alleged gross negligence of the defendant. Defendant moved for a directed verdict at the conclusion of plaintiff's evidence. When this motion was overruled, defendant rested without putting on any evidence, and renewed his motion for directed verdict. This was overruled, and the case was submitted to the jury, which returned a verdict in favor of the plaintiff in the sum of $8,500. Defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial was overruled, and this appeal was perfected.

The accident occurred at a railroad crossing approximately 1½ miles east of Mead, Nebraska, on U. S. Highway No. 30-A, on Sunday night, February 21, 1965. The plaintiff and the defendant sometime in the afternoon met at a restaurant in Fremont and decided to go to Valley for a beer. They had a beer, spent some time in Valley, and then went to Leshara. After visiting for a while in Leshara, they went to Venice where they had another beer and the defendant played pool. When they left Venice, they proceeded west on U. S. Highway No. 30-A. The defendant was driving his car at an approximate speed of 50 to 55 miles an hour. The night was clear and cold. According to the plaintiff there was

nothing unusual about the defendant's driving. The car lights were on, but the record does not indicate whether they were on high beam or low beam. The plaintiff testified that he was sitting in the right front seat, leaning back with his arm over the back of the seat, looking toward the defendant, and carrying on a conversation with him. The first thing that happened out of the ordinary was when the defendant said, " 'My God, a train.' " Plaintiff thinks he looked up and somehow he visualizes a yellow refrigerator car. He remembers nothing else concerning the accident.

A highway patrolman who was approaching the scene of the accident at the time in question testified that he was driving down U. S. Highway No. 30-A from the west proceeding east. When he was approximately one-half mile west of the railroad tracks, he observed a freight train crossing the highway and the lights of a car coming over the crest of a hill, approximately three-tenths of a mile east of the track. When the train cleared there were no lights east of the crossing, and the patrolman stopped to investigate. He found a car in the middle of the road, 69 feet east of the edge of the tracks, facing east. There were two occupants, both of whom were unconscious. There is a crossarm or an "X" sign, with two red blinkers on each side of the track. The signal on the west of the track was operational as the patrolman approached the train. There is no evidence of any nature as to whether the signal east of the track was also operational, except an answer to an interrogatory by the defendant that he did not see any lights. The patrolman observed a gouge mark 5 feet south of the centerline of the highway, near the track, which he testified showed where the car spun around and went back toward the east after colliding with the train. There were no other tire marks.

Plaintiff was a guest passenger in the defendant's automobile. Section 39-740, R. R. S. 1943, is therefore material herein. So far as pertinent, it is as follows: "The

owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle."

While the plaintiff's testimony mentions a beer on two occasions during a period covering the afternoon and evening, there is no contention in the record that the defendant was driving while under the influence of intoxicating liquor. This case, therefore, is not within that exception.

There is no fixed rule for the ascertainment of what constitutes gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances of each case. Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041.

"Gross negligence," within the meaning of the motor vehicle guest statute, has been defined by this court as great or excessive negligence, or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. Holliday v. Patchen, 164 Neb. 53, 81 N. W. 2d 593.

The burden of proof is upon the guest who seeks to recover to prove by a preponderance of the evidence that the owner or operator of the automoblie in which he was a guest was guilty of gross negligence. Failure to so prove, or the fact that the operator of the automobile may have been guilty of ordinary negligence, is insufficient to warrant a recovery in favor of the guest. Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180. In that case, we held gross negligence had not been proved although the operator, after having consumed intoxicating liquor, drove his car in the daytime at an illegal and negligent rate of speed over the crest of a hill on a country road where he was unable to see what was ahead

of him on the other side in time to avoid an accident or to see and comply with the mandate of a stop sign.

The only ultimate fact established by the evidence herein from which negligence may be inferred is the fact that defendant's car at night hit a freight train crossing the highway which he failed to observe in time to avoid the collision.

This case appears to be controlled by our holdings in Pester v. Nelson, 168 Neb. 243, 95 N. W. 2d 491, and Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207, which are not substantially distinguishable on the facts. In these cases, the collisions occurred during the daylight hours and the trains struck the cars on the crossings.

In Pester v. Nelson, *supra,* the guest and the defendant driver lost their lives when the defendant's truck collided with a train crossing a highway 3 miles west of the city of Scottsbluff, Nebraska. The collision occurred at 10 a.m. on a clear day. The area was level and there was no obstruction over a broad area to obscure vision. The evidence justified an inference of excessive speed on the part of the truck. There was a tire mark of 145 feet to the point of impact, and obviously there was inattention and a failure to look and see that which was in plain view. In that case we affirmed the sustaining of a motion for a directed verdict on the theory that the facts adduced did not prove the defendant to be guilty of gross negligence.

In Bishop v. Schofield, *supra,* damages were sought from a defendant who drove his automobile in front of a railroad train, severely injuring the guest. The collision occurred at the crossing of defendant's private driveway and the railroad right-of-way. In that case, we said: "There is a reasonable inference arising from the evidence adduced that appellant was guilty of negligence in failing to maintain a proper lookout for trains as he approached this private crossing and, as a result thereof, drove onto it without seeing the train approaching from the north which caused the accident. How-

ever, in view of the standards which this court has applied in guest cases, we do not think his negligence in this regard arises to the degree of gross negligence within the meaning of the statute."

Kiser v. Christensen, 163 Neb. 155, 78 N. W. 2d 823, involves a situation where the guest warned the driver of an oncoming train when the car was 80 feet from the track and the train was approaching 200 to 300 feet away. The car was traveling 20 to 25 miles an hour. The guest testified the driver failed to slow down and struck the train. The collision occurred at night and the headlights of the engine were on. The defendant's testimony suggested that he "froze up" in the emergency. We concluded that the evidence was insufficient to warrant the submission of gross negligence to the jury.

No two cases are exactly alike. However, there is sufficient similarity in the instant case to those discussed that we conclude the issue of gross negligence should not have been submitted herein. We determine, as a matter of law, that plaintiff failed to make a prima facie case.

Having come to the conclusion that the plaintiff did not make a prima facie case, we find that the motion for a directed verdict should have been sustained at the close of plaintiff's case.

For the reasons given, we reverse the judgment herein, and dismiss the action.

REVERSED AND DISMISSED.

BOSLAUGH and MCCOWN, JJ., dissenting.

Although there was no direct evidence as to whether the signal on the east side of the crossing was operational, we believe that the jury could have inferred that it was operational. We are of the opinion that the evidence in this case presented a question for the jury on the issue of gross negligence, and that the decision in Carter v. Chicago, B. & Q. R.R. Co., 170 Neb. 438, 103 N. W. 2d 152, supports this conclusion.

R AND S CORPORATION, DOING BUSINESS AS BRIGGS CLOTHING, APPELLANT, V. HARVEL BARNES, DOING BUSINESS AS TURF BAR, APPELLEE.
155 N. W. 2d 379

Filed December 29, 1967. No. 36650.

1. **Evidence.** Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference.
2. **Negligence: Evidence.** Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged.

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

Sodoro & Meares, for appellant.

White, Lipp, Simon & Powers, for appellee.

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

NEWTON, J.

This is a negligence action brought by plaintiff to recover for smoke damage occurring in its men's clothing store as the result of a fire in an adjoining building in which defendant operated a tavern. At the conclusion of plaintiff's evidence, defendant's motion for directed verdict was sustained and a verdict found for defendant. The substance of plaintiff's assignments of error is that the evidence was sufficient to sustain a verdict for plaintiff and the court erred in directing a verdict for defendant.

Plaintiff's theory of the case may be gathered from the following statement contained in the petition: "That on or about the 29th day of March, 1964 the aforesaid Glenn O. Thomas was employed immediately prior to the hour of midnight in the sweeping, cleaning and prepara-

tion for closing of the aforesaid Turf Bar, and that while in the performance of the said duties for the named defendant herein, Glenn O. Thomas negligently and carelessly threw ignited cigarettes, cigars, or both, into a plastic waste container containing paper and other flammable materials; that said plastic container was located beneath a sink and immediately beneath said sink. and that said waste container was used as a receptacle for ash tray waste, floor sweepings and cigarette and cigar butts." William McMullen, a district fire chief, who was in attendance on the night of the fire and who subsequently examined the premises, stated that the fire occurred in defendant's tavern at a point about three-quarters of the way down the bar towards the back of the tavern at which point he found the remains of a plastic wastebasket and burned electrical wiring. He also ascertained that there was smoke in plaintiff's mercantile establishment. One Glen Thomas, employed by defendant as a bartender, was also called by plaintiff. His evidence indicates that he closed the tavern about 10:30 p.m. on the night of the fire, swept up the floor, locked the door, and left for the night. When he swept up, he emptied all ashtrays, swept from the back towards the front door, swept the sweepings into a pile, picked them up, and deposited them in a large plastic wastebasket about 6 feet from the end of the bar nearest to the front door. About an inch of water was kept in this plastic basket and that after sweeping up, he poured an additional three beer bottles full of water on the sweepings. The second plastic wastebasket in the vicinity of which the fire occurred was, as heretofore mentioned, about three-quarters of the way down the bar towards the back. No fire occurred in the vicinity of the basket where the sweepings were placed. This witness further testified in regard to use of the wastebasket farthest back where the fire occurred as follows: "Q. Did you have to put anything in that? A. Never used that one at all. I always used the front

one." Plaintiff sought to impeach this testimony by questioning him with reference to a prior statement which the witness does not deny having made. On this prior occasion, when informed that the fire department "said a cigarette was swept up in there," the witness answered as follows: " 'That is about the only way it could have been. I think I swept it up. I didn't notice. I doused it with water. It never entered my mind, but I do now.' " The statement scarcely serves the purpose of impeachment, but is simply an admission in the nature of a conclusion that he could possibly have swept up a lighted cigarette, but if so, he still maintained that he doused it with water.

The foregoing is the substance of the evidence upon which plaintiff must rely for recovery. It will be noted that there is no direct evidence of how the fire started. Plaintiff maintains that there is a reasonable inference that it started from a lighted cigarette thrown into the rear wastebasket; yet such inference directly contradicts the direct evidence elicited from Glen Thomas who stated that he had not used the rear wastebasket in the vicinity of which the fire started. In regard to the fire, the only known and proved fact is that a fire did occur in the immediate vicinity of the rear wastebasket. There is no evidence to show that this basket was used for the purpose of receiving ashtray contents or floor sweepings nor is there any evidence to contradict the possibility of the fire having been started by defective electrical wiring. To sustain plaintiff's case, not one, but several inferences must be drawn—first, that the fire originated in the wastebasket; second, that the rear wastebasket was used as a receptacle for the contents of ashtrays or floor sweepings; third, that an ignited cigarette was dropped in the basket; and fourth, that the fire was started by such ignited cigarette.

"Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference." Stump

v. Stransky, 168 Neb. 414, 95 N. W. 2d 691. See, also, 31A C. J. S., Evidence, § 116 b, p. 202. "Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicates with reasonable certainty the negligent act charged." Stevens v. Shaw, 179 Neb. 34, 136 N. W. 2d 169.

In view of the foregoing, we are disposed to and do find that the evidence of negligence on the part of defendant is too conjectural and speculative to require a reversal of this case. The judgment of the trial court dismissing plaintiff's cause of action pursuant to a directed verdict is affirmed.

AFFIRMED.

DALE HARRINGTON, APPELLEE, V. MISSOURI VALLEY CONSTRUCTION COMPANY, A CORPORATION, ET AL., APPELLANTS.
155 N. W. 2d 355

Filed December 29, 1967. No. 36669.

1. **Workmen's Compensation.** Symptoms of pain and anguish such as weakness, pallor, faintness, sickness, nausea, and expressions of pain clearly involuntary, or other symptoms indicating a deleterious change in bodily conditions, may constitute objective symptoms as required by the Workmen's Compensation Act.
2. ———. The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.
3. **Workmen's Compensation: Evidence.** The burden of proof is on the plaintiff, not only to show that he sustained a personal injury by an accident arising out of and in the course of his employment, but he must also establish by evidence leading to a direct conclusion or by a legitimate inference therefrom that the accident caused the disability.

4. ———: ———. A hospital bill not shown by evidence to have been incurred as a result of the compensable accident is not allowable as a charge against the employer.
5. **Workmen's Compensation: Attorney and Client.** Under the provisions of section 48-125, R. R. S. 1943, an attorney's fee cannot be allowed to a plaintiff for legal services rendered in this court where the employer obtains a reduction of the award on his appeal.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded.

Luebs, Tracy & Huebner and Vincent L. Dowding, for appellants.

Clark & Camp and Baylor, Evnen, Baylor & Urbom, for appellee.

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

CARTER, J.

This is a claim for benefits arising under the provisions of the Nebraska Workmen's Compensation Act. Benefits were awarded by the compensation court sitting en banc, the award affirmed by the district court for Hall County, and an appeal taken to this court by the defendants.

The plaintiff was employed by the Missouri Valley Construction Company, hereinafter referred to as defendant, as a mechanic from April 18, 1963, to January 18, 1966. Plaintiff claims he suffered a compensable accident on April 1, 1965, at which time he was being paid at the rate of $2.45 an hour on a 48-hour week basis. At the time of the accident he was 39 years of age and had been in good health prior thereto. There is no evidence in the record of any previous or subsequent injury or illness that could in any manner contribute to the compensable injury asserted in the present proceeding.

On April 1, 1965, plaintiff was working in the shop on a diesel motor of a truck. He was sitting on the

truck fender leaning toward the motor while performing his work. Pat Kinney, his helper, was at the same time on a creeper under the truck working on the lower part of the motor. For some undisclosed reason, Kinney left the scene of his work, leaving the creeper close to the side of the truck. Plaintiff descended from the truck fender to obtain additional tools, stepped on the creeper which rolled out from under him, causing him to fall some 3½ feet to the floor. He says he fell on his right buttock and arm in a semisitting position. The truck foreman, Earl Hollenbeck, immediately came to his assistance and helped him to his feet. He states that he immediately became deathly sick, was nauseated, was seized with cramps, and vomited. He was taken to a hospital in Grand Island, arriving there about 3 p.m., where he remained in bed for 3 days. He was given tests by Dr. Geer, but no extensive examination of his back was made. On his release from the hospital he returned to his work. He suffered no pain prior to the latter part of the following May although he states that he got more tired at the end of the day's work, a condition he had not previously experienced.

Plaintiff testifies that in the latter part of May 1965, he suffered pains in the thigh and calf of his right leg, particularly in the early morning hours while in a stooped position, which gradually wore off with physical activity. He says he had no pain in the back during this period which continued until November 1965. He continued to work for the defendant until January 18, 1966, when he quit his work on the advice of Dr. Kulowski. The record shows that plaintiff went to Dr. Kulowski in January 1966 who examined his back and caused X-rays to be taken by Dr. Fisher. After the examination by Dr. Kulowski, plaintiff lodged his claim with the defendant. On denial of the claim by the defendant, plaintiff returned to Nebraska from Missouri to prosecute his claim in the Workmen's Compensation Court. He was examined by Dr. Getscher for plaintiff

and Dr. Yost for the defendant after the filing of his claim. The evidence of Drs. Geer, Kulowski, Fisher, Yost, and Getscher is before the court. The proper disposition of the case is determinable largely from the medical evidence in the record.

Dr. Robert R. Geer, a general medical practitioner, examined and treated the plaintiff when he was taken to the hospital immediately following the accident on April 1, 1965. From the symptoms he then had and the history given him by the plaintiff, he diagnosed the case as acute gastroenteritis, commonly referred to by laymen as food poisoning. His white cell blood count was high, indicating the existence of infection. He treated the plaintiff by injecting glucose intravenously and a shot of morphine to relieve the pain. Plaintiff progressed steadily toward recovery and was released from the hospital 3 days later, apparently in good condition. Plaintiff made no complaints of pain in his back. There was no visual evidence of back injury and none was revealed by a palpation of the back area. Plaintiff informed Dr. Geer that he had eaten the same food as other employees who had suffered no deleterious effects. Dr. Geer testified that plaintiff's abdominal pains could have masked any pain in the back and that the morphine injection could have done likewise for a period of 3 to 5 hours. It was the opinion of Dr. Geer that plaintiff had suffered from food poisoning, a condition entirely unrelated to the fall at the shop.

When the pains in plaintiff's thigh and calf of the right leg began to accelerate in intensity, plaintiff left his employment and returned to his farm in Missouri. He sought the assistance of Dr. Jacob Kulowski, an orthopedic surgeon in St. Joseph, Missouri, who saw him on February 4, 9, and 14, 1966. It was Dr. Kulowski's opinion that plaintiff probably had a herniated or ruptured disc, but stated that a myelogram was needed to make a final determination. From X-rays taken by Dr. Fisher, he also testified to a pars interarticularis of

the lumbar spine which he described as a fibrous union across the bony bridge of the fifth lumbar vertebra. He diagnosed this as a congenital defect which had become disabling and in his opinion the fall mentioned in the history had some direct relation to it.

Dr. Joseph L. Fisher, a radiologist of St. Joseph, Missouri, took the X-rays at the instance of Dr. Kulowski on February 7, 1966. He found the pars interarticularis which he diagnosed as being congenital in origin, and not caused by trauma. He found the intervertebral spaces to be within normal limits and found no evidence of recent or old bone injury. He found no evidence of trauma in the back or pelvis, and noted the absence of pain in the back. He did not say that there was no ruptured disc as it was possible to have an obturated nucleus not determinable by X-ray and which could be found only by a myelogram examination. He found no slipping of vertebrae out of line, in other words, no determinable spondylolisthesis. He stated that plaintiff was more prone to injury because of the congenital pars interarticularis. He stated that a spondylolisthesis had not yet occurred, but a person with such a defective vertebra is a more vulnerable candidate for injury to his back or slippage of one vertebra on the other than is a person with a normal back in whose spine the bony parts have grown together properly.

On March 28, 1966, plaintiff filed his claim before the Nebraska Workmen's Compensation Court. The evidence of Drs. Yost and Getscher was thereafter procured. The medical meanings of pars interarticularis and spondylolisthesis become important in a consideration of the case. The physicians in this case define the pars interarticularis of the fifth vertebra as meaning that the lower part of the fifth lumbar vertebra is not fused solidly with the upper part and thus permits them to move independently of each other, creating an unstable condition. A spondylolisthesis means that one vertebra has slipped forward or backward on the vertebra above or below it. It is

made clear that a pars interarticularis is generally congenital and is not caused by trauma occurring after birth. In many cases such defects exist and cause no trouble throughout the life of the persons in which they exist.

On September 12, 1966, Dr. John G. Yost, an orthopedic surgeon at Hastings, Nebraska, examined the plaintiff. The history given by plaintiff was basically the same as that previously given except that he stated that his toes on his right foot continuously tingled as if they were asleep, his back was stiff, and that he could not bend forward very far. Dr. Yost examined the plaintiff and took X-rays of the back. He found the pars interarticularis which he designated as a pedicle defect of the fifth lumbar vertebra. He also found a first degree spondylolisthesis between the fifth lumbar and the first sacral vertebrae. He found some signs of nerve root irritation, but was unable to identify a ruptured disc in the absence of a myelogram which he did not procure. He found no signs of a recent or old injury. He states that plaintiff's complaints are not necessarily caused by trauma including the accident of April 1, 1965. He states his opinion that if the injury recited in the history was directly related to his present pain and symptoms, he would have had an onset of such pain and symptoms within 48 to 72 hours following the accident. There being no evidence of pain in the back or other symptoms within the period, it was Dr. Yost's opinion that the condition of plaintiff was not related to the fall that occurred on April 1, 1965.

Dr. Phil Getscher, an orthopedic surgeon of Lincoln, Nebraska, testified at the hearing before the compensation court held on November 23, 1966. He first examined plaintiff on April 13, 1966, at which time he took X-rays. At this time he found the pars interarticularis and a beginning spondylolisthesis in the fifth lumbar vertebra. He caused additional X-rays and a myelogram to be taken on October 11, 1966, and from them discovered a ruptured intervertebral disc. He stated that the pars

interarticularis appeared to be congenital and had existed during the life of the plaintiff. He testified that an injury resulting in an uncomplicated ruptured disc ordinarily produces pain within 48 to 72 hours, but where, as here, two factors exist, such as the pars interarticularis and a ruptured intervertebral disc, the symptoms such as pain may not appear until more extended periods of time. He states that in the case of the spondylolisthesis or slipping vertebra, the portions of bone are held together by ligaments and do not cause pain until the ligaments are weakened or damaged, and permit the bone to slip. He states that the lack of pain within 48 to 72 hours is not significant or unusual because of the unusualness of the two factors involved. He places significance on the pain in the thigh and calf of the right leg in the latter part of May 1966 because this indicates the point of time the nucleous had slipped far enough to begin irritating the nerve. Dr. Getscher states that there was a slipping when he examined the plaintiff, that he did not know when it occurred, and that such slipping was a competent producing cause of pain. He relates plaintiff's present condition to the fall on April 1, 1965, as follows: "The cause-and-effect relationship is established on the basis of my examination and the findings and X-ray with these points: He denies prior pain; he did not consult a physician prior to this time with these complaints; he has an established defect in the neural arch; he has an established ruptured intervertebral disc; he has clinical findings that support the X-ray findings and the history, and, in turn, the history supports the clinical findings insofar as the appearance of nerve root irritation and strain in the lower back. I would like to point out as I did before that this is an unusual case where two conditions are present in the same area in the lower back. In my opinion the injury caused sufficient change in the spondylolisthesis so that there was not only a cause for the disc to later slip, but also a cause for the delay in the appearance of nerve

root symptoms." Dr. Getscher gave it as his opinion, based on reasonable medical certainty, that plaintiff has a ruptured intervertabral disc as a result of the injuries sustained on April 1, 1965. He further states that plaintiff is totally disabled from performing work until he has surgical correction by fusing the section of the back here involved to prevent further slipping and consequent pains. It is his further opinion that a surgical operation will reduce his present total disability to a 15 percent disability of the body as a whole.

Defendant contends that the evidence fails to show any objective symptoms of injury at the time of the accident. It is the theory of the defendant that the symptoms testified to by plaintiff immediately following the accident are not shown to be in any way related to the back injury of which he now complains. The evidence does show that immediatly following the fall from the truck fender, plaintiff became deathly sick, was nauseated, and vomited. We think these were objective symptoms within the meaning of the statute. In Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492, this court said: "It is also said that no 'objective symptoms' of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce 'at the time objective symptoms of an injury,' but the difficulty is as to what constitutes objective symptoms. Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of the opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute." See, also, Knudsen v. McNeely, 159 Neb. 227, 66 N. W. 2d 412. If the position of defendant is the correct one, an employee could never recover for accidents where the symptoms were

delayed or the injuries latent. This is not the intent of the workmen's compensation law. The issue is one of causal relationship between the accident and the claimed injury. "The requirement that objective symptoms of an injury be produced 'at the time' of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. * * * There is no evidence in this case of any intervening cause of the plaintiff's disability." Schoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N. W. 2d 547.

The burden of proof is on the plaintiff, not only to show that he sustained a personal injury by an accident arising out of and in the course of his employment, but he must also establish by evidence leading to a direct conclusion or by a legitimate inference therefrom that such accident caused the disability. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51.

Drs. Kulowski and Getscher testify that in their opinion the present disability of the plaintiff is disabling and that it is caused in whole or in part by the fall of April 1, 1965. Dr. Yost testifies that plaintiff's complaints of back pains and other concurring pains were not necessarily caused by trauma and states in his opinion plaintiff's disability was not caused by the fall because no pain in the back existed within 48 to 72 hours after the accident. We point out, however, that Dr. Getscher testifies that under the unusual circumstances of this case, it is not unusual for such pains to manifest themselves for a delayed period of time for the reasons we have stated in a review of his testimony. His testimony in this respect was not contradicted by other expert testimony. Since this testimony for the plaintiff is not challenged, the credibility of Dr. Getscher is our only concern and we have found no reason to question its reliability. After giving due consideration to all the evidence, the history and nature of the accident, and the sequence of events following the accident, we are

of the opinion that the evidence of plaintiff preponderates over that of the defendant, and that plaintiff was disabled because of the fall on April 1, 1965, within the meaning of the Workmen's Compensation Act.

Defendant asserts that error was committed in the allowance of the claim of the Grand Island hospital for $62.15 for services rendered plaintiff immediately following plaintiff's fall on April 1, 1965. The evidence shows by the testimony of Dr. Geer that plaintiff was suffering from food poisoning at the time, that plaintiff responded to treatment on such a diagnosis, and that the fall was in no way related to the difficulty for which he was hospitalized. There is no dispute in the record on this question. No expert states or offers his opinion to the effect that this hospitalization was or could have been the result of the accident. The most that any doctor said was that this hospitalization was of no significance in determining if the back injury was caused by the accident of April 1, 1965. There is a complete want of proof that this item of expense was a result of the accident, the only proof being to the contrary. This item of expense is not chargeable to the employer.

Plaintiff requests this court to allow him an attorney's fee for services rendered by his attorney in this court. The rule is clear that an attorney's fee may be allowed only where the employer fails to obtain a reduction of the award in this court. But here the employer is entitled to a reduction of the award. This defeats a claim for an attorney's fee in this court. § 48-125, R. R. S. 1943. See, also, Anderson v. Bituminous Casualty Co., 155 Neb. 590, 52 N. W. 2d 814; Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315.

The allowance of the claim of St. Francis Hospital is reversed. The award of the district court is otherwise affirmed. An allowance of an attorney's fee is denied. Costs of the appeal are taxed to the defendant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V, DONALD M. WILLIAMS, APPELLANT.
155 N. W. 2d 377

Filed December 29, 1967. No. 36675.

1. **Post Conviction Evidentiary Proceeding.** In a post conviction proceeding, petitioner has the burden of establishing a basis for relief.
2. ———. Under the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error.

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

Donald M. Williams pro se.

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

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

NEWTON, J.

This is a proceeding under the Post Conviction Act.

Defendant was charged with having committed first degree murder on December 26, 1959. Information was filed January 15, 1960, a plea of guilty entered January 8, 1962, to second degree murder, and a sentence of life imprisonment pronounced on January 22, 1962. Dorothy Elliott, with whose death defendant was charged, and one Edward Ellis were killed on the date charged in the information. One Jerry Erving was convicted as a principal and one Milton Howard as an accessory to these killings. Defendant was a witness for the State in the trial of Erving and Howard.

It is the present contention of defendant that his plea of guilty was involuntary, and was made pursuant to a confession obtained by the county attorney by threatening defendant with a trial on first degree murder

charges and a sentence of death, and by promises that he would receive a sentence of something less than life imprisonment if he cooperated. An evidentiary hearing was held in this case at which defendant was represented by counsel. The trial court found that there was no basis for the contention so made and overruled defendant's motion for relief. We affirm the judgment.

Defendant testified, both by deposition and in person, and the evidence given by him at the post conviction hearing tends to support his allegations of an infringement of a constitutional right by reason of a coerced plea. The county attorney who had prosecuted defendant was called as a witness and unequivocally denied defendant's contentions. In addition, the record of the testimony given by this defendant as a witness for the State at the trial of Erving and Howard was received in evidence and conclusively demonstrates the weakness of defendant's testimony at the post conviction hearing. No purpose can be served by attempting to detail the very lengthy testimony found in this record. Suffice it to say that from the defendant's standpoint, the best light in which the present record can be viewed is that the evidence is conflicting. The trial court on the facts found generally against the defendant and to the effect that he had not sustained the burden of proof. "In a post conviction proceeding, petitioner has the burden of establishing a basis for relief." State v. Sagaser, 181 Neb. 329, 148 N. W. 2d 206. We agree that defendant's present attempt to retract his previous very detailed and lengthy testimony, as a result of which he was subjected to a very vigorous cross-examination, is not convincing.

At the post conviction hearing, defendant at first insisted on proceeding pro se but finally accepted the assistance of the public defender. After the hearing had been held and the judgment of the trial court had been entered, the public defender requested permission to withdraw from the case for the reason that he considered

that an appeal would be without merit and of a frivolous nature. There was no objection and the court permitted counsel to withdraw. Defendant now assigns as error the failure of the trial court to assign counsel on appeal. This contention is also without merit. Under the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error. See State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217. No abuse of discretion appears here.

No error appearing, the judgment is affirmed.

AFFIRMED.

SADIE WONDERLING, APPELLANT, V. JOHN E. CONLEY ET AL., APPELLEES.

155 N. W. 2d 349

Filed December 29, 1967. No. 36678.

1. **Judgments: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong.
2. **Trial: Courts.** The record of the trial court, when properly certified to this court, imports absolute verity. If the record is incorrect, any correction must be made in the district court.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Affirmed.

Leamer & Graham, for appellant.

Ryan & Scoville, for appellees.

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

BOSLAUGH, J.

The plaintiff, Sadie Wonderling, is the owner of Lot

28, Block 47, in Joy Place, an addition to the city of South Sioux City, Nebraska. The defendants, John E. Conley and Valerie M. Conley, own Lot 27 which lies east of and adjacent to Lot 28.

In 1963, the defendants moved a structure onto Lot 27 which they remodeled into a duplex. Apparently the duplex is so located that the eaves and the basement window wells on the west side of the structure extend over onto Lot 28.

In 1965, the plaintiff commenced this action to recover damages for trespass. The plaintiff alleged that the entire value of her property had been destroyed and sought to recover its value from the defendants.

The defendants' answer alleged that there was a division fence on the property when they purchased Lot 27 in 1946; that the division fence was located at least 6 feet west of the building placed on Lot 27 in 1963; that the division fence had been destroyed in 1952; and that the defendants had obtained title by adverse possession to the "lands occupied by said building and for approxmately six (6) feet to the west thereof."

A jury was waived and the action tried to the court. The trial court dismissed the petition and taxed the costs to the plaintiff. The plaintiff's motion for new trial was overruled and she has appealed.

The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong. Weiss v. Weiss, 179 Neb. 714, 140 N. W. 2d 15.

The evidence in this case failed to establish with any degree of certainty the extent of the encroachment of the defendants' duplex upon the plaintiff's land. There was testimony concerning a survey, but the surveyor did not testify. The evidence did not sustain the plaintiff's theory that the entire value of her property had been destroyed, and there was no other evidence from which the trial court could fix the damages. The plaintiff's contention that the evidence does not sustain the

judgment of the trial court is without merit.

The transcript in this case contains a "JOURNAL ENTRY ON TRIAL" signed by the trial court, the judgment as it appears in the journal of the court, and the notes of the district judge which appear in the trial docket.

The "JOURNAL ENTRY ON TRIAL" and the judgment as they appear in the journal both contain a finding that the defendants have been in adverse possession "of the strip of land in question" for more than 10 years and that they are adjudged to be "the owners of the land occupied by them and their title thereto is quieted and confirmed in them." However, a line has been drawn through that part of the finding and judgment. The record contains no information as to how the deletion occurred. The entry in the trial docket is consistent with the judgment as deleted and shows only: "Pltff's petition dismissed. Costs taxed to Pltff."

The defendants have not cross-appealed but they seem to contend that we should assume that the deletion was unauthorized and that we should disregard it and interpret the record as showing a finding and judgment for the defendants upon their cross-petition.

The record of the trial court, when properly certified to this court, imports absolute verity. If the record is incorrect, any correction must be made in the district court. Lippincott v. Lippincott, 144 Neb. 486, 13 N. W. 2d 721. The judgment of the trial court in this case, as certified to this court, contains no finding or judgment for the defendants upon their cross-petition.

There was no evidence as to a division fence extending the length of the lots. There was evidence concerning a pole shed that is located at the rear of Lot 27 and a wire fence that had extended south from the pole shed to a cob shed and then a "short" distance to the south. The fence and cob shed were destroyed by a flood in 1952. Although the pole shed may extend onto Lot 28, the extent of the encroachment is not shown with any definiteness.

John E. Conley testified that he had used Lot 28 for gardening purposes but he did not claim that this use had been adverse.

There was no showing of adverse possession to a definite and certain boundary. The evidence supports a finding and judgment against the defendants upon their cross-petition.

The judgment of the district court is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1968

STATE OF NEBRASKA, APPELLEE, V. GERALD DEAN GODFREY, APPELLANT.
155 N. W. 2d 438

Filed January 5, 1968. No. 36619.

1. **Criminal Law.** The fact that a defendant, as a part of the initial procedures at a police station, after full Miranda warnings, is asked whether he desires to make a statement at that time, and answers negatively, does not automatically invoke his right to counsel and render inadmissible any subsequent statement obtained in the absence of counsel. Such a factual circumstance, coupled with other facts present, does not prohibit or invalidate a later waiver voluntarily, knowingly, and intelligently made.
2. **Constitutional Law: Trial.** The constitutional right to trial by jury is a personal privilege which may be waived and the prosecution is without power to require a jury trial if the defendant wishes to waive it.
3. **Trial: Motions, Rules, and Orders.** The court may reasonably require that a motion to waive a jury trial be made or filed within a reasonable time prior to trial as a condition to the consent of the court.

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

A. Q. Wolf and Bennett G. Hornstein, for appellant.

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

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

McCOWN, J.

The defendant has appealed from a conviction and sentence for burglary. Two issues involving constitutional rights are presented. One involves an interpretation of Miranda rules and the other the waiver of the right to trial by jury.

In the early morning hours of October 20, 1966, a burglary was committed at a Safeway Store in Omaha. Some 80 or 90 cartons of cigarettes were taken. An eyewitness had been awakened by the sound of breaking glass and had observed "two fellows" coming out of the broken glass door. Two police officers stopped an automobile in the vicinity and shortly after the time of the burglary. The two white male occupants were the defendant and a companion. They were taken to the scene of the burglary. When the police officers had completed their investigation of the burglary at the store, the defendant and his companion were taken to the central police station where sergeant Kaufhold and his partner interviewed the two suspects. This interview took place in the detective bureau between 6:05 and 6:15 a.m. In advising defendant of his Miranda rights, the officers followed a "rights advisory form." The defendant was asked if he was willing to give a statement at that time and he said: "No." He was then booked on suspicion of burglary and placed in a cell. Meanwhile, the police continued their investigation in the field and found the bulk of the stolen cigarettes.

At approximately 11 a.m., officers Sieborg and Wilson had the defendant brought from his cell to a fourth floor interrogation room of the police station. At this interrogation, defendant was informed that the police had found the cigarettes. The defendant at this time was given all of the Miranda warnings pursuant to the "rights advisory form," and his responses were noted in writing by the police officers. He was advised that they were police officers; that he had a right to remain silent and not make any statements or answer any questions; that

anything he might say could be and would be used against him in court; that he had a right to consult with a lawyer and have the lawyer with him during the questioning; and that if he could not afford a lawyer, the court would appoint one to represent him. He was asked if he understood each portion of the warning as it was given to him. He was then asked: "Knowing your rights in this matter are you willing to make a statement to me now?" He answered: "Yes." He was then asked: "Do you willingly waive and do without the services of an attorney at this time?" He responded: "Yes." Following this, a typewritten statement and confession was taken from the defendant. The defendant read the statement over and stated it was true, but refused to sign it as it was "not with his thinking to sign it." The total time required for the interrogation and statement was 40 to 50 minutes.

At the trial, a hearing was held out of the presence of the jury to determine the admissibility of the statement made. Following the hearing, the trial court specifically found that the statements made by the defendant at or about 11 a.m. in the police station on the morning of October 20, 1966, were voluntarily made and were made after compliance with the requirements of Miranda. The typewritten statement was thereafter offered and received in evidence over objection.

There is no contention that incomplete or inadequate warnings were given to the defendant. There is no contention that there were any promises or threats or coercion or physical abuse. There is no contention that the defendant was ill-treated, incarcerated for long periods, nor in any way mentally deficient or unaware of the circumstances. Neither is there any contention that he was denied access to parents, friends, or others, nor subjected to any extended periods of interrogation.

Boiled to its essence, the defendant's position is that when, shortly after 6 a.m. in the detective bureau, he answered "No" to the question, "Knowing your rights

in this matter are you willing to make a statement to me now?", the negative answer to that specific question invoked his constitutional rights under Miranda, prevented any further in-custody interrogation of him by the police in the absence of a lawyer, and made inadmissible the subsequent statement obtained in the absence of counsel at 11 a.m.

Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, has spawned reams of articles concerning its application and its peripheral boundaries. Fifth and Sixth Amendment issues, both made applicable to the states by virtue of the Fourteenth Amendment, are now interwoven in the problem of in-custody interrogation and statements resulting from it. The plural but separate and integrated nature of the privilege against self-incrimination and the right to counsel is obvious throughout Miranda. The necessary constitutional underpinning rests on compulsion. How much of "the compulsion inherent in custodial surroundings" remains, after the protective devices required by Miranda have been employed, is uncertain, particularly when applied as a rule of evidence.

The Supreme Court has not foreclosed the admission of all statements made in the atmosphere of the police station. It has said: "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

"If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilage so long as they do not question him during that time."

"An express statement that the individual is willing

to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Miranda v. Arizona, *supra.*

The defendant seems to concede that if there had been no prior questioning, the statements and waivers obtained at 11 a.m. might satisfy the burden of the government to "demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."

The defendant's position is that whenever the specific warnings required by Miranda are once given to a defendant in custody, the warnings themselves, coupled with any inquiry as to whether defendant wishes to make a statement, must be regarded as the commencement of an interrogation. An indication that the defendant wishes to remain silent at that time, the defendant contends, fully invokes the defendant's constitutional right not only to remain silent, but to have counsel, and prohibits the introduction of any later statement made without the presence of a lawyer. We cannot agree.

From the evidence here, when the police received the "no" answer at the early morning interview made in connection with booking procedures, the interview was stopped. This should have demonstrated "that his interrogators are prepared to recognize his privilege should he choose to exercise it." Miranda clearly requires that if a defendant in custody at any time indicates that he wants an attorney before speaking to the police, any interrogation must cease until an attorney is present and the right continues to have the attorney present during any subsequent questioning. It is not clear that the same right to have an attorney present arises solely from a defendant's indication at a specific time that he does not then wish to make a statement or answer a question where, as here, he does not ask for an attorney. This

is particularly true where the police do not question him after such indication while investigation in the field is carried out for a few hours. We recognize that the police cannot be permitted to attempt an in-custody interrogation and, upon being met with a refusal, return a prisoner to his cell and then attempt to repeat the procedure periodically until a statement is obtained. However, an otherwise valid voluntary waiver of both the right to counsel and the right to remain silent, knowingly and intelligently made, followed by a statement, should not be transformed into invalidity merely because of silence at some prior time. One refusal to make a statement, when that refusal is fully honored, ought not to taint the substance of the entire subsequent procedures under the circumstances here.

The case of Tucker v. United States, 375 F. 2d 363 (8th Cir. 1967), while not identical on all its facts, did involve many similar factual circumstances. The court there said: "In resolving the question in light of the Miranda standards, the substance and not the form of the warnings should be of primary importance."

We believe also that when Miranda warnings have been fully given, the substance and not the form of the entire procedure should be of primary importance.

We hold that the fact that a defendant, as a part of the initial procedures at a police station, after full Miranda warnings, is asked whether he desires to make a statement at that time and answers negatively, does not automatically invoke his right to counsel and render inadmissible any subsequent statement obtained in the absence of counsel. Neither does such a factual circumstance, coupled with the other facts here, prohibit or invalidate a later waiver voluntarily, knowingly, and intelligently made.

The record convincingly sustains the findings of the trial court on the issue here. The warnings given constituted sufficient compliance with Miranda, and the defendant fully apprised of a meaningful choice in regard

to his right against self-incrimination, voluntarily, knowingly, and intelligently waived his privilege to remain silent and his right to counsel at 11 a.m. on October 20.

Trial of this case commenced on January 25, 1967, at 9:30 a.m. The defendant was arraigned and a jury was impaneled. After the jury was impaneled, but before opening statements were made, the defense moved to waive a jury. The motion was overruled and trial continued to the jury which found the defendant guilty.

The defendant's position is that he has an unlimited, unconditioned right to waive a jury trial, and that the refusal to grant it is reversible error.

This court, in Johnson v. State, 169 Neb. 783, 100 N. W. 2d 844, held that the constitutional right to trial by jury is a personal privilege which may be waived. A prior case to the contrary, Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007, was expressly overruled in State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129. In the Carpenter case, this court specifically reaffirmed the holding of Johnson v. State, *supra*.

We also said: "The right to a jury trial is personal to the defendant, and the state is without power to require one if the defendant wishes to waive it." That holding, while it removed any requirement of consent by the prosecution, did not go to the issue of whether the waiver can be subjected to reasonable conditions by the court.

Singer v. United States, 380 U. S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965), held, as to federal criminal cases, that reasonable conditions may be put on waiver of jury trial, and that the conditions imposed under rule 23A, Federal Rules of Criminal Procedure, were reasonable. For a summary and discussion of the conditions imposed by the various state courts, see 51 Cornell L. Q. 339 (1966).

In this case, the motion to waive the jury trial was made after the jury trial had begun, and after the jury had been impaneled. Under such circumstances, the trial court exercised proper judicial discretion in

denying the motion. We hold that the court may reasonably require that a motion to waive a jury trial be made or filed within a reasonable time prior to trial as a condition to the consent of the court. The court, of course, may grant such a motion at any time and should do so whenever it will promote the fair, reasonable, and efficient administration of justice.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARDELL NELSON SMITH, APPELLANT.
155 N. W. 2d 368

Filed January 5, 1968. No. 36639.

Criminal Law: New Trial. The record in this case fails to show that defendant was unavoidably prevented from filing his motion for a new trial within the statutory time.

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

S. J. Albracht, Robert C. Vondrasek, and Lathrop & Albracht, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

SMITH, J.

In this post conviction proceeding the district court overruled defendant's motion for a new trial because the motion had been filed out of time. Defendant contends on appeal that he was unavoidably prevented from filing the motion timely. No such statement appears in the motion itself, and the bill of exceptions discloses nothing relevant. The judgment is affirmed. See, §

25-1143, R. R. S. 1943; Roggencamp v. Dobbs, 15 Neb. 620, 20 N. W. 100.

AFFIRMED.

CECIL O. CAMPBELL, APPELLANT, V. CITY OF LINCOLN, A CITY OF THE PRIMARY CLASS, ET AL., APPELLEES.
155 N. W. 2d 444

Filed January 5, 1968. No. 36677.

1. **Statutes.** The burden is on one who attacks a statute or an ordinance valid on its face and enacted by lawful authority to prove facts to establish its invalidity.
2. **Municipal Corporations: Constitutional Law.** The classification of the cities of the state into classes and subclasses, and the conferring upon them of corporate powers by acts of the Legislature of a general nature, yet the provisions of which are applicable to but one of such classes or subclasses, is not repugnant to any provision of the Constitution.
3. ———: ———. The Legislature shall not pass local or special laws incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village.
4. ———: ———. A valid classification of cities for purposes of legislation must admit of additions to it. It must not be so constituted as to preclude addition to the numbers included within it.
5. **Statutes: Constitutional Law.** Legislative Bill 586 (Laws 1965, c. 43, p. 288), is not so restrictive as to constitute special legislation.
6. ———: ———. No legislative bill shall contain more than one subject and the same shall be clearly expressed in the title.
7. **Municipal Corporations.** Municipal corporations are subject to legislative control and the annexation authority of a municipality is valid within the exclusive discretion of the Legislature.
8. **Courts: Powers.** Courts have the power to inquire into and determine whether conditions exist which authorize annexation.
9. **Boundaries.** The fixing of boundary lines is within the exclusive domain of the Legislature.
10. **Constitutional Law.** The property of no person shall be taken for public use without full compensation therefor.

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

Merril R. Reller and John McArthur, for appellant.

Ralph D. Nelson, Jack B. Lindner, Carl C. Kopines, Richard R. Wood, and James M. Winter, for appellees.

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

SPENCER, J.

This action was brought by Cecil O. Campbell, a resident, inhabitant, taxpayer, and real property owner of the village of West Lincoln, hereafter referred to as village, after the village council refused to do so. The council had earlier adopted a resolution to contest annexation, but rescinded that action at a special meeting. This action seeks to declare Legislative Bill 586 (Laws 1965, c. 43, p. 238), hereinafter referred to as L.B. 586, unconstitutional and void, and to declare an annexation ordinance of the city of Lincoln, hereinafter referred to as city, passed pursuant thereto, invalid. The action was filed January 3, 1966, the day before the annexation ordinance adopted by city was to become effective. A temporary injunction was denied and the ordinance became operative. The trial court found L.B. 586 constitutional and valid, and plaintiff perfected this appeal.

Plaintiff contends L.B. 586 is unconstitutional for the following reasons: (1) It is special legislation; (2) the title thereof covers more than one subject; (3) city brought itself within the provisions of L.B. 586 by gerrymandering and annexing agricultural lands, rural in character; (4) village is not contiguous to present city boundaries; (5) L.B. 586 creates an unreasonable classification with no real benefit to either the city or the village; and (6) L.B. 586 is fundamentally unfair.

The burden is on one who attacks a statute or an ordinance valid on its face and enacted by lawful authority to prove facts to establish its invalidity. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

Is L.B. 586 special legislation and repugnant to the provisions of Article III, section 18, Constitution of Ne-

braska? This provision reads in part as follows: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Incorporating Cities, Towns and Villages, or changing or amending the charter of any Town, City or Village."

There is now and for the foreseeable future there will be only one city of the primary class in Nebraska. This point is adequately discussed in State ex rel. Jones v. Graham, 16 Neb. 74, 19 N. W. 470. We there held: "The classification of the cities of the state into classes and sub-classes, and the conferring upon them of corporate powers by acts of the legislature of a general nature, yet the provisions of which are applicable to but one of such classes or sub-classes, is not repugnant to any provision of the constitution."

The following language from State ex rel. Jones v. Graham, *supra,* is particularly pertinent herein: "The substance of these provisions was contained in the first constitution of the state, and was borrowed from the state of Ohio, which, so far as my information extends, was the first state to realize the evils of special and local legislation and to provide a constitutional protection against them. But the experiment, for experiment it was and is, met with a serious impediment in its application to laws for the government of cities. It was found that laws and regulations demanded by and necessary to large cities were not necessary to nor their support within the means of many of the ambitious villages which had become incorporated as cities; hence the expedient of classifying the cities of the state according to the population, and enacting general laws applicable to each class respectively. Such laws made applicable only to cities of the first class were upheld, although there were only one or two cities of that class in the state, on the ground that, as the population of the cities of the lower classes was constantly increasing they would or might become cities of the first class, and then such laws would be applicable to them."

The annexation authority of a city of the primary class is much more restricted than that of a city of the metropolitan class. By L.B. 586, the authority of a city of the primary class was broadened to permit the annexation of any village within the limits of such city which it serves with water service or supply or with a sanitary sewerage system or service or both.

The problem here, if one exists, is the fact that L.B. 586 is much more restrictive than necessary. It is difficult to understand why those interested in the bill deemed it necessary to add, "and which it serves with water service or supply or with a sanitary sewerage system and service, or both such water and sanitary sewerage service." It is this language which poses the question. If the quoted language had been omitted, there could be no question the act would be of general application.

The classification must be such that it can readily apply to other cities which might come into the class. As we said in Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894: "A valid classification of cities for purposes of legislation must admit of additions to it. It must not be so constituted as to preclude addition to the numbers included within it."

It is fairly obvious that a city growing sufficiently to move into the primary class could gradually surround an adjoining village. It is not so obvious that the village would be dependent on that city for either its water or sewerage facilities. The more restrictive the statute the more likely that it must be considered special legislation. Village is the only incorporated village within a primary city receiving its water and sewerage service from that city. City has furnished village with water for the past 30 years. It is furnishing sewerage facilities only because of the transfer of Sanitary District No. 1 to it in 1957. Prior to that time, Sanitary District No. 1 had supplied sewerage facilities to village for many years. While it is not necessary to decide whether L.B.

586 would have been special legislation if the conjunction "and" had been used, and while we question any particularization, we do decide that the use of "or" permits a determination that the classification is a reasonable one. We recognize the definite probability that a village surrounded by a primary city might eventually depend on the city for either water or sewerage service, and hold that the restriction to one or the other does not narrow the class to the point that it violates the constitutional provision.

Plaintiff contends L.B. 586 is violative of the portion of Article III, section 14, Constitution of Nebraska, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

The title of L.B. 586 is as follows: "AN ACT to amend sections 15-113, 15-115, 15-116, 15-117, and 15-118, Reissue Revised Statutes of Nebraska, 1943, and section 15-104, Revised Statutes Supplement, 1963, relating to cities of the primary class; to authorize such cities to annex any village within the limits of such city which it serves with water or sanitary sewerage service; and to repeal the original sections." Clearly the title is in full compliance with the above requirement. There is no merit to this assignment.

Plaintiff argues that L.B. 586 creates an unreasonable classification and is fundamentally unfair. Municipal corporations are subject to legislative control and the annexation authority of a municipality is within the exclusive discretion of the Legislature. Courts have the power to inquire into and determine whether conditions exist which authorize annexation. However, it is not for the courts to determine which portions may be properly annexed. The fixing of boundary lines is within the exclusive domain of the Legislature. Bierschenk v. City of Omaha, 178 Neb. 715, 135 N. W. 2d 12.

Many of plaintiff's constitutional contentions were answered 60 years ago in Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151, which enunci-

ated the following principles: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

Plaintiff suggests that L.B. 586 gives city vast eminent domain rights without compensation. There is no foundation for this allegation. The power granted must be properly exercised. Any exercise of the power of eminent domain is subject to the constitutional mandate, "The property of no person shall be taken or damaged for public use without just compensation therefor." Art. I, § 21, Constitution of Nebraska.

Plaintiff also complains that to complete the requisites necessary to fulfill the requirements of L.B. 586, city in 1964 annexed agricultural land on the north side of village and there were then no present plans for the development of said area. While it is unnecessary to discuss this assignment because plaintiff cannot collaterally attack those proceedings (McClay v. City of Lincoln, 32 Neb. 412, 49 N. W. 282), we do make the following observations: The record fails to indicate that plaintiff or village had any interest of any nature in the land north of the village annexed by city. There is nothing in this record to show any protest or objection of any nature to this annexation by the property owners involved or anyone else. Section 15-104, R. S. Supp., 1965, permits city to include within its limits contiguous or adjacent lands for municipal purposes except that agricultural lands cannot be included where the sole object is to increase the revenue of the city. Witham v. City of Lincoln, 125 Neb. 366, 250 N. W. 247. City's brief succinctly describes the area as follows: "This land is in a triangle of which the village is the base, one side is Interstate 80, and the other side is Interstate 180 * * *. This land is near all city utilities. It is adjacent to the Lincoln Municipal Airport, a large facility involving several square miles. It is adjacent to the tracks of the Union Pacific Railroad and of the C. B. & Q. Railroad. There was testimony by the Planning Director and by a qualified land appraiser that the land is essentially urban in character * * *."

For the reasons set forth above, we conclude that the

judgment of the trial court is correct and should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALVARO BRAVO ESCAMILLA, APPELLANT.
155 N. W. 2d 344

Filed January 5, 1968. No. 36682.

1. **Right to Counsel.** The right to counsel is a personal right and may be knowingly waived.
2. **Criminal Law: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
3. ———: ———. Section 29-2308, R. R. S. 1943, makes it the duty of this court, when proper proceedings are had, to review the sentence and to set aside any sentence which the evidence will not warrant, and further if the sentence is set aside to render such sentence as may be justified by the evidence.

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

Willard F. McGriff and Alfred J. Kortum, for appellant.

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

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

SPENCER, J.

Defendant entered a guilty plea to a charge of robbery, and after receiving the maximum sentence provided by section 28-414, R. R. S. 1943, perfected an appeal to this court. Defendant assigns as error the fact that he was not represented by counsel at his arraignment or at the presentence hearing, as well as the severity of the sentence.

Defendant, a Mexican 22 years of age, had three previous felony convictions and was on parole at the time of the crime herein. About 1 a. m., April 2, 1967, defendant, possibly under the influence of intoxicating liquor and three yellow-jacket pills, stopped at the Wardman Hotel in Scottsbluff. After getting into an argument with the clerk, Mrs. Jean Ferguson, he put his hand in his pocket suggesting the presence of a gun, and demanded the money in the cash drawer which she handed over to him. He then ordered Mrs. Ferguson into the men's restroom and directed her to remove her clothes. She refused to do so, and a struggle ensued. She was left unconscious. The defendant was taken into custody approximately 5 hours later. Mrs. Ferguson sustained a skull fracture, bruises about her shoulders, a laceration on the right thumb as a result of a bite, and her eyes were gouged out of normal position. When found her eyes were outside of the lids, the eye muscles were torn, and the conjunctiva, or the skin around and covering the eyeballs and the inner side of the lids, was also torn. The medical testimony is that she will never see again.

Defendant, relying on Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, assigns as error the failure to furnish him assistance of counsel when he was brought into the station for questioning. There is no merit to this assignment. The undisputed evidence is that defendant was advised of his rights when he was first interviewed at the station. Within an hour thereafter he, together with his brother and sister-in-law with whom he resided, signed a consent to a search of his premises. This consent is as follows:

"April 2, 1967 8:00AM

"I hereby voluntarily give consent for Chief Richard Camper, Scottsbluff Police Department, to search the premises where we reside at 818 East Overland Ave., Scottsbluff, Nebraska.

"This consent is given freely and voluntarily without

threat or promises of any type. I have been advised of my right to remain silent, my right to the services of an attorney and the fact that an attorney will be appointed to represent me if I cannot afford to secure my own, the fact that any statement made and any evidence gathered as a result of this search could and would be used against me in a court of law.

"I also give consent for any other officers accompanying the Chief of Police to assist in the search of the apartment.

"RUDOLPH B. ESCAMILLA (Sgd.)
Rudolph B. Escamilla
"ALVARO B. ESCAMILLA (Sgd.)
Alvaro B. Escamilla
"VALENTINA ESCAMILLA (Sgd.)
Valentina Escamilla

"WITNESSED: Richard Camper (Sgd.)
Robert A. Lacy (Sgd.)"

The defendant's clothing and some latent fingerprints secured at the scene were sent to the F.B.I. laboratory for analysis, and he was held in custody. On the morning of April 6, 1967, defendant sent for the deputy sheriff and told him he wanted to sign a confession. In the presence of this deputy and the sheriff, he was fully advised of his rights and warned of the consequences of any statement. After receiving what the sheriff's office labels the "Miranda Warning," which is a printed form in evidence herein as exhibit 6, he wrote out and signed a confession, but first executed the following waiver:

"YOUR RIGHTS

"Place Sheriffs Office, Gering, Nebr
"Date Thursday April 6, 1967
"Time 12:30 PM 12:15 A. E.

"Before we ask you any questions, you must understand your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

"If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

"If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

"WAIVER OF RIGHTS

"I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

"Signed Alvaro B. Escamilla (Sgd.)

"Witness Steve Warrick (Sgd.)

"Witness Earl Yeoman (Sgd.)

"Time 12:15 PM"

The right to counsel is a personal right and may be knowingly waived. State v. Brevet, 180 Neb. 616, 144 N. W. 2d 210.

The record discloses that when the defendant was arraigned in district court, the following occurred:

"THE COURT: Alvaro Bravo Escamilla, you have heard the crime charged in the information that has just been read to you by Mr. James Ponder, the County Attorney of Scotts Bluff County, Nebraska. Before proceeding further it becomes my duty to advise you that the crime charged is a felony, and you have a right to be represented by a lawyer in these proceedings. If you do not have the money with which to employ your own lawyer, the Court will appoint you a lawyer at the expense of the County of Scotts Bluff.

"Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: Do you wish to be represented by a lawyer?

"THE DEFENDANT: No.

"THE COURT: You understand that you do have a right to have a lawyer, do you?

"THE DEFENDANT: Yes, I do.

"THE COURT: And is this choice not to have a lawyer your own choice made freely and voluntarily on your part?

"THE DEFENDANT: Yes, it is.

"THE COURT: And so you wish to proceed now without a lawyer?

"THE DEFENDANT: Yes.

"MR. PONDER: Your Honor, I might inquire of the defendant. Mr. Escamilla, isn't it a fact that prior to your last sentence to the Complex you were represented by counsel?

"THE DEFENDANT: Yes.

"MR. PONDER: And that was Mr. Kortum?

"THE DEFENDANT: Yes, it was.

"MR. PONDER: I see. And you know he is from the Public Defender's Office, is that correct.

"THE DEFENDANT: Yes.

"MR. PONDER: Are you acquainted with Mr. McGriff?

"THE DEFENDANT: Not personally, no.

"MR. PONDER: You know, also, he is actually the Public Defender?

"THE DEFENDANT: Yes.

"MR. PONDER: These people are available to you if you want counsel.

"THE DEFENDANT: I understand.

"MR. PONDER: You understand that?

"THE DEFENDANT: Yes.

"THE COURT: So the Court understands it, you have waived the right to counsel, is that right?

"THE DEFENDANT: Yes.

"THE COURT: Let the record show that the defendant has waived his right to be represented by counsel and that the Court is of the opinion that his waiver is made freely and voluntarily."

After accepting defendant's plea and entering a finding of guilty, the trial court continued the matter until the next day for a presentence hearing. At that time defendant's confession was read into evidence. Testimony was adduced as to the condition of Mrs. Ferguson, and defendant's minister made a statement on behalf of the defendant, after which the court passed sentence.

Defendant's constitutional rights were fully explained to him prior to, during, and after the giving of the confession. The warning requirements of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, were clearly met herein. We are satisfied that defendant understood his rights and his confession having been freely and voluntarily given was properly admitted at the presentence hearing.

Defendant further assigns the assessment of a maximum penalty herein as error. We have repeatedly held that where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Konvalin, 179 Neb. 95, 136 N. W. 2d 227.

Section 29-2308, R. R. S. 1943, makes it the duty of this court, when proper proceedings are had, to review the evidence and to set aside any sentence which the evidence will not warrant, and further if the sentence is set aside to render such sentence as may be justified by the evidence. Anderson v. State, 26 Neb. 387, 41 N. W. 951.

Robbery is a major crime. The statute provides a maximum penalty of 50 years for the offense. As we said in Cherpinsky v. State, 122 Neb. 52, 238 N. W. 917:

"It is a well-known fact that criminals, engaged in committing crimes of this character, are potential murderers." Defendant, although only 22 years of age, is already a recidivist. There is nothing in this record which could be urged in extenuation of his acts. The crime committed is one of the most aggravated nature. Defendant showed no consideration for the sensibilities of his victim, and certainly his actions constituted inhuman brutality. His attempt to force his victim to disrobe, and his fiendishly brutal treatment of her requires the severest of penalties. The medical testimony indicates that a blow could not have caused the eye injuries sustained by the victim. Only deliberate gouging could have produced that result. The victim has been permanently blinded by defendant's act. If the maximum penalty is ever to be exacted, it is required herein.

What we said in Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, in discussing another section of our criminal statutes, is particularly appropriate herein: "The Legislature has fixed the public policy of this state and determined what shall be done in cases of this character. It is a policy of long standing. It is a trite statement, but it is our duty to enforce the law." There was no abuse of discretion by the trial court in assessing the maximum penalty herein.

For the reasons stated, we find that the assignment of errors cannot be sustained. The judgment of the district court should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHOICE JACKSON, APPELLANT.
155 N. W. 2d 361

Filed January 5, 1968. No. 36693.

1. **Post Conviction: Right to Counsel.** Under the Post Conviction Act, it is within the discretion of the district court as to whether

or not legal counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error.

2. ———: ———. When evidence is insufficient to sustain a finding that defendant's plea of guilty was wrongfully obtained by promises of leniency, that he was denied the right to retain counsel of his own choosing, and that court-appointed counsel was ineffective because not given an opportunity to investigate and ascertain the facts of defendant's case, relief by the trial court is properly denied.

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

Choice Jackson pro se.

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

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

NEWTON, J.

This is a post conviction hearing.

On October 7, 1959, information was filed in Douglas County, Nebraska, charging that defendant on October 3, 1959, committed the offense of murder in the second degree. On October 9, 1959, defendant entered a plea of guilty to the charge contained in the information and on October 28, 1959, was sentenced to life imprisonment. He was represented by a member of the staff of the public defender. The case is now before us on defendant's motion to vacate his conviction and sentence. The district court granted an evidentiary hearing on the motion and appointed counsel to represent the defendant in connection therewith. Defendant's deposition was taken and received in evidence; witnesses called were the assistant public defender who had represented the defendant at the time of his conviction, and James L. Koley, a deputy county attorney who had been in charge of the prosecution.

At the conclusion of the hearing, the matter was

taken under advisement by the court and, subsequently, an order was entered overruling the defendant's motion. The order is quite lengthy, setting out the pertinent evidence on the various points involved and the law pertaining thereto in great detail and reflects a very conscientious attempt by the court to properly resolve the questions presented.

The defendant assigns error in regard to several factual conclusions arrived at by the trial court and insists that his constitutional rights were violated. His first contention is that his plea of guilty was not a voluntary plea but was coerced by promises of leniency. He intimates that the deputy county attorney told him that if he were convicted of first degree murder, due to his past record, he might be sentenced to the electric chair, but that on conviction of second degree murder, he would get a life sentence. He admits that he knew before he was so informed of the difference in the sentences provided by law for first and second degree murder. In connection with his contention that he was promised a life sentence rather than the electric chair if he would plead guilty to second degree murder, the following evidence given by him would appear to be conclusive: "Q- Did he say anything about if you would plead guilty to second degree murder that he would see that you would get life? A- He didn't say. * * * Q- And then did he tell you that if you pleaded guilty to second degree murder that you'd get a life sentence? A- Well, I don't remember what he said about getting a life sentence, but I do know that he told me it would be best to plead to second degree, but at the time I don't remember him saying anything about that, * * *." He further testified: "Q- Now Mr. Koley explained to you if you were found guilty of first degree murder that there was a chance that you might lose your life, is that right? A- Yes. Q- And he said if you were found guilty of second degree murder or if you were found guilty that you would be given life imprisonment? A- Yes. Q-

And you knew that at the time? A- Yes."

The foregoing testimony of the defendant indicates that he was not promised a life sentence rather than the electric chair if he would plead guilty to second degree murder. It further indicates that he already knew before the deputy county attorney so informed him that on a first degree murder charge it was possible on conviction to be sentenced to the electric chair, but that this could not be done on a conviction for second degree murder. The deputy county attorney specifically denied advising Jackson that if he pleaded guilty to second degree murder that he would receive a life sentence, but if he did not so plead, he would be convicted of first degree murder and would be executed. The foregoing evidence makes it clear that not only was there sufficient evidence to sustain the finding of the trial court that defendant's plea of guilty was not coerced by promises that he would receive a life sentence, but that a finding to the contrary could not be sustained on the record.

Defendant's second contention is that he was denied the right to retain an attorney of his own choosing. The record reflects the statement by the defendant to the effect that he wanted to contact friends and so informed the jailer; and that his purpose in wishing to contact his friends was to have them get him a lawyer. Yet, he admits that he at no time requested the assistant public defender, the deputy county attorney, or the court for permission to employ counsel of his own choosing and the attorney from the public defender's office, who represented defendant, testified that he questioned defendant about his ability to employ counsel of his own choosing and ascertained that defendant could not do so. The record thus sustains the finding of the trial court in connection with defendant's second assignment of error.

Third, the defendant contends that he was denied the right to effective counsel because he was not given the opportunity to confer with his court-appointed counsel and such counsel had no opportunity to investigate or

ascertain the facts of the case. Defendant testified that the first time he saw the attorney from the public defender's office who represented him was when he was taken into the courtroom, arraigned, and entered a plea of guilty and that the only other time he saw his attorney was at the time he was sentenced. These statements are directly contradicted by the evidence of the assistant public defender who stated that he consulted with the defendant on 6, 8, or 10 different occasions; that he had access to a list of the State's witnesses, and to the deputy county attorney's file in defendant's case; and that he examined this file and familiarized himself with all the evidence which the deputy county attorney proposed to use against the defendant. This testimony of the assistant public defender is verified by that of the deputy county attorney who prosecuted the case. It would appear that the assistant public defender permitted the defendant to plead guilty only after he had familiarized himself with the facts of the case and arrived at the conclusion that this was best for the defendant, particularly in view of the fact that defendant had previously been convicted on several occasions in the past and at least one such conviction had been for homicide. There is no merit to defendant's third contention.

Defendant further contends that he was subjected to pretrial questioning in violation of rules set out in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and Miranda v. Arizona, 384 S. Ct. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. The record does not reflect the nature of any statements which may have been elicited from the defendant in this manner, but certainly such statements were not used against him. The rules referred to cannot be of assistance to the defendant. They were rules for the exclusion of evidence wrongfully obtained and no such evidence was made use of in this case. See State v. Silvacarvalho, 180 Neb. 755, 145 N. W. 2d 447. In any event, the rules laid down in the cases mentioned are not retroactive.

See Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

Defendant's last contention is that the trial court erred in not appointing counsel to represent him on this appeal. The record indicates that after the evidentiary hearing in the trial court, defendant's court-appointed attorney asked leave to withdraw from the case because both he and the public defender had arrived at the conclusion that defendant had no valid grounds upon which he could expect relief in the event of an appeal to this court and that such appeal would be frivolous in nature. The trial court permitted counsel to withdraw, subject to his first completing defendant's appeal to this court, and in view of the circumstances did not appoint other counsel. Under the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error. See State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217. No abuse of discretion appears.

No error appearing, the judgment of the district court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL BLUNT, APPELLANT.
155 N. W. 2d 443

Filed January 19, 1968. No. 36583.

1. **Appeal and Error: New Trial.** Section 25-1912, R. R. S. 1943, requires that to vest jurisdiction in the Supreme Court, a notice of appeal must be filed in the district court within 1 month after the rendition of judgment or of the overruling of a motion for new trial.
2. **Appeal and Error: Post Conviction.** When a defendant who has been convicted in a criminal action contends that his right to appeal has been defeated due to a violation of a constitu-

tional right, his remedy is one arising under the Post Conviction Act.

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

Richard J. Bruckner, for appellant.

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

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

NEWTON, J.

Defendant Paul Blunt was convicted of the offense of burglary in Douglas County, Nebraska. He was represented at the time of trial by the public defender for said county. After his conviction, motion for new trial was duly filed. On October 18, 1966, defendant's motion for new trial was overruled and sentence pronounced. No further proceedings were had until January 5, 1967, at which time defendant requested leave to file a delayed notice of appeal and to proceed in forma pauperis. The motion for leave to file a delayed notice of appeal was overruled and from such action defendant appeals to this court.

Defendant contends that he had requested the public defender to appeal his conviction and did not learn that an appeal had not been taken until after the time allotted therefor had expired.

Section 25-1912, R. R. S. 1943, requires that to vest jurisdiction in the Supreme Court, a notice of appeal must be filed in the district court within 1 month after the rendition of judgment or of the overruling of a motion for new trial. It is conceded that the statute was not complied with in the present case and the constitutionality of the jurisdictional statute is not challenged. Indeed, we know of no instance in which such a statute has been held unconstitutional.

Defendant cites but two cases in support of his con-

tention that he should be permitted to file a delayed notice of appeal, neither of which is applicable to the present situation. In State v. Williams, 181 Neb. 692, 150 N. W. 2d 260, the defendant did comply with the foregoing statute by filing his notice of appeal within the time required. In Ford v. State, 258 Iowa 137, 138 N. W. 2d 116, the defendant actually did everything within his power to take the required jurisdictional steps to complete an appeal, but his efforts were defeated by the failure of a state employee to post a letter containing the required instruments until after the time for appeal had expired. In the present case, the defendant simply contends he had requested his attorney to appeal, supposed that he was doing so, and did not learn of the failure of his attorney to act until after the time for appeal had expired. The record discloses that defendant was indigent and was represented by the public defender. He apparently believes that his constitutional rights were violated by the failure of the public defender to lodge an appeal from his conviction. Whether or not the facts of the case would justify such conclusion cannot be determined on the record before us. Provision is made for a hearing in such cases under the Post Conviction Act found in Chapter 29, article 30, R. S. Supp., 1965, and by resort to the remedy there provided, defendant may have a determination of the question of whether or not any constitutional right to which he is entitled has been violated.

No error appearing, this judgment must be affirmed.

AFFIRMED.

FRANK L. KUTA ET AL., APPELLANTS, V. DECLAN E. FLYNN ET AL., APPELLEES.
155 N. W. 2d 795

Filed January 19, 1968. No. 36646.

1. **Waters.** Surface waters are waters which appear upon the

surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.

2. **Waters: Drains.** The owner of land may collect diffused surface waters, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow by nature.
3. **Waters.** Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence.
4. **Easements.** An easement by prescriptive right can be acquired only by adverse use for 10 years.
5. **Actions.** Generally, a prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action.

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

Robert F. Martin, for appellants.

Vogeltanz & Kubitschek, for appellees.

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

WHITE, C. J.

This is an action in equity by the plaintiffs, Frank L. Kuta and Josie Kuta, to require the defendants, Declan E. Flynn and Minnie Flynn, to remove an obstruction across an alleged natural watercourse flowing southward from the plaintiffs' land and across the defendants' land, and seeking damages for the loss of crops. Plaintiffs allege that the defendants' construction in 1963 of a raised alley or lane and irrigation lateral base running east and west some 20 feet south of the south property line of the plaintiffs blocks water flowing from plaintiffs' land in a natural watercourse causing water to back up and pool on some 3 acres of plaintiffs' land.

In addition, plaintiffs allege that water falling on the defendants' property drains northward from this raised irrigation lateral and contributes to the pooling of water on these 3 acres of the plaintiffs' land. Plaintiffs contend that prior to the construction of this raised irrigation lateral and raising of the alley or lane, water from plaintiffs' land naturally flowed in natural watercourses at two points where it entered defendants' property.

Defendants deny the above allegations and allege that the plaintiffs changed the natural slope of their land and thereby changed the natural watercourse and drainway on said property, and had dammed water on the plaintiffs' land and had caused its wrongful overflow onto the lands of the defendants. Defendants seek injunctive relief and damages.

The trial court denied relief to both the plaintiffs and the defendants and taxed costs to the individual parties. Plaintiffs appeal. We affirm the judgment.

The first question involved is whether the defendants are blocking or obstructing a natural drainway or watercourse from the plaintiffs' property across their land lying to the south. The law in Nebraska with reference to diffused surface waters and natural drainageways is well settled. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. Rolfsmeyer v. Seward County, *ante* p. 348, 154 N. W. 2d 752; Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195. The owner of land may collect diffused surface waters, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow by nature. Rolfsmeyer v. Seward County, *supra;* Linch v. Nichelson, 178 Neb. 682, 134 N. W. 2d 793. And when diffused surface waters gather in volume in veloc-

ity or flow into a natural depression, draw, gulch, or drainway, such waters are not subject to the rule that they may be dammed, repelled, or diverted without liability as in the case of diffused surface waters. Rolfsmeyer v. Seward County, *supra;* Nichol v. Yocum, *supra.*

Both properties herein are irrigated. The pooling area of 3 acres for which the plaintiffs claim damages, is not disputed. It lies on plaintiffs' property immediately to the north of the property line separating the properties. The defendants' lateral irrigation lane or base lies about 20 feet south of the property line between the parties.

Plaintiffs' theory of this case is predicated upon the contention that there is a natural drainway from their property onto the defendants' land at two points. It would serve no purpose to review the detailed evidence in this respect. The evidence shows that during the years up to 1953 the plaintiffs' land had been leveled and several knolls had been removed as late as 1953. While this leveling apparently occurred more than 150 feet north of the property line, the clear inference is that the natural watercourse or drainway off plaintiffs' property had been changed. The evidence is persuasive that the purpose and effect of the leveling interfered with the natural flow of surface water on the plaintiffs' property, increased the total volume which flowed onto the property of the defendants, and discharged it at the two points which the plaintiffs claim were the natural drainways. We note that the court, in this case, inspected the premises. Also persuasive in this respect are aerial photographs, exhibits 1 and 3, and a picture of the property, exhibit 17. These exhibits and the other evidence make it clear that historically the water from the plaintiffs' land did not drain in the courses into which the plaintiffs have now brought the water from their land as it drains onto the defendants' property. It appears from this evidence and these exhibits that water drained naturally from the plaintiffs' prop-

erty onto the defendants in at least three different places and there is no way of reasonably estimating any particular amount of water that might have drained off the plaintiffs' land in its natural state that backed up on the plaintiffs' land and was a part of the 3-acre water pool. As noted before, a landowner cannot collect surface waters and divert them onto lands of another except in depressions, draws, swales, or other drainageways through which such waters flow by nature. Linch v. Nichelson, *supra*. From our review of the evidence we find that the plaintiffs have failed to establish the existence of a natural watercourse or drainway at two points and running from their land onto the defendants' land. Testimony as to the general surface water drainage in an area does not substantiate allegations that a natural watercourse existed at specific places in a state of nature. We come to the conclusion that plaintiffs have failed to establish in the evidence the basic theory of their case.

Plaintiffs, however, claim that surface water falling on the defendants' land to the north of the irrigation lateral has been obstructed and diverted from its natural course to the south because of the raising of the irrigation lateral when defendants repaired it in 1963. It is claimed that this obstruction causes or contributes to the pooling of the water on plaintiffs' land. Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, in the absence of negligence. Nichol v. Yochum, *supra* (1962); Neilsen v. Chappelear, 175 Neb. 381, 121 N. W. 2d 809 (1963). The evidence shows that the plaintiff Frank Kuta cut across the defendants' land and lateral in November 1962 without permission and that the purpose was to drain rain water pooled on this 3-acre tract. The evidence shows that the defendant Declan Flynn repaired their land and lateral in 1963 to remedy the damage caused by the plaintiffs cutting through the lane and lateral. Plaintiffs contend that in performing their repair work the defendants raised the irrigation lateral and lane about a foot so that it now

causes the water to back up and cause the pooling of water on the 3 acres. This was denied by the defendants. The evidence shows that a qualified engineer took survey readings at 50-foot intervals along the property line between the Kuta land and the Flynn land and laterally at right angles at each interval. An examination discloses that the area identified by the plaintiffs as the area from which the flooding occurred encompasses about 15 intervals where readings were taken. At each of these intervals the level of the defendants' lateral irrigation base or lane was lower than the corresponding level at the property line. Plaintiffs' own testimony was that the land at the property line fence had never been disturbed. And it is undisputed that the natural slope or drainway was south from the plaintiffs' property over the defendants. Particularly significant also is the fact that the plaintiffs first experienced pooling on their land in 1962, prior to the repair work by the defendants in 1963 as a result of the plaintiffs' cutting across the prior lateral and lane of the defendants. Both of plaintiffs' causes of action are based upon the alleged liability of the defendants in the repair of their lateral irrigation base in 1963. They have not established that the defendants in performing this act either blocked or obstructed the natural drainways or watercourses or that they had unreasonably diverted or repelled surface water falling on their own property thus causing the pooling of the water on the plaintiffs' property.

Plaintiffs also allege that they have acquired an easement by prescriptive rights to drain water across the defendants' land. In this state, an easement by prescriptive rights can be acquired only by adverse use for 10 years. In Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334, this court stated: " '* * * prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action.' " The evidence shows that the first pooling of water on the plaintiffs' property occurred in

1962 and the first cause of action the defendants could have had against the plaintiffs as indicated by the evidence herein would have been in 1962 when the plaintiffs cut into the defendants' lateral base in order to drain the pool of water on their property. Consequently, plaintiffs have failed to establish any easement by prescriptive rights.

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

AFFIRMED.

KENNETH REID ET AL., APPELLEES AND CROSS-APPELLANTS, V. LAWRENCE SLEPICKA ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH BERNARD J. KLASEK, COUNTY SUPERINTENDENT OF SCHOOLS OF SALINE COUNTY, NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLEES.
155 N. W. 2d 799

Filed January 19, 1968. No. 36657.

1. **Schools and School Districts.** The validity and sufficiency of a petition under section 79-402, R. R. S. 1943, are determined by the county superintendent after notice and hearing, and the validity or sufficiency of the signatures upon the petition is not determined upon basis of the list of legal voters alone.
2. ———. A list or lists of the legal voters in a school district which in fact includes all of the legal voters in the district is sufficient under section 79-404, R. R. S. 1943. It is not jurisdictional that the list contain a sworn statement that all of the legal voters in the district are included.
3. ———. The parents of pupils who have obtained a transfer for school purposes under section 79-478, R. R. S. 1943, are not legal voters in the new district for the purpose of petitions under section 79-402, R. R. S. 1943.
4. **Affidavits: Schools and School Districts.** An affidavit which was in fact sworn to before a notary public is sufficient for the purpose of withdrawing a signature from a petition under section 79-402, R. R. S. 1943, even though the affidavit does not state specifically that it was made under oath or sworn to before a notary public.
5. **Property: Schools and School Districts.** The "total assessed

valuation of the property within the school district" includes both tangible and intangible property.

6. **Schools and School Districts.** Section 79-426, R. R. S. 1943, which provides that the legal organization of a school district shall be presumed when the district has exercised the privileges and franchises of a district for 1 year does not apply to a district in which the validity of the organization of the district has been in litigation since its inception.

7. **Supersedeas.** Generally, supersedeas is not a prerequisite to an appellate review.

Appeal from the district court for Saline County: BARTLETT E. BOYLES, Judge. Affirmed as modified.

Jerry L. Snyder, for appellants.

Clarence C. Kunc and Perry, Perry, Sweet & Witthoff, for appellees Reid et al.

Bernard J. Ach, for appellees Klasek et al.

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

BOSLAUGH, J.

This is an appeal in a proceeding under section 79-402, R. R. S. 1943, to merge 17 school districts in Saline County and Gage County, Nebraska, into the Wilber, Nebraska, School District. The county superintendents approved the merger as to all districts except School Districts Nos. 75, 87, and 88 of Saline County. From this order, seven of the defendants, who are legal voters in the districts affected, perfected an appeal to the district court for Saline County, Nebraska. An order dismissing the appeal was reversed by this court in School Dist. of Wilber v. Pracheil, 180 Neb. 121, 141 N. W. d 768.

The trial court found that the merger should have been approved as to all districts except School Districts Nos. 87 and 88 of Saline County. The defendants' motion for new trial was overruled and they have appealed.

The statute requires that a list or lists of all the legal voters in each district affected, sworn to by a resident

of the district, be given to the county superintendent when the petitions are presented. § 79-404, R. R. S. 1943. The lists which were filed with the petitions in this case did not include sworn statements that the lists contained the names of *all* the legal voters in the districts. The defendants contend that this was a jurisdictional defect, citing Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90.

The defendants' contention goes only to the form of the sworn statements appearing on the lists. The record shows that the lists filed were in fact complete and actually included the names of all the legal voters.

Olsen v. Grosshans, *supra,* was an error proceeding in which the record failed to show that a complete list of legal voters had been filed with the petition. The case is not controlling here.

The validity and sufficiency of a petition under section 79-402, R. R. S. 1943, are determined by the county superintendent after notice and hearing. The validity or sufficiency of the signatures upon a petition is not determined upon basis of the list of legal voters alone. Harnapp v. Bigelow, 178 Neb. 440, 133 N. W. 2d 611.

We think there has been substantial compliance with the statute when a list of legal voters is filed which is in fact complete. This court should not create jurisdictional requirements in reorganization proceedings which have not been imposed by the Legislature. The lists which were filed in this case were sufficient and the defendants' contention cannot be sustained.

The defendants contend that the trial court should have found that Joseph Kovarik and Carole J. Kovarik were legal voters in School District No. 3 of Saline County, Nebraska. The trial court found that they were not legal voters in School District No. 3 for the purpose of the petitions filed in this proceeding. The sufficiency of the petitions filed by the legal voters of School District No. 3 depends upon this finding being correct.

Mr. and Mrs. Kovarik live upon land which is actually located within School District No. 88, but they had obtained a transfer for school purposes to School District No. 3 under section 79-478, R. R. S. 1943. Section 79-483, R. R. S. 1943, provides that the parents of pupils so transferred shall have the right to vote in the new district on all school matters except those of issuing bonds, levying a tax for building purposes, contracting for instruction, and "closing the district."

The petitions filed in this proceeding sought to dissolve School District No. 3 and attach its territory to the Wilber School District. The effect of the petitions would be "closing the district." For that reason, Mr. and Mrs. Kovarik were not legal voters of School District No. 3 for the purpose of the petitions filed in this proceeding. The finding of the trial court was correct.

Four of the legal voters of School District No. 75, who had signed a petition, filed affidavits with the county superintendent withdrawing their names from the petition. If the withdrawals were effective, the petitions signed by legal voters in School District No. 75 did not contain sufficient signatures. The county superintendents found that the petitions were insufficient, but the trial court held that the petitions contained sufficient signatures.

The affidavits did not state specifically that they had been made under oath or had been sworn to. In fact, each affidavit had been sworn to before a notary public. At the hearing on the motion for new trial the defendants established that the form of affidavit used had been furnished through the office of the county superintendent.

The plaintiffs contend that the withdrawals were not "notarized affidavits" as required by section 79-402, R. R. S. 1943, and were ineffective.

Although the form of affidavit which was used is subject to criticism and might not be effective for other purposes, we believe that the withdrawals should be

held effective under the particular circumstances of this case. We conclude that the petitions signed by legal voters in School District No. 75 did not contain sufficient signatures and that the merger should not have been approved as to School District No. 75.

All of the petitions filed in this proceeding contained a provision that the merger was conditioned upon there being petitions filed by other districts so that "the total assessed valuation of the property within the school district to result by favorable action upon said petition shall have an assessed valuation of not less than the sum of Ten Million Dollars ($10,000,000)." The county superintendents and the district court found that this condition had been satisfied. The finding in each instance was based upon a consideration of the valuation of both tangible and intangible property.

In School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429, this court held that "the total valuation of all property subject to taxation" included both tangible and intangible property.

The petition of the Wilber School District, accepting the petitions of the other districts, contained a finding that petitions had been submitted by the electors of other districts which had an assessed valuation of property such that in the event of favorable action upon the petitions, the district which would result would have an assessed valuation of not less than $10,000,000 "as shown by the following tabulation." The tabulation that followed consisted of a listing of valuations for all districts involved including School Districts Nos. 75, 87, and 88. The amounts which were listed in the tabulation indicate that only the value of tangible property was included in the tabulation. The defendants contend that the petition of the Wilber District was not an unconditional acceptance of the other petitions and that the entire proceeding must fail because the assessed value of tangible property for 1964 in all of the districts in-

volved, excluding Districts Nos. 75, 87, and 88, was slightly less than $10,000,000.

Except for the tabulation appearing in the petition of the Wilber School District, there is nothing in any of the petitions which suggests that only the value of tangible property shall be considered in determining the total assessed valuation of the district to result from the merger. The defendants' assertion that the parties had placed such a construction on the language of the petitions is not supported by the record. The petition of the Wilber School District, when properly considered, is a complete acceptance of the other petitions with an erroneous tabulation of the assessed valuation of the new district. The finding of the district court on this issue was correct.

The plaintiffs contend, by cross-appeal, that the trial court should have disposed of the case under section 79-426, R. R. S. 1943, which provides that the legal organization of a school district shall be presumed when the district has exercised the privileges and franchises of a district for 1 year.

The validity of the organization of the new district has been in litigation since its inception. The statute was not intended to apply where the validity of the organization of the district is in litigation. Generally, supersedeas is not a prerequisite to an appellate review. Burke v. Dendinger, 120 Neb. 594, 234 N. W. 405.

The judgment of the district court should be modified to provide that the merger is not approved as to School District No. 75 of Saline County, Nebraska. The judgment as so modified is affirmed.

AFFIRMED AS MODIFIED.