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REPORTS OF CASES

DECIDED BETWEEN

AUGUST 4, 1972 and MARCH 29, 1973

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1972 and JANUARY TERM 1973

VOLUME CLXXXIX

H. EMERSON KOKJER

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By H. Emerson Kokjer, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1972

E. HERBERT THILES, IN PERSON AND FOR ALL OTHERS SIMILARLY SITUATED, APPELLEE, V. COUNTY BOARD OF SARPY COUNTY, A CORPORATE BODY POLITIC, ET AL., APPELLEES, FRED ISKE, INTERVENER-APPELLANT.

200 N. W. 2d 13

Filed August 4, 1972. No. 38219.

1. **Counties: Public Officers and Employees.** County commissioners are clothed with the powers expressly conferred upon them by statute and also such powers as are requisite to enable them to discharge the official duties devolved upon them by law.
2. **Counties: Public Officers and Employees: Contracts.** County boards are usually given authority to make all contracts necessary and incident to the management of the interests of the county, and they may stipulate as to the manner in which such contracts are to be performed and contract with ministerial officers of the county, unless such contracts are prohibited by statute.
3. ———: ———: ———. County boards may not hire a person to perform (1) unauthorized acts, (2) official discretionary duties of the board, or (3) statutory official duties of the board or another county or state official. With these limitations, county boards have implied power to employ such agents and servants as may be required for county purposes and which are not otherwise provided for by statute or by the state Constitution; and the wisdom and expediency of making a particular contract of employment is within the exclusive discretion of the board. Where only part of the services contracted for in a particular case are within the power of the board to engage, the contract is nevertheless valid as to that part.

4. **Counties: Public Officers and Employees: Statutes: Contracts.** Section 23-916, R. R. S. 1943, of the county budget act, does not apply to contracts executed by a county board of commissioners.
5. **Counties: Public Officers and Employees: Statutes: Trial: Evidence.** In an action against county commissioners pursuant to sections 23-132 and 23-134, R. R. S. 1943, to recover money alleged to have been unlawfully expended after the annual tax levy, it must be shown not only that warrants in excess of 85 per cent of the amount levied by tax for the current year were issued, but also that there was no money in the proper fund for their payment.
6. **Counties: Contracts: Appeal and Error.** A contract, although in violation of a statute, will not be declared void if it was not the intent of the Legislature to make it illegal and void.
7. **Counties: Contracts.** To invalidate a contract for illegality, the illegality must be inherent and not merely collateral.

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

Wall & Wintroub, for intervener-appellant.

Ronald Reagan, for appellee Thiles.

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Stephen Greenberg, and Eugene Atkinson, for appellees County Board of Sarpy County et al.

Heard before SPENCER, SMITH, and NEWTON, JJ., and LYNCH and MORAN, District Judges.

LYNCH, District Judge.

This action was originally filed by a taxpayer who asked that a contract of employment executed by the county board of Sarpy County be declared void.

It is undisputed that the board hired Dale L. Payne as an administrative assistant on December 30, 1968, and that by resolution his duties included assisting the board in obtaining government grants, representing the county on legislative matters, and aiding the board when so instructed.

The plaintiff's witnesses were the county clerk, county

treasurer, four county commissioners, and the defendant Payne. After the plaintiff rested and before the trial was resumed, the parties stipulated that the defendant Payne had been appointed civil defense director and that the office of administrative assistant was unfilled. The court then sustained defendants' motion to dismiss the action.

Thereafter another taxpayer was granted leave to intervene. He filed a motion for a new trial, which was granted. A second amended petition asked that the employment contract be declared void and that judgment be entered against the defendants for all sums paid pursuant thereto.

Intervener's proof was the transcript of the original trial, expense and salary claims, extracts from minutes of county board meetings, the 1969-1970 county budget, warrants payable to Payne, and the general ledger from July 1, 1966, to December 31, 1969, as it pertained to the inheritance tax fund.

The trial judge filed an order of dismissal and memorandum in which he found that Dale L. Payne was employed as an administrative assistant to the Sarpy County board; that his duties, which included lobbying, were defined in a resolution of the county board and his salary fixed; that under section 23-104, R. R. S. 1943, a county is empowered to make contracts and to do all other acts in relation to the concerns of the county necessary to the exercise of its corporate powers; that there was no evidence the county board abdicated or attempted to replace other county or state officials with Payne; that lobbying was not a function or duty of any other county officer; that although the 1968-1969 budget made no specific provisions for the employment of an administrative assistant, the budget did appropriate $21,505 labeled "Miscellaneous general" and as of January 1, 1969, there was a balance in this fund of $21,497; that a contract for services to be paid for from the general fund and not in excess of the unexpended bal-

ance is not in violation of the provisions of the budget act; and that expenditures of inheritance tax funds for general fund purposes is authorized by statute, although there probably should have been a resolution transferring the amounts rather than simply directing the payment of a general fund item out of the inheritance tax fund, which the trial court considered a defect in form rather than in substance.

The intervener's motion for new trial was submitted without argument and overruled.

Intervener asserts the trial court erred: (1) In holding that the county board did not exceed its statutory powers in employing an administrative assistant; (2) in holding that it was not unlawful to employ an assistant to perform duties which by law were to be performed by the board itself, another county officer, or a state officer; (3) in holding that the employment of an assistant and the payment of his claims for work and expense were not in violation of the county budget act; and (4) in holding that the payments from the inheritance tax fund were not illegal. The assignments will be considered in the order enumerated.

Section 23-104, R. R. S. 1943, provides: "Each county shall have power * * * (6) to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers; * * *." Section 23-106, R. R. S. 1943, directs that: "The county board shall manage the county funds and county business except as otherwise specifically provided." In Speer v. Kratzenstein, 143 Neb. 300, 9 N. W. 2d 306, this court held: "County commissioners are clothed with the powers expressly conferred upon them by statute and also such powers as are requisite to enable them to discharge the official duties devolved upon them by law." See, also, Wherry v. Pawnee County, 88 Neb. 503, 129 N. W. 2d 1013; Beadle v. Harmon, 130 Neb. 389, 265 N. W. 18. In Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489, it is

stated: "Unless prohibited by statute, a county board may adopt such means to assist county officers to properly discharge the duties of their offices as in its judgment it shall deem necessary."

The county commissioners testified in substance that the rapidly expanding population of Sarpy County demanded more time than part-time board members could devote; that they could not adequately investigate all areas of responsibility; that the county was disregarded because of a lack of knowledge concerning available state and national funds; that legislation affecting the county should be examined and the county be competently represented; that there was a need for someone to assemble information in many branches of government management so that the board could function more efficiently; and that the hiring of an assistant had been considered for about a year and a half prior to the appointment. No other pertinent testimony was adduced concerning the judgment of the county commissioners and their purposes in employing an administrative assistant.

"County boards are usually given authority to make all contracts necessary and incident to the management of the interests of the county, and they may stipulate as to the manner in which such contracts are to be performed and contract with ministerial officers of the county, unless such contracts are prohibited by statute." 14 Am. Jur., Counties, § 40, p. 209.

The duties of the assistant described in the board's resolution and the evidence were not shown to be prohibited, there was no contradiction or impeachment of the commissioners' testimony that hiring an assistant was a county need, and there was no claim that Payne did not perform the work assigned to him. Notice can be taken of the comparatively sudden growth of Sarpy County and the unforeseen problems and duties that necessarily resulted. Neither the plaintiff nor intervener submitted evidence from which the trial court

could have found that there was a doubt concerning the power of the board to employ assistance for the stated purposes. Even where there is conflicting evidence in a trial to the court, this court will not disturb findings of fact unless they are clearly wrong. Rothenberger v. Wilks, 186 Neb. 514, 184 N. W. 2d 626; American Standard Ins. Co. v. Tournor, 186 Neb. 585, 185 N. W. 2d 267. To extend the theory of strict judicial construction to the circumstances of this case would defeat the purposes for which the Legislature specifically granted to counties the right to perform acts essential to the concerns of the county. As the trial judge aptly stated, section 23-104, R. R. S. 1943, is not a "strait jacket."

Relative to the second assignment of error, there was evidence that a primary duty of the administrative assistant was to lobby, and that county officials and board members had lobbied occasionally and had performed other tasks included in the new position. Intervener argues that an elected state Legislator was representing Sarpy County, that the county board, county clerk, and county attorney previously performed duties included in the job plan for the board's assistant, and that no general law authorizes the hiring of an administrative assistant or a lobbyist.

Speer v. Kratzenstein, *supra*, confirms at page 317 that: "Concededly, a county board is without power to contract with a person to perform acts which are a part of the official duties imposed by statute on the board itself or another county officer or on an officer of the state. 20 C. J. S. 1014, sec. 180." In 20 C. J. S., Counties, § 180, p. 1013, it is more comprehensively stated that county boards may not hire a person to perform (1) unauthorized acts, (2) official discretionary duties of the board, or (3) statutory official duties of the board or another county or state official. At pages 1014 and 1015, it is stated: "With these limitations county boards have implied power to employ such agents and servants

as may be required for county purposes and which are not otherwise provided for by statute or by the state constitution; and the wisdom and expediency of making a particular contract of employment is within the exclusive discretion of the board. Where only part of the services contracted for in a particular case are within the power of the board to engage, the contract is nevertheless valid as to that part." See, also, Campbell v. Douglas County, 142 Neb. 773, 7 N. W. 2d 764.

The evidence and the law relied upon do not support the contention that enumerated duties of the administrative assistant properly belonged to other officials, and there was neither proof nor intimation that other county officers had been shirking their statutory assignments.

Concerning the numerous references to lobbying, it is stated in 51 Am. Jur. 2d, Lobbying, § 1, p. 991: "'Lobbying' has a well-defined meaning in this country: addressing or soliciting members of the legislative body, in the lobby or elsewhere, for the purpose of influencing their vote. Thus, in its broadest meaning, lobbying constitutes an indispensable element of the legislative process, that of communicating the people's needs and wishes to the legislature." At page 997 it is mentioned that court decisions disagree concerning the authority of municipal corporations to employ lobbyists. However, in Nebraska prior to 1965, section 50-306, R. R. S. 1943, excluded duly appointed or elected officials of counties and cities from registering as lobbyists "* * * when appearing on behalf of themselves or on matters pertaining to their respective political subdivisions, * * *." The Legislature obviously viewed it as a legitimate activity of a county; and when portions of the act were repealed, it is significant that the Legislature neither banned lobbying by county employees nor did it assign those activities to any particular county officials.

The trial court's finding as to the second alleged error must be affirmed.

Concerning the third assignment of error, it was not questioned that no funds had been earmarked in the 1968-1969 budget for an administrative assistant, and that there was a reserve of county funds available as well as cash on hand as of January 1, 1969.

The sections of the budget act relied upon are in substance: Section 23-909, R. R. S. 1943, requires the county board to adopt a budget and to appropriate certain amounts for the various offices. Section 23-912, R. R. S. 1943, provides that the funds allocated to the departments or offices be used only for the purposes of those departments. Section 23-916, R. R. S. 1943, states that no officer or other agency shall contract to spend money not included in or in excess of the budget provided for that office. Section 23-917, R. R. S. 1943, exempts a county from liability on violations of section 23-916, R. R. S. 1943.

The county board adopted a budget as directed, and the other sections cited by intervener obviously have no reference to contracts executed by a county board; hence, intervener's conclusion is without basis. In Becker v. County of Platte, 155 Neb. 180, 50 N. W. 2d 814, this court commented: "That valid claims may be presented, the allowance of which will result in deficits, is contemplated by the Act * * *." Reference is therein made to section 23-903, R. R. S. 1943. The court also found that the contracts in question were not in violation of the budget act "* * * because of the condition of the assessor's budget at the time they were entered into."

Intervener under this assignment of error cites sections 23-132 and 23-336, R. R. S. 1943.

The limitations under which a county board may contract and issue warrants after the adoption of the annual budget are specified in section 23-132, R. R. S. 1943; however, a review of the record fails to reveal a

violation of this statute. There was no proof that 85 percent of the budget had been exhausted and that there was no money in the treasury to the credit of the proper fund as of December 30, 1968. See, also, § 23-134, R. R. S. 1943. Furthermore, the procedure for a taxpayer to question the allowance of a claim under this section is set out in section 23-136, R. R. S. 1943. This procedure was not followed. See, Beadle v. Harmon, *supra;* Speer v. Kratzenstein, *supra.*

Intervener argues the contract in question is void because not expressly authorized by statute, citing section 23-336, R. R. S. 1943. This contention overlaps the first assignment of error, and it has been determined that the Sarpy County board of commissioners did not exceed its expressly conferred power to manage the county business and funds and to contract when necessary. Even if some irregularity had been proved, it was held in Capital Bridge Co. v. County of Saunders, 164 Neb. 304, 83 N. W. 2d 18, that section 23-336, R. R. S. 1943, "* * * has no application where the county has general authority to make the contract but the power has been irregularly exercised."

Finally, intervener contends that the funds used to pay the administrative assistant were spent in contravention of section 77-2032, R. R. S. 1943, in that the money was not transferred by resolution of the county board to the general fund prior to expenditure.

It is admitted that the salary and expenses were paid directly from the inheritance tax fund, the first payment having been made about 6 weeks after the contract of employment.

No authority is cited for the conclusions prayed for by intervener.

In 17 Am. Jur. 2d, Contracts, § 166, p. 523, it is stated: "A contract, although in violation of a statute, will not be declared void if it was not the intent of the legislature to make it illegal and void, * * *." In 17 C. J. S., Contracts, § 190, pp. 982 and 983, it is stated: "To in-

validate the contract, the illegality must be inherent and not merely collateral. * * * One may not rely on illegality where the doing of that said to be forbidden may reasonably be made legal and possible through administrative or judicial action."

Under the inheritance tax statute there is no express prohibition against spending county funds not properly credited; there is no penalty for failure to credit money as set out; there is no clause nullifying a contract pursuant to which payments have been made from an inappropriate budget; and there are other specific statutory protections for people contracting with a county board. It cannot be assumed that the Legislature intended a contract executed under the circumstances presented in this case to be void.

It was established in this lawsuit that the county board of Sarpy County had authority to execute the contract, the employee performed pursuant thereto, and there was money available in a proper fund to pay for the services. The county board could not have avoided liability and a taxpayer cannot demand that the board members be personally liable. See, Warren v. County of Stanton, 147 Neb. 32, 22 N. W. 2d 287; Capital Bridge Co. v. County of Saunders, *supra*.

It is determined that the trial judge carefully considered and properly decided all the issues; therefore, his findings and judgment are affirmed.

AFFIRMED.

WAITE LUMBER COMPANY, INC., A CORPORATION, APPELLEE, V. MASID BROS., INC., ET AL., APPELLANTS, IMPLEADED WITH CAMERON E. GRAY ET AL., APPELLEES.

200 N. W. 2d 119

Filed August 4, 1972. No. 38247.

1. **Landlord and Tenant: Mechanic's Liens.** A tenant cannot, with-

out the authority of the landlord, charge the land with a lien for materials for constructing or improving a building thereon.

2. ———: ———. The mechanic's lien law of this state requires that a contract for material, labor, etc., for an improvement on real estate shall be made with the owner thereof or his agent; and a tenant of real estate, because of his tenancy, is not the agent of his landlord for that purpose.

3. **Estates: Mechanic's Liens.** Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged.

4. **Estates.** The general legal rule is that, when a greater and a lesser estate meet in one person, without an intervening estate, the lesser estate is merged in the greater.

5. **Estates: Equity.** In equity, the common law legal rule as to merger is not always followed, and the doctrine of merger is not favored.

6. ———: ———. Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied.

7. **Estates.** A merger does not always or necessarily result from such a coinciding of lesser and greater estates.

8. ———. Whether lesser and greater estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected.

9. **Estates: Trial: Equity.** In determining whether a merger of titles to real estate has taken place, the court will consider the circumstances of the particular case in the light of equity and good conscience.

10. **Pleadings: Trial: Evidence.** A general denial is available to a defendant to challenge one or more of the elements essential to a recovery by the plaintiff, and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matters denied.

11. **Landlord and Tenant: Abandonment.** An abandonment of leased premises by the tenant constitutes an offer to terminate the lease, and an abandonment or surrender of the leased premises together with an acceptance thereof by the landlord as by resumption of possession, may constitute a surrender by operation of law.

12. ———: ———. Whether there has been an acceptance by the landlord of the tenant's abandonment of the premises is largely a matter of intention and such an acceptance may be inferred from acts of the landlord inconsistent with the continuance of the lease.

13. **Landlord and Tenant: Mechanic's Liens: Foreclosure: Parties.** A person whose leasehold interest is terminated, in premises upon which there is a mechanic's lien, is not a necessary party to a petition for foreclosure.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert M. Harris and Van Steenberg, Winner & Brower, for appellants.

Wright & Simmons, for appellee Waite Lumber Co., Inc.

James R. Hancock, Orie C. Adcock, and W. A. Herman, for appellees Gray et al.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

BUCKLEY, District Judge.

This is an action for foreclosure of five mechanic's liens, brought against Masid Bros., Inc., owner of the land involved, and Hartford Accident and Indemnity Company, who allegedly had given a bond in substitution for the land pursuant to section 52-121, R. R. S. 1943. The trial court found in favor of all lien claimants but judgment as to all but Cameron E. Gray, doing business as Gray's Plumbing and Heating have been satisfied. Masid and Hartford appeal from Gray's judgment against them.

Masid is a corporation wholly owned by brothers Leo Masid, vice president, and Sammy Masid, president. Masid was the fee owner of a one story brick building in Scottsbluff, Nebraska. Half of the building had been leased in March 1968, to Western Office Supply Company. On September 2, 1969, Masid leased the other half of the building to Chris Verges for use as the Beefeaters Restaurant and Lounge. The written lease provided for a term of 10 years commencing November 5, 1969, with rent of $500 per month for the first 5 years

and $600 per month thereafter, with a 5-year option to renew. The lease also provided that: "It is agreed that the leased premises will be remodeled by Second Party (Verges), at Second Party's (Verges) sole cost, which remodeling will include decorating, it being further agreed that First Party (Masid) will bring all utilities to the leased premises, to include water, natural gas, electrical power and sanitary sewer, and in addition, will enclose the open pipes in the building and enclose the air-conditioners in the building. First Party (Masid) further agrees to rough-in for two toilets, all necessary plumbing, to include water, hot and cold and sanitary sewer. . . .

"It is agreed that all equipment and fixtures of Second Party (Verges) may be removed on the termination of this lease, under the terms thereof, but that anything attached to the building, to include false ceiling, partitions or carpeting will remain a part of the building."

Verges entered into verbal agreements with various contractors and material suppliers to do the necessary work, including the work required by the lease of Masid. All bills were submitted to Verges and all payments made on the claimants' accounts were made by Verges. None of the claimants had any written contract with Masid, either for Masid's portion of the work required by the lease or in the form of an agreement to be responsible for Verges' debts.

Verges operated the Beefeaters from March 1970, until the first week in July 1970, when, suddenly and unexpectedly, he abandoned the premises taking some of the equipment with him. Masid locked the building, later replaced the equipment taken by Verges, and in December 1970, leased the same premises to Copper Kettle, Inc.

The trial court did not set forth a basis for its judgment. Masid's principal contention is that Gray's lien could not attach to Masid's fee title because he had no contract with Masid, express or implied, as required by

the mechanic's lien statute but only with Verges, the tenant, who was not Masid's agent for that purpose.

We have said that a tenant cannot without the authority of the landlord charge the land with a lien for materials for constructing or improving a building thereon, and the tenant is not the landlords' agent for this purpose, even if he has the landlord's consent. Platner Lumber Co. v. Krug Park Amusement Co., 131 Neb. 831, 270 N. W. 473; Waterman v. Stout, 38 Neb. 396, 56 N. W. 987; Moore v. Vaughn, 42 Neb. 696, 60 N. W. 914; Frost, Curyea & Murtey v. Ronne, 113 Neb. 655, 204 N. W. 387.

Gray contends that the equitable doctrine of merger should apply, whereby, upon the abandonment by Verges of his leasehold estate, and Masid's reentry and reletting of the premises, the leasehold and fee estates merge, subjecting Masid's fee to the payment of Gray's lien. We agree.

Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. Central Construction Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817; Harte v. Shukert, 94 Neb. 210, 142 N. W. 517.

The general rule is that where two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged in the greater. Peterborough Savings Bank v. Pierce, 54 Neb. 712, 75 N. W. 20; American Savings & Loan Assn. v. Barry, 123 Neb. 523, 243 N. W. 628; Central Construction Co. v. Highsmith, *supra*.

But, in equity the common law legal rule as to merger is not always followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied. American Savings & Loan Assn. v. Barry, *supra;* Watson v. Dalton, on rehearing, 146 Neb. 86, 20

N. W. 2d 610; 53 Am. Jur. 2d, Mechanic's Liens, § 322, p. 850; 28 Am. Jur. 2d, Estates, § 381, p. 589.

This court has said: "But merger does not always or necessarily result from such a coinciding of such estates. . . . Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected." Peterborough Savings Bank v. Pierce, *supra.* See, also, Central Construction Co. v. Highsmith, *supra.*

In American Savings & Loan Assn. v. Barry, *supra,* we said: ". . . in determining whether a merger has taken place the court will consider the circumstances of the particular case in the light of equity and good conscience."

On at least three occasions this court has applied equitable principles to decide whether to merge a leasehold estate with mechanic's lien attached with the fee. In Harte v. Shukert, *supra,* the lessee of an apartment building spent more than $70,000 on permanent improvements with the consent of the owner. The lessee became insolvent and was adjudged a bankrupt. The trustee, pursuant to a void order, surrendered the leasehold estate to the owner who remodeled the improved building and relet parts of it. There we observed: "Shukert knew what was being done on the premises by Hanson and Harte, and observed the progress made by them in improving his property. Months before Hanson began to remodel the building, Shukert knew of his tenant's intention to improve it in a manner requiring the outlay of large sums of money. He stood by for more than a year and saw improvements made at the rate of thousands of dollars a month until the aggregate exceeded $70,000. He knew Harte's connection with the work, and during a portion of the time visited the premises daily. For the entire period covered by these expenditures, no rent was ever paid when

due. While the property was being improved, Shukert did not exact payment of the monthly rentals according to the terms of the lease or attempt to exercise his option to cancel it. Had he done so, the situation of Hanson and Harte would have been changed. In that event their improvements and expenses would have been stopped at the end of the first month of the term. . . .

"It is further argued that the decree is erroneous because it permits the fee to be sold to satisfy Harte's lien, which attached only to the leasehold of Hanson. There were two estates, the fee and the leasehold. That Shukert owns the fee is unquestioned. After he assumed to forfeit the lease, he took possession of the demised premises and of all the improvements made by Hanson and Harte, and ever since has used both estates as his own property. He remodeled the improved building at a cost of $15,000, and leased different parts of it to different persons. He has not kept the estates separate, and for the purposes of the lien has merged the leasehold in the fee."

In Platner Lumber Co. v. Krug Park Amusement Co., *supra,* the leasehold estate lienholder relied upon Harte v. Shukert, *supra,* to urge merger of the estates. There the Cassel Realty Company leased to Krug Park Amusement Company land in Omaha, Nebraska, known as Krug Park, and used by the lessee as an amusement park. The lessee was constantly and increasingly delinquent in rent payments during which time the lessee contracted with Platner Lumber Company and others to rebuild the bathhouse destroyed by fire in 1932. In the winter of 1933 the lessee did not pay the watchman, but the owner, being interested in some of the buildings, paid the watchman so that he would not abandon the premises. After the Krug Park Amusement Company went into bankruptcy, the Cassel Realty Company did not lease the premises, but agreed with a former officer of the lessee to run the park by arrangement with Krug Park Amusement Company if he paid $50 per day. But it refused

to insure his possesion as against the lessee or anyone claiming through or under it. There we said: "It does not necessarily follow that an estoppel against the landlord to exercise an option to forfeit the lease because the rent has not been paid causes a merger of the estates and an attachment of the lien to the fee. Such cannot be the fact when the evidence discloses, as in this case, that there has been no merger of the leasehold with the fee; that there has been no forfeiture; and that the estates remain separate and distinct, not only as a matter of fact, but because the landlord is estopped to exercise the option of forfeiture. . . .

"The facts in the case at bar and the Shukert case are distinguishable because in that case the landlord illegally took possession and appropriated the leasehold interest, including the expensive improvements erected by the lessee, to his own use and benefit, to the exclusion of a lienholder."

In Central Construction Co. v. Highsmith, *supra,* the land was owned by Wholesalers Adjustment Company, who on August 1, 1946, contracted to sell it for $1,300 to Highsmith, who took possession. While making payments on the contract he mortgaged the property to the Bilbys on October 3, 1946. On January 16, 1947, Highsmith contracted for the construction of a porch to the house for $1,180, resulting in a lien and a proceeding for its foreclosure. On January 18, 1947, the adjustment company deeded the property to the Ehlers, and Highsmith assigned his contract to Ehlers. The interests of the Ehlers are not too clearly defined, but on the whole it is clear that Mrs. Ehlers owned the title. The deed and assignment were recorded in October 1947, at which time Bilbys released the mortgage and Highsmith gave a quitclaim deed. Mr. Ehlers claims to have paid for the deed, assignment, release, and quitclaim deed. Ehlers claimed title to the propery and that the mechanic's lien was null and void. There we said: "Mr. Ehlers testified that he paid the amount due under

the contract and obtained the adjustment company deed. By deed from Highsmith, Mrs. Ehlers secured whatever interest he had in this property and performed the Highsmith contract. A clear intention to merge the titles is shown. The equities all require that it be held that a merger of the adjustment company's legal title and Highsmith's equitable title occurred when Mrs. Ehlers acquired both estates. . . . Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. . . . It further follows that the mechanic's lien, if valid, is a lien on the fee title shown to be held by Mrs. Ehlers."

In light of these decisions, we turn to the instant case. Both Masid and Verges were obligated to improve the south half of the building to make what was an open area into a restaurant and lounge. The improvements required of Verges were substantial, indicating that they would not have been made except in contemplation of their use by Verges during the 10-year term plus 5 years option to renew fixed by the lease.

Masid was totally familiar with the improvements Verges contracted for, including those required of Masid. There was some form of arrangement between Masid and Verges whereby Verges undertook the entire job, but Leo Masid denied Verges was Masid's agent or that Masid had any arrangement to repay Verges for its share, except to say that, "He owed us money."

Construction began about November 20, 1969, and finished in early March 1970. Verges made the required rent payments on November 5, 1969, and December 5, 1969, but none thereafter, and thus was in default during most of the construction period. Masid never exercised its option to forfeit or cancel the lease, but rather stood by and let Gray and the other material and labor suppliers finish the job. Leo Masid, in fact, visited the site almost daily and was consulted numerous times by Allen Crecilius, general foreman of the work, about

those items Leo agreed were Masid's responsibility.

After Verges suddenly abandoned the premises, for reasons unknown, Masid took immediate possession to protect its property. While Verges' actions were not indicative of any intent to return to the premises, there is no evidence that Masid attempted to communicate with Verges or give Verges any notice of forfeiture or cancellation of the lease. Yet Masid proceeded to make some improvements and then lease the property to Copper Kettle, Inc., less than 6 months after Verges left. The lease to Copper Kettle, Inc., was for the same monthly rental and makes no mention of the Verges lease or any claimed equitable interest of Verges in the premises. Thus Masid by its action clearly intended to foreclose Verges from any and all leasehold estate he had. Masid, however, argues that by virtue of our holdings in Bernstein v. Seglin, 184 Neb. 673, 171 N. W. 2d 247, it had no choice but to relet the premises to mitigate damages. There we held, overruling a prior decision, that a landlord may not unreasonably refuse to accept a qualified and suitable tenant for the purpose of mitigating the damages recoverable from a tenant who has abandoned the leased premises prior to the expiration of the term. But even if Masid had a positive duty to relet the premises, it was not necessarily penalized by having a merger occur as a matter of law, for, as we previously stated, such a merger that would make Masid liable for Gray's lien will occur only if equity and good conscience so dictate.

That such a merger should result here becomes evident when we examine the position of the parties at the time Masid relet to Copper Kettle, Inc. It now owned a building, half of which had been completely changed into a restaurant and lounge, at a cost of nearly $20,000, of which Masid paid nothing and Verges paid over $8,000, notwithstanding the lease called for a significant portion of the improvement to be made by Masid. The construction included the completion of a partial con-

crete block wall into a complete, permanent fire wall, cut through and above the roof 18 inches. Internal structuring was done to result in a kitchen, table and chair area, including the bar, a banquet room, a storeroom and office, and two restrooms. The floor was carpeted, steam pipes and heating units were covered, all the usual equipment for the bar, kitchen, and restrooms were installed, and the necessary plumbing and electrical installations were completed. Verges operated the restaurant only 4 months of the 10-year lease. When Verges left he removed the tables and chairs, the bar, and the kitchen range. Masid replaced these and changed some electrical facilities before reletting. The cost of this is not shown, but it comprises only a minor portion of the total improvements made. Masid was in a position to lease a completely furnished and equipped restaurant and lounge, which it did, and it is significant that the new lease makes no mention of any improvements to be made by either Masid or Copper Kettle, Inc., obviously because none were needed.

To allow Masid to so enrich itself at the expense of Gray, and the other lienholders, would produce an unconscionable result, which equity will not permit.

There is due and owing to Gray the sum of $6,101.17, and he has a valid lien on the fee title of Masid for that amount. The trial court's judgment was correct.

Appellant Hartford claims that the judgment against it should be reversed for want of proof.

Gray, in his cross-petition, alleged: "That Hartford . . . has written its bond in substitution for the land herein described, and this Defendant is entitled to judgment against Hartford . . . for $6,101.17, costs, interest and equitable relief." No copy of the alleged bond was attached to the cross-petition. Masid and Hartford denied generally all allegations of the lien claimants not expressly admitted.

A general denial is available to a defendant to challenge one or more of the elements essential to a re-

covery by the plaintiff, and the effect of the denial is to put the burden on the plaintiff to establish by evidence the matters denied. Master Laboratories, Inc. v. Chesnut, 154 Neb. 749, 49 N. W. 2d 693.

No evidence whatsoever was offered as to even the existence of the alleged bond. Gray has wholly failed to prove any essential element of this cause of action. There was no basis for the trial court's judgment against Hartford and it shoud be reversed.

Appellants assign as error the trial court's finding that Verges had been properly summoned as a party. Verges was served personally in Montrose County, Colorado, by the sheriff of that county. He did not appear at the trial and no judgment was rendered against him.

The validity of the service on Verges is not material because Verges was not a necessary party to the action. The liens were filed against Masid's fee title. Gray's action to foreclose the lien was filed on August 28, 1970, well after Verges abandoned and Masid reentered the premises. When Masid leased to Copper Kettle, Inc., Verges no longer had any interest in the property.

"An abandonment of leased premises by the tenant constitutes an offer to terminate the lease, and an abandonment or surrender of the leased premises, together with an acceptance by the landlord, as by resumption of possession, may constitute a surrender by operation of law." 51C C. J. S., Landlord and Tenant, § 125(1), p. 398. ". . . whether there has been an acceptance by the landlord of the tenant's abandonment of the premises is largely a matter of intention, and such an acceptance may be inferred from acts of the landlord inconsistent with the continuance of the lease." 51C C. J. S., Landord and Tenant, § 125(4), p. 402.

We conclude that from the conduct of Verges and Masid as previously described, a surrender of the lease occurred, terminating any interest of Verges in the property. A person whose leasehold interest is terminated, in premises upon which there is a mechanic's lien, is

not a necessary party to a petition for foreclosure. See, McCormick v. Lawton, 3 Neb. 449; Pickens v. Polk, 42 Neb. 267, 60 N. W. 566; Glover v. Hargadine-McKittrick Dry Goods Co., 62 Neb. 483, 87 N. W. 170.

The judgment of the district court against Hartford is reversed and the cause is remanded with directions to dismiss the action as to Hartford. The judgment of the district court in all other respects is affirmed.

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

ROSE M. WORKMAN ET AL., APPELLEES, V. GREAT PLAINS INSURANCE CO., INC., A CORPORATION, APPELLANT.
200 N. W. 2d 8

Filed August 4, 1972. No. 38270.

1. **Insurance: Public Administrative Bodies and Procedures: Contracts.** No insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the Department of Insurance, and approved by it.
2. **Insurance: Contracts.** Section 44-348, R. R. S. 1943, does not prohibit the insurance company from printing in or attaching to an insurance policy additional or altered terms or conditions not found in the standard approved form, provided they are not inconsistent with or a waiver of any of the provisions of such authorized approved form. Provisions not in conflict with the provisions of such an approved form may be added when necessary to express the terms of a contract of insurance which is authorized.
3. **Trial: Appeal and Error: Judgments.** 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.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Bernard Wishnow and Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

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

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

McCOWN, J.

This is an action for a declaratory judgment to determine whether the coverage of an automobile liability insurance policy extended to a sister of the named insured, who was driving the insured vehicle with permission. The critical issues involve an "omnibus" clause and an endorsement which excluded "all other drivers except the named insured" from coverage.

The owner's insurance policy involved was issued to the plaintiff, Rose M. Workman, upon an application signed by her January 26, 1966, and covered the period ending July 26, 1966. The policy contained an "omnibus" clause which included as an insured any person using the automobile with the permission of Rose M. Workman. There was also an endorsement issued headed: "ENDORSEMENT VOIDING AUTOMOBILE INSURANCE WHILE A CERTAIN PERSON IS OPERATING CAR." It contained printed language: "(T)he company shall not be liable for loss, damage, and/or liability caused while the automobile described in the policy or any other automobile to which the terms of the policy are extended is being driven or operated by the following named person." It then named Gary Workman and Jerry Workman, brothers of the insured. The printed form of the basic policy and the printed form of the endorsement had both been approved by the Nebraska Department of Insurance.

The policy was renewed from time to time by the issuance of renewal certificates. In April 1968, the description of the insured vehicle was changed and the name of Rose M. Workman's sister, Janice, was noted as a driver, apparently for the purpose of premium computation.

On July 29, 1968, Rose M. Workman requested the insurance company to cancel Janice Workman from the policy because she would no longer be driving the car. The policy was then renewed for the period from July 31, 1968, to January 31, 1969, including the omnibus clause. An endorsement was also issued on the identical form which had previously excluded Rose M. Workman's two brothers. It too contained in large letters at the top the words "ENDORSEMENT VOIDING AUTOMOBILE INSURANCE WHILE A CERTAIN PERSON IS OPERATING CAR." The endorsement applied to all coverages and provided in the printed portion: "(T)he company shall not be liable for loss, damage, and/or liability caused while the automobile described in the policy or any other automobile to which the terms of the policy are extended is being driven or operated by the following named person." The words "the following named person" were stricken and the company typed in the blank space below: "All other drivers except the named Insured." The endorsement concluded that "in all other respects this policy remains unchanged."

On November 30, 1968, the insured vehicle was involved in an accident while it was being driven by Wuanita Workman, another sister of Rose M. Workman. She was driving the vehicle with the permission of Rose M. Workman. Following the accident, the defendant insurance company advised Rose that it had no obligations with respect to the accident because the endorsement excluded all other drivers except Rose. This action was then commenced by Rose M. Workman and Wuanita Workman.

The district court specifically found that the policy contained an omnibus clause; that the endorsement excluding "all other persons except the named insured" was on a form which had been approved by the Department of Insurance but that the manner in which the endorsement was used was not in the form approved by the Department of Insurance as required by section

44-348, R. R. S. 1943; and said endorsement was void and of no force and effect and contrary to the public policy of the State of Nebraska. The district court determined that the liability insurance policy was in full force and effect at the time of the accident; required the defendant insurance company to assume the duties of coverage; and allowed an attorney's fee for plaintiffs' attorneys for services in the district court.

The crucial issue in this case revolves around the printed endorsement form which was altered and used by the insurance company as an endorsement on an approved insurance policy form. The regular policy form contained an unrestricted omnibus clause which included as an insured, any person using the automobile with the permission of the named insured. This omnibus coverage was not directly revoked, amended, or even referred to in the endorsement. The defendant insurance company asserts that there is no statute, and therefore no public policy, which prohibits the use of such an altered endorsement form, and that the insurance company has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations as it wishes. This argument ignores section 44-348, R. R. S. 1943, which provides: "No insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the Department of Insurance, and approved by it."

It is obvious that the public policy of the State of Nebraska as to insurance may be expressed and enforced by the Department of Insurance through the exercise of its powers under this and other statutes, as well as by the Legislature in the enactment of specific statutes. The representative of the Department of Insurance who testified in this case was the individual who had reviewed and approved the printed form of endorsement relied on by the insurance company here. He testified that he had never approved an endorsement which would

eliminate coverage for all drivers other than the named insured. He also testified that the Department of Insurance guidelines with reference to the approval of exclusionary endorsements from coverage would only allow approval of a restrictive endorsement "where the endorsement eliminates coverage on a named individual or on a reasonable group * * *." It is clear that the printed form of endorsement which was approved by the Department of Insurance clearly fell within the guideline approval limits while the endorsement as altered by the defendant was completely outside the guidelines.

The altered endorsement by the defendant company came in response to a written request by the plaintiff to cancel Janice Workman from the policy. This could have been easily accomplished by simply inserting Janice' name in the approved form of printed endorsement. Instead, the defendant altered the approved endorsement form to the extent that it not only changed its character, but also completely revoked the omnibus clause contained in the principal policy, without any mention whatever of that omnibus clause in the endorsement. In fact, the endorsement concluded with a recitation that except for the endorsement, the original policy remained unchanged. To say the least, the action of the insurance company created a direct ambiguity and conflict in the policy which was misleading. The Department of Insurance certainly had the authority to carry out the public policy of the State of Nebraska to prevent misleading or ambiguous insurance policies. Although the statutory requirement of an omnibus clause currently applies only to a policy certified under the Financial Responsibility Act, nevertheless it is clear that the public policy interest of the state in automobile liability insurance policies extends not only to the protection of the public who may be injured by the operation of automobiles but also to the protection of the insured.

We have been cited to no cases directly in point on the factual issues here. Cases such as Jones v. Mid-South Insurance Co., 358 F. 2d 887, and State Farm Mut. Auto. Ins. Co. v. Pierce, 182 Neb. 805, 157 N. W. 2d 399, are not applicable. In Jones, the policy did not contain an omnibus clause at all, nor was there any evidence that the policy as written would not have been approved by the Louisiana law. In Pierce, this court specifically held that the statutory requirement of an omnibus clause was limited to a "certified" policy and that an endorsement excluding coverage for a particular named driver is not void as against public policy. The original endorsement form approved in this case falls directly within the holding of Pierce. It should be noted also that regardless of whether an omnibus clause was or was not required by statute or was or was not required by the Department of Insurance, it was contained in the policy written here, and the form had been approved by the Department of Insurance.

The defendant takes the position that the change in the approved endorsement form was a mere minor variation of that form and that such individual variations do not require approval by the Department of Insurance. Section 44-348, R. R. S. 1943, does not prohibit the insurance company from printing in or attaching to an insurance policy additional or altered terms or conditions not found in the standard approved form, provided they are not inconsistent with or a waiver of any of the provisions of such authorized approved form. Provisions not in conflict with the provisions of such an approved form may be added when necessary to express the terms of a contract of insurance which is authorized. See, Onstad v. Minnesota Mut. Life Ins. Co., 226 Minn. 546, 33 N. W. 2d 691; Heim v. American Alliance Ins. Co., 147 Minn. 283, 180 N. W. 225. It is obvious that the alterations of the approved form of endorsement here were not only inconsistent with the endorsement but also with the principal policy form.

The alterations made here were also directly conflicting with the omnibus clause contained in the approved basic policy form. In fact, the alterations constituted a complete waiver and cancellation of the omnibus clause without even a reference to the change effected. Such variations are by no means minor nor are they in any sense necessary to express the terms of an authorized contract of insurance.

A jury was waived in the trial court and the trial judge specifically found that the policy here contained an omnibus clause; that the endorsement form approved by the Department of Insurance permitted the exclusion of named individuals, but did not authorize the exclusion of "all other persons except the named insured." The trial court also found that the endorsement as altered here was not in the form approved by the Department of Insurance and was contrary to the public policy of the State of Nebraska and therefore void and of no effect. 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 Auto. Ins. Co. v. Kersey, 171 Neb. 212, 106 N. W. 2d 31. Here there is ample evidence to support the trial court's findings and they were clearly correct.

The defendant also asserts that the allowance of attorney's fees to the plaintiff was not authorized because the action here was not an action "at law." Section 44-359, R. R. S. 1943, at the times involved here, provided in part as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of * * * insurance * * *, the court, upon rendering judgment against such company, * * * shall allow * * * a reasonable * * * attorney's fee * * *." In 1971, the Legislature made the section applicable to "an action upon any type of insurance policy" and removed the term "at law." The defendant contends that a declaratory judgment action is not an

action "at law" unless it involves the recovery of a money judgment. It is of course correct that generally speaking declaratory judgment proceedings are probably neither legal nor equitable but sui generis. In any event, this court has previously treated a declaratory judgment action seeking to determine whether insurance coverage is applicable in particular instances or to particular persons as an action at law. See, Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623; State Farm Mutual Auto. Ins. Co. v. Kersey, 171 Neb. 212, 106 N. W. 2d 31. A jury was specifically waived in the trial court. The nature of the action here is not to impose equitable terms on disputing parties, but to determine fixed legal rights. The action here takes the place of what would be a later action for money damages. That does not change the nature of the action nor make the statute inapplicable.

The judgment of the district court was correct in all respects, and is affirmed. The plaintiffs are allowed an attorney's fee of $1,000 for services in this court.

AFFIRMED.

BOSLAUGH, J., dissenting.

The effect of the majority opinion is to declare void any endorsement to an insurance policy that makes any change of substance in the policy if the form of the endorsement has not been approved by the Department of Insurance under section 44-348, R. R. S. 1943. I do not agree that this is a correct statement of the law.

It has long been the rule that parties may contract for any lawful insurance coverage. An insurer may limit its liability and impose restrictions and conditions upon its contractual obligations not inconsistent with public policy or statute. Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721. Public policy is a matter of law, not fact, and the findings of the trial court on such an issue are not controlling.

The parties stipulated that the endorsement in question in this case was delivered to the plaintiff and signed

by her on or about July 31, 1968. The following appears above her signature on the endorsement: "In consideration of the reduced premium the named insured accepts this endorsement as witness his signature: and has read and understands the contents thereof and consents to the limitation of the policy."

An omnibus clause is not a standard provision or statutory clause in an automobile liability insurance policy in Nebraska and there is no public policy that requires it be included in such policies. It is clear the Legislature has limited the statutory requirement to a policy certified under the Financial Responsibility Act. See §§ 60-533 and 60-534, R. R. S. 1943. The policy involved in this case was not certified.

The purpose of the requirement that policy forms be filed and approved is to protect the public from clauses which mislead, deceive, or unreasonably deny coverage granted in general provisions. A failure to comply with such a statute may result in the insurer being subject to a penalty, but the policy is not void. See, Progressive Mutual Ins. Co. v. Taylor, 35 Mich. App. 633, 193 N. W. 2d 54; Graf v. Employers' Liability Assurance Corp., 190 Iowa 445, 180 N. W. 297; Walters v. Western Automobile Ins. Co., 116 Kan. 404, 226 P. 746; Southern Casualty Co. v. Hughes, 33 Ariz. 206, 263 P. 584; Hall v. Metropolitan Life Ins. Co., 146 Ore. 32, 28 P. 2d 875.

WHITE, C. J., joins in this dissent.

NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

199 N. W. 2d 729

Filed August 4, 1972. No. 38289.

1. **Damages: Evidence: Trial.** In an action for damage to property, the accounting records of the owner of the property damaged which relate to cost of repair are evidence of the actual cost

of the repair, but such records are not binding on the triers of fact.

2. **Damages: Evidence: Trial: Interest.** A claim for damage to property, established by reference to an accounting system involving allocation of costs of overhead, labor, vehicles, and material, which the trier of fact may consider, but is not bound to accept, is not a liquidated account to allow plaintiff to recover prejudgment interest.
3. **Pleadings: Parties.** The granting of leave to file a third party complaint is a matter entirely within the discretion of the trial court.

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

Edward Sklenicka, Joseph H. McGroarty, Warren G. Austin, and William A. Claerhout, for appellant.

Gaines, Spittler, Neely, Otis & Moore, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

C. THOMAS WHITE, District Judge.

The plaintiff sued in the district court on two causes of action: On a contract to indemnify and on a breach of contract to construct. The cause was tried to a jury, and the jury found for the plaintiff on a combined verdict in the amount of $74,554.75. Plaintiff appeals and defendant cross-appeals.

The plaintiff is a corporation engaged in the operation of telephone and related communication facilities, in interstate and intrastate commerce. Its rates are generally fixed by the Federal Communications Commission and other state agencies. Its business records are kept in a form and according to detailed standards fixed by the Federal Communications Commission. The regulations prescribed formulas for cost allocation of all services, labor, materials, and overhead, primarily for the purpose of determining rates.

The defendant is a fraternal benefit society with its principal activity the issuance of contracts of insurance on its members.

This action concerns the construction of the Woodmen of the World Building on Block 116 of the Original City of Omaha, Nebraska. Block 116 is bounded on the north by Douglas Street, on the south by Farnam Street, on the west by 18th Street, and on the east by 17th Street. As part of the original plat and dedication, an alley existed in Block 116, running east and west between 17th and 18th Streets. The alley was 20 feet in width, 264 feet long, and buried beneath it were a sewer and electric power cables and conduits containing telephone facilities belonging to the plaintiff.

The defendant, prior to the contract in question, owned the entire south half of Block 116 and parts of several lots to the north of the alley, and held an option to purchase the remaining portions of the alley from other owners of property in Block 116, so that in the event of vacation of the alley, defendant would own the entire vacated alley. It was the plan of the defendant to build and it ultimately did build an office building on the south half of Block 116 and the vacated alley.

As a condition for the vacation of the alley, the planning commission of the City of Omaha required defendant to make provisions for the maintenance of the utility services then in the alley. The contract in suit was a result of that requirement.

The contract was entered into on May 24, 1966. After recitation of the above facts, the contract required defendant to build an underground tunnel to house the utility lines of the plaintiff and the Omaha Public Power District, according to specifications attached to the contract. The contract provided that the costs of the moving of the utilities in the tunnel would be borne by the defendant, and that the defendant ". . . agrees to and does hereby indemnify the . . . Telephone Company against all damages to their utility facilities located in the alley, . . . and for liability to the customers . . . for refunds or for interruption of service, caused by Woodmen's excavation and construction activities and by

the acts and omissions of Woodmen's architects or contractors."

The defendant started construction of its building and the plaintiff moved its telephone lines to an uncompleted tunnel. On May 7, 1968, while the construction activities of the defendant were in progress, a fire started in the tunnel damaging and destroying a number of cables carrying local and distance call lines of the plaintiff. The plaintiff made emergency repairs to the cables, and was required to make refunds to customers who were denied the use of the facilities for periods ranging from 24 to 36 hours. Ultimately the tunnel was completed to specifications.

At the date of the fire the construction site was under the control and occupied by the defendant and its architects and contractors. The fire was extensively investigated and the probable cause as testified to by the investigators was a spark from a cutting torch which dropped through openings at the top of the tunnel or the dropping of a lighted cigarette or cigar at the point of the fire. The evidence disclosed no other possible cause or causes. At the conclusion of the evidence, the court directed a verdict of liability on the indemnity portion of the contract and submitted to the jury the issue of a breach of the agreement to construct a tunnel. The jury returned a verdict of $74,544.74 on all causes of action.

The plaintiff asserts seven assignments of error, but simply stated, they involve three issues: (1) The court should have directed a verdict and entered judgment for the amount the plaintiff's evidence proved as repairs and refunds; (2) the court should have directed a verdict on the alleged failure of defendant to protect the plaintiff's facilities and its failure to construct an enclosed tunnel; and (3) the court should have allowed interest from the date of the presentation of the repair statement on June 29, 1969.

The Federal Communications Commission is given

the authority to prescribe a uniform system of accounting for telephone companies, including the disbursements and receipts of money. 47 U. S. C. A., § 220, p. 122. The plaintiff cites a number of cases dealing with the validity of the regulations adopted, but the same are not in point here.

The plaintiff's evidence of the damages on behalf of itself and A. T. & T., an associated company, generally was that of the accounting personnel. The various witnesses testified in detail as to methods of allocation of direct cost, its method of determining allocation of overhead, vehicle expense, pension and other costs, and the amount of refunds. The plaintiff introduced evidence that the bookkeeping procedures were those specified and required by the Federal Communications Commission. Under the formula the plaintiff offered evidence tending to show damages in the amount of $100,225.83. The evidence as to amount was not substantially controverted.

The trial court instructed the jury after directing a verdict on the indemnity contract, that in considering the amount of the plaintiff's damages, the jury "may consider" certain elements of damages, to-wit, "the fair and reasonable costs of labor and material plus a reasonable overhead," and credit and refunds to customers.

The court further instructed the jury that it "may consider" records kept according to a method required by the Federal Communications Commission as a proper measure of plaintiff's damage, and further the jury was not bound by a bookkeeping system of the plaintiff.

Wisconsin Telephone Co. v. Reynolds, 2 Wis. 2d 649, 87 N. W. 2d 285, is cited as authority for the proposition that in an action by a telephone company against a grading contractor for damage to an underground cable, the company's accounting records relating to cost of repair, which records were in the form prescribed by the Federal Communications Commission, indicated actual cost of the repair.

Baltimore & Ohio R. R. Co. v. Commercial Transport, Inc., 273 F. 2d 447, held that a jury could compute damages for repair overhead on the basis of a formula utilized by railroads in charging one another for repairs. The cases merely hold that a verdict may be based on costs determined by uniform accounting practices. No authority has been cited for the proposition that a trier of fact is conclusively bound by such a system. The assignment is without merit.

All parties agree that the defendant did complete the tunnel according to the specifications, although the evidence established that at the time of the fire the tunnel was not complete. The trial court properly submitted to the jury the issue of whether the activities of the defendant and its contractors constituted a breach of the agreement to "protect" the facilities of the plaintiff. The jury found for the plaintiff and incorporated such award as it may have found in the single verdict. We find no error.

With regard to the plaintiff's claim for prejudgment interest, the rule is: "Recovery of interest on an unliquidated claim, the subject of reasonable controversy and incapable of being fixed by computation, may be had only from the date of determination of the right of recovery and the ascertainment of the amount." Inland Drilling Co. v. Davis Oil Co., 183 Neb. 116, 158 N. W. 2d 536.

The petition prayed for damages to the plaintiff and a related company of $217,989.56. The amount of damages was disputed and proof was dependent on witnesses' opinion of the reasonable value of material, labor, use of equipment, and overhead expenses. The claim, to be liquidated, must be based on evidence which, if believed, makes it possible to compute the amount without reliance upon opinion or discretion. Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204. It cannot be said that the claim, under this standard, was in any sense determined or liquidated. The trial court

was correct in denying prejudgment interest.

The defendant cross-appeals assigning 15 alleged errors by the trial court. We discuss only the pertinent assignments. The first refers to the trial court's refusal to allow the defendant leave to file a third party complaint. The third parties sought to be joined were Woodmen's architect, contractor, and the contractor's surety company.

Granting of leave to file a third party complaint is entirely within the discretion of the trial court. § 25-331, R. S. Supp., 1969. No showing of prejudice is made, nor is the defendant prevented from litigating in an appropriate form the possible liability of its contractor or architects. The result of joinder would be to further complicate an already complicated factual and legal controversy. We find no abuse of discretion.

Defendant assigns as error the trial court's allowing the claim of A. T. & T. to be included in the claim of plaintiff. The contention is without merit. The contract recites that the contract was made on behalf of the plaintiff "and associated companies." There is no dispute that A. T. & T. is an associated company of plaintiff, that it had lines belonging to it in the alley before and after movement to the tunnel, and that its lines were damaged. The defendant's arguments as to the extent of the indemnity are not persuasive, the indemnity obviously extended to those associated companies of plaintiff who had lines in the alley and which the contract required the plaintiff to protect.

The third assignment of error relates to the trial court's action in directing a verdict for plaintiff on the issue of liability on the first cause of action. The plaintiff offered proof of construction activities of the defendant's contractors sufficient to account for the cause of the fire in a building site solely under the control of the defendant and its contractors, and the defendant offered no evidence as to any other conceivable cause. Whether in any circumstance it would be required that

the plaintiff prove negligence in a contract of indemnity is not reached. The only evidence before the court sustains the proposition that the fire was caused by some act or activities of the defendant or its contractors. The defendant's contention is without merit.

Other assignments of error argued by the defendant are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

MID-PLAINS EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. MID-PLAINS NEBRASKA TECHNICAL COLLEGE, NORTH PLATTE, NEBRASKA, APPELLANT.

199 N. W. 2d 747

Filed August 4, 1972. No. 38291.

1. **Master and Servant: Labor and Labor Relations.** An employer's action or nonaction which results in cessation of an employee's employment is unlawful if the employer's motive in so doing is to discourage union membership or activity, or in reprisal or retaliation for the latter activities.
2. **Court of Industrial Relations: Labor and Labor Relations.** Section 48-811, R. S. Supp., 1969, establishes the right of any labor organization organized under the provisions of the act to file a petition with the Court of Industrial Relations invoking its jurisdiction when any industrial dispute exists between the parties as set forth in section 48-810, R. S. Supp., 1969.

Appeal from the Court of Industrial Relations. Affirmed.

Maupin. Dent, Kay, Satterfield, Girard & Scritsmier and Kem W. Swarts, for appellant.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

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

WHITE, C. J.

In this labor relations case the plaintiff labor organization alleged that five of its members, including all of its officers, were wrongfully discharged by the defendant because of labor organization activity. The Court of Industrial Relations found for the plaintiff and ordered reinstatement. We affirm the judgment of the Court of Industrial Relations.

The plaintiff, to which we will hereinafter refer as the Association, was formed in the fall of 1970 by members of the faculty of the defendant college. One of its purposes was to represent its members in collective negotiations with the Board of Governors of the college. On November 15, 1970, the Association formally requested recognition as the bargaining agent of the faculty and negotiations concerning working conditions. The Board of Governors rejected this request on December 15, 1970. On January 25, 1971, the Association filed a petition in the Court of Industrial Relations, invoking the court's jurisdiction to resolve the dispute concerning representation and negotiations. Hearings on the petition were held by the Court of Industrial Relations on March 8 and April 24, 1971, and the matter was taken under advisement by the court. On May 5, 1971, the Board of Governors, without prior warning, announced that the contracts of six teachers, five of whom are involved in this suit, would not be renewed for the next school year. The Association subsequently filed an application with the Court of Industrial Relations asking for reinstatement of five of the teachers. A hearing was held, and an order of reinstatement was issued from which the college takes this appeal.

The college first contends that the Court of Industrial Relations lacked jurisdiction to issue the order of reinstatement because the petition was filed by the Association and not by the affected teachers. Stripped of its rhetoric this is akin to a defendant arguing that the court had no jurisdiction over the plaintiff, an argument

which the defendant clearly has no standing to make.

We are satisfied that the procedure in bringing this petition properly invoked the jurisdiction of the Court of Industrial Relations. Section 48-837, R. S. Supp., 1969, provides in part: "Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder * * *." Section 48-811, R. S. Supp., 1969, provides in part: "Any * * * labor organization * * * when any industrial dispute exists between parties as set forth in section 48-810, may file a petition with the Court of Industrial Relations invoking its jurisdiction * * *." These statutes make it quite apparent that in a dispute such as this, a labor organization may invoke the jurisdiction of the Court of Industrial Relations in behalf of its affected members.

Article XV, section 13, of the Nebraska Constitution, provides: "No person shall be denied employment because of membership in or affiliation with * * * a labor organization * * *." Section 48-837, R. S. Supp., 1969, provides: "Public employees shall have the right to form, join and participate in * * * any employee organization of their own choosing * * *." Section 48-811, R. S. Supp., 1969, provides: "No adverse action by threat or harassment shall be taken against any employee because of any petition filing by such employee * * *." These constitutional and statutory provisions do not interfere with an employer's ordinary powers over his employees except to this extent: If the employee can demonstrate that adverse action against him was motivated by a desire to discourage or retaliate for union membership or activity, the action is unlawful. The college vigorously contends that these teachers were employed on 1-year contracts, and that it was under no obligation to rehire them and acted well within its rights in failing to do so. This does not preclude consideration

of the motive of the college. A failure to rehire is a denial of employment and an adverse action against an employee, just as an outright firing would be, and if it is prompted by anti-union motives, it comes within the prohibitions of the Constitution and the statutes. The relevant consideration is the motive of the employer. The Court of Industrial Relations succinctly and correctly stated the law: "An employer's action or nonaction which results in cessation of an employee's employment is unlawful if the employer's motive in so doing is to discourage union membership or activity, or in reprisal or retaliation for the latter activities." See Annotation, 83 A. L. R. 2d 532.

Before examining the facts upon which this decision is based, it is appropriate to discuss the scope of our review. An appeal from the Court of Industrial Relations is triable de novo in this court. §§ 25-1925 and 48-812, R. R. S. 1943. This does not mean that we are powerless to examine the conclusions of fact in the lower court. Wiese v. Klassen, 177 Neb. 496, 129 N. W. 2d 527. This court has held many times that even when the case is triable de novo, the superior position of the original trier of fact is to be respected and accorded great weight. See, Keenan v. Keenan, 187 Neb. 686, 193 N. W. 2d 568; Parkhurst v. Parkhurst, 184 Neb. 687, 171 N. W. 2d 243. This rule is particularly appropriate where something as subjective as motivation is in question.

The college justified its failure to rehire the teachers in question on the grounds that two of them had received bad evaluations, and that the other three had had their jobs eliminated by a curriculum change. Both of these grounds appear adequate on their faces, but it is clear that the college cannot hide behind them if its real motive was to retaliate for union activity. Upon an examination of the facts we must concur in the conclusion of the Court of Industrial Relations that these justifications do not ring true.

Both of the teachers who received poor evaluations

had been rehired with commendations in previous years, and neither had been specifically warned about his shortcomings or given an opportunity to correct them. One of them was head of his department, a position of some importance, and the other apparently was about to be promoted to that position. There was evidence of personality clashes involving these teachers and the administration, but not all of these seem to have arisen during the 1970-71 school year. What appears, then, is the administration on one hand, commending the work of these teachers, and entrusting positions of responsibility to them, and on the other hand giving them very poor evaluations. The evidence shows nothing to resolve this ambiguity. Further, the college president and other administration officials did not recommend to the Board of Governors that these teachers be dismissed, told that body that it could work with these teachers, and expressed surprise when they were not rehired. It seems highly unlikely that the Board of Governors, which does not deal with the faculty on a day-to-day basis, would in these circumstances take it upon itself to dismiss these teachers, unless other factors, unrelated to the evaluations, were at work.

The curriculum change which purportedly eliminated the jobs of the other three teachers is not credible. The college is a vocational school, and its curriculum includes courses of both a practical and a more theoretical nature. As we understand it, a student studying welding would go to an instructor who would teach him the mechanical aspects of how to weld. This instructor is called a "major area instructor." Our hypothetical welding student would also attend classes in which the instructor would teach the scientific and mathematical principles which a welder needs to know. These instructors are called "related area instructors." The proposed curriculum change would eliminate the related area instructors and provided that their functions would be taken over by the major area instructors. Under this

plan, the other three teachers would lose their jobs. On its face this plan seems reasonable and well within the discretion of the college. However, the extreme speed with which the plan was promulgated and the fact that no one on the faculty, including the department heads, had been told about it, forces us to the conclusion that it was merely a pretext for the dismissal of these three teachers.

The college attempted to show that this change had long been contemplated, but its evidence is not convincing. The change was the brainchild of Mr. Kenneth Aten, the college president, and several people testified that Mr. Aten had discussed the matter with them long previously. Obviously Mr. Aten himself is the best authority on what he was thinking about, but the record shows that he was present in court throughout the reinstatement hearing, and was not called upon to testify. This may be explained by Mr. Aten's testimony at one of the prior hearings on the subject of recognition, held April 24, 1971. At that hearing the following exchange took place: "Q. Mr. Kessner asked you about the teachers, are there any of the teachers from 6 down through 19 (the question refers to an exhibit containing a numbered list of faculty members) that are not coming back next year, that have resigned? A. The only resignation I know of so far is John McBride, number 14." If Mr. Aten had been planning a curriculum change at that time, he would have known that some of the related instructors' jobs would be eliminated, and that they would not be back. He could not truthfully have answered this question in the way he did if he had been planning the change at that time. Yet only 10 days later, May 5, 1971, the curriculum change was presented as "fait accompli." It is incredible that in the ordinary course of school administration a curriculum change of this magnitude would be implemented so rapidly and with no notice to anyone. In the April 24th hearing, the college took the position that some of the depart-

ment heads were more properly designated as administrative personnel, rather than faculty, and thus should not be included within the membership of the union. To fortify this position, evidence was presented emphasizing the importance of the department heads in the planning of the curriculum. We are now asked to believe that a major curriculum change was considered and adopted without these department heads even knowing about it. We cannot but agree with the Court of Industrial Relations that the plan was not bona fide.

In casting about for another explanation for the failure to rehire these teachers, we are irresistibly drawn to a clear and frankly expressed antipathy toward this labor organization on the part of the Board of Governors and the administration of the college. The witnesses representing these bodies made no attempt to conceal their disinclination to deal with the Association. They were not accustomed to dealing with unions; they were apprehensive at the prospect of negotiating with an experienced labor representative; and they feared the increase in influence which the faculty might achieve through this union. In the light of this antipathy, we turn to the action taken by the college. Six teachers were not rehired; and all six were members of the Association. All of the officers and organizers of the Association were not rehired. All nonmembers of the Association were rehired. Although some Association members were rehired, their numbers were so few that the Association could no longer make a credible claim to be the bargaining agent for the entire faculty.

In the light of these facts we are convinced that the failure to rehire was motivated by an unlawful intent to discourage and retaliate for labor organization membership and activity. We cannot improve upon the conclusion of the Court of Industrial Relations in its quotation from the Supreme Court of the United States: "It would seem that when employers freely recognize the right of their employees to their own organizations and

their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge." Jones v. Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.

The judgment of the Court of Industrial Relations is correct and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. The opinion fails to recognize that the teachers involved were not on tenure, but were hired on 1-year contracts. They were not discharged but simply were not rehired for an additional year when their existing contracts expired.

An employer should have an absolute right to refuse to renew a contract, regardless of his reasons, unless tenure is involved, See Board of Regents v. Roth (Wis.), 40 Law Week 5079. The majority opinion, carried to its logical conclusion, will permit employees under short-term contracts, to make those contracts permanent ones regardless of the wishes of the employer. At the very least, an employee can force the employer to litigate every refusal to renew a contract.

NEWTON, J., dissenting.

I dissent. See dissent appearing in School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, — N. W. 2d —.

NORTH PLATTE STATE BANK, A BANKING CORPORATION, APPELLANT, V. PRODUCTION CREDIT ASSOCIATION OF NORTH PLATTE, NEBRASKA, A CORPORATION, APPELLEE.
200 N. W. 2d 1

Filed August 4, 1972. No. 38292.

1. **Contracts: Sales: Uniform Commercial Code.** Under the Uniform Commercial Code, where goods are delivered to the buyer

under contract for sale and are physically received by him, they are in his possession.

2. **Security Interests: Time: Uniform Commercial Code: Notice.** The basic rule of notice filing under Article 9 of the Uniform Commercial Code is that where two security interests are perfected by filing, the one that is covered by the financing statement which is filed first has priority.
3. **Security Interests: Uniform Commercial Code.** The purchase money security interest of a person who is not a seller can arise only if the value which is given is used to enable the debtor to acquire rights in or the use of collateral.
4. **Security Interests: Time: Uniform Commercial Code.** The purchase money priority provided for in section 9-312, U. C. C., is an exception to the first to file rule, and should be applied only in strict accordance with the limitations in the Uniform Commercial Code.
5. **Sales: Time: Uniform Commercial Code.** Under the Uniform Commercial Code, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, unless otherwise explicitly agreed.

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

Murphy, Pederson & Piccolo, for appellant.

Kelley & Wallace, for appellee.

Carl W. Funk, for amicus curiae.

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

WHITE, C. J.

This case deals with the priority of secured creditors, each having a perfected security interest in the same collateral. For convenience, the plaintiff-appellant, North Platte State Bank, is hereinafter referred to as Bank, and the defendant-appellee, Production Credit Association of North Platte, is hereinafter referred to as PCA.

In August 1967, Gerald S. Tucker received an "operating loan" from PCA, the loan being subject to annual

renewal in the month of December. A contemporaneously executed security agreement contained an after-acquired property clause which applied PCA's security interest to, inter alia, "all livestock now owned or hereafter acquired by debtor, whether by purchase, natural increase or otherwise." PCA perfected its security interest by properly filing a financing statement which covered "all of the Debtor's livestock," and all subsequent transactions between PCA and Tucker. No other financing statement was filed by PCA.

From November 1967 through January 1968, PCA advanced approximately $70,000 to Tucker, primarily for periodic purchases of cattle. In February 1968, a second security agreement was entered into by Tucker and PCA to cover newly purchased cattle. PCA inspected the Tucker ranch in March and September of 1968 to count the number of head of cattle that had been added by purchase and by natural increase. Still another security agreement was executed by the parties in September to cover the increase in calves.

In October or November of 1968, Tucker approached D. M. Mann, hereinafter referred to as Seller, to purchase certain Angus heifers in the Seller's possession. It should be mentioned that the Seller was merely an agent acting for the true owner of the cattle but this fact has no bearing on a determination in this case. Tucker agreed to purchase as many of the 100 head of cattle as tested pregnant, and the price was $225 per head. The Seller and Tucker agreed that Tucker *was to take delivery of the cattle before January 1, 1969,* but payment and transfer of a bill of sale were to take place after that date. Sometime in November and again in December of 1968, Tucker went to the Bank to discuss opening a line of credit but there was no discussion of a specific loan for any particular purpose.

On November 30, 1968, a trucking company hired by Tucker took 79 head of impregnated Angus heifers from the Seller's ranch and hauled them to the Tucker ranch.

PCA had inspected the Tucker ranch earlier in November, and then in December 1968, PCA made a routine search of the security interest filing records in several counties pursuant to a loan renewal scheduled for December but not formally executed until March 24, 1969. PCA did not see any Angus cattle on the Tucker ranch when it inspected in November, and the December search of the records revealed that only the PCA financing statement of August 1967 was on file.

On January 13, 1969, approximately *a month and a half after he took possession of the cattle,* Tucker drew a check on the Bank for $17,775, the total purchase price for the 79 head of cattle. The Seller, payee of the check, mailed the check to the Bank for deposit. The check was returned for lack of funds, but upon the Seller's inquiry, the Bank acknowledged that a loan to Tucker had been discussed and that if Tucker would come in to complete the necessary papers, the loan would be granted and the check would be honored. Because of weather conditions, Tucker was unable to reach the Bank until January 30, 1969. A note advancing $20,000 to Tucker and a security agreement were executed that day and the next day the Bank honored the check presented by the Seller. Near this point in time, the bill of sale dated January 12, 1969, for the cattle was given to Tucker. On February 5, 1969, the Bank filed a financing statement, thus perfecting a security interest in the 79 head of cattle.

PCA became aware of the presence of the Angus cattle on the Tucker ranch sometime in February 1969. Tucker told PCA that the Angus cattle were purchased with the proceeds of a sale of several calves of another breed. Having checked the records in December 1968, and receiving this explanation for the presence of the Angus cattle, PCA saw to it that a loan renewal note was signed by Tucker and a security agreement including, specifically, the 79 Angus cattle, was executed on March 24, 1969.

In December 1969, unable to locate all of Tucker's cattle in which it had a security interest, PCA checked the filing records and found the Bank's financing statement of February 5, 1969. Late in December 1969, after Tucker defaulted on the PCA note of March 24, 1969, PCA took possession of all the cattle on Tucker's ranch, including the 79 head of Angus cattle. After the Bank claimed priority to the Angus heifers, PCA and the Bank agreed to sell the cattle and to hold the proceeds in escrow pending a determination as to the priority of their respective security interests.

The issue here is which of the secured creditors has priority to the proceeds from the sale of the cattle. The district court held that the first creditor to file a financing statement, PCA, has priority. We affirm the judgment of the district court.

The primary purpose of Article 9 of the Uniform Commercial Code was to simplify and lend certainty to procedures for establishing security interests in goods. The heart of Article 9 is its notice filing system and the fundamental rule therein is that when a conflict exists between security interests in the same collateral and the security interests were perfected by filing, the first in time to file a financing statement has priority. § 9-312 (5) (a), U. C. C. A special category called purchase money security interests was established to give those interests qualifying a special priority. § 9-312 (3) and (4), U. C. C. In this case, both security interests were perfected by filing so that unless subsections (3) or (4) of section 9-312, U. C. C., apply, under section 9-312 (5) (a), U. C. C., the first creditor, PCA, being the first to file, has priority. The second creditor, the Bank, claims that section 9-312 (4), U. C. C., does in fact apply and that, therefore, the second creditor has priority.

There are two basic questions presented in this case. As we see it, the resolution of either one of these questions will be decisive in the case. The first question is whether the Bank did in fact under the pertinent pro-

visions of the Code have a purchase money security interest in the collateral? The second question is that, if it did have a purchase money security interest in the collateral, did it acquire priority under section 9-312 (4), U. C. C.?

Did the Bank have a purchase money security interest?

A purchase money security interest is defined in section 9-107, U. C. C. It states:

"A security interest is a 'purchase money security interest' to the extent that it is

"(a) taken or retained by the seller of the collateral to secure all or part of its price; or

"(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used."

Tucker and the Seller (agent for Long) made an oral contract for sale sometime in November 1968. Later when the 79 pregnant cows were identified, they were finally delivered to Tucker on November 30, 1968. It is apparent, therefore, that the actual goods contracted for were delivered to the buyer under the previous contract for sale; that Tucker physically received them; and that they were therefore in his legal possession. The ordinary understanding of the term "possession" means that a person has possession when he has physical control of the property. Boyd v. Travelers Fire Ins. Co., 147 Neb. 237, 22 N. W. 2d 700. The only further question to be determined here is whether the actual physical delivery of the cows and their acceptance by Tucker, the buyer, was affected by the fact that the payment of the price and the delivery of the bill of sale were postponed. It is true that delivery by a seller under a contract for sale can take place prior to the receipt of the goods by the buyer. Receipt is defined by section 2-103 (1) (c), U. C. C., as taking physical possession. It is clear that the tender of delivery by the Seller for Long took place here under section 2-503 (1), U. C. C.,

and the buyer received and accepted the goods on arrival at his ranch. It is not argued and indeed, it could not be argued, that the postponement of payment and the later delivery of the bill of sale had any effect upon the time that Tucker received legal possession of the goods. The buyer had received the goods under the precise terms of the Code and this receipt was evidenced by his taking of the actual physical possession. It seems quite obvious that when the cows were delivered to Tucker under the contract for sale and were actually physically received by him, they were in his legal possession and we so hold.

We turn now to the question of whether Tucker on November 30, 1968, acquired more rights in the cows than their possession. It appears from the evidence in this case that Tucker acquired title to the cows as well on November 30, 1968. There is considerable colloquy about the understanding of the parties and particularly about the testimony of the Seller, Long's agent, about what he relied upon in delivering the cows, and what he would have done had the cows not been paid for. What is important is that the Seller said Tucker's word was good enough for him. All of the indications of the oral testimony are that the Seller was relying on Tucker's willingness and ability to make payment of the price and that he was making a sale on open credit. Neither Seller nor Long made any effort to reclaim the goods under section 2-702, U. C. C., granting an unpaid seller on open account the right to reclaim the goods if he discovers his buyer's insolvency. This right must be exercised within 10 days, it was not so exercised, nor did the Seller nor Long know until long after November 30, 1968, that Tucker had become insolvent.

Whatever the parties may have thought, the provisions of the Uniform Commercial Code govern, and it is clear that title to the cows actually passed to Tucker when they reached his ranch and he received the actual physical possession of them. Section 2-401 (2), U. C. C.,

says that unless otherwise *explicitly* agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest. There is no evidence that the sales agreement, either expressly or impliedly, contained an *explicit* provision or term reserving the title until payment had actually been accomplished. We therefore come to the conclusion that after November 30, 1968, once the cattle reached Tucker's ranch and came into his physical possession, under the completely oral transaction the Seller had no enforceable security interest in them and no other interest of any kind. Title and possession were merged in Tucker, it was an unsecured credit transaction, and no cause of action existed against Tucker except one for the agreed price of the cattle under the terms of the agreement.

What, then, was the nature of the Bank's security interest? We pause to observe that at the moment the cattle reached Tucker's ranch, PCA's perfected security interest immediately attached to the 79 cows. All of the conditions necessary had been met; there was a written security agreement with an after-acquired property clause containing a description sufficiently broad to include the cows, value had been given in the form of the original loan, and subsequent extensions of credit which had been renewed a number of times. As we have seen, Tucker had acquired both possession and title to the cows. At the time of delivery and possession of title to Tucker, on November 30, 1968, the financing statement of PCA was the only financing statement on file.

As we have pointed out, section 9-107 (b), U. C. C., provides that a security interest cannot become a purchase money security interest unless it is taken by a person who by making advances or incurring an obligation gives value to enable the debtor *to acquire rights in or the use of collateral* if such value is in fact so used.

Clearly, the Bank could not qualify as the seller of the 79 cows. Obviously, by advancing the $20,000 and taking the mortgage it did acquire a security interest in the cows. The distinction is vital to the disposition of this case. The money advanced by the Bank enabled Tucker to pay the price to Seller for the cows. But it was not used by Tucker to acquire any rights in the cows because he already had all the possible rights in the cows he could have with both possession and title.

There is a further and even more fundamental reason why the Bank may not succeed in establishing any priority over PCA in the enforcement of its security interest. This is because that although it filed its statement within 10 days after it made its loan, the filing occurred almost 2 months after the cows had been delivered and the title had passed to Tucker. At the risk of repetition, we will repeat the basic portion of section 9-312 (4), U. C. C., which states: "* * * if the purchase money security interest is perfected at the time the *debtor* receives possession of the collateral or within ten days thereafter." (Emphasis supplied.) The application of this plain, simple, and forceful language to the facts in the case at bar seem so obvious as not to require any further argument. However, the Bank argues at length and persistently that Tucker did not become a "debtor" within the meaning of section 9-312 (4), U. C. C., until the money was loaned by the Bank and that, therefore, "debtor" Tucker never had full "possession of the collateral" in the section 9-312 (4), U. C. C., sense until the loan was made by the Bank and the security agreement signed. Therefore, the Bank argues that since it filed a financing statement within 10 days after the execution of the security agreement with Tucker, it qualifies for the special priority of section 9-312 (4), U. C. C.

Manifestly, on January 30, 1969, when the Bank executed the loan, Tucker was a "debtor" of both the Bank and PCA. Section 9-105 (1) (d), U. C. C., pro-

vides that unless the context otherwise requires a "debtor" is "the person who owes payment or other performance of the obligations secured, whether or not he owns or has rights in the collateral * * *." Tucker did not or could not receive possession from the Bank and it is uncontrovertible that he became a "debtor" to the Seller on November 30, 1968. While Tucker may not have been the Bank's "debtor" until January 30, 1969, it is inescapable in the context of the Code that he was the "debtor" in the section 9-312 (4), U. C. C., sense when he became a "debtor" to PCA. On November 30, 1968, the time and the only time that he "received" possession, Tucker was a "debtor" of PCA and Seller only. To hold otherwise renders the language of the statute meaningless, and purports a construction wholly unrelated to setting up an ascertainable time standard by which priorities may be established so that a subsequent lender can achieve priority over the first to file. This interpretation is well stated in 2 Coogan, Hogan & Vagts, Secured Transactions Under the Uniform Commercial Code, section 19.02 (3) (a), p. 1979, wherein it is stated: "The time at which the debtor receives possession *starts the running* of the ten-day grace period for perfection. Problems will undoubtedly arise as to when the debtor 'receives possession' of the collateral. The Code does not offer a specific definition of the term, but there are indications that actual delivery to the buyer or to a third party is crucial. *It is important to realize that this priority rule turns on the more easily ascertained time of receipt of possession and not upon the time the debtor obtains 'rights' in the collateral.*" (Emphasis supplied.)

The very purpose of the 10-day grace period was to relieve from the rigidity of a requirement of a loan first and acquisition second or simultaneousness of receipt of possession and execution of the loan. At the same time the integrity of the transaction had to be guaranteed by an ascertainable standard related to the re-

ceipt of possession, and the retroactive granting of priority over the first to file and the first to advance funds. See II Gilmore, Security Interests in Personal Property, § 29.2, p. 782.

We observe that the 10-day grace period in itself allows for a permissible flexibility in the practical aspects of consummating a purchase money transaction. By their nature grace periods must have a fixed time limit, or they become meaningless. We cannot extend judicially another grace period over the Code grace period. We cannot pile flexibility upon flexibility. The purchase money priority is an exception to the first to file rule, and it should be applied only in accordance with the limitations established by the Code. To interpret section 9-312 (4), U. C. C., in the manner the Bank urges would not only be contrary to the plain meaning of the language used in the statute but would expose an original lender to such serious practical risks that the whole structure of the Code would be impaired or endangered, because the original lender could never feel sure that he could rely on his collateral in his future dealings with the debtor. We point out our holding herein is consistent with the Code provision that when inventory is involved, anyone with a purchase money security interest who seeks to escape from the first to file rule must not only perfect his security interest *before* the debtor receives possession of the collateral but must also, before possession is received by the debtor, give notice to the original security holder concerning the financing the purchase money security holder is about to undertake. We point out further that the grace period, although adequate to encompass the practicalities of the ordinary financing transaction, must necessarily be brief because of the possibility the original first to file lender may make additional advances relying upon the existence and the possession of after-acquired property by the borrower. It is clear that to hold otherwise would permit a subsequent lender 2

months later, 6 months later, or perhaps a year later, to convert an unsecured credit transaction into a first lien taking priority of the first to file lendor who had advanced substantial sums on the basis of the acquisition and the possession of the same property to which priority is sought to be attached.

The Bank relies almost completely on the decision of the Court of Appeals in Brodie Hotel Supply, Inc. v. United States, 431 F. 2d 1316 (9th Cir., 1970). There are two answers to this contention, besides the analysis and the decision we have reached on the merits. In the first place, the Brodie case is inapposite on the facts. The court reached the correct decision in the Brodie case because the purchase money security holder in fact perfected his filing within 10 days after Lyon, the purchaser, obtained possession of the equipment and thereby achieved priority over the lender. The language and the reasoning of the Brodie case, however, relied upon by the Bank have been seriously criticized. For a full discussion of this case, see 27 The Business Lawyer, Kennedy, Secured Transactions, 755 at p. 768 (1972); and Comment, 49 No. C. L. Rev. 849 (1971).

We conclude with this particularly appropriate statement taken from the recent case of James Talcott, Inc. v. Franklin National Bank of Minneapolis (Minn.), 194 N. W. 2d 775: "The fundamental purpose of Art. 9 of the code is to make the process of perfecting a security interest easy, simple, and certain. It was intended to be a complete reversal of prior chattel security law and to rid the unaware of the traps of requirement of specific types of acknowledgements, technical affidavits of consideration, selection of specific proper forms, and other pitfalls that were not uncommon. The code very simply and briefly provides for a notice-filing procedure with a minimum of information required to be publicized in a filed financing statement. All that is required is a minimal description, and it may be by type or kind. The statement need not necessarily contain de-

tail as to collateral, nor any statement of quantity, size, description or specifications, or serial numbers. No preciseness is required with respect to whether the collateral exists at the time of filing or is to be acquired thereafter, and no statement of charges, payment schedule, or maturity date need be included in the statement. The first to file shall prevail. Although there are a few exceptions, *they are very clearly and definitely stated.*" (Emphasis supplied.)

We therefore hold in this case that the Bank failed to comply with the requirements of section 9-312 (4), U. C. C., because it did not file a financing statement until more than 10 days had passed from the time the cattle came into the "debtor" Tucker's possession. Therefore, the first to file rule of section 9-312 (5) (a), U. C. C., applies, and the original priority of PCA controls.

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

AFFIRMED.

THEODORE REGIER ET AL., APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

199 N. W. 2d 742

Filed August 4, 1972. Nos. 38365, 38366.

1. **Trial: Appeal and Error.** A party cannot be heard to complain of an error which he was instrumental in bringing about.
2. ———: ———. Error without prejudice is not ground for reversal.
3. **Trial: Juries.** A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection.
4. **Trial: Appeal and Error: Evidence: Motions, Rules, and Orders.** A motion to declare a mistrial is addressed to the sound discretion of the trial court, and his ruling will not be disturbed in the absence of a showing of an abuse of discretion.

Appeals from the district court for Hamilton County: JOHN D. ZEILINGER, Judge. Affirmed.

Wilson, Barlow & Watson and Ted L. Schafer, for appellant.

Christensen & Glynn, Lawrence C. Sandberg, Jr., and E. H. Powell, for appellees.

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

BOSLAUGH, J.

These are appeals in proceedings in eminent domain. They were consolidated for trial in the district court and for briefing and argument in this court.

The plaintiffs, Theodore Regier and Marjorie Regier, own and farm approximately 626 acres of land south and east of Aurora, Nebraska. In 1969, the defendant condemned easements across the plaintiffs' property for the construction of a transmission line.

The appraisers appointed by the county judge fixed the damages at $29,500. The defendant appealed to the district court where the jury returned a verdict in the amount of $62,600. The defendant appeals.

The plaintiffs' land consists of the southwest quarter of Section 22, the northeast quarter of Section 27, and the west half of Section 26, all in Township 10 North, Range 6 West of the 6th P.M., in Hamilton County, Nebraska. The land is fertile, level, irrigated land. It is well developed and improved for agricultural use. Its value before the taking was between $559,800 and $681,260.

The defendant, in its declarations of taking, divided the plaintiffs' land into separate tracts. The petitions filed in the county court described Tract No. H-29 as the NE ¼ SW ¼, and the NW ¼ of 26-10-6. Tract No. H-30 was described as the NE ¼ of 27-10-6. Separate awards were made by the appraisers and separate appeals were taken by the defendant to the district

court. In the district court the cases were consolidated for trial with the separate tracts considered as separate causes of action. Separate verdicts were returned on each cause of action and separate appeals taken to this court. The defendant now contends that the judgments should be reversed and the causes remanded for a new trial because the plaintiffs' land was not considered as a single unit in the district court.

All of the land involved in these cases is owned by the plaintiffs, is contiguous, and is devoted to the same use. It should have been considered as one unit or parcel for the purpose of ascertaining the damages resulting from the taking of the easements. See Verzani v. State, 188 Neb. 162, 195 N. W. 2d 762. The assignments of error, however, cannot be sustained for several reasons.

The error resulted from the defendant's election to divide the plaintiffs' land into separate tracts in the declarations of taking. A party cannot be heard to complain of an error which he was instrumental in bringing about. Beveridge v. State, 183 Neb. 406, 160 N. W. 2d 229. The defendant had the benefit of separate appraisals which would have permitted a single appeal if it had been satisfied with one of the awards. It cannot now complain of the theory which it adopted in the petitions filed in the county court. Furthermore, the record shows there was no prejudice to the defendant. Error without prejudice is not ground for reversal.

The defendant filed motions for a change of venue which were overruled by the district court. The ruling on these motions is assigned as error. The motions alleged, in substance, that a fair and impartial trial could not be had in Hamilton County because bias, prejudice, bitterness, and hostility against the defendant would make it impossible to select fair and impartial jurors. Affidavits offered in support of the motions referred to a number of newspaper articles which were

critical of the defendant and the routing of the transmission line.

The defendant did not examine any of the prospective jurors in regard to the newspaper articles, and the voir dire examination of the jury panel did not show that a fair and impartial jury could not be obtained. No challenge for cause by the defendant was overruled, and at the close of the examination of the jury panel, it was passed for cause by the defendant. Under these circumstances, it is unnecessary to consider further the showing made in support of and in resistance to the motions. A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection. State v. Eggers, 175 Neb. 79, 120 N. W. 2d 541; State v. Harris, 184 Neb. 301, 167 N. W. 2d 386.

The defendant contends that the verdicts were excessive. This is the principal issue presented by the appeals.

The verdicts in these cases included both permanent and temporary damages caused by the taking of the easements. The taking occurred on May 28, 1969. Construction of the transmission line began in April 1970. The defendant's contractor moved heavy equipment onto the land causing compaction and disturbance of the soil in the easement area. There was also a problem with trash left by the contractor which interfered with farming operations. The plaintiffs estimated the temporary damages at $10,000. A witness for the defendant estimated the temporary damages at $3,000. Since the verdicts were general, the amount allowed by the jury for temporary damages cannot be determined.

The easements taken are 150 feet wide and cross the plaintiffs' property on a diagonal line from northwest to southeast. The combined area of the easements is approximately 19 acres. The centerline of the easement area across Section 27 intersects the west boundary of the northeast quarter 1,060 feet south of the north line

of the section. The centerline intersects the line between Sections 27 and 26, 703 feet north of the half-section line. The centerline intersects the east boundary of the west half of Section 26, 168 feet south of the half-section line. No part of the southwest quarter of Section 22 is included in the easement area.

The trial court considered the west half of Section 26 to be the area affected by easement across Tract H-29, and the northeast quarter of Section 27 and the southwest quarter of Section 22 to be the area affected by the easement across Tract H-30. It was a question of fact as to whether there was remainder damage to the southwest quarter of Section 22 and that part of the southwest quarter of Section 26 omitted from the description of Tract H-29 in the petitions filed in the county court. The evidence was in conflict and the question was for the jury.

The plaintiffs' land is irrigated from 6 wells and 3 reuse pits. One of the wells on Tract H-30 is located within the easement area. Since the date of the taking, the plaintiffs have drilled an additional well near the center of the southwest quarter of Section 26 and have installed a center pivot irrigation system there. Much of the evidence relates to center pivot irrigation systems, their desirability and efficiency; whether the land was adaptable to irrigation by center pivot systems; and the effect the easements had upon the market value of the land because parts of it now cannot be irrigated by center pivot systems. The evidence was in conflict and presented questions for the jury.

The transmission line presently constructed across the plaintiffs' land is a 345,000 volt line with 6 conductors and 2 shield wires. There are 7 "K" frame, 2-pole structures on the land which are 750 to 900 feet apart. The poles of each structure are spaced 26 feet apart. There are no guy wires or down-guys on the structures at this time but the evidence shows some of the structures are no longer perpendicular.

The evidence established that the structures now erected on the easement area interfere with farming the land and require much additional time and labor to perform the necessary operations on the land. The plaintiff uses 8-row machinery and it is impossible to farm through the structures with this equipment. Much hand labor with shovels is required to open the furrows through the structures so that gravity irrigation may continue beyond the easement area. Weed control in the areas around the structures is difficult, and aerial spraying will be more difficult.

The plaintiffs' evidence fixed the permanent damages resulting from the taking at between $62,000 and $71,000. The defendant's evidence fixed the permanent damages at between $9,500 and $11,000. It is apparent that the jury rejected the testimony of the defendant's witnesses as unrealistic.

In determining whether the verdict was excessive it is important to consider the exact nature of the easements which were taken. The easements permit the "survey, construction, operation, maintenance, inspection, repair, removal, alteration, relocation and reconstruction of Condemner's electric transmission lines including necessary poles, towers, footings, guys, downguys, anchors, conductors, shield wires and all other equipment used in connection therewith, together with all rights and privileges incident to the use and enjoyment thereof" on the property, including rights of ingress and egress within the easement area. The plaintiffs may cultivate and use the land within the easement area if the use does not endanger or interfere with the defendant's use of the area. The plaintiffs may not place or allow any "combustible trash or property, buildings, structures, hay or straw stacks" to remain within the easement area. The plaintiffs' right to future damage to fencing or crops is reserved in accordance with section 76-710, R. R. S. 1943.

The defendant suggests that damages should be de-

termined on the basis of the present structures on the land because it appears unlikely that additional lines or structures will be placed on the easement area. The easements taken are permanent and the plaintiffs have no assurance as to what future use may be made of the easement area. The addition of guy wires and down-guys to the present structures would materially increase the inconvenience and hazard to the plaintiffs, particularly when lighting conditions are poor. It is possible that future developments will result in relocation and reconstruction of transmission lines within the easement area so that plaintiffs will be denied any substantial use of the area, and the structures will prevent farming through the area. These are matters which the jury considered and which we must consider in determining whether the verdicts were excessive.

In Johnson v. Nebraska Public Power Dist., 187 Neb. 421, 191 N. W. 2d 594, a similar case involving an easement for the same transmission line in an adjoining county, we said: "The 150-foot diagonal easement with the present seven 2-pole structures running diagonally for over a mile across the farm is obviously a substantial factor affecting market value. The record supports, almost conclusively, that operation of the present irrigation systems will be materially inconvenienced and impeded in operation. With larger modern machinery and power units, aerial spraying of fertilizer, nutrients, and insecticides, and the large scale movement of tubing and irrigation equipment, the diagonal easement will realistically impair normal ground operations on the farm. Beyond this, the record strongly supports a conclusion that it cannot now be adapted to the use of an irrigation system (center-pivot) substantially increasing productivity. These are but a few of the factors in evidence before us for review."

The plaintiffs have a well-developed, highly improved farm. It produced approximately 65,000 bushels of corn and a gross farm income of over $100,000 in 1969.

There is grain storage capacity of 210,000 bushels on the property and dryer capacity of 65,000 bushels. The buildings are valued at $60,000 to $100,000. As in the Johnson case, *supra,* it is obvious the easements have a substantial adverse effect upon the market value of the plaintiffs' property. The record does not show that the verdicts were excessive.

The last assignment of error relates to a ruling of the trial court upon a motion for mistrial made by the defendant. Donald W. McDannel, a value witness for the defendant, stated during cross-examination that he had been authorized by the defendant to negotiate with landowners if they brought up the subject. The witness was then asked when he had first contacted Mr. Regier and if that was the time the witness had "attempted to negotiate with him for twelve hundred and fifty dollars a pole setting." The witness answered: "I don't remember." The defendant moved for a mistrial but the motion was overruled and the jury instructed to disregard the question and answer.

The defendant contends that the ruling was reversible error and that the trial court should have declared a mistrial. The defendant relies upon the rule that ordinarily offers to compromise and negotiations for settlement are not admissible. See Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581. Here there was no issue as to liability. The sole issue was damages and the witness had already testified that the damages were a larger sum. Under the facts and circumstances in these cases the ruling of the trial court was not an abuse of discretion.

The judgments of the district court are affirmed.

AFFIRMED.

KNIGHT BROS., INC., AND E. STOLTENBERG & SON, A JOINT VENTURE, APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.
199 N. W. 2d 720

Filed August 4, 1972. No. 38376.

1. **Contracts: Words and Phrases.** The language in a construction contract, prepared by the owner, that the quality of embankment materials in certain designated sites "will be acceptable in general," accompanied by language which provides "the contractor shall determine for himself the amount of selective excavation, blending, screening, mixing, and other work required to provide a finished product meeting the specifications," and which authorized the owner's engineer to "reject portions of the deposit as unacceptable," does not constitute a representation by the owner to the contractor that the quality is such that the material can be excavated and processed without undue difficulty. Neither does such language prevent the owner from waiving specifications on quality.
2. **Contracts: Words and Phrases: Warranty.** Specifications in a construction contract containing test borings of a site for embankment materials and which contain the following language: "No guarantee is made regarding the nature of the material at points other than locations sampled," expressly negatives a warranty of quality except as shown by the test borings.
3. **Contracts: Warranty.** The risk of unexpected cost and difficulty in the performance of construction contracts is usually carried by the building contractor. Of course, the employing owner may make representations or warranties; and the parties may by agreement allocate such risks as they see fit. Every case stands on its own legs; there is no rule of law with an answer mechanically determined.
4. **Contracts.** If the contract is fairly entered into by an experienced builder, the fact that a portion of the work proves to be more expensive than was estimated does not entitle the builder, in the absence of fraud or mistake, to any allowance beyond the contract price.
5. **Trial: Judgments: Evidence.** 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 will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.
6. **Contracts.** A provision of a contract is ambiguous when, con-

sidered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.

7. **Contracts: Courts.** When a contract is ambiguous, the court must determine the parties' intent and an ambiguity must be resolved so as to give effect to that intent.
8. **Contracts: Parties: Courts.** The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence, and the court should ordinarily enforce such construction.
9. **Contracts: Evidence: Juries.** Where evidence relating to ambiguities and contradictory provisions in a written contract is conflicting, the interpretation to be given the contract is for the jury.

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

Hird Stryker of Fraser, Stryker, Marshall & Veach, for appellants.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., Gary R. Welch, Dale L. Babcock, Jr., and Randall E. Sims, for appellee.

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

CLINTON, J.

This action originated with a claim arising out of a contract of the plaintiffs with the Department of Roads of the State of Nebraska, which claim was filed under the provisions of section 77-2406, R. R. S. 1943. The claim was disallowed. Appeal was then made under section 77-2407, R. R. S. 1943, to the district court for Lancaster County which found for the defendant. The plaintiffs then perfected their appeal to this court.

The plaintiffs, a corporation and a partnership, respectively, were as joint venturers the successful bidders for the construction of work under Federal Aid Interstate Project No. I 80-4(26) in Lincoln County, Nebraska, and on February 18, 1965, entered into the contract with the State of Nebraska. Insofar as is here

immediately pertinent the plaintiffs under the provisions of the contract were to place and compact approximately 2,560,000 cubic yards of embankment material for a 7.902-mile segment of Interstate 80 southeast of North Platte, Nebraska, at a price of 29.5 cents for each cubic yard of such materials measured in the embankment. The plaintiffs completed the work and were paid for the placement of the material in the embankment at the contract price.

This cause of action is founded upon certain purportedly false representations allegedly knowingly or negligently made by the State in the contract documents as to the quantity and quality of the material available in certain borrow pits referred to in the specifications. Plaintiffs alleged in their petition that the claimed representations were made by the State with the intent that the bidders rely thereon and that the plaintiffs did in making their bid and in entering into the contract rely thereon. The plaintiffs further claim that the quantities were insufficient and the material in one certain pit did not meet specifications.

The position of the plaintiffs may be succinctly stated by the following quotations from their brief: "On the quantity issue, it is the Plaintiffs' position that it was the intent of the State and the understanding of the Plaintiffs that the five pits shown on the plans would provide sufficient material to complete the project; and that if they did not, the contract documents contemplated and required that the State pay the Plaintiffs the extra costs incurred in procuring the necessary additional material from other sources. A subsidiary issue is the Plaintiffs' claim that it was also the intent and understanding that material from certain of the designated pits would be utilized for specific segments of the embankment. . . .

"On the issue of the substandard quality of the material in one of the pits, . . . it is the Plaintiffs' position that the proper test to be applied in determining whether

the material in that pit was 'acceptable in general' and, hence, fulfilled the State's representations, was not whether the State ultimately authorized and directed its use in the embankment, but rather, whether the material that was so used, in fact, met (or could be made to meet) the quality standards prescribed by the specifications; and that the testimony of the State's own witnesses established that the difficult to excavate and manipulate material from that pit that was used in the embankment was cohesive rather than granular in character, and did not meet, and could not be made to meet, the quality standards upon which the Plaintiffs' bid was based and the contract awarded.

"It is also the Plaintiffs' position that when the substandard character of that pit was discovered, it was the State's duty, under Paragraph 5 of Article 6.02 of the Standard Specifications, to authorize the Plaintiff to abandon it, and procure material that would meet the specifications from other sources, and to reimburse the Plaintiffs for the extra costs incurred in so doing. It is the Plaintiffs' position that the State's refusal to authorize the abandonment was also a breach of the contract for which the Plaintiffs are entitled to recover their resultant damages."

The State denied making false representations as to quality or quantity; denied reliance by the plaintiffs and alleged full knowledge on the part of the plaintiffs; and alleged that the quantities and qualities were sufficient, that the plaintiffs did only what the contract provided, and that the prolongation of the work was caused by the plaintiffs' improper procedures.

The trial court found generally for the defendant and against the plaintiffs; that there were no misrepresentations; that paragraph 4 of Article 6.02 of the Standard Specifications was the governing provision of the contract; that the joint venture suffered substantial loss in the performance of the contract but it was unnecessary to determine the amount of loss because the defendant

was not liable; and then dismissed the plaintiffs' petition. We affirm the order of the trial court.

In order to convey an adequate understanding of the issues and the contentions of the parties it is necessary to set forth by quotation, or in summary, pertinent contract provisions. The contract consists of a 2-page executed agreement which incorporates numerous documents. Included among these is the proposal. The proposal provides: "We have carefully examined the plans and specifications for the work contemplated in this proposal and we have made a personal examination of the site and have inquired into the local conditions affecting the work. We propose to furnish all the necessary equipment, machinery, tools, apparatus, and other means of construction and to do all the work *and to furnish all the materials* to complete the work in accordance with the plans and specifications on file for the schedule of prices listed in this proposal." (Emphasis supplied.)

Also included are the State of Nebraska 1965 Standard Specifications for Highway Construction. Article 2.07 provides: "Article 2.07—Examination of Plans, Specifications, Special Provisions, and Site of Work

"The bidder is required to examine carefully the site, and the proposal, plans, specifications, special provisions, and contract form, for the work contemplated, and it will be assumed that *the bidder has investigated and is satisfied as to the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished,* and as to the requirements of these specifications, the special provisions, and contract. It is mutually agreed that the submission of a proposal shall be considered prima facie evidence that the bidder has made such examination." (Emphasis supplied.)

Article 6.02 of that document is in part as follows: "Article 6.02—Designated Local Material Sources

"1. Sources of local materials may be designated and

described in the plans and special provisions. The quality of material in such deposits will be acceptable in general, but the contractor shall determine for himself the amount of selective excavation, blending, screening, mixing, and other work required to provide a finished product meeting the specifications. It shall be understood that the engineer may order procurement of material from any portion of the designated option area and may reject portions of the deposit as unacceptable.

"2. When material deposits are not designated in the plans or special provisions, the contractor shall provide material conforming to the specified requirements.

"3. The department may acquire and make available to the contractor the right to take materials from the sources designated in the plans and described under special provisions, together with the right to use such property as may be specified, adjacent thereto, as may be required for plant site, stock piles, and hauling roads. Any special requirements required by the terms of options will be shown in the plans.

"4. If the contractor desires to use materials from sources other than those designated, he shall, at his own expense, explore and develop such other sources and request in writing, the engineer's approval of the alternate source or sources stating that he will acquire the necessary right to take the materials and pay all costs involved, including any which may result from an increase in length of haul. The use of materials from other than designated sources will not be permitted until representative samples taken by the engineer have been approved and written authority issued for the use thereof. Approval of the use of materials from such alternate sources will not be given unless the quality of the material therefrom is at least equal to the quality of material from the designated source or sources.

"5. Should the engineer find it necessary or desirable, during construction to change from a designated local material source to another not designated in the

plans or described in the special provisions, due to depletion of the material, variation in gradation of material, or to the locating of a more suitable material, the work of moving from one source to another and any additional stripping or hauling of the material, and any other additional costs occasioned by such change shall be considered as 'extra work'."

In the case of this contract certain local material sources were designated. These were set forth in the sheets containing the plan and profile of the highway. These material sources were borrow pits numbered 1, 16, 20A, 12, and 23. These were described by tract, number, owner, terms of option under which the material might be used, that is, whether a lump sum payment or a per acre cost, and the estimated cost. In the case of pits Nos. 1 and 20A the cost was designated as "free." These two pits had apparently been acquired by the State by eminent domain. These specifications provided: *"Pit Nos. 1 and 20A are required to be used."* (Emphasis supplied.) The specifications as to these two pits further set forth the maximum cubic yards available in the pits and *the minimum cubic yards required to be removed.* As to the other pits the maximum cubic yardage available was designated but none was required to be removed. Evidence introduced at the trial indicated that the purpose of the *required* excavation of the two pits was to use them as a part of the Interstate chain of lakes. The record also discloses that where the State has acquired title to borrow pits by eminent domain but does not use them the federal government does not reimburse the State for its 90 percent of the cost.

The sheets on which the compaction requirements for the embankment appear contain the following: "The contractor will be required to furnish the borrow on this project," and also provide, with exceptions, that the embankment should be constructed of "granular materials having at least 90 per cent retained on the

No. 200 sieve and at least 10 per cent retained on the No. 10 sieve."

The first basic question in this case is whether the contract is reasonably subject to the interpretation that it made representations that the quality of the materials in Pit No. 1 were of such a nature that they could be excavated and processed without undue difficulty. There is convincing evidence in the record to support the position that the material in Pit No. 1 had a deeper and more variable layer of very cohesive overburden than the plaintiffs anticipated and that there were pockets of cohesive material in lower levels. In the course of excavation and processing some of this cohesive material became mixed with the granular material and the plaintiffs had great difficulty in handling and processing the material. The State did in fact waive in part the sieve retention requirements earlier quoted as to a portion of the material in Pit No. 1 for use in certain portions of the embankment. There is evidence which supports the conclusion that with this waiver there was sufficient select material in Pit No. 1 to complete the work on that portion where Pit No. 1 material was being used. The State also lowered the minimum cubic yards required to be removed, but the plaintiffs did in fact remove and use more than the minimum required even under the original specifications. Evidence was introduced by the State which would support a finding that the plaintiffs' problems in Pit No. 1 were caused by their use of improper dewatering and material handling methods. Early in the work the plaintiffs obtained privately and used material from what is identified as the Krychek Pit in portions of the embankment which were being built by material from Pit No. 1. The request for this substitution stated: "We will furnish the material at no additional cost to the State." The responsive authorization from the State said: "1. It is understood that the substitute source is granular material; but that in any case the specified gradation re-

quirements listed on sheet No. 3 of the plans and any other requirements of the plans and specifications will be complied with. 2. That you will pay all royalty and any other additional costs involved in the substitution of this material. 3. That approval of the substitution of embankment material described herein, in lieu of material from the pits shown in the plans, does not alter the requirements specified in the plans for the plan pits."

The contractual provisions to which we have earlier made reference plus those which we now set forth do, in our opinion, negative as a matter of law a representation as to quality and so in effect of the workability of the material such as the plaintiffs claim. Furnished with and included in the plans and specifications were the results of test borings made by the State of the pits including Pit No. 1. The specifications sheets containing this information have the following stated thereon: "The information shown on these plans represents the physical characteristics of the material at the locations indicated. *No quarantee is made regarding the nature of the material at points other than locations sampled.*" (Emphasis supplied.) There is no contention made by the plaintiffs that the summaries of the soil material information based upon the borings is false or inaccurate.

The plaintiffs in effect argue that the language of Article 6.02, provision 1, of the Standard Specifications as follows: "The quality of material in such deposits *will be acceptable in general, . . .*" (emphasis supplied), constitutes a representation to the bidder that the bulk of the material will meet the sieve standards and so be readily workable without undue difficulty. We do not believe this is, in light of the whole contract, a reasonable interpretation thereof. We believe it means that the State will accept the material generally and if it does not, but rejects it, or a portion of it, and on that account the contractor is directed under provision 5 to

another material source, then he is entitled to reimbursement for the "extra work" involved.

In addition to the disclaimer of any quarantee the provisions of the specifications that the engineer "may reject portions of the deposit as unacceptable" clearly negatives any representation that the deposit will meet any specific standard. This is also indicated in the language, "The contractor shall determine for himself the amount of selective excavating (etc.)."

We find nothing in any of the provisions of the contract which would restrict the right of the State to waive specifications by loosening the material standards. The contract, as we have noted, provides that the material "will be acceptable in general." This language certainly is at least inclusive of the right of the State to waive material specifications.

Another aspect of the contract insofar as it pertains to Pit No. 1 may be mentioned. The excavation of the specified minimum cubic yardage from Pits Nos. 1 and 20A was a part, even though an incidental part, of the performance of the contract. Had this not been done the contract, in the absence of a waiver, would not have been completely performed.

In support of their claim for "extra work" the plaintiffs cite Pitt Constr. Co. v. City of Alliance (6th Cir., 1926), 12 F. 2d 28. That case involved a contract for the construction of a concrete basin. The backfill was to be provided from the materials excavated from the basin. The plans provided there would be approximately 9 feet of material to be excavated from the basin site. There was actually only 3 feet of material available. The contractor brought an action to recover the additional expense incurred as a result of the deficiency in material and was allowed recovery. There was in that case a positive representation. Here there was none. As far as Pit No. 1 is concerned this case comes within the purview of those cases where performance of a construction contract is more difficult or burdensome than

anticipated. At 3 Corbin on Contracts, § 598, p. 590, we find the following: "The risk of unexpected cost and difficulty in the performance of construction contracts is usually carried by the building contractor. Of course, the employing owner may make representations or warranties; and the parties may by agreement allocate such risks as they see fit. Every case stands on its own legs; there is no rule of law with an answer mechanically determined." At 17A C. J. S., Contracts, § 367(1), p. 374, we find: "If the contract is fairly entered into by an experienced builder, the fact that a portion of the work proves to be more expensive than was estimated does not entitle the builder, in the absence of fraud or mistake, to any allowance beyond the contract price." This court has followed the same general principles as to contracts generally. Wilson & Co., Inc. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N. W. 2d 657. Applicable cases from other jurisdictions are: State Highway Dept. v. MacDougald Constr. Co., 102 Ga. App. 254, 115 S. E. 2d 863. That was a case where test borings were made by the highway department and the contractor relied thereon. The contract contained a provision stating the data was not guaranteed. See, also, Gillespie Land & Irr. Co. v. Hamilton, 43 Ariz. 102, 29 P. 2d 158; Bates & Rogers Constr. Co. v. United States, 56 Ct. Cl. 49; Leary v. City of Watervliet, 222 N. Y. 337, 118 N. E. 849.

Insofar as there is conflicting evidence as to the quality of material in Pit No. 1 and as to the cause of the problems of the plaintiffs in processing the material in that pit, we take into consideration that the trial court seems to have decided these issues adversely to the plaintiffs we apply the following principles. 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 will not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most

favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Parsons Constr. Co. v. State, 180 Neb. 839, 146 N. W. 2d 211.

The next question we consider is whether the contract documents contain a representation by the State that the material in the pits contain sufficient material to complete the embankment in accordance with the specifications. The trial court made no finding as to whether there was an actual deficiency, but the evidence would support a finding that there was.

There is in the contract no express representation that the quantities in the local material source pits would be sufficient to complete the embankments, but the plaintiffs' argument apparently is that there is an implied representation. In that respect we find the contract somewhat ambiguous. As already noted, certain provisions of the contract call for the contractor to furnish the material and except for the two pits required to be used he must pay for the material used from the designated pits. The ambiguity arises from certain provisions of Article 6.02. It says: "2. When material deposits are not designated in the plans or special provisions, the contractor shall provide material conforming to the specified requirements." One might imply from the last provision that it is only where sources are not designated that the contractor must locate and supply (as distinguished from "pay for," which, except for "free" material he must do in any event) the required material. This provision taken together with the language of provision 5 of Article 6.02 which provides that where the engineer designates a change in sources because of "depletion of the material" the contractor will be paid for "the work of moving from one source to another and any additional stripping or hauling of the material," might possibly lead to the conclusion of a representation as to the sufficiency of quantities. A

contract is ambiguous when, considered as a whole, it is capable of being understood in more senses than one. 17A C. J. S., Contracts, § 294(b) (2), p. 34.

In this light we apply the following principles. "Where a contract is ambiguous, the court must determine the parties' intent; and an ambiguity must be resolved so as to give effect to that intent." 17A C. J. S., Contracts, § 295(f), p. 65. See, also, 1 Corbin on Contracts, § 95, p. 397. The interpretation given a contract by the parties themselves while engaged in their performance of it is one of the best indications of their true intent and should be given great, if not controlling, influence, and the court should ordinarily enforce such construction. Enterprise Co., Inc. v. Nettleton Business College, 186 Neb. 183, 181 N. W. 2d 846; McLeod v. Crawford, 176 Neb. 513, 126 N. W. 2d 663; Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497; Restatement, Contracts, § 235(c), p. 319; 17 Am. Jur. 2d, Contracts, § 274, p. 686; 17A C. J. S., Contracts, § 325(2), p. 246. "Where evidence relating to ambiguities and contradictory provisions in a written contract is conflicting, the interpretation to be given the contract is for the jury." Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562. In this case where a jury was waived the question was for the trial judge and with the same effect as a jury verdict.

The record establishes that in addition to the material from the designated pits the plaintiffs obtained material from the following pits: Krychek (mentioned earlier), Northwest Engineering, Stenger, No. 14, and from an unidentified pit in the river bed.

On April 26, 1965, Stoltenberg in writing requested permission to use pit No. 14, stating: "We have made an agreement with the landowner." The Department of Roads approved the request on April 28, 1965, stating as a condition: ". . . you will pay all royalty costs and that the use of this material will result in no additional costs to the State." On April 29, 1965, he asked for per-

mission to use the Northwest Engineering pit. Permission was given on April 30, 1965, on the same condition. On April 7, 1965, in response to both a verbal and written request the Department of Roads gave permission in writing to Knight to use the Krychek pit upon the same conditions. On June 11, 1965, Knight in writing requested permission to use material from the stream bed "at no extra cost to the State of Nebr., and will provide for the access to this material." Permission was given. On October 20, 1965, permission was given to use the Stenger pit under similar conditions.

The contract itself and the circumstances surrounding its execution are pertinent. The contract makes a representation of the *maximum* cubic yardage available in the designated pits. It says this is the most you can get out of them and except for Pits Nos. 1 and 20A there is no representation of the least amount available. Plaintiffs and the State were both aware that other material was available in the vicinity. All parties knew that a yard of material compacted and measured in the embankment together with waste would require substantially more than a yard of material measured in the pit. This factor varies, but it is 1.3 or more apparently. The plans and specifications make no representation of this factor. The plaintiffs were experienced grading contractors and were as capable of making a determination of the quantities of material required in place to complete the contract as was the State.

The finding of the court that the plaintiffs understood that the contract made no warranty as to quantities is justified by the evidence.

The above holdings are determinative and it is not necessary to consider other assignments in connection with the rejection of evidence offered by the plaintiffs. The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF NORRIS SCHOEN, FAIRBURY, NEBRASKA.
NORRIS SCHOEN, APPELLEE, V. AMERICAN COMMUNICATION COMPANY, INC., APPELLANT.
199 N. W. 2d 716

Filed August 4, 1972. No. 38382.

Public Service Commissions: Words and Phrases: Telecommunications. In statutory provisions for a person to obtain telephone service furnished in the exchange service area adjacent to his residence or place of operation, such phrases as "reasonably adequate service," "duplication of facilities," "public interest," and "community of interest in the general territory" acquire new meaning limited to the context. Definition must evolve, case by case.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and David R. Parker, for appellant.

Norris Schoen, pro se.

O'Hanlon & Martin, for amici curiae.

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

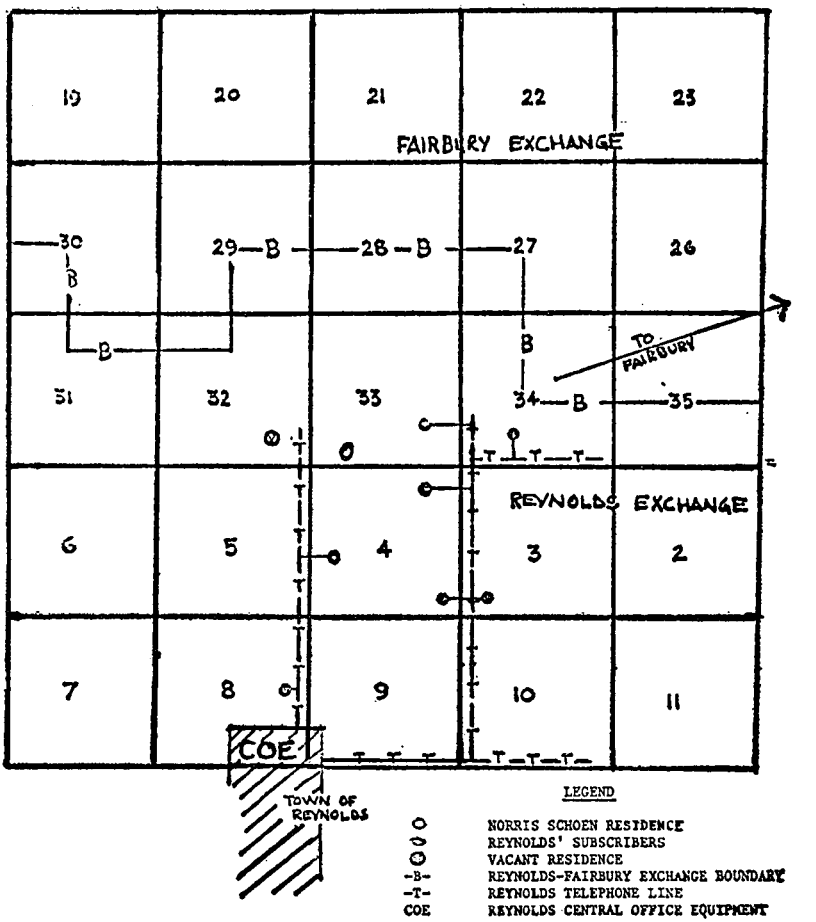
SMITH, J.

Norris Schoen resided in the telephone service area of the Reynolds exchange of American Communication Company, Inc. He applied to the Nebraska State Railway Commission for service from the Fairbury exchange of Lincoln Telephone and Telegraph Company. A common boundary separated the two service areas.

The commission, dividing 3-2, granted the application subject to reimbursement of American for loss of investment and to payment of construction costs of Lincoln. American appeals. It attacks (1) commission findings on issues relating to duplicate facilities, community of interest, and public interest, and (2) authority of the commission to extend the certificate of public

convenience and necessity without an application by Lincoln.

The area in question appears on the following map:



This rural area is sparsely populated, and growth is not anticipated in the foreseeable future. According to the 1970 census, the population of Fairbury, a county seat, was 5,265. The Reynolds exchange comprises 82 stations, one-half of which are rural.

Toll lines of Lincoln extend along the north-south road adjoining Schoen's residence. Providing the requested service would entail construction of separate circuitry on the poles northward 1½ miles to the nearest subscriber of Lincoln. The new circuitry would extend Lincoln's service area to a point only 2 miles away from the base rate area of American. Integrated companies of which American is a member operate 100 exchanges. Their service usually extends more than 2 miles from the community site of the central office equipment.

The investment of American in Nebraska averages between $350 and $400 a station. The properties are mortgaged to the United States. The president of American testified that loss of one potential station would not affect the company adversely. Thought of a trend in that direction, however, perturbed him.

Schoen has refused telephone service from American and its predecessors since he moved to his present home in 1957. At the hearing he lodged only one complaint: The exchange rate on calls from the Reynolds service area to Fairbury was $.20. Business acquaintances, children's schools, family friends, and church are all located at Fairbury. He and his family have no interest in the Reynolds service area outside his farm of 160 acres. The great majority of residents in the area possess a community of interest in Reynolds.

Schoen and American alone appeared at the hearing, although the commission had notified Lincoln. Schoen has not appeared on appeal, and no one has filed a brief in support of his position.

Powers and duties of the commission include regulation of rates, service, and general control of common carriers as the Legislature may provide. In the absence of specific legislation, however, the commission is to exercise the powers and perform the duties. Art. IV, § 20, Constitution of Nebraska.

Entry or extension of a public utility in intrastate telephone business in Nebraska under legislation en-

acted in 1963 must be preceded by (1) an application from the utility to the commission, (2) notification and hearing, (3) findings relating to lack of "reasonably adequate telephone service," (4) agreement among subscribers and interested telephone companies, (5) absence of duplication of facilities, and (6) existence of public interest or interest of the party who desires service. See, § 75-604, R. R. S. 1943; Sherdon v. American Communication Co., 178 Neb. 454, 134 N. W. 2d 42 (1965).

Since 1969 any person may apply to the commission for telephone service furnished in the exchange service area adjacent to his residence or place of operation. Grant of the application is subject to proof of facts and to conditions as follows: (1) Applicant is not receiving, and within a reasonable time will not receive, reasonably adequate exchange service from the company that is serving his residence. (2) The grant is economically sound and will not create a duplication of facilities or impair the capability of the company to serve its remaining subscribers. (3) The community of interest in the general territory is such that the commission should grant the application. (4) Applicant will pay construction and other costs and fair rates. (5) Applicant will reimburse the company for any necessary loss of investment in existing property as determined by the commission. See §§ 75-613 and 75-614, R. R. S. 1943.

Schoen did not allege manipulation of the exchange rate of $.20. See, generally, Fulda, "Telephone Regulation in Texas; Should Regulation by Cities Be Replaced by a State Commission?" 45 Tex. L. Rev. 611 at 623 (1967); Trebing, "Common Carrier Regulation - The Silent Crises," 34 Law & Contemp. Prob. 299 at 301, n. 1 (1969). Indeed he admitted the reasonableness of the rate. From his viewpoint and to him alone the charge would be exorbitant.

It is possible to construe the statute of 1969 to provide a new remedy but otherwise to maintain the status

quo. We think the statute introduces a new concept. An applicant may prevail without proving inadequacy of service or unfairness of rates in the tradition of public utility law. The concept that such relief furthers the public interest is new but not startling. See Trebing, op. cit. at 302 and 310. Such phrases as "reasonably adequate service," "duplication of facilities," "public interest," and "community of interest in the general territory" acquire a new meaning limited to the context of §§ 75-613 and 75-614, R. R. S. 1943. Definition must evolve, case by case.

The small independent companies worry that affirmance here will signal a trend toward erosion of their service areas. The argument is wide of the mark. We decline to conjecture future legislation or action of the commission as well as the impact of the technological revolution in communications. See, generally, Trebing, op. cit. at 307-310; Irwin, "The Communication Industry and the Policy of Competition," 14 Buffalo L. Rev. 256 (1964-65); Havighurst, "Foreword," 34 Law & Contemp. Prob. 203 (1969); Barrow and Manelli, "Communications Technology - A Forecast of Change," 34 Law & Contemp. Prob. 205 (1969); Werner, "A Lawyer Looks at Our Communications Policy," 11 A. B. A. Jurimetrics J. 81 (1970).

The argument that Lincoln failed to apply for a certificate overlooks the statutory provisions and several circumstances. Lincoln is not directly or indirectly an invader. After notification of hearing it opted not to appear. Lincoln is capable of protecting its own interests without the assistance of a competitor.

The order is affirmed.

AFFIRMED.

NEBRASKA PANHANDLE COMMUNITY ACTION AGENCY, INC., APPELLEE, V. MARTIN DOUGLAS STRANGE, APPELLANT.
NEBRASKA PANHANDLE COMMUNITY ACTION AGENCY, INC., APPELLEE, V. SIDNEY GRANT CURTRIGHT, APPELLANT.
NEBRASKA PANHANDLE COMMUNITY ACTION AGENCY, INC., APPELLEE, V. RAMON J. PEREZ, APPELLANT.

200 N. W. 2d 23

Filed August 4, 1972. Nos. 38408, 38409, 38410.

1. **Contracts: Master and Servant.** If a condition of an obligor's duty is that he be satisfied with the obligee's performance, an interpretation is preferred under which the condition occurs, provided a reasonable man in the position of the obligor would be satisfied and such a test is practicable.
2. ———: ———. Present a condition in employment contract that obligor be satisfied with obligee's performance, if the agreement leaves no doubt that honest satisfaction and no more is meant, the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied.
3. ———: ———. Where a condition of an obligor's duty is that he be satisfied with the obligee's performance, the mere statement of the obligor that he is not satisfied is not conclusive.
4. **Corporations: Master and Servant: Appeal and Error.** Under the Nebraska Nonprofit Corporation Act, the Economic Opportunity Act of 1964, as amended, and the administrative regulations, unless the particular facts require it, we will not review the validity of resolutions in which the board of directors of corporate administrator of programs under the Economic Opportunity Act of 1964, as amended, terminate its employees.

Appeals from the district court for Scotts Bluff County: HUGH STUART, Judge. Affirmed.

Atkins, Ferguson, Nichols & Hahn, for appellants.

Lovell, Raymond & Hippe, for appellee.

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

SMITH, J.

The district court on plaintiff's petition adjudged that plaintiff had terminated employment of defend-

ants. It also dismissed the claim of each defendant for reinstatement and recovery of damages. Defendants appeal.

Contentions are: (1) Plaintiff breached its contract to employ defendant Perez; and (2) the resolutions of the board of directors of plaintiff discharging defendants Curtright and Strange were also void for insufficiency of number of directors, conflict of interest of a voting director, lack of notification of meetings, lack of a quorum, and violation of the Enonomic Opportunity Act of 1964, as amended. No defendant asserts a violation of a constitutional right, a statutory civil right, or a right of a poor person to employment by plaintiff under the Act.

Plaintiff was organized as a nonstock nonprofit corporation under sections 21-1901 to 21-1991, R. R. S. 1943, which conformed to the A.B.A. Model Nonprofit Corporation Act (1964). Its principal purpose was to administer programs under the Economic Opportunity Act of 1964, including subsequent amendments.

Resolutions of the board of directors in March 1971 terminated the employment of defendant Curtright as director of health and nutrition and of Perez as general manager. In April the acting general manager terminated the employment of defendant Strange as planner-trainer. Curtright and Strange had been employed under oral agreements terminable at will. Plaintiff had employed Perez in a written agreement for a term of 1 year from November 30, 1970. Under the agreement his employment would terminate should his performance not be to the satisfaction of the board of directors, which was to be the sole judge.

If a condition of an obligor's duty is that he be satisfied with the obligee's performance, an interpretation is preferred under which the condition occurs, provided a reasonable man in the position of the obligor would be satisfied and such a test is practicable. If the agreement leaves no doubt that honest satisfaction and no

more is meant, the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied. The mere statement of the obligor that he is not satisfied is not conclusive. Restatement 2d, Contracts, Tent. Dr. 7, § 254 (1972); cf. Thurman v. City of Omaha, 64 Neb. 490, 90 N. W. 253 (1902); quaere: Nelson v. Turner, 125 Neb. 603, 251 N. W. 172 (1933).

A condition of plaintiff's duty plainly was honest satisfaction and no more. Such a question ordinarily is one of fact. See Nelson v. Turner, *supra*. The district court found against Perez. The finding was correct. For reasons to be given, the resolution terminating the employment of Perez is not vulnerable to his attack.

In 1970 the Economic Opportunity Act of 1964, as amended, declared these purposes: (1) The strengthening of community capabilities to eliminate poverty; (2) the better organization of services; (3) the greater use, subject to adequate evaluation, of new types of services and innovative approaches in attacking causes of poverty; (4) the maximum feasible participation of the poor; and (5) the enlisting of services from other groups. See 42 U. S. C. § 2781 (1970).

Plaintiff was a community action agency within the definition of the Act which provided as follows: A board consisting of not more than 51 members was to govern the agency. One-third were to be public officials, and not more than one-third were to be members of major groups in the community. Democratic selection procedures were designed to assure that they would be representatives of the poor in the area to be served. The board was to possess power to appoint persons to senior staff positions and to determine major personnel, fiscal, and program policies. Congress directed it to establish specific standards to assure that employees would be promoted under impartial procedures calculated to improve agency performance and effectiveness. Congress also declared a policy of resident employment. See, 42 U. S. C. §§ 2781, 2790, 2791 (b), (e), and (f) (1), (2),

and (3), 2795 (b) (4), 2796 (a), and 2810 (1970).

Congress required the Director of the Office of Economic Opportunity to prescribe rules for (1) schedule and notification of meetings, (2) quorums that were to be not less than 50 percent of the total membership, (3) representative groups of the poor to petition for adequate representation, and (4) simplified requirements for smaller agencies in rural areas. See 42 U. S. C. §§ 2791 (d) and 2796 (b) (1970).

Regulations promulgated by the Director established procedures for hearing of grievances and for withdrawal of assistance. See 45 C. F. R. §§ 1060.1 to 1067.1-11 (Jan. 1, 1971).

Plaintiff and similar community action agencies were new entities. They differed from other kinds of corporations, for they possessed attributes of political subdivisions. Some authors have predicted that future generations would consider these agencies precursors of the restructuring of local government. The agencies have been analyzed, approved, and criticized. See, Everett, "Foreword," 31 Law & Contemp. Prob. 1 (1966); Faux, "Politics and Bureaucracy in Community - Controlled Economic Development," 36 Law & Contemp. Prob. 277 (1971); Ginsbury and Shiffman, "Manpower and Training Problems in Combating Poverty," 31 Law & Contemp. Prob. 159 (1966); Kotler, "The Politics of Community Economic Development," 36 Law & Contemp. Prob. 3 (1971); Leach, "The Federal Role in the War on Poverty Program," 31 Law & Contemp. Prob. 18 (1966); March, "Coordination of the War on Poverty," 31 Law & Contemp. Prob. 114 (1966); Oxendine and Puryear, "Profit Motivation and Management Assistance in Community Economic Development," 36 Law & Contemp. Prob. 136 (1971); Perry, "National Policy and the Community Development Corporation," 36 Law & Contemp. Prob. 297 (1971); Sanford, "Poverty's Challenge to the States," 31 Law & Contemp. Prob. 77 (1966); Sturdivant, "Community Economic Development," 36

Law & Contemp. Prob. 35 (1971); Note, 83 Harv. L. Rev. 1558 (1970); Note, 75 Yale L. J. 599 (1966).

The hybrid nature of plaintiff cautions us against a mechanical application of common law applicable to another kind of corporation. Cf. Oleck, "Non-Profit Types, Uses, and Abuses: 1970," 19 Clev. St. L. Rev. 207 (1970). No statutory provision or administrative regulation indicates to us that defendants were beneficiaries entitled to tenure without contract. Provisions relating to structure and operation of plaintiff attempted to prevent discrimination against the poor. Congress balanced interest in innovation and local control against costs of loose structure. If plaintiff violated the provisions, the violations afforded defendants no remedy. Under the particular facts, the statutes, and the regulations, we will not review the validity of the resolutions of the board of directors of plaintiff.

The judgments are affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

TONY ABOOD ET AL., APPELLANTS AND CROSS-APPELLEES, V. EMMA JOHNSON, APPELLEE AND CROSS-APPELLANT.

200 N. W. 2d 20

Filed August 4, 1972. No. 38414.

1. **Boundaries: Adverse Possession.** When a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.
2. **Limitations of Actions: Adverse Possession.** After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period.

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

Gary L. Hogg, for appellants.

Knapp, Tarrell, State & Yeagley, for appellee.

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

MCCOWN, J.

This is a boundary line dispute between adjoining landowners. The court found generally in favor of the plaintiffs, fixed the boundary line, and awarded damages to the plaintiffs for a fence destroyed by the defendant. The plaintiffs have appealed contending that the boundary line fixed by the court did not include all the land enclosed by the fence. Defendant's cross-appeal contends that the line should be the lot line.

Plaintiffs were the owners of Lot 6, and defendant was the owner of Lot 7, both located in Section 12, Township 8, Range 16, Buffalo County, Nebraska. The quarter-section line running north and south in Section 12 was the lot line between the two lots. Lot 6 was east of the line and Lot 7 was west of it. The Platte River formed the north boundary of both properties and a county road formed the south boundary. The distance from north to south was approximately 1,500 feet. The plaintiffs first acquired an interest in Lot 6 in 1926, and became the sole owners in 1953. Defendant acquired Lot 7 in 1947.

The allegations and evidence of the plaintiffs were that a boundary line fence had been in existence for at least 50 years. It extended the entire distance of the lot line but was located some distance west of it. Plaintiffs' evidence fixed the location of the boundary line fence 61 feet west of the lot line at the south, 49.2 feet west of the line at a point near the center of the properties, and 28 feet west of the line at the north end of the properties.

The defendant contends that the correct boundary was the lot line; that there was no fence which was a boundary line fence; and that any use which plaintiffs had made of Lot 7 was with permission. Defendant has cross-appealed from that portion of the decree which fixes any part of the boundary line at any point other than the platted lot line.

Evidence convincingly established the existence of a fence between the two properties for more than 50 years. The fence was located at a point west of the quarter-section lot line but the exact distance west of the line at particular locations in prior years was not surveyed or measured. The evidence was undisputed that the plaintiffs had dug and established an irrigation well approximately 40 feet west of the lot line on the south end of the properties and had used it continuously since 1957. The evidence was also undisputed that the plaintiffs had planted and cultivated crops on much of the south half of the disputed area. The evidence was convincing that plaintiffs had built and maintained a silo or ensilage bed at a point some 700 feet north of the south line of the properties. The west edge of the ensilage bed was 49.2 feet west of the lot line. The evidence is undisputed that in 1967, the plaintiffs and defendant jointly removed approximately 400 feet of fence at the north end of the property to permit gravel operations to continue moving easterly along the south side of the Platte River and from defendant's to plaintiffs' property. In April of 1971, the defendant used a bulldozer and destroyed the fence on the remainder of the property. At the trial, the evidence established that there were some broken fence posts at the south edge of the property 61 feet west of the lot line. There was a fence post on the west side of the ensilage bed approximately 700 feet north of the south line and 49.2 feet west of the lot line. There was a broken concrete fence post some 400 feet further north. A line connecting these three specific locations and extended north for

the remaining distance of approximately 400 feet ends 28 feet west of the lot line at the north border. Plaintiffs' evidence was that the fence had been located on that line. There is no evidence that a fence was ever located on the lot line at any point.

The court found generally in favor of the plaintiffs, fixed the boundary line, and directed the preparation of a survey accordingly. The boundary fixed by the court commenced 43.7 feet west of the platted lot line on the south, rather than 61 feet as shown by the plaintiffs' evidence; the next point was some 740 feet north, and at that point the line fixed by the court and the line established by plaintiffs' evidence were identical, both being 49.2 feet west of the lot line. From that point, the boundary fixed by the court ran generally north but toward the east where it joined the lot line at a point some 400 feet further north. The boundary then continued to the north end of the properties on the quarter-section lot line. The court also awarded damages to the plaintiffs for the fence destroyed by the defendant.

A thorough review of the record confirms the court's general findings in favor of the plaintiffs. The boundary line fixed by the court, however, does not fully conform to the evidence. The trial court did not indicate the basis upon which the boundary was fixed, nor make specific explanatory findings. The court determined that the dividing line on the north 400 feet of the property should be the quarter-section lot line rather than any fence line. Comments in the record indicate that determination was made because the plaintiffs and defendant had jointly removed the fence in that area for the sole purpose of removing gravel from both properties in 1967.

We believe this case is controlled by McCain v. Cook, 184 Neb. 147, 165 N. W. 2d 734. It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory

period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. See, also, Ohme v. Thomas, 134 Neb. 727, 279 N. W. 480.

"After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. It cannot be lost by a mere abandonment, or by a cessation of occupancy, or by an expression of willingness to vacate the land, or by the acknowledgment or recognition of title in another, or by subsequent legislation, or by survey." McCain v. Cook, *supra.*

Under the evidence here, the plaintiffs had acquired title to the property long before 1967, either by boundary line acquiescence or adverse possession, or both. Plaintiffs' title could be divested by nothing short of a validly executed deed, by adverse possession, or by other legal means not pertinent here.

The county surveyor who testified on behalf of both parties also prepared exhibit 57, describing the boundary fixed by the court. The surveyor also prepared a survey reflecting the fence line as established by plaintiffs' evidence. This survey was exhibit 50, but it was not admitted into evidence because a copy of it had not been furnished to the defendant within the time specified in the pretrial order. The surveyor did testify as to the location of the various points used as the basis of that survey and that he had observed the fence posts at the points shown. Exhibit 50 designates the line on which the dividing line fence was located in reference to the north-south quarter-section line. Exhibit 50 may not be complete insofar as a legal survey description of the property line is concerned, but subject to any such technical completion, it designates the boundary line established by the plaintiffs' evidence.

The decree of the district court was generally correct

but it should be modified by substituting the division line shown in exhibit 50 for the line shown in exhibit 57 and described in paragraph 2 of the journal entry. As so modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

SPENCER, J., participating on briefs.

STATE OF NEBRASKA EX REL. HARRY P. ANDERSEN ET AL., APPELLANTS, V. EUGENE A. LEAHY ET AL., APPELLEES.
199 N. W. 2d 713

Filed August 4, 1972. No. 38433.

1. **Municipal Corporations: Annexation: Constitutional Law.** A municipal corporation may not, without the sanction of the state by constitutional provision or legislative enactment, annex territory to its corporate area or change its boundaries.
2. **Municipal Corporations: Initiative and Referendum: Ordinances.** An ordinance proposed by the electors of a city under the initiative law must constitute such legislation as the city council or the legislative body of the city has the power to enact under the delegated powers granted and defined by the Legislature.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Warren S. Zweiback and Mark L. Laughlin, for appellants.

Herbert M. Fitle, Frederick A. Brown, and Seymour L. Smith, for appellees.

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

WHITE, C. J.

This is a mandamus action. The essential question is whether the ordinance annexing the City of Millard to Omaha may be attacked and repealed by a vote

of the electors of Omaha on an initiative petition. The district court denied relief and we affirm.

The background history of this litigation is as follows. On December 5, 1967, the city council of Omaha passed ordinance No. 24496, annexing Millard. This ordinance, by its terms, became effective 16 days after passage, or on December 21, 1967. It was attacked by suit in district court, judgment being against Millard. This court affirmed June 5, 1970. City of Millard v. City of Omaha, 185 Neb. 617, 177 N. W. 2d 576. An appeal to the United States Supreme Court was rejected March 8, 1971 (28 L. Ed. 2d 234). Motion for rehearing was overruled April 19, 1971 (29 L. Ed. 2d 664). On December 13, 1967, a temporary injunction was allowed, containing reciprocal restraints. It was allowed by agreement of the parties, and had no provisions preventing the circulation of a referendum petition during the statutory 15 days allowed therefor.

On May 3, 1971, the petitions in suit were filed with the demand that the city clerk examine the petitions to ascertain the number of qualified electors signing same; and that if the number of signatures were sufficient the council proceed to repeal ordinance No. 24496, or submit the question of its repeal to the electors of Omaha, as it exists, with Millard annexed.

In holding the Millard annexation valid, this court stated the basic law applicable, which is the law of this case, as follows: "'* * * 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, unre-*

strained by any provision of the Constitution of the United States.' This language was reaffirmed in Sailors v. Board of Education, 387 U. S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650." (Emphasis ours.) City of Millard v. City of Omaha, *supra.*

Therein we also said: "The protection of such persons and property is a matter of state concern and in fulfillment of its duties in this respect, the state must fix the rules and regulations pertaining to annexation procedures. * * *

"Municipal corporations are legislative creations and as such, subject to dissolution by legislative action. See Burger v. City of Beatrice, 181 Neb. 213, 147 N. W. 2d 784."

Under section 14-117, R. R. S. 1943 (metropolitan cities annexation statute), the former territory of the City of Millard became annexed to and a part of Omaha on or about December 21, 1967. The record shows extensive assumptions of obligation by Omaha of governmental powers and responsibilities including police, health, and fire protection duties and the merging of fiscal and tax authority.

It is conceded that no referendum petition was filed as prescribed by section 14-211, R. R. S. 1943, and therefore it appears under the express terms of that statute that no action was taken to delay the effectiveness of the annexation ordinance.

The petition herein was filed under section 14-210, R. R. S. 1943, relating to initiative petitions which provides in pertinent part: "The right to enact ordinances for any metropolitan city is hereby granted to the qualified electors of such city, but such grant is made upon the following conditions and in addition to the right herein granted to the council to legislate: * * *."

Extensive argument is made as to whether an initiative process may be used to repeal an ordinance or statute. It appears that it may be so used. See, Klosterman v. Marsh, 180 Neb. 506, 143 N. W. 2d 744; 82 C. J. S., Stat-

utes, § 120, p. 199; Annotation, 33 A. L. R. 2d 1118.

We do not reach that question in resolving the issue in this case. It appears conclusively from what we have said that Millard became annexed and incorporated into the City of Omaha on December 21, 1967. It has been a part of Omaha, Nebraska, since then, and its residents legal voters and electors of that city as the petitions relied upon by relators demonstrate. So the question here becomes whether the initiative process may be used to detach or de-annex that portion of Omaha which was Millard prior to the time the annexation ordinance went into effect.

There is no doubt that the detachment of territory from a municipal corporation, like annexation, is a matter of statewide concern, and not one of local or municipal concern.

In Village of Niobrara v. Tichy, 158 Neb. 517, 63 N. W. 2d 867, this court said: "A municipal corporation may not, without the sanction of the state by constitutional provision or legislative enactment, annex territory to its corporate area *or change its boundaries.*" (Emphasis ours.)

In MacGowan v. Village of Gibbon, 94 Neb. 772, 144 N. W. 808, it was held: "The power to change lawfully established boundaries of a municipality and to define the terms on which territory may be detached therefrom is legislative." See, also, 2 McQuillin (1969 Rev. Ed.), Municipal Corporations, § 724, p. 400.

The Legislature, in delegating this power, specifically did not grant power to cities of the metropolitan class (Omaha) to detach or contract its boundaries. It only grants power to extend (annex) its boundaries. A little reflection on the chaotic practical effects of permitting whimsical or ill-considered detachment or de-annexation reveals the strong policy considerations for such a denial by the Legislature. We point out that section 17-414, R. R. S. 1943, does permit detachment to cities of the second class and villages, an obviously different situ-

ation. Neither did the original metropolitan cities act, enacted in 1921, now sections 14-117 to 14-125, R. R. S. 1943, or any subsequent statute, permit such detachment or contraction of Omaha's boundaries.

This being true, we reach the crucial holding in this case. It is that an ordinance proposed by the electors of a city under the initiative law must constitute such legislation as the city council or the legislative body of the city has the power to enact under the delegated powers granted and defined by the state Legislature. 5 McQuillin (1969 Rev. Ed.), Municipal Corporations, § 16.54, p. 208; 42 Am. Jur. 2d, Initiative and Referendum, § 7, p. 655; Dewey v. Doxey-Layton Realty Co., 3 Utah 2d 1, 277 P. 2d 805; Gamrin v. The Mayor and Council of Englewood, 76 N. J. Super. 555, 185 A. 2d 55; Lindsley v. Dallas Consol. St. Ry. Co. (Tex. Civ. App.), 200 S. W. 207; 2 McQuillin (1969 Rev. Ed.), Municipal Corporations, § 7.24, p. 400; Newsom v. Board of Supervisors (Cal.), 261 P. 990; Village of Beachwood v. Board of Elections, 167 Ohio 369, 148 N. E. 2d 921; Pittsburgh, C., C. St. L. Ry. Co. v. City of Anderson, 176 Ind. 16, 95 N. E. 363; 62 C. J. S., Municipal Corporations, § 454, p. 872; Custer City v. Robinson, 79 S. D. 91, 108 N. W. 2d 211.

The relators' contention, at bottom, is based on the untenable premise that annexation is a matter of statewide concern, under the Legislature's direction but that detachment is a matter of local concern. Such a position flies in the face of our decisions to the contrary, is logically inconsistent, and would enable the local electorate to harass and whimsically destroy the Legislature's statewide law-making power under the Constitution.

We therefore hold that after Millard became legally annexed, the initiative process provided for under section 14-210, R. R. S. 1943, could not be invoked to detach or de-annex the territory that was formerly Millard and that the district court was correct in denying man-

damus to compel the honoring of the petitions and the placing of the issue on the ballot.

In light of our decision it is not necessary to pass on the numerous other issues extensively argued in the briefs.

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

AFFIRMED.

LEO W. CONNOT, APPELLEE, V. CHARLES BOWDEN, APPELLANT.
200 N. W. 2d 126

Filed August 8, 1972. No. 38295.

1. **Easements: Highways: Adverse Possession.** A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued.
2. **Easements: Notice: Adverse Possession.** It is well settled that a permissive use cannot ripen into a prescriptive right until 10 years after notice of the adverse claim is brought home to the landowner.
3. **Easements: Adverse Possession: Evidence.** To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Reversed and remanded with directions to dismiss.

Michael V. Smith, for appellant.

W. Gerald O'Kief, for appellee.

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

NEWTON, J.

This action was brought to establish a roadway ease-

ment across defendant's land and enjoin him from interfering in its use. The district court held a public road had been established and granted an injunction against defendant. We reverse the judgment of the district court.

Plaintiff's father is the owner of the south half of Sections 8, 9, and 10, Township 34 North, Range 26 West of the 6th P.M., in Cherry County, Nebraska, and other lands running south to the Niobrara River. Defendant is the owner of the north half of Sections 9 and 10 and the northeast quarter of Section 8. Paved Highway No. 12, completed in 1962, runs along the north edge of these sections. The disputed right-of-way runs along the east fence line of the northeast quarter of Section 8. Both the Connot and Bowden buildings are 2 miles east bordering a north-south road running between Sections 10 and 11. The respective holdings of the parties are fully fenced. There is a wire gate in the northeast corner of Section 8 and there formerly was a similar gate in the southeast corner of the northeast quarter in a fence maintained by Connot.

Plaintiff's evidence is to the effect that, prior to 1914, Section 8 was a military reservation, unfenced, open to public grazing, and crossed at will by the public, including persons living on the river bottom to the south. The land in the area was then homesteaded and fenced. Thereafter for a period of about 6 years, in the 1930's, persons living on the river sometimes entered Section 8 at the gate in the northeast corner, drove south through the Connot gate in the southeast corner, and on south across Connot land to the river. A trapper and one or two persons cutting wood on the river bottom did likewise on occasion. The length of this usage is not reflected by the record. Plaintiff claims he used the trail across defendant's land 50 to 150 times each year since 1960 and that there had for many years been a well-defined trail. Plaintiff knew of only 2 neighbors who had used the trail and that was about 30 years ago.

A man by the name of Hayes formerly owned and lived on the northeast quarter of Section 8. He had padlocked one of the gates for a considerable period of time commencing about 1940. Plaintiff's father had padlocked the gate in the southeast corner of the northeast quarter of Section 8 about 30 years ago, then removed the gate and fenced across the alleged road. An individual who lived south along the river for a short time was given a key and plaintiff says he now drives through by removing a post and letting down the fence.

Plaintiff and his father concede they often crossed from the east through their own land to reach their land 2 miles to the west and had a well-defined trail used for this purpose but insist they made use of the road, now Highway No. 12, and the trail across defendant's land. A disinterested neighbor, a Valentine high school teacher for 10 years, gave volunteer work as a neighbor to the Connots in 1967 and says in every instance he drove through the Connot land to get to the Connot westerly holdings. He was not aware that Connot ever used a trail through defendant's land. Plaintiff says the route through the Connot land is now impassable due to a washout or deepening of a creek.

Plaintiff introduced aerial photos taken in 1955. These photos fail to show any north-south road across the Connot land but do show an east-west trail. The only trail appearing on defendant's land in the northeast quarter of Section 8 is one running to the Hayes building site where it ends and does not run farther south. Pictures taken by defendant after issuance of a restraining order and recent use of the alleged trail by plaintiff do not reflect a well-defined trail, but only a mashing down of the foot-high grass. Usage of this route by plaintiff for 50 to 150 times per year over a 10-year period, as he testified, would necessarily have resulted in destruction of the grass and a well-defined roadway. Plaintiff concedes that until 1971 practically all his machinery was moved west across the Connot

land; and that prior to construction of Highway No. 12, that roadway was a very poor one. Defendant verifies this and indicates it was subject to sand blowouts.

Plaintiff further says that on occasion a coyote hunter, a trapper, and on occasion a gardener on the river bottom had entered or left across plaintiff's and defendant's lands from the road, now Highway No. 12. Defendant states that to his knowledge plaintiff had only used the alleged trail on one occasion, in 1961, when his truckers hauled hay out after asking defendant's permission.

The district court, understandably, failed to find an easement by prescription had been established but did find a public road had been established by user. This finding is of necessity based upon the more or less sporadic travel across plaintiff's and defendant's lands and is directly contradictory of the actions of the owners, specifically including the Connots. For many years plaintiff's father either padlocked his gate or fenced solidly across the road plaintiff now seeks to establish. The same was done by the former owner of defendant's land, Hayes. Obviously none of the owners recognized the establishment of a public road or the right of others to freely enter and leave. They interrupted, at will, the sporadic entry by others, and Connot, after exerting such rights of ownership, granted permission to the last resident to the south to cross his land by giving him a key. Such interruptions of public use are assertions of ownership rights, stop the running of the statute, and definitely indicate a permissive use only.

It is apparent that the land was formerly public owned, was open grazing land, was traversed at will by anyone desiring to do so, and that such use was permissive. In the year 1914 it was thrown open to homesteading, was subsequently homesteaded, and eventually fenced. The permissive crossing of the land appears to have continued. There was no road through the area. The situation appears to be similar to that

described in Burk v. Diers, 102 Neb. 721, 169 N. W. 263, wherein it is stated: "The road in controversy, if it was a road, which is disputed, was a neighborhood road. Oftentimes farmers or owners of city lots, out of mere generosity and neighborly feeling, permit a way over their land to be used, when the entire community knows that the use is permissive only, without thought of dedication or adverse user. This use ought not to deprive the owner of his property, however long continued. Such rule would be a prohibition of all neighborhood accommodations in the way of travel. * * *

"The use necessary to estop the owner from claiming his land must be such that interruption would affect private rights or public convenience. Where the public has exercised no control or dominion over the road, nor used it to such an extent as to inform the owner, exercising reasonable care for his rights, that the public is using it under claim of right, then neither implied dedication nor adverse user is shown. There is no evidence in this case that the general public has depended upon the existence of this road and will be seriously inconvenienced by the loss of it; nor have private persons made improvements in the belief that this is a road. In fact, the road is a cul-de-sac."

In the vast holdings of grazing lands in western Nebraska, many well-defined trails may be found which are accessible to all through gates provided. Entry by nonowners of the land for various purposes cannot ordinarily be deemed to be adverse. It is not under a claim of right but generally recognized as permissive in nature. In the present case, no "claim of right" was ever asserted until the incidents occurred which gave rise to this action. As stated in Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547: "In the instant case the evidence by the plaintiffs shows the original entry and use to have been permissive. The plaintiffs did not inform Bolton that they claimed a right-of-way and perpetual easement across his land. They crossed the land

on occasions to go hunting, as did others. There was no claim of right or exclusive use. The most that can be said as to their crossing the lands in question is that it was permissive only, a neighborly act on the part of the owners or tenants on the land. There was no claim of ownership on the part of plaintiffs of such a nature that they openly and forcibly asserted directly against the actual owners of the land in such a manner that the owners would be required to take affirmative action against the plaintiffs." It is well settled that a permissive use cannot ripen into a prescriptive right until 10 years after notice of the adverse claim is brought home to the landowner. See Walsh v. Walsh, 156 Neb. 867, 58 N. W. 2d 337. "A permissive use of the land of another, that is a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued. * * *

"To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription." Scoville v. Fisher, 181 Neb. 496, 149 N. W. 2d 339.

Plaintiff did not contend that a public road had been established but claimed only an easement. The record does not disclose that the public ever claimed dominion over the alleged right-of-way or exercised dominion over it. It was never worked or maintained by the public. With the establishment of the Connot fence it became a deadend or cul-de-sac. The evidence discloses that if a road ever existed it ran all the way through the lands of both parties to the Niobrara River. The actions of the Connots clearly negate their claims that either an easement or a public road was established by prescription. Their padlocking of the gate and closing of the fence definitely import a permissive use only. Both landowners have asserted dominion over the purported easement way. When their lands were fenced they

could no longer be crossed at any or all points. Entry could only be gained through the gate which defendant's predecessor in title provided as a means of entry to his improvements and home and thence south through the Connot gate.

It is conceded that Connots had access to their lands through their own property and commonly used this means of access until the recent construction of Highway No. 12 when they found it more convenient to cross defendant's land. The photographs fail to support their contention that a well-traveled easement or roadway existed. On the contrary, they verify defendant's contention that Connot used the way through his own land almost exclusively and that the lane on defendant's land ran only to the site of the old improvements and not straight south through the Connot fence. "'* * * To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence.'" Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768. See, also, Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196. The proof here is not sufficient to meet this requirement.

The language used in Gilliland v. County of Frontier, 148 Neb. 636, 28 N. W. 2d 448, is appropriate: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land." That case further stated: "The plaintiff owner acquired the land in 1916 and 1917. He fenced it in 1918 and there were gates at C and at E. Thereafter these gates were kept closed, in particular during the several months of each year when stock was kept there. The relatively few people who found occasion to use the road did so, opening and closing the gates. It was a community,

neighborly arrangement such as existed in many sections of Nebraska. From 1918 to 1945, no one protested or questioned plaintiffs' right to enclose the road and to maintain the gates."

The existing circumstances demonstrate that neither a prescriptive easement or public road has been established. The judgment of the district court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. The main issue presented by the appeal is the sufficiency of the evidence, under the applicable law, to sustain the judgment of the trial court.

Plaintiff's father testified that he purchased the south half of Section 9 in 1938, and has owned it since that time. He has been familiar with the road in question since 1934, and has always considered it a public or open road. He used it as such whenever he had occasion to do so. On occasions, the county tractor had on request dragged it in the winter. His testimony placed the road between Sections 8 and 9, going north to Highway No. 12. In addition to his own use, he gave the names of others who had used the road since the early 1930's.

Plaintiff testified to his use of the road for 50 to 150 trips annually. He gave the names of several others who have used the road since 1934. There was a gate at the highway. This action resulted when the defendant padlocked the gate after a dispute with the plaintiff and the plaintiff cut the padlock.

Martin G. Grooms testified that he was familiar with the road because he had traveled it years ago. His use of the road covered the period from 1932 into the 1950's. He knows from observation the road was used by the public for that period. He has not been in the area since the 1950's. In 1932, through 1934, he cut wood

in the canyon below this property and built a cabin there. The road at that time was well-traveled and was the only way in and out. He had never asked permission of anyone to use it, and knows of his own knowledge that it was used by the public for more than 10 years continuously as a public road. In 1933, he built a road below this one through the canyon south of Sections 8 and 9. This road then was open all the way from present Highway No. 12 to the river.

The testimony of defendant at one place on direct examination appears to corroborate plaintiff's evidence. It is as follows: "Q All right. Now, was there, at that time, when you acquired this, a road going straight south from the northeast corner of Section Eight down clear across the section, or down towards the north half of the section? A Yeh. Q There was a road there? A Yes." Defendant's testimony otherwise would seem to indicate that Highway No. 12 was an old concrete trail, rough and hilly, previous to 1961; that it had very little use; and, while there were a few trails across his land, there was no road. It was his testimony the Connots had a road across the south half of Sections 9 and 10 which they used. Except for a few occasions when he saw the plaintiff hauling hay on the area in question, he did not see the Connots using the alleged road. None of the Connots asked his permission to use the road, and he doesn't know of anyone who was prohibited from using it in the 1930's.

Defendant's brother-in-law testified there was a road but he could not give the date nor the exact location. He placed it across this area to the highway. His testimony was to the effect this road was extensively used back in the early years.

Fred R. Grooms testified he traveled the road as early as 1914. He placed the road along the section line on the west side. The road went clear down into the canyon, and it was used by folks in the canyon going north. Most of them came out over this road.

There are two aerial photographs of the area in evidence, one taken in 1939, the other taken October 17, 1955. Both indicate the presence of a road between Sections 8 and 9, as well as a trail on Section 8. Exhibit 4 is a general highway and transportation map of Cherry County as of January 1, 1937. It clearly shows a road between the section lines at the exact spot where the trial court found a public road to exist.

The plaintiff has shown open, visible, continuous, and unmolested use of the road for a period of time sufficient to acquire an easement by adverse user. In such instance, the use would be presumed to be under a claim of right. See Hopkins v. Hill (1955), 160 Neb. 29, 68 N. W. 2d 678. In that case we said: "If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied." Plaintiff's use and that of his father started before defendant acquired the north half of Sections 8 and 9.

In Pierce v. Rabe (1964), 177 Neb. 745, 131 N. W. 2d 183, we said: "The use and enjoyment which will create title by prescription to an easement are substantially the same in quality and characteristics as the adverse possession which will give title to real estate. The use and enjoyment must be adverse, under claim of right, continuous, notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, must continue for the full prescriptive period, and must be substantially identical."

In Pierce v. Rabe, *supra,* we further said: "If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it."

Passing for the moment the finding of a public road,

the evidence herein is ample to establish a prescriptive right to an easement.

While plaintiff's action was for an easement, the trial court found a public road to exist, and that the plaintiff had the right to use the same without interference by the defendant. From exhibit 4, there can be little question a public road did exist at the point involved on January 1, 1937. This was before defendant acquired his property. While the county has not maintained the road, plaintiff's evidence would indicate it has been used since that time by the plaintiff, his family, and other members of the general public.

To establish a highway by prescription, it must be shown there was use by the general public under a claim of right, adverse to the owner of the land on some particular or defined line of travel, uninterruptedly without substantial change for a period of time necessary to bar an action to recover the land. However, in this respect, it is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of travel has remained substantially unchanged for the full period, it is sufficient, even though at times to avoid encroachments, obstructions, or the like upon the road there have been slight changes in the line of travel. See State ex rel. Game, Forestation & Parks Commission v. Hull (1959), 168 Neb. 805, 97 N. W. 2d 535.

The evidence was sufficient to show the establishment of a road previous to the time the defendant acquired his property. In the Hull case, *supra*, we held that the change in the course of a road after the right of the public is established by use for the statutory period does not defeat the public right to the use of the road as previously established.

While the evidence is not as clear as I would like to have it as to the exact location of the road in question, I feel it is sufficient to sustain the finding of the trial court. The Cherry County highway transportation map

definitely indicates the road was well established at least by January 1, 1937.

I have determined the evidence was sufficient to permit the trial court to find that a public road existed along the section line dividing the northeast quarter of Section 8 and the northwest quarter of Section 9. The evidence is fairly conclusive that there had been a road in the area which was used as a thoroughfare by the public for many years previous to the acquisition of the property of the parties herein.

The trial court inspected the area in question. He had an opportunity to personally observe the manner and conduct of the witnesses in testifying; and the exhibits in evidence tend to support his finding.

The following rule enunciated in Satterfield v. Dunne (1966), 180 Neb. 274, 142 N. W. 2d 345, is particularly pertinent herein: "When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite."

From the above, it is apparent to me that the judgment entered by the district court is correct and should be affirmed.

SMITH, J., concurs with the dissenting opinion by Spencer, J.

STATE OF NEBRASKA, APPELLEE, V. LARRY LARUE CLARK, APPELLANT.
201 N. W. 2d 205

Filed October 6, 1972. No. 38286.

Criminal Law: Trial. There is no constitutional right to a separate trial. Rather, the right is statutory in origin and depends upon a showing that prejudice will result from a joint trial.

Appeal from the district court for Douglas County: C. THOMAS WHITE, Judge. Affirmed.

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

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

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

SPENCER, J.

Defendant and Ronald L. Reed were convicted of entering a bank building with the intent to steal or rob; using a firearm in the commission of a felony; and shooting with the intent to kill, wound, or maim. The conviction of Reed was affirmed on appeal. State v. Reed (1972), 188 Neb. 815, 199 N. W. 2d 707.

Defendant alleges three assignments of error: First,

the district court erred in granting the State's motion to consolidate the defendant's trial with that of his co-defendant; second, the court erred in failing to adequately instruct the jury concerning the segregation and consideration of evidence of guilt against only the defendant to whom it related; and, third, the court erred in denying defendant's motion for a directed verdict of acquittal at the conclusion of the State's case-in-chief. We affirm.

Section 29-2002(3), R. R. S. 1943, provides as follows: "The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if the offense, and the defendants, if there are more than one, could have been joined in a single indictment, information or complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint."

Defendant in this appeal is relying specifically on subsection (4) of section 29-2002, R. R. S. 1943, which provides as follows: "If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires."

Defendant made no factual showing on the record before trial which would establish sufficient facts to indicate the granting of the motion to consolidate would be erroneous. The record herein does not establish that any evidence whatsoever was given on the motion to consolidate, although the ruling came after other motions had been resolved. There were no statements or confessions given by either defendant. In essence, defendant's argument is that the joint trial was unfair as to him because much of the evidence related only to his

codefendant. This is not unusual in joint trials, and is not the type of evidence which is considered prejudicial to joinder.

There is no constitutional right to a separate trial. Rather, the right is statutory in origin and depends upon a showing that prejudice will result from a joint trial. State v. Erving (1966), 180 Neb. 824, 146 N. W. 2d 216. As stated, no such showing was made herein. Most of the cases cited by the defendant involve prejudice because of statements or confessions by a codefendant which implicate the appealing defendant. In the absence of a showing of an abuse of discretion, the ruling of the trial court upon the motion for consolidation will not be disturbed.

Defendant's second assignment of error questions the adequacy of the instruction to the jury that evidence relating to one defendant may not be considered against any other defendant. The instruction given is as follows: "Though the defendants are tried together, it is your duty to separately consider the guilt of each defendant. Evidence relating to one defendant may not be considered against any other defendant. A finding of guilt against any defendant, if such you should find, shall in no manner be considered in your determination as to any other defendant. You will not permit any defendant to be prejudiced by reason of the fact that the defendants are tried together."

Defendant requested two instructions taken from Nebraska Jury Instructions, Nos. 14.54 and 14.54a. NJI No. 14.54a is an alternative, abbreviated form of No. 14.54. The instruction given by the trial court is essentially NJI No. 14.54, which reads as follows: "Though the defendants are tried together, it is your duty to consider separately the guilt or innocence of each defendant. Each defendant is entitled to have his guilt or innocence determined from his own conduct and from the evidence which applies to him, as if he were being tried alone. Evidence relating to one defendant alone

may not be considered against the other defendants. (A finding of guilt or innocence against any defendant, if such you should find, shall in no manner be considered in your determination of the guilt or innocence of the other defendants.) You will not permit any defendant to be prejudiced by reason of the fact that the defendants are jointly charged with a criminal offense."

While the trial court could have avoided any question if he had given NJI No. 14.54 as written, we cannot say that the instruction given by the trial court is so inadequate as to be prejudicial. The jury was specifically instructed it could not consider the evidence relating only to one defendant against the other. This is the substance of NJI No. 14.54. Defendant could not have been prejudiced because the instruction given omitted one sentence of NJI No. 14.54.

The defendant's third assignment of error alleges the insufficiency of the evidence as a matter of law to establish the defendant's guilt. Three of the witnesses identified the defendant as one of the three men seen in the bank at the time of the attempted robbery. While questions were raised in the cross-examination as to the efficacy of their identifications, credibility is an issue for the jury and not the court. There was sufficient evidence to require the overruling of defendant's motion for a directed verdict and the submission of the case to the jury.

For the reasons given, the judgment herein should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. STENNIS, APELLANT.
201 N. W. 2d 117

Filed October 6, 1972. No. 38306.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

James A. Stennis, pro se.

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

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

SMITH, J.
Affirmed. See Rule 20.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. JOHNSON, APPELLANT.
201 N. W. 2d 200

Filed October 6, 1972. No. 38345.

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

Richard L. Johnson, pro se.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

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

BOSLAUGH, J.
The defendant was originally charged with burglary. The information was amended to charge grand larceny, and, upon arraignment, he pleaded not guilty. Two weeks later, he withdrew this plea and entered a guilty plea. Three months thereafter, he was allowed to with-

draw the guilty plea and again plead not guilty to the amended information.

Approximately 7 weeks later, the defendant again withdrew his plea and entered a plea of guilty. Later, he attempted to withdraw this last plea, but leave was denied and he was sentenced to 1 to 3 years' imprisonment. The presentence report is not a part of the record in this court.

Throughout the proceedings the defendant was represented by the public defender. After the appeal had been docketed in this court, the trial court allowed the public defender to withdraw because the appeal was frivolous.

The defendant claims he was not represented by adequate counsel, there was a misunderstanding as to whether he would receive probation, and the sentence was excessive. The record before us fails to substantiate any of these claims.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY COSSAART, APPELLANT.
201 N. W. 2d 203

Filed October 6, 1972. No. 38368.

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

Bauer & Galter, for appellant.

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

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

CLINTON, J.

The defendant, Jerry Cossaart, pleaded guilty to one

count of issuing an insufficient fund check and was sentenced to a term of not less than 2 years nor more than 4 years imprisonment, pursuant to section 28-1213, R. S. Supp., 1969. The sole contention on appeal is that the sentence was excessive.

The record reveals that the defendant was 41 years old. The amount of the check was $108.61. The guilty plea was entered as a result of plea bargaining, whereby the State agreed to dismiss other charges pending against the defendant. This was the defendant's sixth felony conviction. The presentence report was not introduced into evidence.

Under such circumstances there was no abuse of discretion by the trial court and the sentence here was not excessive. State v. Meloy, 188 Neb. 98, 195 N. W. 2d 173.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES HAROLD THOMPSON, APPELLANT.
201 N. W. 2d 204

Filed October 6, 1972. No. 38372.

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

James Harold Thompson, pro se.

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

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

McCOWN, J.

After a first degree murder charge was reduced as a result of a plea bargain, defendant James Harold Thompson pleaded guilty to a charge of second degree murder, and was sentenced to life imprisonment. The defendant

now contends that he understood that a sentence of 10 years to life would be imposed rather than a life sentence, and that the plea bargain was not carried out. The record abundantly demonstrates that the trial court made certain that the defendant understood the nature of the charge, the possible penalty, and the effect of his plea. See, State v. Turner, 186 Neb. 424, 183 N. W. 2d 763; State v. Cruse, 187 Neb. 331, 190 N. W. 2d 629. The plea bargain was that the first degree murder charge would be reduced to second degree with a recommendation by the State of imprisonment for life. That agreement was fully complied with in every respect. State v. Kimes, 188 Neb. 85, 195 N. W. 2d 216, is inapplicable.

The trial court made it specifically clear to the defendant that the sentence would be a life sentence "with no minimum, which would mean that the statutory minimum of 10 years would apply for certain purposes." The minimum sentence for second degree murder is 10 years. § 28-402, R. R. S. 1943. The court here did not express any minimum in the sentence. For purposes of eligibility for parole, the statutory 10-year minimum term applies. Eligibility for parole is the same as though 10 years had been expressed as the minimum of an indeterminate sentence. See, §§ 83-170(5) and 83-1,110(1), R. R. S. 1943.

There is nothing in the record to support defendant's contention that his guilty plea was induced in any sense by a reasonable misunderstanding of a plea bargain. That bargain was fully carried out.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES MCGOVERN, APPELLANT.
201 N. W. 2d 202

Filed October 6, 1972. No. 38373.

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

James McGovern, pro se.

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

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

NEWTON, J.

Defendant was convicted, on a plea of guilty, of a violation of section 28-472.04 (3), R. S. Supp., 1969. He asserts that the sentence of not less than 2 nor more than 4 years is excessive.

Neither the record of this case nor the law sustain defendant's contention. See Rule 20. See, also, State v. Koch, 188 Neb. 392, 196 N. W. 2d 910.

AFFIRMED.

ROBERT KLEIN, APPELLANT, V. TRINITY INDUSTRIES, INC., ET AL., APPELLEES.
201 N. W. 2d 200

Filed October 6, 1972. No. 38419.

Workmen's Compensation: Appeal and Error: Evidence. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

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

A. James McArthur, for appellant.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and LYNCH and MORAN, District Judges.

MORAN, District Judge.

The plaintiff recovered a workmen's compensation award in the one-judge Workmen's Compensation Court. Upon rehearing before the court sitting en banc, the award was set aside and plaintiff's petition was dismissed. On appeal to the district court the judgment of the three-judge court was affirmed. We affirm the judgment of the district court.

The plaintiff, Robert Klein, was injured in a collision while driving a truck-tractor unit of the defendant, Trinity Industries, Inc., in Klamath Falls, Oregon. Prior to the collision the plaintiff had detached the tractor from its trailer.

Plaintiff's petition was dismissed by the compensation court upon the following findings:

"* * * that the evidence in (sic) inconclusive in showing that the plaintiff's injuries occurred in an accident arising out of and in the course of his employment but rather that at the time of said accident and injuries, the plaintiff was returning to the motel where he was staying after performing a mission for purposes of his own benefit and not the benefit of his employer; that at the time of said accident and injuries and immediately prior thereto the plaintiff's conduct was such as to evidence reckless indifference to safety, which conduct contributed to said accident and injuries; that the evidence is insufficient to sustain a finding that the injuries sustained by the plaintiff on November 15, 1970, were the result of an accident arising out of and in the course of his employment by the first-named defendant, and the plaintiff's petition should therefore be dismissed."

Contrary to plaintiff's contention, the foregoing con-

stitutes findings of fact. Either the finding of intentional willful negligence or that plaintiff's injuries did not arise out of and in the course of employment is sufficient to defeat the plaintiff's appeal if there is reasonable evidence to support it. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285. We consider only the former.

There was evidence plaintiff was in at least one bar in Klamath Falls on Sunday afternoon, November 15, 1970. He staggered, stumbled, and slouched as he crossed the street from the bar to his truck-tractor. He had difficulty raising his feet to get into the cab, and he attempted to drive the vehicle from the curb while the air brakes were set. He failed to stop at the cross-walk in at least three intersections against red traffic signals, coming to an abrupt stop well into the intersection, and accelerating rapidly when the traffic lights changed to green. These signals were synchronized to permit traffic to proceed without stopping at 20 miles per hour. Plaintiff moved swiftly from one lane of traffic to another and when he entered the intersection at Spring Street protected by a signal he came to a rolling stop, accelerated, and "fishtailed" around the corner. He then proceeded down Spring Street, rapidly pulling away from a following vehicle which was proceeding at least 35 miles per hour. The speed limit in this area was 20 miles per hour. After traveling approximately 8 city blocks, plaintiff failed to stop at an intersection protected by a stop sign. He then applied his brakes leaving 173 feet of skid marks from his front wheels and 74 feet of skid marks from his rear dual wheels. The truck-tractor unit struck a concrete pillar supporting an overpass when plaintiff failed to negotiate a curve of approximately 45 degrees in the street just beyond the stop sign. The plaintiff was pinned in the cab for some time and chunks of concrete were torn from the concrete pillar as a result of the collision. The unit was a total loss. The accident occurred at approximately

9:43 p.m. It was dark enough for all other moving vehicles to have their headlights illuminated and dark enough that the occupants of an automobile following the plaintiff with its headlights illuminated were unable to determine the license number of plaintiff's vehicle when it accelerated away from the intersection and down the street prior to the collision.

Under the definitions in Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15, Moise v. Fruit Dispatch Co., 135 Neb. 684, 283 N. W. 495, and Krajeski v. Beem, 157 Neb. 586, 60 N. W. 2d 651, there was reasonable evidence to support a finding of intentional willful negligence here.

AFFIRMED.

SMITH, J., concurring.

The court correctly applies the rule relating to sufficiency of evidence, for the burden of proof of willful negligence is on the employer. See, § 48-107, R. R. S. 1943; compare Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285 (1971), with Adler v. Jerryco Motors, Inc., 187 Neb. 757, 193 N. W. 2d 757 (1972).

SAMUEL S. DIEDRICHS, APPELLEE, V. DARRELL EMPFIELD, APPELLANT.
201 N. W. 2d 254

Filed October 6, 1972. No. 38420.

Appeal and Error. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

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

Welsh & Moylan, for appellant.

Murphy, Pedersen & Piccolo, for appellee.

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

NEWTON, J.

This is an action for the recovery of attorney's fees. On the continuous failure of the defendant to comply with the order of the court for the production of records, the court entered a judgment by default on September 8, 1971. On October 4, 1971, defendant filed a motion requesting vacation of the judgment and the granting of a new trial. Notwithstanding the failure to file the motion within 10 days from the entry of judgment, the court on November 22, 1971, entered a conditional order setting aside the judgment on compliance by defendant with certain specified conditions. Defendant failed to comply but, instead, attempted to appeal, the proceedings therefore being initiated as of December 28, 1971.

Section 25-1912, R. R. S. 1943, requires that a notice of appeal be filed within 1 month of the entry of judgment or order overruling a motion for new trial. "Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed." State v. Williamsen, 183 Neb. 173, 159 N. W. 2d 206.

This court not having acquired jurisdiction, the appeal in this case must be dismissed.

APPEAL DISMISSED.

IN RE INTEREST OF WAYNE ALVIN GRANT.
WAYNE ALVIN GRANT, APPELLANT, V. GORDON M. DOESCHOT, APPELLEE.
201 N. W. 2d 252

Filed October 13, 1972. No. 38207.

1. **Appeal and Error.** If the evidence in an action reviewable de

novo on the record is so conflicting as to be irreconcilable, we consider the opportunity of the trial court to have observed the witnesses and judged their credibility.

2. **Appeal and Error: New Trial: Time.** A separate juvenile court posesses jurisdiction to hear and determine a motion for new trial on the ground of newly discovered evidence during the pendency of an appeal to the Supreme Court.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed in part, and in part reversed and remanded.

Bradford & Bloch and Richard J. Coenen, for appellant.

Donald L. Knowles and Colleen R. Buckley, for appellee.

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

SMITH, J.

A separate juvenile court adjudicated Wayne Alvin Grant a delinquent child, committing him to the custody of the Department of Public Institutions. Grant appeals. He asserts that a de novo review requires reversal of the adjudication and that the trial court erred in denying him a hearing on his motion for new trial, the motion alleging newly discovered evidence. The court ruled that pendency of the appeal to this court ousted its jurisdiction.

The petition charged that Grant maliciously stabbed John Winterstein with intent to kill, wound, or maim the latter. Such conduct was proscribed in the criminal code. See § 28-410, R. R. S. 1943.

Winterstein and Grant, who were strangers, participated in a melee on March 2, 1971, in an Omaha parking lot where 30 to 50 teenagers were present. While Winterstein was attempting to separate two boys, someone behind him wrapped one arm around his neck and stabbed him with a hunting knife in the back. Grant was positively identified as the assailant by two witnesses. Winterstein did not know who stabbed him.

Other witnesses testified to close observation of Grant and the absence of any knife in his possession. They did not identify the assailant, although there was testimony that another teenager clad in a jacket like that of Grant was carrying a knife. Grant denied possession of a knife, but he conceded he had struck someone in the back with a hollow steel pipe in defense of a third person.

The parties concur that we are to review the adjudication de novo on the record and to reach an independent conclusion on disputed issues of fact. See §§ 25-1925, R. R. S. 1943, 43-238, R. S. Supp., 1972. If the evidence is so conflicting as to be irreconcilable, we consider the opportunity of the trial court to have observed the witnesses and judged their credibility. First Trust Co. v. Airedale Ranch & Cattle Co., 136 Neb. 521, 286 N. W. 766 (1939).

Application of the foregoing standards is complicated by the burden of persuasion. The record reflects no conclusion of law of the trial court on the subject. Since 1970 due process has required proof beyond a reasonable doubt during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. In re Winship, 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The trial court adjudicated the delinquency of Grant in May 1971. The statute then provided for proof by a preponderance of evidence. See former § 43-206.03, R. R. S. 1943; Laws 1963, c. 252, § 4, p. 770. The Legislature by amendment prescribed proof beyond a reasonable doubt, but the amendment became effective on August 27, 1971, while Grant's appeal was pending. See § 43-206.03, R. S. Supp., 1971.

At the trial Grant neither raised a constitutional objection nor requested a conclusion of law on the burden of persuasion. No such issue is raised on appeal. We conclude that the evidence is sufficient to sustain the adjudication beyond a reasonable doubt and that the

opportunity of the trial court to observe the witnesses tips the scales in favor of affirmance. Our conclusion pitched against a different background might not withstand logical analysis, but further examination would be idle.

A separate juvenile court possesses jurisdiction to hear and determine a motion for new trial on the ground of newly discovered evidence during the pendency of an appeal to the Supreme Court. See, Finnern v. Bruner, 170 Neb. 170, 101 N. W. 2d 905 (1960); cf. Smith v. State, 167 Neb. 492, 93 N. W. 2d 499 (1958).

The refusal of the trial court to hear the motion of February 8, 1972, for new trial on the ground of newly discovered evidence was erroneous. The order refusing to hear the motion is reversed and the cause remanded for further proceedings in accordance with this opinion. The adjudication and commitment are affirmed subject to action on the motion. Costs on appeal are taxed to Grant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. BARON WALKER, APPELLANT.
201 N. W. 2d 250

Filed October 13, 1972. No. 38386.

Appeal from the district court for Kearney County: FRED R. IRONS, Judge. Affirmed.

Baron Walker, pro se.

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

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

PER CURIAM.

The defendant was charged with escape from legal custody. He was advised of all his constitutional rights. The court offered the assistance of counsel at least six times and at least six times the defendant refused, in words clearly indicating that he was irritated with the advice, for example: "Damn, I told you * * * I don't want one."

He pleaded guilty and was sentenced to 5 to 7 years in the Nebraska Penal and Correctional Complex. He responded, "Hell, no," when the court asked him before sentencing if he had any regrets or remorse for the crimes he had committed. At the conclusion of the proceedings, he threatened the trial judge, and spit in the direction of the bench, the court, and the court reporter.

The only issue the defendant raises on this appeal is that his sentence was excessive. Section 28-736, R. R. S. 1943, provides a penalty of not less than 1 nor more than 10 years for escape from legal custody.

The sentence of 5 to 7 years in the Nebraska Penal and Correctional Complex is not excessive. The judgment is affirmed.

AFFIRMED.

SMITH, J., dubitante.

It is not clear whether defendant, Baron Walker, an indigent, desires counsel to prosecute his appeal. His waivers of the right to assistance of counsel in district court occurred prior to pronouncement of sentence. In district court no one mentioned judicial review. Walker appeals pro se in forma pauperis without requesting counsel.

Several possibilities exist: (1) Waiver of the right on appeal occurred in district court, but the record fails to reflect it; (2) a waiver in district court automatically carries through an appeal; (3) Walker's proceeding on appeal constitutes a constructive waiver; and (4) a recent statutory provision does not cover the situation.

See Laws 1972, L. B. 1463, pp. 1295 to 1299.

Walker's situation is odd in light of general constitutional principles, extrajudicial standards, and a federal rule of criminal procedure.

An accused possesses a constitutional right to the assistance of counsel at the sentencing hearing. Mempa v. Rhay, 389 U. S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). The right affects the very integrity of the fact-finding process. McConnell v. Rhay, 393 U. S. 2, 89 S. Ct. 32, 21 L. Ed. 2d 2 (1968). Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, an unconstitutional line has been drawn between rich and poor. Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). If assistance of counsel is a constitutional requisite, the right does not depend on a request. Swenson v. Bosler, 386 U. S. 258, 87 S. Ct. 996, 18 L. Ed. 2d 33 (1967). If error violative of the constitutional right exists, Walker will eventually obtain relief in a process that is slow. See, §§ 29-3001 to 29-3004, R. S. Supp., 1969; Title 28 U. S. C. A., § 2254 (1971).

The American Bar Association has said: "It is appropriate for courts imposing sentence in contested cases to assume the burden of advising the defendant that he has the right of review . . . and that he should promptly consult counsel in that regard." A. B. A. Standards Relating to Criminal Appeals, § 2.1, pp. 9 and 41 (App. Dr., 1970). "Defendants should be neither induced to take appeals nor deterred from appealing by systematized factors unrelated to the probable outcome of their appeals." Id. § 2.3, pp. 10 and 52.

The federal rule reads: "After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis." F. C. A. (1972 Supp.), Rule 32 (a) (2). The Advisory Committee rejected inclusion of defendants

who plead guilty. The Committee was perturbed by images of confused defendants, false hopes, and frivolous appeals. Its opinion has been criticized trenchantly. 8A Moore's Federal Practice (2d Ed.), § 36.06, n. 5.2, p. 32-86.

The proposition that the State has not violated Walker's right to counsel on appeal may ring true, or dissonance may linger. I am in doubt.

STATE OF NEBRASKA, APPELLEE, V. RODNEY WILLIAMS, APPELLANT.
201 N. W. 2d 241

Filed October 13, 1972. No. 38423.

1. **Post Conviction: Appeal and Error.** The Post Conviction Act is not a substitute for appeal.
2. **Post Conviction: Constitutional Law.** It is only the violation or infringement of constitutional rights which is cognizable under the Post Conviction Act.
3. **Constitutional Law: Implied Consent Law.** The Fifth Amendment privilege against self-incrimination protects accused only from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature, and the withdrawal of body fluid and the use of its analysis does not involve compulsion.
4. **Automobiles: Constitutional Law: Implied Consent Law.** The Nebraska Implied Consent Law is constitutional.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Thomas A. Wagoner, for appellant.

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

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

SPENCER, J.

Defendant appeals from the denial of an evidentiary

hearing on his motion for post conviction relief. Defendant was convicted of motor vehicle homicide. He elected not to appeal and was sentenced to a term of 8 to 10 years in the Nebraska Penal and Correctional Complex. Defendant was represented by counsel of his own choice. The record of the trial is a part of the record herein. We affirm.

Defendant filed a form post conviction motion on which he had checked certain allegations which he wished to assert. Stripped to its essentials, the motion asserts: (1) The use of evidence obtained pursuant to an unlawful arrest; (2) introduction of a coerced confession; (3) introduction of a statement obtained in the absence of counsel; (4) use of testimony known to be perjured; (5) denial of counsel; (6) denial of the right to appeal; and (7) the excessiveness of the sentence.

Counsel appointed for the defendant filed an amended post conviction motion, alleging: (1) A violation of the Miranda rule; and (2) the unconstitutionality of the Nebraska Implied Consent Law. On the hearing on the motion, the trial court advised defendant's counsel that the trial record had been prepared and was available. The trial court then requested defendant's counsel to argue the points involved, and answered his argument from the trial record. No evidence was adduced other than the record of the trial.

We have repeatedly held the Post Conviction Act is not a substitute for an appeal. State v. Erving (1966), 180 Neb. 680, 144 N. W. 2d 424. It is only the violation or infringement of constitutional rights which is cognizable under our Post Conviction Act.

We find no merit to any of the claims defendant alleges constitute an infringement of his constitutional rights. He was represented by counsel of his own choosing. A review of the trial record indicates the adequacy of that representation. Defendant was found to be the driver of a car involved in a collision which resulted in nine fatalities. Subsequent to his conviction he filed a

written waiver of appeal, undoubtedly in an attempt to mitigate his sentence. The trial court examined defendant as to the voluntariness of the waiver of appeal, and accepted it.

The collision occurred between 11 and 11:30 p.m., August 8, 1970. About 3:30 a.m., August 9, the defendant was found at home in bed by a state trooper. He was taken to the hospital to talk to the assistant county attorney and another trooper, and to be checked for injuries. He had an odor of alcohol about him and when he arrived at the hospital the other trooper advised him of his rights and asked him for a specimen which he gave. After giving the specimen, he was permitted to return home. About 1:05 p.m. the next day, August 10, the defendant and his father were asked to visit the county attorney's office where the defendant was questioned by the deputy county attorney in the presence of his father. Before being questioned, his rights were fully explained to him, including his right to counsel. He initialed a waiver of right form after each right was explained. After the interview, the defendant was permitted to return home. A warrant for motor vehicle homicide was issued on August 11, 1970, and defendant was arrested and taken before the district judge. At that time he was represented by his trial counsel.

Defendant asserts the invalidity of the proceedings at which he gave the specimen and those before the county attorney the next day because he was not told at either time that he was to be charged with motor vehicle homicide. The specimen was taken 3 or 4 hours after the collision. The defendant knew that the specimen was being taken to determine the alcoholic content in his body fluid. Defendant knew that he had been in a major collision and if he were found to be the driver at the time of the collision he would be subject to criminal penalties. We have held that the voluntariness of blood or urine tests is not in a comparable class with confessions or incriminating statements. The consent to

the test is implied when the defendant operates a motor vehicle on a public road. The giving of the sample pursuant to the statute does not involve a question of involuntariness, want of due process, or self-incrimination. State v. Oleson (1966), 180 Neb. 546, 143 N. W. 2d 917.

The proceedings in the county attorney's office on August 10 were during an investigatory stage of the proceedings, and before the defendant had secured counsel although his father had attempted to reach the counsel who subsequently appeared. Defendant's rights were explained to him and he specifically waived each of them. He was advised of his right to counsel and agreed to give a statement in the absence of counsel. The statement given, however, was not prejudicial to the defendant. It could not be construed as a confession or as an admission against interest, but was entirely exculpatory in nature.

The trial record indicates no suppression of evidence. Defendant's counsel had no idea as to what the defendant was referring. The statement concerning the use of perjured testimony is clearly a conclusion. There is no indication of any kind who might have given perjured testimony or what that testimony might be.

The question of excessive sentence cannot be raised in a post conviction action.

The final point raised by the defendant in the amended motion is the constitutionality of Nebraska's Implied Consent Law. This matter is not specifically argued in the defendant's brief, and under our rules would be considered waived. However, answering the implications to be drawn from defendant's brief, the Nebraska Implied Consent Law is constitutional. In Prucha v. Department of Motor Vehicles (1961), 172 Neb. 415, 110 N. W. 2d 75, we said: "The essence of the 'implied consent law' is that by driving a motor vehicle on the public highway, the operator consents to the taking of a chemical test to determine the alcoholic content of his body fluid. By the act of driving his car, he has waived

his constitutional privilege of self-incrimination, which has always been considered to be a privilege of a solely personal nature which may be waived." See, also, Breithaupt v. Abram (1957), 352 U. S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448, in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident while the driver was unconscious. The United States Supreme Court affirmed the conviction resulting from the use of the test in evidence, holding that under such circumstances the withdrawal did not offend due process.

In the later case of Schmerber v. California (1966), 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908, the defendant refused to give a blood test on the advice of counsel. At the direction of a police officer a blood sample was withdrawn from petitioner's body by a physician at the hospital. The United States Supreme Court affirmed the defendant's conviction. The court held that the Fifth Amendment privilege protects an accused only from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question did not involve compulsion to those ends.

The following quotation from Schmerber is particularly pertinent to both the issues raised in defendant's amended motion: "In Miranda v. Arizona, ante at 460, the Court said of the interests protected by the privilege: 'All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load" . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors,

rather than by the cruel, simple expedient of compelling it from his own mouth.' The withdrawal of blood necessarily involved puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the 'inviolability of the human personality.' Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused 'by its own independent labors.'

"As the passage in Miranda implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through 'the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." ' Ibid. The leading case in this Court is Holt v. United States, 218 U. S. 245. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as 'based upon an extravagant extension of the Fifth Amendment,' and went on to say: '[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a

prisoner and compare his features with a photograph in proof.' 218 U. S., at 252-253.

"It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U. S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

We agree with the trial court that the motion and supplemental motion for post conviction review, when considered in the light of the record, show that the defendant is not entitled to an evidentiary hearing, and the order denying an evidentiary hearing and overruling the motion is affirmed.

AFFIRMED.

CYNTHIA MOON DOVEY, APPELLANT, V. MICHAEL THOMAS SHERIDAN, APPELLEE.
201 N. W. 2d 245

Filed October 13, 1972. No. 38429.

1. **Witnesses: Trial.** The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown.
2. **Witnesses: Trial: Evidence.** The general rule is that opinion evidence is admissible where it is necessary and advisable as an aid to the jury. Opinion evidence which may be of aid to the jury may be admitted even though it bears directly on the main

issue. Such evidence should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine.

3. **Instructions: Trial: Evidence.** The admission of incompetent evidence may be cured by an instruction which directs the jury to consider as an established fact the transaction sought to be impeached by the incompetent evidence.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Joy N. Lindquist and Lawrence R. Brodkey, for appellant.

D. Nick Caporale and M. Brian Schmid of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

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

SPENCER, J.

In this negligence action plaintiff appeals from a jury verdict for the defendant. Plaintiff argues three assignments of error: (1) The court erred in admitting the testimony of an expert witness concerning the purpose of access roads, median strip breaks, and whether a certain street was a major or heavily traveled street; (2) the court erred in refusing to strike the testimony of the expert witness and in failing to admonish the jury to disregard the same; and (3) the court erred in failing to give plaintiff's requested instruction No. 1, as follows: "You are instructed that a preference will not be given to vehicles moving on highways as against traffic on intersecting roads merely because of their relative dignity or importance." We affirm.

At approximately 1:45 a.m., on March 22, 1970, the parties were involved in a collision on 72nd Street in Omaha, Nebraska. At the time of the collision the defendant was southbound on 72nd Street, a four-lane highway. The plaintiff was eastbound and turning north on 72nd Street from an access road which runs parallel

to and is separated from 72nd Street by a median. The area of impact had an overhead traffic light for all northbound and southbound traffic on 72nd Street. There was no light or traffic signal controlling the entry from the access road to 72nd Street.

At the trial a professional engineer familiar with the area was permitted to testify over plaintiff's objection as to the location, the purpose, and the definition of access roads; the width of the access road and of 72nd Street; and the relative importance of both roads. Plaintiff objected that this testimony was irrelevant and immaterial to any issue, and that it invaded the province of the jury. Plaintiff subsequently moved for an order striking such testimony and for an instruction to the jury to disregard the same. This motion was overruled. Plaintiff also submitted instruction No. 1 which was refused.

The trial court gave its instruction No. 14, which reads as follows: "The Court instructs you, that it has found, as a matter of law, that the collision between the motor vehicles being operated by the plaintiff and the defendant, occurred at an 'intersection' as defined by the Statutes of the State of Nebraska.

"The Court has found, as a matter of law, that there existed at the time of this collision, two separate and distinct highways upon the land taken for right of way purposes, and known as 72nd Street, and that the rules of the road of the State of Nebraska have application to each of said highways, separately and individually. The area west of the median strip, as shown by the evidence, and throughout this case referred to as an 'access road,' upon which traffic proceeded in a north and south direction, and which consists of two traffic lanes, is a separate and distinct highway from the highway east of the median strip, which contains four lanes for traffic, two lanes for southbound traffic and two lanes for northbound traffic. This latter highway is entered upon from the west by virtue of the paved

opening in the median strip which connects the two highways. This, therefore, creates what in law is known as an 'intersection' across the four-lane highway, east of the median strip. The said 'intersection' being the area embraced within the prolongation of the lateral curb lines of the break in the said median strip in an easterly direction across said four-lane highway.

"By the same token, the break in the median strip, likewise creates an intersection across the two-lane highway, located west of the median strip. This intersection being the area embraced within the prolongation of the lateral curb lines of the break in said median strip in a westerly direction across the said two-lane highway."

The trial court also gave instruction No. 17 on right-of-way. It is as follows: "You are instructed that the laws of the State of Nebraska provide as follows:

"Motor vehicles traveling upon a public highway shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left, when said vehicles shall reach the intersection at approximately the same time.

"The Statutes further provide when two vehicles approaching or entering an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.

"The Statutes further provide that the driver of a vehicle approaching, but not having entered an intersection shall yield the right of way to a vehicle within such intersection, and turning therein to the left across the line of travel of such first-mentioned vehicle, provided the driver of the vehicle turning left has given a plainly-visible signal of intention to turn.

"There has likewise been introduced an ordinance of the City of Omaha in force at the time of this accident which provides 'vehicles approaching an intersection: When two vehicles approach an intersection at approx-

imately the same time, the driver of the vehicle on the left shall yield to the driver on the right. The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection.'

"The parties hereto have stipulated that the legal prima facie lawful speed pursuant to City ordinances on 72nd Street was 35 miles per hour."

The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. See McNaught v. New York Life Ins. Co. (1943), on rehearing, 143 Neb. 220, 12 N. W. 2d 108.

Referring to the testimony of the expert witness, we said in Drahota v. Wieser (1968), 183 Neb. 66, 157 N. W. 2d 857: "The general rule is that opinion evidence is admissible where it is necessary and advisable as an aid to the jury. McNaught v. New York Life Ins. Co., on rehearing, 143 Neb. 220, 12 N. W. 2d 108. Opinion evidence which may be of aid to the jury may be admitted even though it bears directly on the main issue. Such evidence should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. Sears v. Mid-City Motors, Inc., on rehearing, 179 Neb. 100, 136 N. W. 2d 428."

It has long been the rule in this state that an error in the admission of incompetent evidence may be cured by an instruction which directs the jury to consider as an established fact the transaction sought to be impeached by the incompetent evidence. O'Connor v. Padget (1908), 82 Neb. 95, 116 N. W. 1131.

Without analysis or discussion, but for the purposes of this case, accepting plaintiff's contention that portions of the expert's testimony may have invaded the province of the jury and should have been excluded, it could not have been prejudicial herein. It was at most harmless error. The instructions adequately cov-

ered plaintiff's theory. Any possible prejudice was cured by the giving of instructions Nos. 14 and 17 which are set out above.

The judgment herein is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE L. SCHUMACHER, APPELLANT.
201 N. W. 2d 249

Filed October 13, 1972. No. 38451.

Criminal Law: Intent: Words and Phrases. The terms "maliciously" and "feloniously," as used in describing an offense, import a willful act.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

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

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

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

NEWTON, J.

Defendant was convicted of burglary. He assigns as error the omission of the word "willful" from the information; failure to instruct on his theory of the case; and prejudicial argument by the prosecuting attorney. The judgment of the district court is affirmed.

The information charged that defendant acted "unlawfully and feloniously, maliciously and forcibly." To act with malice means to act maliciously. "Malice in a legal sense denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." Sall v. State, 157 Neb. 688, 61 N. W. 2d 256.

"The word willfully or purposely means intention-

ally and not accidentally or involuntarily, and the word feloniously means proceeding from an evil purpose or done with deliberate intention of committing a crime. Felonious describes a willful act and feloniously in a legal sense refers to an act done with intention to commit a crime." Sall v. State, *supra*. The terms "maliciously" and "feloniously" necessarily import a willful act. Furthermore, in this instance, defendant admits he intentionally entered, and the trial court instructed that "willful" entry was a material element of the crime charged.

Defendant's second assignment of error contains a charge that the court failed to instruct on defendant's theory of the case as set out in several requested instructions. Defendant fails to point out in what respect such failure occurred. Examination of instructions given and requested fails to disclose any erroneous or prejudicial action on the part of the trial court. Defendant's theory, as disclosed by his evidence, was that the entry was not forcible and not with an intent to steal. These issues were adequately submitted.

Defendant was shown to be living with a woman called by him as a witness. The evidence was pertinent from the standpoint of credibility. Objection was made to the prosecutor's reference to a question asked in this regard and the court instructed the jury to disregard anything outside the evidence so referred to. There was no prejudice.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALBERT JAMES DAVIS, APPELLANT,
201 N. W. 2d 258

Filed October 13, 1972. Nos. 38473, 38474.

Appeals from the district court for Hitchcock County: JACK HENDRIX, Judge. Affirmed.

Leon C. Hines and Brice F. Rueter, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

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

BOSLAUGH, J.

The defendant pleaded guilty to separate informations charging burglary and escape. He was sentenced to 2 years' imprisonment for the burglary and 2 to 3 years' imprisonment for the escape, the sentences to run consecutively. He appeals, claiming the sentences are excessive, his accomplice having received a 1-year sentence for the burglary.

The presentence report is not a part of the record in this court. The record does not show what sentence the accomplice received or any circumstances concerning him.

The statements of the county attorney, made in open court at the time of sentencing and which stand unchallenged, indicate that the defendant had a record of previous offenses, some felonies, dating back to at least 1968. When the defendant escaped from custody he again resorted to criminal conduct.

There is nothing in the record which would justify a reduction of the sentences imposed in these cases. The judgments are, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD RUBEK, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL RUBEK, APPELLANT.

201 N. W. 2d 255

Filed October 13, 1972. Nos. 38495, 38496.

1. **Criminal Law: Guilty Plea.** A guilty plea which represents a voluntary and intelligent choice of available alternatives, even though made for the purpose of attempting to secure a lighter sentence, is acceptable.
2. ———: ———. An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence, when he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt.
3. **Criminal Law: Sentences: Statutes: Time: Appeal and Error.** When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the district court for resentencing in conformity with the statute.

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

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

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

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

NEWTON, J.

Defendants, charged with assault to commit rape, entered pleas of guilty and were each sentenced to serve not less than 8 nor more than 12 years in the Nebraska Penal and Correctional Complex. They assign as error: (1) An alleged denial of motions to with-

draw their pleas of guilty; (2) a failure to inform the defendants of the nature of the charges against them; (3) that no factual basis appears for acceptance of the guilty pleas when defendants asserted their innocence; and (4) that the sentences are excessive. We affirm the judgments of the district court but not the sentences imposed.

The defendants were separately charged, filed separate appeals, but joined in one brief, and the cases were submitted together. The records in the two cases are identical and both will be considered and disposed of in this opinion.

Defendants were originally duly arraigned and thereupon entered pleas of not guilty. Subsequently the pleas were changed to "guilty." The records fail to disclose any motions to withdraw the latter pleas which were entered on November 8, 1971, and were reaffirmed at the time of sentencing on January 11, 1972. This assignment is frivolous.

It is contended that defendants were not properly informed by the court of the nature of the charges against them. The record discloses the defendants had been duly arraigned, which means the charges against them were read to them, at the time they pleaded not guilty. At the time of entry of the pleas of guilty they assured the court they fully understood the nature of the charges against them and had discussed the situation with their respective attorneys. Furthermore, the reading of the information may be waived and a rereading was waived. See § 29-1816, R. R. S. 1943. This contention is also frivolous.

The defendants, although pleading guilty, claimed to be innocent. In view of this situation it is asserted there was no factual basis justifying the court in accepting the pleas of guilty. In North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, it was held: "A guilty plea that represents a voluntary and intelligent choice among the alternatives available to a de-

fendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because it was entered to avoid the possibility of the death penalty. Brady v. United States, 397 U. S. 742. * * *

"An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt." We have a similar situation here. Defendants specifically stated to the court that they, and their counsel, were aware of the strength of the State's case against them, had heard the evidence at the preliminary hearing, and were sure they would be convicted; also, that they fully understood the nature of the charges against them, their constitutional rights, and were entering their pleas voluntarily. They were hoping to receive probation. The court had before it, in addition to the defendants' concessions in regard to the evidence against them, the affidavit of a police detective showing that there was an eyewitness in addition to the prosecutrix, that some of the girl's clothes, which had been removed, were found in the automobile of one of the defendants, and that he believed there was ample evidence to assure the convictions of defendants. We cannot agree that the court erred in accepting the pleas of guilty.

The final contention deals with the question of excessiveness of the sentences. Defendants were sentenced under section 28-409, R. R. S. 1943, which provided for a sentence of not less than 2 nor more than 15 years. The sentences handed down were for not less than 8 nor more than 12 years. Laws 1972, L.B. 1499, p. 1427, became effective during the pendency of this appeal. It provides that when an indeterminate sentence is imposed, the minimum limit fixed shall not be less than

the minimum provided by law nor more than one-third of the maximum term. This would require a reduction in the minimum limits fixed by the court to 5 years if applicable to the present cases.

Laws 1972, L.B. 1202, p. 799, is not applicable here. It applies only to cases where "the particular law under which such sentence was pronounced is thereafter amended to decrease the *maximum* period of confinement which may be imposed, * * *." (Emphasis supplied.) There has been no change in section 28-409, R. R. S. 1943. Also, we deal here with a "minimum" and not a "maximum" in the sentences.

Although the sentences do not appear to have been excessive, nevertheless, Laws 1972, L.B. 1499, has the effect of mitigating the punishment in situations such as are here presented. The sentences imposed conflict with the presently expressed legislative intention. In such cases either this court will amend the sentences to conform to the legislative intent or will remand the causes to the district court for the imposition of sentences conforming to the statute. See State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225.

The convictions of the defendants are affirmed. The sentences are vacated and the causes remanded to the district court for resentencing in conformity with the provisions of Laws 1972, L.B. 1499.

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

STATE OF NEBRASKA, APPELLEE, V. LYLE EDGAR NELSON, APPELLANT.
201 N. W. 2d 248

Filed October 13, 1972. No. 38499.

1. **Jury: Time: Trial.** Ordinarily a challenge to the array must be made before trial.
2. **Jury: Time: Post Conviction.** Alleged exclusion of women from

the jury panel cannot be raised for the first time in a post conviction proceeding.

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

Lyle Edgar Nelson, pro se.

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

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

BOSLAUGH, J.

The defendant was convicted of cattle stealing. State v. Nelson, 182 Neb. 31, 152 N. W. 2d 10. In this proceeding for post conviction relief he alleged he was deprived of a constitutional right because "women were excluded from the jury panel" which convicted him. The defendant did not allege a systematic exclusion of women from the jury panel. The trial court denied relief on the ground that no objection had been made to the panel of prospective jurors at any time.

Ordinarily a challenge to the array must be made before trial. Davis v. State, 31 Neb. 247, 47 N. W. 854. The record indicates the question was not raised at any time in the prior proceeding although the defendant was represented by able counsel throughout the proceeding.

The Post Conviction Act was intended to provide a remedy where a miscarriage of justice may have occurred. It is not a substitute for appeal or a procedure to secure a routine review of a conviction. State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

A defendant is not permitted to raise an issue concerning a search and seizure for the first time in a post conviction proceeding if the circumstances were fully known at the time of the trial. See State v. Losieau, 182 Neb. 367, 154 N. W. 2d 762. A similar rule should apply here. The defendant and his counsel may

have been well satisfied with the jury selected to hear the case. The defendant should not be allowed to speculate on the verdict and then challenge the selection of the panel after the verdict.

There is nothing which suggests that the defendant was prejudiced in any way by the fact that there were no women on the jury. Under the circumstances in this case, post conviction relief was properly denied.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RUSSELL R. STROM, JR., RESPONDENT.
201 N. W. 2d 391

Filed October 20, 1972. No. 38198.

1. **Attorneys at Law: Licenses.** A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts.
2. ———: ———. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment.

Original action. Judgment of disbarment.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for relator.

Russell R. Strom, Jr., and William L. Walker, for respondent.

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

NEWTON, J.

This is a disciplinary proceeding brought by the Ne-

braska State Bar Association against Russell R. Strom, Jr., a lawyer practicing in Lancaster County, Nebraska. Pursuant to complaint entered by Mrs. Dorina M. Neal, hearing was had before the Committee on Inquiry of the Nebraska State Bar Association for District No. 3 (Lancaster County). Defendant waived further proceedings to be had before a referee and complaint was filed in this court on the record made before the Committee on Inquiry.

The defendant had represented Mrs. Neal in a personal injury action and obtained a settlement of $6,000. His fee was $1,700. The complaint charges a wrongful conversion by defendant to his own uses of the $4,300 balance due Mrs. Neal.

The following facts are undisputed. On receipt of the $6,000 settlement check, defendant deposited on April 16, 1970, $5,600 in a trust account and took $400 in cash. This brought the trust account up to $5,636.48. The following checks were then paid out of the account: $248.60, dated April 8, 1970, payable to the Internal Revenue Service; $1,926.40, dated April 13, 1970, to Herbert Robins Bunting and Roland Albert Bunting; $289.81, dated April 16, 1970, to Luann Kobza, defendant's secretary; $800, dated April 17, 1970, to defendant; $1,000, dated April 21, 1970, to defendant; and $200, dated May 11, 1970, to defendant. There then remained in the trust account a balance of $658.26 as of May 11, 1970.

The $6,000 check was received by defendant on April 16, 1970. Mrs. Neal failed to receive a remittance until receipt of defendant's check for $4,300, dated May 25, 1970. It was returned for "insufficient funds." She contacted defendant by telephone and was told: "* * * the reason that the check was returned was that he had settled another case, deposited an insurance check in that settlement, and given his client's share of that settlement by his check; and that after this client had cashed the check he had given to her, the insurance

company had stopped payment on its check because of a disagreement as to figures involved in the settlement, and that this was the reason that the check he had given to me had bounced." Defendant's account fails to reveal such transaction. Following other telephone conversations, Mrs. Neal was told in the third week of June 1970, to redeposit the check. It was again returned unpaid. Pursuant to several more telephone conversations, she received, on July 20, 1970, a telegram saying defendant's check was in the mail. On failing to receive the check she again called defendant and was told it had been mailed on Thursday instead of Monday. It again failed to materialize. She was then informed the letter had been misaddressed. She asked that he stop payment on the missent check and forward another at once. After several other telephone calls, Mrs. Neal consulted an Oklahoma attorney on July 27, 1970, and was referred to the Lancaster County Committee on Inquiry. On August 7, 1970, she presented the original check at the Lincoln bank on which it was drawn. Again payment was refused. She was unable to contact defendant but he called her at her son's home in Lincoln on August 9, 1970. He said he had mailed a check to her on August 7, 1970. It was never received. She demanded cash and he agreed to get the money on the morning of August 10, 1970, then said he would have it the next day, August 11. The alleged check of August 7, 1970, not having been delivered to her home in Oklahoma, Mrs. Neal, on the afternoon of August 11, 1970, called at the office of a member of the Committee on Inquiry and executed an affidavit setting out the foregoing facts, concluding with the following: "I request that this Affidavit be considered my Complaint against Russell R. Strom, Jr., and that said Complaint be referred to the Committee on Inquiry of the Nebraska State Bar Association for Judicial District No. 3."

On August 11, 1970, Mrs. Neal consulted a Lincoln lawyer about the collection of the funds due her and

a copy of her affidavit was supplied to this lawyer. On August 13, 1970, defendant borrowed from a Lincoln bank and paid Mrs. Neal. Subsequently, on September 15, 1970, she wrote the member of the Committee on Inquiry whom she had consulted, confirmed that defendant had paid her, and stated:

"The matter has been resolved satisfactorily. Since I was pleased with the way Mr. Strom handled my case, and since I have received the amount of the settlement, plus an additional amount for loss and expenses, I do not wish to file charges.

"Thank you very much for your assistance while I was in Lincoln."

The foregoing is also undisputed. Thereafter she was contacted by defendant and on November 18, 1970, made a further purported affidavit disclaiming the first affidavit she gave and claiming she had authorized defendant to use her funds. Defendant contends he had borrowed the money from her.

In regard to the Bunting check for $1,926.40, dated April 13, 1970, it appears that this was in payment of distributive shares due from an estate for which defendant was attorney and administrator. Although no charge is made in regard to these funds, it appears they should have been kept in an administrator's account and, in any event, there were not sufficient funds in the trust account to pay the check when it was drawn.

There is further evidence that Mrs. Neal was fully aware of the import of the first affidavit she executed. She knew the Committee on Inquiry was a disciplinary committee, that her affidavit constituted a complaint against the defendant, and that she would have to employ other counsel for the purpose of collecting her money. In view of her persistent efforts, starting soon after the settlement of her case, to obtain payment of the funds due her, and the failure of the defendant to contradict her statements in this respect, it is apparent that her subsequent statement to the effect that

defendant was authorized to keep and use her money is not worthy of credence. If she did not understand she was commencing a disciplinary proceeding and not one to collect the funds due her, why did she seek other counsel for the latter purpose? Furthermore, at a preliminary hearing before the Committee on Inquiry, defendant failed to claim or even intimate that he had obtained a loan from Mrs. Neal and the fact the funds were deposited in a trust, rather than a personal account, belies this contention.

We conclude that defendant violated Canon 1 of the Code of Professional Responsibility and Canons of Judicial Ethics providing as follows: "DR 1-102 Misconduct. (A) A Lawyer shall not: * * *

"(3) Engage in illegal conduct involving moral turpitude.

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Defendant was also in violation of Canon 9 and Disciplinary Rule 9-102 (B) (4). "(B) A lawyer shall: * * *

"(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive."

Under Canon 9, Ethical Considerations, EC 9-5 states: "Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided."

"A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring

discredit to himself, the profession, and the courts. * * *

"Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment." State ex rel. Nebraska State Bar Assn. v. Rhodes, 177 Neb. 650, 131 N. W. 2d 118. See, also, State ex rel. Nebraska State Bar Assn. v. Jensen, 171 Neb. 1, 105 N. W. 2d 459.

Ordinarily the conversion by a lawyer of trust funds in his possession is deemed cause for disbarment. It is therefore adjudged that defendant be disbarred.

Judgment of disbarment accordingly.

JUDGMENT OF DISBARMENT.

SPENCER, J., not participating.

LOUIS W. REIMER ET AL., APPELLANTS, V. CITY OF O'NEILL, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
201 N. W. 2d 706

Filed October 20, 1972. No. 38390.

1. **Municipal Corporations: Public Utilities: Classification.** A public utility may classify its users for rate purposes if the classification is reasonable and not unjustly discriminatory.
2. ———: ———. ———. Hotels and motels may be classified separately from trailer courts and apartment houses for the purpose of fixing rates for water and sewer service.
3. ———: ———: ———. A municipality furnishing water and sewer service to its residents must treat all customers in the same class equally.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed in part, and in part reversed and remanded.

Richard E. Mueting and Thomas E. Brogan, for appellants.

Norman Gonderinger and Stewart, Calkins, Duxbury & Crawford, for appellees.

Beynon, Hecht & Fahrnbruch and A. Michael Alesio, for amicus curiae.

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

BOSLAUGH, J.

The plaintiffs own and operate a trailer court in O'Neill, Nebraska. They commenced this action against the City of O'Neill and its officials to enjoin enforcement of the ordinances prescribing water rates and sewer use charges in O'Neill and to recover alleged overcharges.

The trial court found generally for the defendants and dismissed the action. The plaintiffs appeal.

The controversy centers around the minimum charges imposed by the ordinances in question. Ordinance No. 393A, prescribing water rates, provides a minimum bimonthly charge of $4 per resident consumer for the "First 10,000 gallons used or consumed or fraction thereof." Consumer is defined as follows: "A consumer is an occupant of a single-family residence, an occupant of each unit of a multiple-family residence, apartment house or trailer court, an occupant of a business building, an occupant of one unit of an office building or other building where multiple offices or businesses are located, or a permanent resident of a hotel or motel. Because of the transient nature of occupancy existing in a hotel and motel, each four units or rooms of said hotel or motel not occupied by a permanent resident shall be computed as one consumer."

Ordinance No. 394A provides that the charges for sewer service to residential users shall be as follows:

"A. Single-family Residences. Two Dollars per month.

"B. Multiple RESIDENCES, Apartment Houses and Trailer Courts. Two Dollars per month for each family unit.

"C. Hotels and Motels. Two Dollars per month for

each permanently occupied unit and Two Dollars per month for every four rooms or units available for rental to transients."

The ordinances classify hotels and motels separately from trailer courts so that the minimum charge imposed for each unit of a hotel or motel is one-fourth that imposed on each unit of a trailer court unless the hotel or motel unit is occupied by a permanent resident. The plaintiffs contend that the classification made is unreasonable and arbitrary.

A public utility may classify its users for rate purposes if the classification is reasonable and not unjustly discriminatory. Erickson v. Metropolitan Utilities Dist., 171 Neb. 654, 107 N. W. 2d 324. The classification made in the ordinances in question was based upon the transient nature of the persons usually occupying hotel and motel units. Similar classifications have been held valid in Knotts v. Nollen, 206 Iowa 261, 218 N. W. 563; Lewis v. Mayor & City Council of Cumberland, 189 Md. 58, 54 A. 2d 319; Caldwell v. City of Abilene (Tex. Civ. App.), 260 S. W. 2d 712; and City of Kermit v. Rush (Tex. Civ. App.), 351 S. W. 2d 598. See, also, United States v. American Water-Works Co., 37 F. 747; Thompson v. City of Goldsboro, 151 N. C. 189, 65 S. E. 901. The plaintiffs rely upon two Oregon decisions which reached a contrary result: Kliks v. Dalles City, 216 Ore. 160, 335 P. 2d 366; and Barendse v. Knappa Water Assn. (Ore.), 490 P. 2d 990. We think the better rule is that such a classification is permissible.

The record shows that although apartment houses and trailer courts were classified the same under the ordinances, the City did not make a uniform application of the ordinances to these customers. The water commissioner testified that apartment owners were charged a minimum for each unit whether it was vacant or occupied. The plaintiffs were charged a minimum for each trailer in place when the meters were read without regard to how long it had been there or would

be there. Other trailer courts were given adjustments where trailers were in place for only a part of the billing period.

It apparently was the city's interpretation of the ordinance that such adjustments were required. The ordinance must be applied uniformly to all in the same class. Erickson v. Metropolitan Utilities Dist., *supra*. Ordinance No. 393A refers to "occupants" and the plaintiffs should be allowed a credit in each instance where they were charged the full minimum water rate for a trailer which was not in place during the entire billing period.

That part of the judgment finding the ordinances to be valid is affirmed; that part finding the plaintiffs are not entitled to recover for overcharges is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CAROLINE PARKHURST, APPELLANT, V. EDNA MAY BARTH, APPELLEE.

201 N. W. 2d 708

Filed October 20, 1972. No. 38469.

1. **Trial.** Ordinarily, a party cannot complain of the submission of an issue to the jury where the finding on that issue is favorable to him.
2. **Trial: Verdict: Damages: Appeal and Error.** A verdict and judgment will not be set aside as inadequate unless they are clearly wrong and so against the weight and reasonableness of the evidence as to indicate that they were the result of passion, prejudice, or mistake.

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

J. Thomas Rowen of Miller & Rowen and John C. Coupland, for appellant.

Quigley, Dill & Quigley, for appellee.

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

NEWTON, J.

Plaintiff sought to recover for personal injuries and property damage sustained in an automobile accident at a city intersection. Plaintiff recovered judgment for $1,000 but appeals on the ground the verdict was inadequate and, in connection therewith, asserts a verdict should have been directed on the question of liability. We affirm the judgment of the district court.

Plaintiff was traveling south on a through street. Defendant, driving in a westerly direction, was a stranger in the city and failed to see a stop sign, drove through without stopping, and the accident occurred. The court rejected a motion for a directed verdict. The case was submitted to the jury, without reference to claimed contributory negligence, and the jury found for the plaintiff.

It was stipulated that the statements for car repairs and two medical expense items totaling $505.04 were fair and reasonable. A chiropractor's bill for $802 and a physician's bill for $115 were not stipulated to. The medical evidence was conflicting and it is apparent the jury did not accept plaintiff's claim regarding the extent of her injuries, the necessity for extended treatment, and the reasonableness of the medical expense.

The jury resolved the question of defendant's liability in favor of plaintiff. Plaintiff received from the jury the very finding she had requested it be instructed to make. She was not prejudiced by the failure of the court to direct a verdict on the question of liability. "Ordinarily, a party cannot complain of the submission of an issue to the jury where the finding on that issue is favorable to him." Prell v. Murphy, 178 Neb. 278, 133 N. W. 2d 5.

The verdict was for a sum less than the amount of special damages claimed by plaintiff to be a proximate

result of the accident. As noted above, the jury, which saw and heard the witnesses, failed to accept plaintiff's evidence in this regard. "A verdict and judgment will not be set aside as inadequate unless they are clearly wrong and so against the weight and reasonableness of the evidence as to indicate that they were the result of passion, prejudice, or mistake." Cooper v. Hastert, 175 Neb. 836, 124 N. W. 2d 387.

The judgment of the district court is affirmed.

AFFIRMED.

LOIS M. GIER, APPELLANT, V. C. E. GLEASON ET AL., APPELLEES.

201 N. W. 2d 388

Filed October 20, 1972. No. 38484.

1. **Instructions: Pleadings: Evidence: Trial.** Instructions must be confined to issues presented by the pleadings and supported by evidence.
2. ———: ———: ———: ———. Where an issue, even assuming that it is properly pleaded, affords no basis for recovery under the evidence adduced in the case, the trial court's submission of such an issue to the jury constitutes error.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

John A. Wagoner, for appellant.

Luebs, Tracy, Huebner, Dowding & Beltzer, for appellees.

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

NEWTON, J.

This is an action for damages resulting from an automobile accident. An employee of defendants, while driving defendants' pickup truck, was involved in the accident. Plaintiff pleaded and sought to recover on the theory that the employee was acting within the

course and scope of his employment at the time the accident occurred. Plaintiff appeals from an adverse verdict and judgment which we affirm.

One Alfred Wolfe was engaged by defendants through an employment office. He was conveyed to a pasture where defendants pastured sheep and instructed to remove woven wire fencing from permanent posts and roll it up. The rolls contained from 20 to 80 rods of wire and weighed up to 175 or 200 pounds. Wolfe was neither instructed nor expected to load the rolls although a pickup truck used in fencing operations and belonging to defendants was standing in the pasture. It does not appear that Wolfe was given authority to operate the truck on the public highways for any purpose. Wolfe did very little work before taking off in the pickup and at the time of the accident was intoxicated. He had not been drinking alcoholic liquors prior to the time he was conveyed to the pasture nor does it appear defendants were aware of any propensity Wolfe might have had for becoming intoxicated.

The evidence clearly fails to prove that Wolfe was acting in the course and scope of his employment as pleaded. Plaintiff now seeks to recover on the theory of "negligent entrustment." In order to do so she must allege and prove that defendants entrusted the pickup to Wolfe and knew, or in the exercise of ordinary care, should have known, he had a propensity for becoming intoxicated. See, Annotation, 19 A. L. R. 3d 1175; Deck v. Sherlock, 162 Neb. 86, 75 N. W. 2d 99. The record reveals that plaintiff neither alleged nor proved a cause of action based upon negligent entrustment. It is well settled that instructions must be confined to issues presented by the pleadings and supported by evidence. See Seeman v. Pagels, 184 Neb. 757, 172 N. W. 2d 100.

In addition to establishing negligence on the part of Wolfe, it was essential to a recovery by plaintiff that she prove the existence of a master-servant relationship between Wolfe and defendants and that at the time

of the accident Wolfe was acting within the course and scope of his employment. It appears that Wolfe was an employee of defendants, but the record is barren of any evidence whatsoever to establish that he was at the time of the accident acting within the course and scope of his employment. On the contrary, it appears he took the pickup truck without authorization. Plaintiff having failed to prove an essential element of her cause of action, defendants' motion for a directed verdict should have been sustained. "Where an issue, even assuming that it is properly pleaded, affords no basis for recovery under the evidence adduced in the case, the trial court's submission of such an issue to the jury constitutes error." Baker v. Daly, 188 Neb. 156, 195 N. W. 2d 755. Under such circumstances submission of an issue of contributory negligence to the jury cannot be prejudicial.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE F. HUTCHISON, APPELLANT.

201 N. W. 2d 390

Filed October 20, 1972. No. 38488.

1. **Criminal Law: Confessions: Trial: Evidence.** In determining the admissibility of a confession, all evidence on the subject must be considered and the mere fact that the evidence is conflicting is not a bar to its admission.
2. ———: ———: ———: ———. When the accused has been informed of his constitutional rights and thereafter freely and voluntarily confesses, the confession is ordinarily admissible in evidence.

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

Padley & Dudden, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

NEWTON, J.

Defendant was found guilty of statutory rape. The sole question presented on appeal is the admissibility of a statement or confession of the defendant. The evidence as to the circumstances under which the statement was given was conflicting. The court and the jury resolved the conflict in favor of the State.

In determining the admissibility of a confession, all evidence on the subject must be considered and the mere fact that the evidence is conflicting is not a bar to its admission. See State v. Erving, 180 Neb. 824, 146 N. W. 2d 216.

When the accused has been informed of his constitutional rights and thereafter freely and voluntarily confesses, the confession is ordinarily admissible in evidence. See State v. Erving, *supra*.

The defendant's contention is not meritorious and the judgment of the district court is affirmed.

AFFIRMED.

FRANCIS DIANE KARTMAN, FORMERLY KNOWN AS FRANCIS DIANE COOK, APPELLANT, V. GERALD FRANCIS COOK, APPELLEE.

201 N. W. 2d 705

Filed October 20, 1972. No. 38628.

Appeal and Error: Dismissal and Nonsuit: Contempt. The principle is well established that an appellate court may dismiss an appeal for contumacious violation of an order of the court. One who flouts the order of the court is not in a position to seek judicial assistance.

Appeal from the district court for Sarpy County: VIC-

TOR H. SCHMIDT and RONALD E. REAGAN, Judges. On motion to dismiss appeal. Motion to dismiss conditionally sustained.

Haney, Wintroub & Haney, for appellant.

Samuel V. Cooper, for appellee.

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

NEWTON, J.

Pursuant to proceedings had in the district court for Sarpy County, Nebraska, an order was entered awarding the custody of the minor children of appellant and appellee to appellee and directing appellant to surrender the children to appellee. The children were not surrendered, but on the contrary, appellant has removed and concealed the children while seeking to appeal the custody decision. Appellee moves to dismiss the appeal.

The principle is well established that an appellate court may dismiss an appeal for contumacious violation of an order of the court. One who flouts the order of the court is not in a position to seek judicial assistance. See, Pike v. Pike, 24 Wash. 2d 735, 167 P. 2d 401, 163 A. L. R. 1314; Henderson v. Henderson, 329 Mass. 257, 107 N. E. 2d 773; Burns v. Burns, 35 Ill. App. 2d 34, 181 N. E. 2d 605; Commonwealth ex rel. Beemer v. Beemer, 200 Pa. Super. 103, 188 A. 2d 475; Rude v. Rude, 153 Cal. App. 2d 243, 314 P. 2d 226; Strange v. Strange (Tex. Civ. App.), 464 S. W. 2d 216; Strange v. Strange (Tex.), 464 S. W. 2d 364.

On failure of the appellant to comply with the order of the trial court and make a proper showing of such compliance in this court within 30 days, this appeal shall stand dismissed.

MOTION TO DISMISS CONDITIONALLY SUSTAINED.

GENE D. WALCOTT ET AL., APPELLANTS, V. HAWKEYE-SECURITY INSURANCE COMPANY, A CORPORATION, APPELLEE.
201 N. W. 2d 817

Filed November 3, 1972. No. 38479.

Motor Vehicles: Insurance: Words and Phrases. An automobile that had been modified for use in stock car racing by removing the seats, dashboard, headlights, taillights, and glass and by adding special equipment to facilitate its use in races, was "equipment designed for use principally off public roads."

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

Fisher & Fisher, for appellants.

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellee.

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

BOSLAUGH, J.

This action arises out of claims made under the medical payments and uninsured motorists coverage of an automobile liability insurance policy issued by the defendant. The trial court found there was no coverage under the policy as to the claims in question and sustained the defendant's motion for a summary judgment. The plaintiffs appeal.

The accident happened at Hemingford, Nebraska, on August 17, 1969. The named insured, Gene D. Walcott, his wife, and son were seated on a station wagon owned by a third party watching a stock car race at the Box Butte County Fair when one of the vehicles in the race, driven by David Sward, struck the station wagon injuring the plaintiffs. The policy issued by the defendant provided both medical payments and uninsured motorists coverage subject to certain exclusions.

The policy provided that the medical payments coverage did not apply to bodily injury sustained through

being struck by "a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads." The policy further provided that the term "uninsured automobile" shall not include "a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads."

The vehicle operated by Sward was a 1957 Ford that had been modified for use in races. The seats, dashboard, headlights, taillights, and all glass had been removed from the vehicle. A wire mesh screen had been installed in place of the windshield, and roll bars had been installed in the passenger compartment. Other special equipment, such as tires, bumpers, a driver's seat, and a gas tank had been installed to facilitate its use and operation in races. It is clear that it was a vehicle intended for use principally off public roads and was not upon a public road at the time of the accident.

The question presented is whether the vehicle operated by Sward was excluded from coverage under the policy as "equipment designed for use principally off public roads." In a similar case, the Supreme Court of Texas held that a 1947 Ford sedan, modified for use as a stock car racer, was "other equipment designed for use principally off public roads" and excluded from coverage under a policy similar to the one involved in this case. Williams v. Cimmaron Ins. Co. (Tex.), 406 S. W. 2d 173. Other decisions to the same effect are Beagle v. Automobile Club Ins. Co., 18 Ohio Op. 2d 280, 176 N. E. 2d 542; Livingston v. Nationwide Mutual Ins. Co., 295 F. Supp. 1122; Kansas Farm Bureau Ins. Co., Inc. v. Cool, 205 Kan. 567, 471 P. 2d 352.

The judgment of the district court finding there was no coverage as to the claims in question was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY CORFIELD, APPELLANT.
201 N. W. 2d 818

Filed November 3, 1972. No. 38489.

Criminal Law: Evidence: Appeal and Error. In a criminal action, this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt.

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

Padley & Dudden, for appellant.

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

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

MCCOWN, J.

The defendant, Jerry Corfield, was convicted of forcibly assaulting and resisting a law enforcement officer while the officer was engaged in the performance of his official duties. He was sentenced to imprisonment for 1 year. We affirm the conviction and sentence.

At approximately 1 a.m., on the morning of August 13, 1971, a citizen of Arthur, Nebraska, complained to the sheriff by telephone about excessive noise and commotion in the downtown area of the village. The sheriff dressed and drove to the main street of the village. There were two automobiles parked in front of the pool hall tavern. There were six or seven young men in or around the cars. The sheriff parked his car nearby, got out with a can of mace in his hand, and walked up to the young men. He advised them that he had received a complaint about the noise and requested that they all go home without any more trouble. Some of the young men got into one of the automobiles and

drove away. The defendant, his brother, and one of the other young men remained.

After some conversation, the defendant refused to comply with the request and a scuffle ensued. Defendant struck the sheriff, knocked him back against a fence, and wrestled with him. The sheriff broke loose, managed to reach his car, grabbed his revolver from the car, and fired it into the air. The defendant again attacked the sheriff. The sheriff then struck defendant over the head with the barrel of the revolver, arrested the defendant and the other two young men, and took them to jail.

The sheriff sustained two lacerations on his temples, both of which required stitches. He also had bruises on his face and the side of his head.

The only real dispute in the evidence is whether the sheriff used mace on the young men before he was assaulted or only after the defendant had assaulted him. The jury obviously resolved that conflict.

The defendant's contentions that requested instructions as to an unlawful arrest were improperly refused are wholly without merit. The remaining assignment of error is directed at the court's refusal to sustain defendant's motion for a directed verdict at the close of the trial. While it was in conflict in some respects, the evidence here was more than sufficient to sustain the verdict of the jury. In a criminal action, this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that is is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Anderson, 184 Neb. 868, 173 N. W. 2d 38.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM (BILL) MCCUNE, APPELLANT.

201 N. W. 2d 852

Filed November 3, 1972. No. 38501.

1. **Infants: Criminal Law: Words and Phrases.** Contributing to the delinquency of a minor consists of an act which encourages, causes, or contributes to the delinquency of a child under 18 years of age. § 28-477, R. S. Supp., 1972.
2. ———: ———: ———. A delinquent child is any child under the age of 18 years who has violated any state law or city or village ordinance. § 43-201, R. R. S. 1943.
3. **Infants: Criminal Law: Evidence: Intoxicating Liquors.** Evidence that a defendant furnished the automobile used for a drinking party upon the public highways in which a 15-year-old girl was allowed to participate will sustain a conviction for contributing to the delinquency of a minor.
4. **Motions, Rules, and Orders: Evidence: Parties: Criminal Law.** A motion to suppress can be urged only by one whose rights were violated, not by one aggrieved solely by the introduction of damaging evidence.
5. **Criminal Law: Police Officers and Sheriffs: Powers.** A peace officer is authorized to stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and he may demand of him his name, address, and an explanation of his actions. § 29-829, R. S. Supp., 1972.
6. **Criminal Law: Police Officers and Sheriffs: Powers: Time.** An officer from an adjoining county may delay apprehending a person he reasonably suspects has committed a crime for a reasonable time so that he can obtain the assistance of a local officer.
7. **Criminal Law: Police Officers and Sheriffs: Powers: Time: Arrest.** A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that the person has committed a misdemeanor and has reasonable cause to believe that the person will not be apprehended unless immediately arrested, may cause injury to others unless immediately arrested, or may destroy or conceal evidence of the commission of the misdemeanor. § 29-404.02, R. S. Supp., 1972.
8. **Criminal Law: Police Officers and Sheriffs: Searches and Seizures.** It is not a search for an officer to observe what is in plain view.

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

Mingus & Mingus, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of contributing to the delinquency of Lenora Pabian, a minor under the age of 18 years, and sentenced to imprisonment in the county jail for 4 months. He appeals, contending the evidence was insufficient to sustain the conviction and the trial court should have suppressed the evidence obtained as a result of his arrest. There is no issue concerning the constitutionality of the statute or the sufficiency of the complaint.

The record shows that Terry Kincheloe, a deputy sheriff of Buffalo County, Nebraska, saw the defendant's automobile parked on a county road in Sherman County, Nebraska, at about 12:30 a.m., on December 28, 1971. As Kincheloe approached the defendant's automobile he saw a beer can lying directly below the door on the driver's side of the automobile, and 2 beer cans behind the automobile. It had snowed during the evening of December 27, and the beer cans were lying on top of the snow. There were no tracks on the road except those that had been made by the defendant's automobile.

Kincheloe drove past the defendant's automobile and contacted the sheriff of Sherman County. Kincheloe and the sheriff then returned to the place where the defendant's automobile had been parked. The beer cans were there but the defendant's automobile was gone. At about 1:30 a.m., they stopped the defendant's automobile on the main street in Ravenna, Nebraska. When

Kincheloe went over to the automobile to ask the defendant about the beer cans that had been near his automobile in Sherman County, Kincheloe detected a strong odor of liquor coming from the automobile and could see that there were several people in the automobile. Kincheloe then asked the defendant and the other occupants of the car, two men and two girls, to get out of the automobile. The girls were Lenora Pabian, 15, and Monica Fisher, 19. The defendant is 26 years of age.

When the defendant got out of the automobile, Kincheloe saw that there was beer on the floor of the automobile where the defendant had been sitting. The defendant and the other occupants were taken to the city hall and the defendant was told that he would be charged with contributing to the delinquency of a minor.

The record further shows that Lenora Pabian had been riding around in the defendant's automobile in Ravenna and the area nearby since about 8:30 p.m. During this time she had drunk both beer and wine furnished by the other men in the automobile.

The offense consists of any act which encourages, causes, or contributes to the delinquency of a child under 18 years of age. § 28-477, R. S. Supp., 1972. A delinquent child is any child under 18 years who has violated any state law or city or village ordinance. § 43-201, R. R. S. 1943. The defendant furnished the automobile used for a drinking party upon the public highways in which a 15-year-old girl was allowed to participate. The evidence was sufficient to sustain the conviction.

It is doubtful whether the defendant had standing to object to the testimony obtained from Lenora Pabian and the other witnesses who were passengers in the automobile. A motion to suppress can be urged only by one whose rights were violated, not by one aggrieved solely by the introduction of damaging evidence. State v. Rice, 188 Neb. 728, 199 N. W. 2d 480.

The defendant contends that the officers had no right to stop his automobile in Ravenna because at that time there was not probable cause for his arrest. The defendant overlooks the right and duty of peace officers to investigate and prevent crime. In State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129, we said: "Defendant is laboring under the misapprehension that the same rule on probable cause applies when a person is merely stopped and questioned as when he is arrested. Defendant's approach presents a clash of interest between the protection of the public and the right of an individual. His premise is false and would cripple law enforcement. To require that a police officer must have probable cause for arrest before he can stop and question a person would extend the Constitution beyond the realm of reasonable intendment. By so holding, we would be unduly limiting police power for the mere sake of limitation. To do so would emasculate crime prevention and render peace officers impotent and useless. Individual rights on occasion must give way to the rights of society. This is the very purpose of law—to restrict the rights of the individual to provide protection for society. It is not possible to ignore the fact that police officers are charged with the duty to prevent crime as well as to detect it. Often an immediate inquiry is an indispensable attribute to the prevention and discovery of crime. This is particularly true where a moving vehicle is involved. Then, time is of the essence. Unless the vehicle is stopped and the occupants identified, it may be impossible to connect them to the area if a crime is later uncovered." See, also, A.L.I., Model Code of Pre-Arraignment Procedure, Proposed Official Draft No. 1, § 110.2, p. 5.

A peace officer is authorized to stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. S. Supp., 1972.

The circumstances of the defendant's automobile parked on the highway with freshly discarded beer cans around it was sufficient to justify a reasonable suspicion on the part of the officer that one or more crimes had been committed, were being committed, and would be committed. It was not essential that the officer stop and investigate immediately. Being from an adjacent county, it was reasonable for him to obtain the assistance of an officer from Sherman County. See, State v. Carr, 2 Conn. Cir. 247, 197 A. 2d 663; Schindelar v. Michaud, 411 F. 2d 80; 5 Am. Jur. 2d, Arrest, § 33, p. 724.

After the officers had stopped the defendant's automobile in Ravenna and found there was beer in the automobile and a 15-year-old girl in the party, the arrest of the defendant was lawful. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that the person has committed a misdemeanor and has reasonable cause to believe that the person will not be apprehended unless immediately arrested, may cause injury to others unless immediately arrested, or may destroy or conceal evidence of the commission of the misdemeanor. § 29-404.02, R. S. Supp., 1972.

It was unnecessary for the officers to search the defendant's automobile. Both the beer and the 15-year-old girl were within the plain view of the officers and the officers were in a place where they had a right to be.

In view of the defendant's record, the sentence imposed was well within the discretion of the trial court. The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

This court has again held that the offense of "contributing to the delinquency" of a minor consists of any act which encourages, causes, or contributes to the delinquency of a child under 18 years of age. A delinquent child is any child under 18 years of age who has violated any state law or city or village ordinance.

On its face, therefore, the "contributing" statute makes criminal "any act," regardless of intent or purpose, which encourages, causes, or contributes to the violation of any law of the state or any city or village ordinance by a minor under the age of 18 years.

The majority also reaffirm the position that it is sufficient to charge the commission of the crime in the general words of the statute without reference to any specific acts alleged to have been done. See State v. Simants, 182 Neb. 491, 155 N. W. 2d 788. It may be useless to repeat the discussion contained in the Simants dissent at 182 Neb. 497, 155 N. W. 2d 792. Nevertheless, recent decisions of the Supreme Court of the United States dealing with general issues of unconstitutional vagueness and overbroadness make it imperative that the matter be discussed once more.

No specific acts are charged in the information before us. The majority opinion, however, makes it clear that the defendant's acts which support the conviction here consisted of furnishing the automobile used for a drinking party during which a minor drank beer and wine furnished by "other men in the automobile." The defendant's acts are summarized as furnishing the automobile used for a drinking party "in which a 15-year-old girl was allowed to participate." That language would seem to make it a criminal offense to fail to prevent a minor from violating the law or to fail to prevent others from actively assisting the minor in the violation of law. The facts here also indicate that the defendant might well be described as an "undesirable" citizen whose conduct left much to be desired under any ordinary standards.

This court has consistently held that a criminal statute must give a person of ordinary intelligence fair notice of what conduct is forbidden. That position has also been consistently upheld by the Supreme Court of the United States and recently strongly reaffirmed. In Papachristou v. City of Jacksonville, 405 U. S. 156, 92

S. Ct. 839, 31 L. Ed. 2d 110 (1972), the court without dissent struck down the Jacksonville, Florida, vagrancy ordinance as unconstitutional on its face. The court said: "This ordinance is void-for-vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,' United States v. Harriss, 347 U. S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. Thornhill v. Alabama, 310 U. S. 88; Herndon v. Lowry, 301 U. S. 242."

The court also quoted from the case of United States v. Reese, 92 U. S. 214 (1875): "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The court also referred to the language of Mr. Justice Frankfurter in dissent in Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, in which he said: "Only a word needs to be said regarding Lanzetta v. New Jersey, 306 U. S. 451. The case involved a New Jersey statute of the type that seek to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."

On June 29, 1972, the Supreme Court summarily vacated the judgment in Oyen v. Washington, 408 U. S. 933, 92 S. Ct. 2846, 33 L. Ed. 2d 745. In that case, the Supreme Court of Washington had previously held that a statute prohibiting a person "without a lawful purpose" to "willfully loiter" around a school building was not unconstitutional for overbreadth or for vagueness. 78 Wash. 2d 909, 480 P. 2d 766. Obviously, the Papachristou case was deemed determinative by the United States Supreme Court.

On June 1, 1971, the Supreme Court had perhaps telegraphed its later action in Papachristou by its decision in Coates v. City of Cincinnati, 402 U. S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214. In that case, a Cincinnati, Ohio, ordinance made it a criminal offense for "three or more persons to assemble * * * on any * * * sidewalks, street corners, vacant lots, or mouths of alleys and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." The ordinance was declared unconstitutional on its face in an opinion by Mr. Justice Stewart. The dissents tended to indicate agreement that the ordinance would be unconstitutional in many situations, but that it should not be declared unconstitutional on its face.

In the case before us, who shall determine what "act" "encourages, causes, or contributes" to a violation of any state law or city or village ordinance by a minor? The all-encompassing vagueness and overbreadth is largely due to the unusual definition of juvenile delinquency built into the Nebraska statutes since 1965 and retained in the proposed revision of the Nebraska Criminal Code. It would require a veritable Solomon to determine what particular conduct was proscribed under the statutory language. There are simply no ascertainable standards of guilt. Neither does the statute currently require even any criminal intent, nor does it make any difference whether the statute or ordinance violated by the minor is civil or criminal.

"Encouraging" or "contributing" in Nebraska are just as vague and subjective as "annoying" in Ohio. "Delinquency" as defined by the Nebraska statute is much broader than "vagrancy" as defined in the Florida ordinances, and far more imprecise. It seems transparently clear that the current statute prohibiting any act which encourages, causes, or contributes to the delinquency of a minor is unconstitutionally vague as well as unconstitutionally overbroad. The words of the Supreme

Court in Coates v. City of Cincinnati, *supra*, are appropriate. "It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited."

The statute here is unconstitutional and the judgment of the district court should have been reversed.

CLINTON, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DANIEL DOVEL, APPELLANT.
201 N. W. 2d 820

Filed November 3, 1972. No. 38506.

1. **Criminal Law: Sentences: Probation and Parole.** Section 29-2260, R. S. Supp., 1972, gives legislative recognition to the fact that in many cases a sentence of probation is more likely to be effective than is a sentence of imprisonment and that the procedure of probation requires the expenditure of substantially less public funds than does incarceration.
2. **Criminal Law: Appeal and Error: Probation and Parole.** This court will not overturn an order of the trial court which denies probation unless there has been an abuse of discretion.

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

T. Clement Gaughan and Paul M. Conley, for appellant.

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

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

CLINTON, J.

Defendant was charged with feloniously receiving stolen property over the value of $100, knowing the some to have been stolen, and with the intent of fraudulently depriving the owner thereof. He was convicted by a jury of the charge and sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. The statutory penalty for the offense is not more than 7 nor less than 1 year. § 28-508, R. R. S. 1943.

The error assigned on this appeal is that the trial court abused its discretion in imposing such sentence. It is urged that probation would be appropriate because the defendant is only 20 years of age and this is his first felony conviction.

We are cited State v. Shonkwiler, 187 Neb. 747, 194 N. W. 2d 172; Standard 2.3(c), A B A Standards Relating to Sentencing Alternatives and Procedures, Approved Draft, 1968; and section 7.01 of the Model Penal Code, which indicate that probation may be appropriate in offenses of this type. We might also be cited Standard 1.3, A B A Standards Relating to Probation, Approved Draft, 1970, which our Legislature has codified with changes. § 29-2260, R. S. Supp., 1972. This statutory enactment is, of course, recognition that sentences which do not involve imprisonment are more likely to be effective in many cases than imprisonment and that the sentence of probation represents a great deal less in public expenditures. See Standard 2.3(e), A B A Standards Relating to Sentencing Alternatives and Procedures, Approved Draft, 1968.

The difficulty with the position of the defendant in this case is that prolonged and repeated probation for a series of offenses has been tried and failed in his case. This is technically the defendant's first conviction of a felony because the previous offenses, joyriding, burglary, larceny, and auto theft, were treated as juvenile offenses under Chapter 43, article 2, R. R. S. 1943. The trial court with its more personal knowledge of the de-

fendant is in a better position to judge the likelihood of the effectiveness of another try at probation than is this court. We are unable to say that the trial court abused its discretion. State v. Cottone, 188 Neb. 102, 195 N. W. 2d 196.

AFFIRMED.

MILLARD R. SELDIN, APPELLANT, V. NORTHLAND MORTGAGE COMPANY, APPELLEE.
202 N. W. 2d 174

Filed November 10, 1972. No. 38257.

1. **Usury: Actions.** It is well established in this State that usury is a defense rather than a cause of action, and that after usurious interest has been paid an action will not lie to recover it.
2. **Usury: Bills and Notes: Licenses.** Although the Installment Loan Act applies primarily to those who have been licensed under the act, its inhibitory provisions apply to nonlicensees as well.
3. **Usury: Bills and Notes: Trial.** The real question of whether a transaction is an installment loan is a question for the trier of fact under the circumstances.
4. **Statutes: Legislature.** In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject.
5. **Statutes: Courts.** In the construction of a statute, courts must consider the preexisting law and any other laws relating to the same subject.
6. ———: ———. Courts should not give an interpretation to a statute which would have the effect of nullifying another statute when obviously that was not the clear legislative intent.
7. **Statutes.** It is a cardinal principle that statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision.
8. **Statutes: Mortgages: Licenses: Interest.** Real estate mortgage loans by nonlicensees whose terms call for periodic interest payments and a single payment of principal are not installment loans and are not subject to the inhibitory provisions of the Installment Loan Act.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

John W. Delehant, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

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

WHITE, C. J.

This is an action to recover purportedly usurious interest, which interest was completely paid by the plaintiff. Jury being waived, the cause was tried to the court which found generally in favor of the defendant and dismissed the case. We affirm the decision of the district court.

The plaintiff is an experienced real estate developer, doing business with various associates through several partnerships and corporations. The defendant is engaged in the mortgage banking business, which includes serving as a middleman in the placement of long-term loans with large institutional lenders such as insurance companies.

In 1967 the plaintiff, in his capacity as president of Northport Properties, Inc., a corporation owned by him, solicited the defendant's services in securing a 25-year loan of $1,800,000 to finance construction of a high-rise apartment on property owned by Northport. The agreement into which the parties entered at that time provided that the defendant was to receive a contingent fee of one percent of the amount of the loan. Shortly thereafter, the plaintiff, again in his capacity as president of Northport, applied to the defendant for a loan of $150,000 to pay a purchase money mortgage on the property owned by Northport. The application was approved, but the loan was made in the amount of $168,000. The $18,000 difference was attributed to a decision on the part of the defendant that it would require a fixed, nonrefundable fee of $18,000 for its services in the at-

tempt to obtain financing for the apartment project, rather than the contingent fee upon which the parties had previously agreed. The plaintiff contends that the additional $18,000 was actually additional interest which, when combined with the stated interest of 7 percent, made the entire transaction usurious. The loan was secured by a mortgage on the land, and called for monthly interest payments, with the principal due in a single payment at the end of 1 year. In light of the disposition we make of this case, a more elaborate discussion of the facts is unnecessary.

It is well established in this State that usury is a defense rather than a cause of action, and that after usurious interest has been paid an action will not lie to recover it. Waller v. First Trust Co., 126 Neb. 403, 225 N. W. 29; Blain v. Willson, 32 Neb. 302, 49 N. W. 224; New England Mortgage Security Co. v. Aughe, 12 Neb. 504, 11 N. W. 753. An exception to this rule is provided in section 45-138, R. R. S. 1943, a part of the Installment Loan Act: "Any contract of loan made in violation of this section * * * shall not on that account be void, but the licensee shall have no right to collect or receive any interest or charges on such loan. If any interest or other charges have been collected, the licensee shall forfeit and refund to the borrower all interest and other charges for the loan involved."

This section applies only to installment loans, and the plaintiff can avail himself of the exception provided therein only if this is determined to be an installment loan. This court is being asked to hold that a loan providing for periodic interest payments and a single principal payment is an installment loan under the provisions of the Installment Loan Act. The consequence of such a holding would be to find all such loans violate the act, for section 45-138, R. R. S. 1943, also provides: "Every loan contract shall provide for repayment of principal and charges in installments which shall be * * * so arranged that no installment is substantially

greater in amount than any preceding installment." It is clear that no loan of the type involved here could possibly satisfy this requirement. This court has held several times that although the Installment Loan Act applies primarily to those who have been licensed under the act, its inhibitory provisions apply to nonlicensees as well. Pattavina v. Pignotti, 177 Neb. 217, 128 N. W. 2d 817; State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122. It appears, then, that if the plaintiff is correct, all loans of this description, by whomever made, are in violation of the Installment Loan Act, and the lender is entitled to collect no interest thereon.

Boiled down, the only real question involved in this case is whether or not the Seldin-Northland loan was an installment loan as intended by the Installment Loan Act. §§ 45-114 to 45-158, R. R. S. 1943. The entire principal sum was due and payable March 1, 1968, and interest on the note at the rate of 7 percent per annum was to be paid monthly as billed by Northland on the whole amount including the $18,000 fee previously mentioned. To bottom his argument that this was an installment loan, within the meaning of the Installment Loan Act, plaintiff refers to the provisions of section 45-138, R. R. S. 1943, which we have quoted previously in this opinion. The essence of this section of the statute is to provide for *equal* intervals of time and *equal* amounts of payment. The equal payment provision of section 45-138, R. R. S. 1943, has been unchanged since its appearance in 1943. See Laws 1943, c. 107, § 4, p. 371. It is abundantly clear from the language of the statute itself and from the history of our decisions construing the act that the *equal* payment provision of the act was intended to prohibit the vice of balloon payment schemes where the borrower would face a large or balloon payment after months of level payments. See State ex rel. Beck v. Associates Discount Corp., *supra*. This section of the statute was directly aimed

at the balloon payment device as used by unscrupulous lenders to extract exorbitant refinancing agreements from small loan borrowers whereby many small loans mushroomed to large debts and attractive profits.

Despite the number of decisions that have been rendered by this court under the Installment Loan Act, this court has not had occasion to consider a loan similar to that presented here, where a single-payment note for a large amount on undeveloped real estate is accompanied by an agreement for periodic interest payments during the term of the note. We hold that such a note agreement is not an installment loan as intended by the Installment Loan Act.

The argument advanced by plaintiff is both simple and deceptive; it is that periodic payment of interest during the term of a single-payment note makes the note an installment loan. To buttress this bold proposition plaintiff cites section 45-138, R. R. S. 1943, quoted *supra,* and relies on the equal payment provisions of that section which we have discussed. The argument is fallacious. Section 45-138, R. R. S. 1943, applies only to installment loans and not loans generally. The intention of the section, and the mischief sought to be prevented for the protection of small borrowers, is that every installment loan must provide for repayment of principal and charges at substantially equal intervals and in equal amounts for the purpose of avoiding the large balloon payment requiring refinancing with all the charges incident thereto. It is true that the note involved in this case did not meet these requirements of section 45-138, R. R. S. 1943. As a matter of simple logic, it is equally clear that the note here does not become an installment loan act violation simply because it did not meet the requirements of an installment loan under section 45-138, R. R. S. 1943. All loans under the Installment Loan Act must provide for substantially equal payments at approximately equal intervals, but because any loan, regardless of size, does not have such

a provision, it does not follow that it is in violation of the Installment Loan Act. A single-payment note for a land loan cannot convert such a loan into an installment loan. It is clear that the term "every loan contract" means every installment loan contract within the meaning and the purpose of the whole act. The equal payment provision was designed to cure the mischief of a balloon payment, and not to prohibit single-payment land loans.

Plaintiff offers no other argument which could support his claim that the instant note was actually an installment loan within the meaning of the act. It is clear, just as in questions of whether a transaction is a time sale made in good faith or the financing of the unpaid balance of a cash purchase price, the real question of whether a transaction is an installment loan is a question for the trier of fact under the circumstances. See Powell v. Edwards, *supra*. The trier of fact, in deciding this question, is entitled to look through the form and examine the substance of the transaction under all the circumstances. See State ex rel. Beck v. Associates Discount Corp., *supra*.

We judicially notice the fact that the making of large mortgage land loans, such as the one here and in the manner in which this one was made, is not an uncommon practice in the lending business. We observe that during the long history of the Installment Loan Act there has been no whisper from an authoritative source that such transactions might be other than they appeared on their face. The Department of Banking, charged with the duty of enforcing the act and entitled to the first reasonable interpretation of its terms, has done nothing to restrain the practice, and the Legislature has not seen fit to act in any manner in relation to the making of notes and mortgages on large land loans and construction contracts which include such provisions. We reach the same conclusion when we examine the history of the act and its proper relation

to other provisions of the banking and loan laws of this state.

In Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856, we held: "In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the preexisting law and any other laws relating to the same subject." See, also, Lang v. Sanitary Dist., 160 Neb. 754, 71 N. W. 2d 608. In section 8-446, R. S. Supp., 1971 (amended in 1971 only with regard to the length of time in which the loan is repayable), a legislative definition of the term installment loan may be distilled from the following provision: "Every loan made under the provisions of sections 8-435 to 8-450 shall be repayable within a period of one hundred twenty months or less in approximately equal or declining installments of *principal and interest* at approximately equal intervals." (Emphasis supplied.)

In Airport Authority of City of Millard v. City of Omaha, 185 Neb. 623, 177 N. W. 2d 603, we said: "We should not give an interpretation to a statute which would have the effect of nullifying another statute when obviously that was not the clear legislative intent."

If we were to accept plaintiff's contention that a loan providing for periodic interest payments and a single principal payment is an installment loan, we would appear to be nullifying the legislative definition of this term as expressed in section 8-446, R. S. Supp., 1971.

In Nelson v. Robertson, 187 Neb. 192, 188 N. W. 2d 720, we said: "It is a cardinal principle that statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision." After consideration of the aforementioned principles, we conclude that plaintiff's contention is without merit.

We hold that real estate mortgage loans by nonlicensees, whose terms call for periodic interest pay-

ments and a single payment of principal are not installment loans and are not subject to the inhibitory provisions of the Installment Loan Act, sections 45-114 to 45-158, R. R. S. 1943. This being so, the plaintiff cannot avail himself of the provision in the act which allows a borrower to sue to recover allegedly usurious interest which has already been paid.

The plaintiff argues in the alternative that the loan transaction violated section 45-501, R. R. S. 1943, a disclosure statute which was not a part of the Installment Loan Act. Section 45-502, R. R. S. 1943, provided that where a loan transaction violates the provisions of section 45-501, R. R. S. 1943, a borrower may sue to recover any interest which he has paid. Both of these statutes were repealed, without a savings clause, effective June 26, 1969. Laws 1969, c. 45, § 3, p. 258. This suit was not brought until April 7, 1970. It is well established that the repeal of a statute without any reservation takes away all remedies given by the repealed statute. City of Beatrice v. Gage County, 130 Neb. 850, 266 N. W. 777; Bennet v. Hargus, 1 Neb. 419; 82 C. J. S., Statutes, § 439, p. 1012. These statutes were repealed almost a year before this suit was brought, and it is clear that the plaintiff cannot rely on them.

The decision of the district court is correct and is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

BOSLAUGH, J., concurring.

This case involves a $150,000 land loan made by the defendant to Northport Properties, Inc., a corporation owned by the plaintiff. The plaintiff was liable on the note as an endorser. This action was brought to recover what was alleged to have been usurious interest paid to the defendant.

The only issue of any importance in the appeal is whether the Installment Loan Act was applicable. Since the loan had been repaid in full before the action was

commenced, there could be no recovery of interest paid, even if it had been usurious under the general interest statute. The plaintiff attempted to recover on the theory that the Installment Loan Act was applicable. The majority opinion correctly holds that the Installment Loan Act has no application to a transaction of this nature.

The Installment Loan Act authorizes persons licensed under the act to loan not to exceed $3,000 at rates in excess of 9 percent per annum in accordance with the requirements and conditions specified in the act. The act contemplates a "small" loan where the risk is great and the expense under conventional rates prohibitive. The act was never intended to apply to nonlicensees who make loans in the traditional manner at conventional rates such as amortized real estate loans. Pattavina v. Pignotti, 177 Neb. 217, 128 N. W. 2d 817.

Although the act applies to loans made by nonlicensees at rates which would be authorized if the lenders were licensed under the act, it has no application to loans made by a nonlicensee which are not within the scope or contemplation of the act.

CLINTON, J., joins in this concurrence.

ALBERT SIMON, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC COMPANY, ET AL., APPELLANTS, IMPLEADED WITH NATKIN & COMPANY, A CORPORATION, APPELLEE.

202 N. W. 2d 157

Filed November 10, 1972. No. 38307.

1. **Negligence: Invitee: Property.** The duty of an owner in control of the premises where work performance under a contract with the owner is to be executed is to exercise reasonable care to keep the premises in a safe condition while the contract is in the course of performance.
2. ———: ———: ———. The possessor of land retaining con-

trol is subject to liability for personal injuries to business visitors caused by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk of harm to the invitee.

3. **Negligence: Master and Servant.** The duty imposed upon the owner is not that of an insurer; he must use only that degree of care in furnishing a safe place to work which a reasonable and prudent man would exercise under like circumstances.
4. ———: ———. Ordinarily, a safe place to work requires that the owner in possession and control of the premises should recognize that the construction work is likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken.
5. **Negligence: Invitee: Property.** The owner's duty to the invitee to provide a safe place to work cannot be delegated or avoided by contract where the owner retains possession and control of the premises.
6. **Trial: Instructions.** Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available.
7. **Trial: Evidence: Witnesses: Negligence.** A violation of an administrative rule, or of a private safety regulation, is independent evidence of negligence, under all of the circumstances, provided an expert witness incorporates the regulation in his opinion as to an issuable act of negligence and the evidence would probably aid the trier of fact.
8. **Trial: Instructions.** Where the court has properly instructed generally on the law as to some issue presented by the pleadings and the evidence, it is generally the duty of counsel to request an instruction which seeks to supplement and define the general instruction.
9. **Trial: Contracts: Parties.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced.
10. **Principal and Agent: Contracts: Negligence.** Ordinarily, an agent is only liable to his principal for a mere breach of his contract with such principal; but if in the course of his agency he undertakes as a part of his contract to render service to his principal of a type which he should recognize as necessary for the protection of third persons, he must exercise reasonable

care in the performance of the undertaking.

11. **Trial: Evidence: Depositions: Parties.** An extrajudicial admission appearing in the deposition of a party taken before trial is ordinarily not final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

L. J. Tierney and T. J. Stouffer of Cassem, Tierney, Adams & Henatsch and Pilcher, Howard & Dustin, for appellants.

David S. Lathrop of Lathrop, Albright & Dolan, for appellee Simon.

Gaines, Spittler, Neely, Otis & Moore and Joseph R. Moore, for appellee Natkin & Co.

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

WHITE, C. J.

This is an appeal from a jury verdict and a money judgment for the plaintiff, Albert Simon, in a negligence action for personal injuries against the defendants, Omaha Public Power District and Gibbs, Hill, Durham & Richardson, Inc., who are architects and supervisors of the construction for the defendant, Omaha Public Power District. Another defendant, Natkin & Company, for whom Simon was working was impleaded as the plaintiff's employer for the assertion of its workmen's compensation subrogation rights, and both Omaha Public Power District and Gibbs cross-petitioned against Natkin for indemnity as to any amounts adjudged against them in favor of Simon. The jury returned a verdict for Natkin on both indemnity claims, from which finding the Omaha Public Power District and Gibbs, Hill, Durham & Richardson, Inc., appeal. We affirm

the judgment of the district court.

Plaintiff Simon, working as a steamfitter for Natkin, was seriously injured when he fell through an opening in the floor deck of a building under construction known as Unit No. 5 in OPPD's expansion of the North Omaha Power Plant. OPPD was the owner of the premises and its own general contractor. Gibbs, Hill, Durham & Richardson, Inc., hereinafter referred to as GHDR was the consulting engineer and architect engaged by OPPD. The various assignments of error raised by OPPD and GHDR assert, in substance, that the trial court should have sustained their motions for judgment notwithstanding the verdict on the grounds of the insufficiency of the evidence and that there was error in the instructions to the jury.

Boiled down, the contentions of OPPD and GHDR require a determination by this court as to the following:

(1) What was the duty or standard of care owed by them to Simon;

(2) With relation to the instructions to the jury, what was the effect of safety standards which were introduced at trial and based on expert testimony that they were recognized by the construction industry, OPPD and GHDR, and incorporated into regulations issued by the Nebraska Department of Labor; and

(3) The effect of deposition testimony by Simon that was contradictory of his trial testimony as to lookout and knowledge regarding the opening through which he fell.

It is necessary for an understanding of the precise issues presented that a comprehensive and detailed statement of the facts be given.

In 1964 OPPD engaged GHDR to act as consulting engineer in construction of a new generator addition to the North Omaha Power Plant. In their contract, GHDR made the following promises, among others, as regards their undertakings:

"We will manage and supervise the entire construction including:

"1. Overall planning and management of the construction work and building operations will be furnished in addition to coordinating, scheduling, and expediting the work of the various contractors, handling incidental field engineering, and performing all managerial functions incident to the over-all construction work as contrasted to the work of specific contracts.

"2. Inspect field work performed by various contractors to determine acceptability of the work. This service will include the necessary checking to insure compliance with the plans and specifications and to protect the District's interest in safety, housekeeping, fire prevention, and operation of the running plant." OPPD, however, reserved the right to control all phases of the work and to decide all matters pertaining to schedules, policy, and selection of key personnel of GHDR.

The conduct of GHDR under this contract is illustrated through the testimony of Mr. Donald Rutland, the construction superintendent for GHDR who was at the jobsite daily from September 1965 to July 1968. OPPD apparently relied on GHDR for the performance of all safety responsibilities as OPPD had no safety people on the job. In addition, Mr. Devereux, a State inspector, thought that Mr. Rutland worked for OPPD. Mr. Devereux's dealings were with Mr. Rutland, despite the fart that Mr. Ted Short, the OPPD liaison man at the site, was known by Mr. Devereux as the "over-all head of everything there."

Mr. Rutland made twice-daily safety inspections of the site. Mr. Rutland had men who very definitely undertook portions of the job of safety enforcement relative to his inspections, but GHDR had no one whose job was strictly safety enforcement. Neither OPPD nor GHDR had any craftsmen that could be put to work to cover a hole or opening discovered on inspection.

Mr. Rutland would direct one of the several contractors to build a cover. If possible, Mr. Rutland tried to find the contractor whose equipment was going to be installed in the hole, unless it was an emergency.

In the months prior to Simon's fall, Mr. Rutland acknowledged having received many complaints of open, unguarded holes from the State labor inspectors. Four inspection reports were received in evidence. Each reads the same as to item No. 10: "Are all elevators, shafts, and openings properly guarded? No." At no time did Mr. Rutland reject the receipt of these complaints or indicate that this was not his department. The six or seven contractors on the job were not cooperative respecting the complaints, and between the official complaints and Mr. Rutland's inspections the situation was recognized by Mr. Rutland as very serious. In fact, the situation was serious enough that a State inspector on February 7, 1967, was considering a shutdown of the site.

In this situation Mr. Rutland's response was only to continue the regular weekly safety meetings. These meetings had been initiated at the beginning of construction and continued until completion.

On February 9, 1967, Simon fell through a duct opening on the first floor. He was impaled on three one-foot, vertical, reenforcing rods of steel set in concrete on the ground floor directly underneath the duct opening. These rods were designed to form part of the foundation upon which a machine was eventually to rest. The rods, installed by a contractor other than Natkin, had existed for at least a year prior to the injury, and had never been boxed.

The dimensions of the duct opening were 3¼ feet by 3½ feet. It had been created a long time prior to the date of injury, by a contractor other than Natkin, who had been awarded a contract for heavy piping. It was surrounded by an elevated flange to a height of approximately 4 inches.

The following facts might reasonably have been found by the jury from the evidence presented. The duct opening was located 3 feet south of a very large condenser opening which was surrounded by a guardrail. Slightly farther away and to the west a lube-tank opening, 7⅔ by 17 feet, was covered with planks overlaid with plywood. Adjoining it on the west was a large pipe hatch enclosed with a guardrail. There was no artificial lighting but the floor was adequately lighted by the absence of the north wall. The lighting around the duct opening was adequate but not so good as at adjoining places. In the words of a steamfitter who was with Simon at the time of the accident, "your eyes would probably take a little bit to get used to the different lighting there."

Simon, age 60 at the time of trial in July 1971, testified he had completed the tenth grade in school. He had been working intermittently 8 of the 10 working days immediately prior to February 9, 1967. On that morning Simon worked outside hoisting pipes to the west side of the first floor. After lunch he and other steamfitters in his crew attended a safety meeting. At the safety meeting, Simon's first, unguarded openings or holes were not mentioned. Simon had never been on the first floor prior to the injury.

After the safety meeting a foreman of Natkin ordered Simon and others to move cumbersome and heavy pipes into position for eventual hoisting through the pipe hatch. The first section, 40 to 60 feet long, was carried on the shoulders of 6 to 8 men. They walked southeast, stopping at times to maneuver around obstructions. They crossed the lube-tank opening and passed near the south railing of the condenser hole. Simon was near the front of the pipe section carrying the pipe on his right shoulder.

Someone behind Simon said he faced an obstacle and the pipe stopped. In order to help the man and continue the movement of the pipe Simon turned to his left and

slid back along the pipe taking two steps. He recalled nothing further to the time when, impaled on the rods, he looked upward at the duct opening. He had not seen the opening and had not known of it.

The hole or opening had not been covered or otherwise guarded for 3 months, and 1½ hours after the accident no cover was seen in the vicinity. No one else had been working on the floor that day. Only one of the steamfitters testified that he knew of the unguarded duct prior to the accident, and he had forgotten about it on the day of the injury.

A 76 page deposition was taken of Simon in May 1970. In that deposition Simon testified three times to lack of knowledge or sight of the opening prior to the fall. After that testimony he testified 10 times, several of which we infer from the context, that he had seen the duct opening when he had passed it. In the concluding part of the deposition he testified 2 times that prior to the accident he had not seen the hole and had not known of it.

At the trial Simon was able to offer only the following explanation of the contradictions: "No, I can't (explain the contradictions). It was just a misunderstanding and—I was completely baffled with so many questions they asked me about stuff that there really wasn't no way for me to remember."

Simon's expert, Mr. Veatch, qualified by 30 years in construction safety work, incorporated Section 8 of Part 12 of the USA Standard Safety Code for Building Construction in his opinion of reasonable conduct regarding a floor hole or opening. The code was part of the Nebraska Department of Labor regulations in force February 9, 1967, and was nationally recognized as a safety guide in the construction industry.

We examine the fundamental relationships between the parties. Simon, an employee of Natkin, who was a subcontractor for OPPD, was an invitee of OPPD with the consequent responsibility to Simon flowing from

that relationship. Niemeyer v. Forburger, 172 Neb. 876, 112 N. W. 2d 276. We have no difficulty in laying down the general principles of a specific owner-invitee duty involved herein. The duty of an owner in control of the premises where work performance under a contract with the owner is to be executed is to exercise reasonable care to keep the premises in a safe condition while the contract is in the course of performance. The possessor of land thus retaining control is subject to liability for personal injuries to business visitors (Simon in this case) caused by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk of harm to the invitee. Niemeyer v. Forburger, *supra;* Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842. This duty, of course, is qualified by the usual caveat that an owner or possessor of land is not an insurer of business visitors on his premises and owes an invitee the duty to exercise reasonable care but such duty does not ordinarily encompass dangers either known to the invitee or so obvious that the invitee may be reasonably expected to discover them. Hansen v. First Westside Bank, 182 Neb. 664, 156 N. W. 2d 790.

The complaint of OPPD and GHDR centers around a challenge in the trial court's fifth particular of instruction No. 2 which commands consideration whether OPPD and GHDR were negligent in that they failed to provide the plaintiff with a safe place to work. We observe that the notion of "a safe place to work" has become an accepted component of Nebraska tort law in the employer-employee cases. Smith v. Morton Motor Co., 145 Neb. 396, 16 N. W. 2d 843; Gundy v. Nye-Schneider-Fowler Co., 89 Neb. 599, 131 N. W. 964; Kotera v. American Smelting & Refining Co., 80 Neb. 648, 114 N. W. 945. Their argument in substance is an attempt to restrict the rule requiring a safe place to work to the employer-employee relationship only. We

decline, as the trial court did, to so restrict the application of "the safe place to work" rule. It is clear from an examination of all the instructions that the court in setting out specification or particular No. 5 as to the failure to furnish a safe place to work did not expand or enlarge the basic duty that we have stated is owed to an invitee to use reasonable care to keep the premises in a safe condition while the contract is in the course of performance. Nor is there anything misleading in the instructions given, when construed with the other instructions, by which the jury could be led to believe that the duty of the defendants was other than to protect Simon from the injuries caused by a natural or artificial condition when they knew, or by the exercise of reasonable care could have discovered, the opening or the condition which, if known to them, they should have realized as involving unreasonable risk to Simon.

One of the most important cases in our examination of this issue is Westover v. Hoover, 88 Neb. 201, 129 N. W. 285, 19 A. L. R. 215. We first observe that this case does not limit the notion of a safe place to work to only employer-employee cases. Brevity forbids extensive recitation but it is clear that Westover implicitly says that had the plaintiff's pleadings correctly stated his status as an employee of an independent contractor, and had the defect which caused the injury to plaintiff not been open and obvious, the defendant as an owner retaining possession and control of the premises during the work of an independent contractor may be liable to an invitee by reason of failing to provide a safe place to work. Summarizing the authorities on this subject, we can find no reasonable distinction between the notion of furnishing a safe place to work between an employer and an employee and the well-accepted duties under the common law of an owner retaining possession and control of the premises on which work is being performed by an invitee-employee of a subcontractor. The court made it clear in the instructions that the owner

was not an insurer and that in furnishing a safe place to work it was the duty of the owner to use only that degree of care in furnishing a safe place to work which reasonable and prudent men would exercise under like circumstances. See Prosser, Law of Torts (3d Ed.), p. 546.

We are aware that a large construction project, as many of the writers and authorities on this subject have observed, has many dangers which are inherent in or normal in construction work. Under these circumstances a safe place to work requires that the owner in possession and control of the premises should recognize that the work is likely to create during its progress a peculiar risk of physical harm to others *unless special precautions are taken.* See, Restatement, Torts 2d, §§ 416, 427; 41 Am. Jur. 2d, Independent Contractors, § 35, p. 795, and cases cited therein. We have already reviewed the detailed facts surrounding the opening or hole into which Simon fell. The long period of time it was open, the continual warnings of Rutland, and the other facts demonstrate conclusively there was ample evidence from which the jury could conclude that the defendants should have foreseen the actual accident which occurred was likely to happen if precautionary measures for covering or guarding the hole for purposes of preventing the injury were omitted. We have read the instructions complained of and we can find nothing in them which enlarges or magnifies the duty of OPPD and GHDR beyond that which the law commands of an owner to an invitee. We observe further that there is no evidence in this case which would indicate or which would give rise to a reasonable inference that the *uncovered* opening into which Simon fell was necessary to the construction work; or that it was necessary for the rods upon which Simon was impaled to remain exposed for the long period of time which the jury could have found they were; or that either or both conditions were temporarily necessary during installa-

tion work; or that they needed to be so long maintained; or particularly that it was necessary the hole be open at the exact time and place of the accident.

The owner's duty to the invitee to provide a safe place to work under the circumstances cannot be delegated or avoided by contract where the owner retains possession and control of the premises. Wilson v. Thayer County Agricultural Society, 115 Neb. 579, 213 N. W. 966, 52 A. L. R. 1393; Restatement, Torts 2d, § 422. In Wilson v. Thayer County Agricultural Society, *supra*, we said: "'* * * The distinction is, when the work is one that will result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do, to prevent such injurious consequences. * * * and this duty continuously remains with the employer.'" See, also, Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N. W. 952; Schneider v. Southwestern Bell Telephone Co. (Mo. App.), 354 S. W. 2d 315; 57 C. J. S., Master and Servant, § 603, p. 374; Sandrock v. Taylor, 185 Neb. 106, 174 N. W. 2d 186 (employer cannot insulate himself from his duties by a contract that leaves him in control of the operation).

We conclude from reading all the instructions that there was no error in reciting the failure to provide a safe place to work as a separate allegation of negligence. It is clear, considering all the instructions together, that the defendants were not made insurers or held accountable for anything but their negligence and failure to use reasonable care as that negligence was carefully defined by instructions Nos. 29, 30, and 31. The unchallenged rule in this jurisdiction is that instructions to the jury must be considered as a whole, and that when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instruc-

tions is not available. Beranek v. Petracek, 184 Neb. 516, 169 N. W. 2d 275.

OPPD assigns as error the giving of instructions Nos. 34 and 37. These instructions impute the negligence, if any, of GHRD to OPPD because it was acting as the agent of OPPD under their written contract. OPPD attempts to argue instruction No. 34, imputing negligence to OPPD, when considered with instruction No. 37, the finding of active and passive negligence, permitted the jury to find that the negligence of GHDR was the active negligence of OPPD. There is no merit to this contention. Only one reasonable conclusion could be drawn from the terms of the contract and the conduct of the parties under it, and that was that GHDR was the agent of OPPD and its negligence was imputable to OPPD. We will not repeat the basic facts in connection with this situation except to point out that the relationship here between OPPD and GHDR stems from a written instrument which is clear and unambiguous. The court, therefore, did not err in finding that GHDR was the agent of OPPD as a matter of law and any negligence of GHDR was imputable to OPPD. This contention further fails because it is clear that the jury could *not have found* the negligence of GHDR to be the active negligence of OPPD, under the instructions given. This is true because instruction No. 37 states that negligence which is imputed is passive negligence.

Another contention of OPPD is that the court erred in giving instruction No. 32 which stated substantially that any violation of a rule of the USA Standard Safety Code or of the Manual of Accident Prevention in Construction Code or of a rule of the Department of Labor of the State of Nebraska does not in and of itself constitute negligence, but is evidence of negligence to be considered with all the other facts and circumstances. This instruction correctly states the law. Evidence of this nature was introduced by expert testimony. A violation of an administrative rule or of a private safety

regulation is independent evidence of negligence, under all the circumstances, provided an expert witness incorporates the regulation in his opinion as to an issuable act of negligence and the evidence would probably aid the trier of fact. See, Darnell v. Panhandle Coop. Assn., 175 Neb. 40, 120 N. W. 2d 278; Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481; Union Stock-Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357.

Simon's expert, Veatch, incorporated Section 8 of Part 12 of the USA Standard Safety Code for Building Construction in his opinion of reasonable conduct regarding covering a floor opening or hole. OPPD now contends strenuously that the failure of the trial court to instruct as to the distinction between an "opening" and a "hole" was reversible error. This argument flows, not from any applicable statute, nor any common law standard, but merely from the fact that the court in its applicable instruction did not distinguish between that portion of the expert's testimony in which a hole and an opening are defined differently. Because of its importance we deal with this contention at length. Veatch, as has been mentioned, incorporated Section 8, Part 12, of the USA Standard Safety Code for Building Construction, in his testimony. Section 8 in relevant part reads:

"8.1 As soon as the opening is framed, all floor * * * openings within a * * * structure during * * * construction * * * shall be covered with planks so as to carry safely any load which may be required to be supported thereon, or shall be fenced in on all sides by a standard railing.

"8.2 Every floor hole into which persons can accidentally walk shall be guarded either by a standard railing and toe board on all exposed sides, or a cover of sufficient strength to safely support any load which may be placed thereon. While the cover is not in place, such holes shall be constantly attended by someone or

shall be protected by a portable enclosing rail that need not be of standard construction."

The court's instruction No. 2 is attacked as not advising the jury as to a proper distinction between a hole and an opening within the above two sections given to the jury by means of Veatch's expert testimony. Instruction No. 2 listed the following as plaintiff's allegation of negligence No. 4: "In failing to cover or constantly attend the *hole* through which plaintiff fell, all in violation of Section 8 of the American Safety Code for Building Construction, * * *." (Emphasis supplied.) Giving OPPD's argument maximum import we observe that nothing even hinted to the jury that the words "opening" and "hole" in the context of Section 8 are not equivalent.

Section 8 is found in Part 12 which begins with Section 0, definitions, as follows: "0.1 Floor Opening. The term 'floor opening' when used in this code shall mean an opening in any floor, platform, or pavement, twelve (12) inches or more in its least dimension. 0.2 Floor Hole. The term 'floor hole' when used in this code shall mean an opening in any floor, platform, or pavement, less than twelve (12) inches but more than one (1) inch in its least dimension."

The argument then is that, under the facts, the space into which the plaintiff fell was an "opening" and not a "hole" within the code definition. It is abundantly clear, however, that any error in failing to distinguish between the words "opening" and "hole" in the code is without prejudice.

As we have pointed out, this minute distinction between an opening and a hole was introduced into evidence as foundation and support for an expert opinion. There was not the slightest attempt by the court or any misleading of the jury in the instructions to the effect that OPPD was *bound* by any code-directed standard of conduct. Rather the code was introduced only as evidence of negligence. It was relevant evidence as to

the reasonableness of OPPD's conduct. Among other things it could be evidence that it was not an unreasonable burden for OPPD to adopt safety precautions which were commonly followed and promulgated in the construction industry; and, it would not be unreasonably burdensome for OPPD to know of and carry out the measures. Both of these considerations are independent of the precise measurement distinctions found in Part 12 of the code of which Section 8 is only a part.

We search the record to illustrate the fallacy of the contention that there was prejudice in this respect. *It was not brought out in any testimony that the code distinguishes between "hole" and "opening."* In fact, the testimony of Simon's expert would indicate that those who work with the code and breathe into it the practical construction treat "hole" and "opening" in the ordinary sense and meaning of those words. Certainly all connected with this case gave the words that kind of synonymous usage.

We observe further that counsel for Simon, OPPD, and GHDR regularly interchanged their use of the term "hole" or "opening" when attempting to illuminate both the overall pattern of events and the code itself. The Nebraska Department of Labor inspection reports, in evidence, ask whether "openings" are properly guarded. Throughout the briefs of both OPPD and GHDR hole and opening are used synonymously in both their ordinary sense and meaning. *Finally, instructions Nos. 13, 14, and 15 requested by OPPD referred to the open space in the floor as a hole.*

While we have discussed the issue of prejudice on its merits, the contention of OPPD must fall because it failed to proffer any instruction covering this measurement distinction and suggesting or pointing out to the court the code definitions and their significance. Having so failed, error cannot be predicated upon the failure of the court to instruct more fully. The fallacy of this argument is further pointed out by the fact that the

alleged error in the instructions here consists not in what they contain but in what they do not contain. (The code distinction between "opening" and "hole".) The objection is a negative one, and it is not contended there was any positive error in the instruction that was given. Under these circumstances, we may assume an instruction conference was held (Section (b), adopted by the Supreme Court with reference to jury instructions, page ix, NJI). It was clearly the duty of defense counsel to have presented any instructions which were thought necessary to supplement the instructions given. Kroeger v. Safranek, 165 Neb. 636, 87 N. W. 2d 221; Woodruff v. White, 25 Neb. 745, 41 N. W. 781. See, also, Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393; Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12; Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751.

But we observe further that counsel for OPPD invited any alleged error. OPPD's requested instructions Nos. 13, 14, and 15 all referred to the "opening" as a hole in the ordinary sense. Having requested instructions using hole in the ordinary sense, and having failed to proffer an instruction covering the distinction, it is clear that prejudicial error cannot be found for the court's failure to incorporate and use a particular code definition. Kovar v. Beckius, 133 Neb. 487, 275 N. W. 670; Day v. Metropolitan Utilities Dist., 115 Neb. 711, 214 N. W. 647; Vorce v. Independent Telephone Co., 86 Neb. 27, 124 N. W. 836.

Even assuming that such an instruction would have been proper, to find error under these circumstances would require the trial judge to have acted as an attorney for the litigants and would overstep the bounds of judicial propriety. There is no merit to this contention.

We turn now to the contention of GHDR that it is not liable to the third party (Natkin) for its nonfeasance in carrying out its contract with the owner OPPD. Stripped to its essentials this argument rests basically

on the premise that GHDR had no contract with Natkin, and consequently owed no duty to Simon. GHDR argues that its contract with OPPD gave it no authority to stop the work; no authority to commandeer the employees of the various contractors and set them to work building or replacing covers for holes; and that it had no obligation to build and guard the covers itself. Perhaps the best answer to this is to reiterate the terms of the contract which GHDR entered into with OPPD. It assumed the duties of "handling incidental field engineering, * * * performing all managerial functions incident to the over-all construction * * *. Inspect * * * to protect the District's interest in safety." We observe that the primary duty of architects may usually be only to assure to the owner that before final acceptance the work has been completed in accordance with the plans and specifications; and that in this case, by written contract, GHDR assumed much more. We point out further the fact that OPPD relied entirely on GHDR for any and all safety duties owed by OPPD; that Rutland toured the project at least twice a day to inspect for unsafe or hazardous conditions; that Rutland directed various contractors to cover holes and openings; that Rutland's men undertook safety work although no particular persons were so assigned; and probably more important Rutland was the one to whom state inspectors would direct their reports and complaints, which as we have seen, were numerous. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448. See, also, Baxter & Sons v. Sofio, 182 Neb. 599, 156 N. W. 2d 141. We come to the conclusion there can be no question that GHDR assumed by written contract and by its conduct a substantial duty of safety owed by OPPD, and that it was reasonable for the jury to find GHDR

should have recognized that duty as necessary for the protection of third persons.

It is true that for a mere breach of his contract with his principal an agent is only liable to his principal; but in his undertakings the agent must have due regard for the rights and safety of third persons. If in the course of his agency he undertakes as a part of his contract to render service to his principal of a type which he should recognize as necessary for the protection of third persons, he must exercise reasonable care in the performance of the undertaking. It is not the contract which gives rise to the duty, nor is the standard of care increased or diminished by the status as agent, it in his common-law obligation to do that which he undertakes so as not to injure another. Fonda v. Northwestern Public Service Co., 134 Neb. 430, 278 N. W. 836, citing Baird v. Shipman, 132 Ill. 16, 23 N. E. 384.

GHDR actually undertook and entered upon the performance of safety inspection for its principal OPPD, following its written contract to do so. Having done so it was its duty to use reasonable care in the execution of its undertaking and contract so as not to cause any injury to third persons, and it cannot avoid this duty by abandoning its performance and leaving things in a dangerous condition without proper safeguards. Of course, the agent is not liable to strangers for injuries sustained by them because he did not undertake some performance owed solely to his principal and imposed upon him solely by his relation. That is nonfeasance. That, however, is not the case here where GHDR affirmatively contracted with OPPD to perform its duty and assumed and attempted to carry it out.

We shall not attempt in this opinion to draw any distinctions between the concept of misfeasance and nonfeasance. Assuming, as GHDR argues, that it is being held liable for "not doing," it is the "not doing" that the court in Fonda characterized as follows: " 'All this is not doing, but it is not the not doing of that

which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual, in common with all other members of society.'" Fonda v. Northwestern Public Service Co., *supra*, at pp. 439, 440.

The case law of other jurisdictions overwhelmingly supports our conclusion reached herein. See, generally, Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475, 97 N. E. 580; Atkinson v. Wichita Gas Co., 136 Kan. 854, 18 P. 2d 127; Van Winkle v. American Steam Boiler Co., 52 N. J. L. 240, 19 A. 472; Nelson v. Union Wire Rope Corp, 31 Ill. 2d 69, 199 N. E. 2d 769; Smith v. American Employers' Ins. Co., 102 N. H. 530, 163 A. 2d 564; Annotation, 6 A. L. R. 2d 284. Also, see the elevator inspection cases where breach of a duty of inspection gives rise to liability for injury to third persons. Bollin v. Elevator Constr. & Repair Co., Inc., 361 Pa. 7, 63 A. 2d 19; Dahms v. General Elevator Co., 214 Cal. 733, 7 P. 2d 1013; Higgins v. Otis Elevator Co., 69 Ga. App. 584, 26 S. E. 2d 380; Sheridan v. Aetna Casualty & Surety Co., 3 Wash. 2d 423, 100 P. 2d 1024; Banaghan v. Dewey, 340 Mass. 73, 162 N. E. 2d 807; Durham v. Warner Elevator Mfg. Co., 166 Ohio St. 31, 1 Ohio Op. 2d 181, 139 N. E. 2d 10.

Also, Restatement, Torts 2d, § 324A, and Restatement, Agency 2d, §§ 354, 355, affirm the principle that we announce here. The reasoning behind the rule is well stated in Comment a to Restatement, Agency 2d, § 354, as follows: "In the usual case, by undertaking a job a person prevents others from undertaking it, since the principal relies upon him to perform it * * *. If the work given the agent is for the protection of others, and the agent does not perform it, under ordinary circumstances the others do not receive the protection from the principal which otherwise they would have received. If such protection is essential to the safety of others and the agent at the time he undertakes to act should realize this, his intervention into the relations between

the principal and the others by his assumption of the duty to the principal creates a duty to the others to use care either to perform the service or to see that no harm results from his failure to do so. This is particularly so if the other has entered into an undertaking, dangerous unless protective means are used, relying upon the principal to give protection." The contention of GHDR is untenable and consequently the court's instruction reciting the failure to provide a safe place to work as a separate allegation of negligence to GHDR was correct.

It is argued that instructions Nos. 2 and 27 are error because they make GHDR an insurer of the safety of Simon. A reading of these instructions reveals nothing that could mislead the jury, and on the contrary, the instructions stress that neither OPPD nor GHDR is an insurer against accidents.

GHDR assigns as error the giving of instruction No. 33, in which the court erroneously construed the contract between GHDR and OPPD as a third party beneficiary relationship. While this would ordinarily be error, it is clear, since GHDR owed the affirmative duty, as a matter of law, to use care to maintain a safe place, under its contract, there could be no prejudicial error in the giving of this instruction.

The next contention of GHDR is that Simon's trial testimony, that he did not see the hole before he fell, must be discredited and disregarded as a matter of law because of the testimony in a *part* of his deposition where he states several times that he had seen the duct opening when he had passed it. The cases cited by GHDR are not applicable. It appears from the record that there was a large condenser opening, a lube-tank opening, and a pipe hatch opening all in addition to and in close proximity to the opening into which Simon fell. It is asserted that the testimony Simon gave in the deposition more than 3 years after the incident bars his recovery. The record reveals that the jury

could find there was confusion in Simon's mind as to which one of the openings was referred to. Confusion between these various openings and the duct was exhibited by both witnesses and counsel in the record in this case. In any event, the applicable rule in this situation was stated in Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518, where this court held that an extrajudicial admission appearing in the deposition of a party taken before trial is ordinarily not final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled. See, also, Dorn v. Sturges, *supra*. Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65.

Both OPPD and GHDR appeal from the judgment against them on their cross-petitions for indemnity against Natkin, Simon's employer. Here again we meet the rationale of active and passive negligence, or misfeasance and nonfeasance. OPPD and GHDR argue that as between a third party proceeding as an indemnitee and an independent contractor in an action for injuries to an employee of the independent contractor, when the negligence of the independent contractor is active, and the negligence of the third party proceeding as an indemnitee merely passive, the third party has an action in indemnity against the independent contractor despite the independent contractor's compliance with the Nebraska Workmen's Compensation law. That question is not properly before this court and we, therefore, express no opinion on it.

Instructions Nos. 6 and 7 adequately presented the cross-petitions of OPPD and GHDR and their allegations of Natkin's negligence which were the foundation of the indemnity claims. It is, of course, essential that the one sought to be held as an indemnitor be found to have acted negligently. 42 C. J. S., Indemnity, § 23, p. 600. It is the lack of this essential element which is

fatal to the claims of error by OPPD and GHDR presented here. The trial judge, in this extremely complex case, wisely recognized the difficulty of a general verdict in this situation and gave the jury an opportunity to assess the negligence of each defendant separately by use of the special verdict form. See § 25-1121, R. R. S. 1943. Special findings Nos. 8 and 11 dispose of the cross-petitions of OPPD and GHDR in that the jury expressly found that Natkin was not negligent (whether actively or passively) in any one or more of the particulars set forth in the cross-petitions of OPPD and GHDR. Assuming that there was an issue of Natkin's negligence for proper consideration by the jury, the court did submit the allegations and the finding of the jury was adverse to those contentions. Finally, in special findings Nos. 14A and 15A the jury found that both OPPD and GHDR were actively negligent. There is no merit to this contention.

In a sweeping boom attack on the judgment OPPD and GHDR assign error in various other instructions, and we note the attack upon instruction No. 37 in conjunction with instructions Nos. 2, 27, and 33. Our conclusion is that these instructions made it easier for the jury to have found some kind of negligence in the conduct on the part of Natkin. The cross-petition of GHDR could not have been prejudiced by these instructions.

It is unnecessary to examine other assignments of error as they are without merit.

In conclusion, we observe the general rule that where a party has sustained the burden and expense of a trial and succeeded in securing a judgment of the jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Beshaler v. Helberg, 187 Neb. 584, 193 N. W. 2d 261.

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

AFFIRMED.

SMITH, J., concurs in the result.

SPENCER, J., dissenting.

I respectfully dissent because I do not believe that the owner of the premises should be held liable in this instance. The hole was protected by a 4-inch elevated flange, and was plainly visible. GHDR's foreman was supervising the work and was aware of the conditions of the place of employment. In my judgment the contractor is negligent as a matter of law. On this record I would also find assumption of the risk on the part of Simon.

In Laaker v. Hartman (1971), 186 Neb. 774, 186 N. W. 2d 494, we said: "While the owner of premises owes the duty to an invitee to exercise ordinary care to have the premises in a reasonably safe condition for use in a manner consonant with the purposes of the invitation, generally, there is no duty on the part of an inviter owner to protect an invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself."

BOSLAUGH, J., joins in this dissent.

IN RE ESTATE OF FRED BASSETT, DECEASED. ETHEL N. BASSETT, APPELLEE, V. FIRST NATIONAL BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF FRED BASSETT, DECEASED, ET AL., APPELLANTS.

201 N. W. 2d 848

Filed November 10, 1972. No. 38411.

1. **Divorce: Contracts: Husband and Wife: Descent and Distribution.** A mere failure of a surviving wife to tender back support or other payments received by her under terms of a property settlement agreement entered into in connection with an action for divorce does not by itself estop the surviving spouse from denying the finality of the divorce decree and from claiming her statutory rights in the estate of the husband where he dies before the divorce becomes final.

2. ———: ———: ———: ———. A property settlement agreement entered into in connection with and to facilitate an action for divorce, and conditioned upon a divorce being granted and approval of the court, has no viability independent of the finality of the decree of divorce, and where one of the parties dies before the divorce becomes final, rights of inheritance and statutory allowances are not barred by the property settlement agreement.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Perry, Perry & Witthoff, for appellants.

Gaines, Spittler & Otis and Salvadore Carta, for appellee.

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

CLINTON, J.

Two closely related questions are presented on this appeal. First, whether a property settlement agreement entered into by the husband and wife in connection with an action for divorce can be given effect as a postnuptial separation agreement barring the wife from a widow's share in the estate of the husband who died 9 days before the decree would have become final. Second, if the property settlement agreement does not of itself bar the rights of the widow in the estate of her husband, is she estopped to assert such rights by reason of her acceptance of benefits under the property settlement agreement and the decree of divorce.

The essential facts of the case were either admitted or agreed to by stipulation. Ethel N. Bassett, the appellee, and the decedent, Fred Bassett, were married December 25, 1915. They separated in 1940 and thereafter lived apart. Fred Bassett continued to contribute to the support of Mrs. Bassett on a regular basis and during the last few years before the entry of the decree of divorce this contribution had been $150 monthly. Fred Bassett filed a petition for divorce on October 7,

1968. On June 20, 1969, the parties entered into the property settlement agreement which was later, on July 1, 1969, approved by the court in a decree granting to Fred Bassett a divorce on the grounds of desertion. The principal provision of the agreement was to provide for monthly payments to Mrs. Bassett in the amount of $156.33. It also provided for a lump sum payment of $450 designated as a division of property, and for attorney's fees. The agreement and the decree of the court provided for retention of jurisdiction by the district court for the sole purpose of raising or lowering the monthly payments by an amount "no greater than the change shown by the Cost of Living Index as published by the United States Government."

Bassett died on December 21, 1969. Thereafter his will was admitted to probate in Lancaster County. The will named the appellant, Antionette Spitznagle, as residuary legatee. This will, which was executed on September 16, 1969, calls attention to the possibility of claims being made by Mrs. Bassett against his estate on account of the provisions of the decree of divorce and authorizes the executor to make arrangements deemed appropriate.

At the time of Bassett's death, the attorney's fees, the lump sum payment of $450, and the six monthly payments which became due on or before the date the divorce decree would have become final had been paid and accepted by Mrs. Bassett.

After Bassett's death and the admission of his will to probate, Mrs. Bassett filed an election to take against the will of her husband and also an application for the various statutory allowances provided for a surviving spouse, including an allowance for support under the provisions of section 30-103, R. R. S. 1943. The county court made the allowances claimed and entered a finding that she was entitled as the widow of the decedent to the statutory one-half share of his estate. It was from these findings and order that appeal to the district

court was taken by the residuary legatee and the executor. There both sides filed motions for summary judgment. The district court sustained the motion of Mrs. Bassett and denied that of the residuary legatee and executor. The residuary legatee and executor then perfected their appeal to this court.

As we have already noted the appellants contend that because the appellee failed to tender back the payments she received under the agreement until after the appeal to the district court, she is estopped to assert the divorce never became final. The cases cited by the appellants do not support such a proposition and we decline to adopt such a rule. The elements of estoppel are lacking. If she is entitled to share in the estate of the deceased and the allowances provided by statute, any adjustments for payments she has received under the agreement can be made without any prejudice to the estate. We hold that a mere failure of a surviving wife to tender back support or other payments received by her under the terms of a property settlement agreement entered into in connection with an action for a divorce does not by itself estop the surviving spouse from denying the finality of the decree and from claiming her statutory rights in the estate of the husband where he dies before the divorce becomes final.

In connection with the principal question, the appellants rely upon a line of decisions of this court which includes the following: Hiett v. Hiett, 74 Neb. 96, 103 N. W. 1051; In re Estate of Lauderback, 106 Neb. 461, 184 N. W. 128; Koser v. Koser, 148 Neb. 277, 27 N. W. 2d 162. These cases and others hold generally that postnuptial agreements between husband and wife, settling their respective property rights, will be sustained where the parties have separated or separate at the time of the agreement, grounds for divorce exist, a full disclosure of assets has been made, each relinquishes the right of inheritance in the property of the other, the agreement is determined by the court to be

fair and equitable, the terms thereof have been observed by the parties, and there has been no reconciliation.

The appellee relies upon some of the same authorities and argues that the property settlement agreement contains no express mutual waivers of rights of inheritance and is by its terms expressly contingent upon a decree of divorce being entered and the approval by the court of the agreement; and that since the decree of divorce never became final because of Bassett's death, the agreement has no viability independent of the finality of the decree in the divorce action. She cites, among other cases, Parker v. Comstock, 177 Neb. 197, 128 N. W. 2d 696, and In re Estate of Holmberg, 108 Neb. 382, 187 N. W. 903. Both parties cite Focht v. Wakefield, 145 Neb. 568, 17 N. W. 2d 627.

The property settlement agreement provided that it was ". . . conditioned upon the same being approved by the court, and upon a decree of divorce being entered herein, but not in consideration of the entry of such a decree of divorce." It also stated: "The parties recommend to the court that the plaintiff pay to the defendant . . . (here are described the monthly payments to which we have previously made reference) . . . so long as she lives." There then follows a stipulation for payment by Bassett of the attorney's fees of his wife and an agreement for payment of the $450 lump sum we have previously referred to. Paragraph 6 of the agreement provided: "Each of the parties shall, except for the above, have as their own separate estates all of the property of which he or she is now in possession."

Bassett was possessed of an estate of approximately $150,000, which had been acquired by him through inheritance after the separation in 1940. It was stipulated that a full disclosure of the nature of his assets and their value had been made to Mrs. Bassett before the property settlement agreement was entered into.

Since both sides of this controversy filed motions for summary judgment it is evident each felt entitled

to prevail on the basis of the agreed facts and the terms of the property settlement agreement. It appears they have taken the position that no additional evidence could be relevant. We will proceed on that basis.

The primary problem, as we see it, is one of interpretation of the property settlement agreement in the light of the surrounding circumstances concerning which there is no dispute. It appears to us that this case may be decided by determining whether the parties intended the agreement to be contingent upon the divorce becoming final. This intention must be determined primarily from what the parties did and the language of the agreement. The agreement was "conditioned upon the same being approved by the court, and upon a decree of divorce being entered herein." The language "recommend to the court" is not indicative of a contract or agreement intended to be wholly independent of the decree of the court. The decree of the court has no finality until 6 months have lapsed. The decree itself became nugatory when Bassett died because the subject matter was gone and the parties could never be divorced by operation of law. Parker v. Comstock, *supra*. As we have noted, the property settlement agreement and the decree of divorce both provided for retention of jurisdiction of the court for the purpose of raising or lowering the monthly payments in accordance with changes in the cost of living index. While not conclusive, this too argues against independent viability of the property settlement agreement. The district court does not usually retain jurisdiction in a divorce action where one party dies before the decree becomes final.

We have been cited no case in which a property settlement agreement entered into as part of and to facilitate an action for divorce has been held to have independent viability so as to bar the right of the surviving spouse to inherit where one of the parties died before the divorce became final. The Bassetts were

still husband and wife when Bassett died, the statutes of descent and distribution and the statutes providing allowance for the spouse must be given effect. Focht v. Wakefield, *supra*. To extend the doctrine of In re Estate of Lauderback, *supra*, and other similar cases to the situation here presented would lead to much uncertainty and would, we believe, promote litigation in those situations where one spouse dies before the decree of divorce becomes final.

The $450 "division of property" payment made to Mrs. Bassett pursuant to the property settlement agreement and divorce decree shall be charged against Mrs. Bassett's statutory share of the estate. The monthly payments made before the decree became final were payments for support and need not be offset.

AFFIRMED.

MARGARET E. DIXON, APPELLEE, V. DOROTHY DIXON ET AL., APPELLANTS, IMPLEADED WITH HARVEY E. WILSON, APPELLEE.

202 N. W. 2d 180

Filed November 10, 1972. No. 38449.

1. **Partition: Estates.** The purpose of a partition action is to divide a jointly owned interest in property so that each owner may enjoy and possess in severalty.
2. ———: ———. A sole life tenant, who owns no other interest in the property, has no right to compel partition of the property over the objections of the remaindermen.

Appeal from the district court for Washington County: ROBERT L. FLORY, Judge. Reversed and remanded with directions to dismiss.

O'Hanlon & Martin, for appellants.

Nicholas J. Lamme of Yost, Schafersman, Yost & Lamme, for appellee Dixon.

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

BOSLAUGH, J.

This is an action for partition brought by Margaret E. Dixon, a life tenant, against remaindermen. The defendants appeal from a judgment ordering partition of the property.

The petition alleged that Curtis L. Dixon died testate on February 28, 1967; that at the time of his death he was the owner of a 240-acre tract of farmland in Washington County, Nebraska; that the will of the deceased, which was admitted to probate, devised the property to Margaret E. Dixon, his widow, the plaintiff, for her life or until she remarries, the remainder to Dorothy Dixon, Gerald R. Dixon, and Maxine Smith; that the property was not the homestead of the deceased and his widow; and that the plaintiff had not remarried. The defendants are the remaindermen, their spouses, and a tenant under a written lease.

The defendants' general demurrer to the petition was overruled by the trial court. The defendants then answered; the facts were stipulated; and a judgment was entered ordering partition. The issue presented by the appeal is whether a sole life tenant may compel partition of the property over the objections of the remaindermen.

The purpose of a partition action is to divide a jointly owned interest in property so that each owner may enjoy and possess in severalty. Hartman v. Drake, 166 Neb. 87, 87 N. W. 2d 895. The original purpose was to permit cotenants to avoid the inconvenience and dissension arising from the sharing of the joint possession of the land. Simes and Smith, The Law of Future Interests, § 1764, p. 88.

Section 25-2170, R. R. S. 1943, provides: "The petition must describe the property, and the several interests and estates of the several joint owners, or lessees

thereof, if known. All tenants in common, joint tenants, or lessees of any estate in land or interest therein, or of any mineral, coal, petroleum, or gas rights, may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed."

Section 25-2170.01, R. R. S. 1943, provides: "Any joint owner of any real estate or of any interest therein or of any mineral, coal, petroleum, or gas rights, whether held in fee or by lease or otherwise, may compel a partition thereof in the manner provided in sections 25-2170 to 25-21,111."

The statute refers to *joint ownership* of the property to be partitioned. The plaintiff contends that as the sole life tenant she is a joint owner of the property. The defendants contend that the plaintiff is not a joint owner of the property because her estate or interest is not concurrent with that of any of the defendants.

The precise question does not appear to have been decided in any previous case before this court. There are, however, statements in some of our decisions which bear on the question. In Hurste v. Hotaling, 20 Neb. 178, 29 N. W. 299, this court said, in referring to section 802 of the Code of Civil Procedure (now section 25-2170 as amended), that only joint tenants or tenants in common of an estate in the land may bring an action for partition. In Shearon v. Goff, 95 Neb. 417, 145 N. W. 855, the opinion states that a life tenant cannot compel a remainderman to submit to partition. The statement is criticized in Weddle v. Specht, 97 Neb. 693, 151 N. W. 160, as obiter dictum and contrary to the statute as applied to the owner of an interest in fee.

In Nitz v. Widman, 106 Neb. 736, 184 N. W. 172, the plaintiff was a life tenant in 40 acres of a 629-acre tract in which the testator had owned a half interest, the remainder to her children. She brought the action for partition in her own behalf and as next friend of her minor children. This court held that because the plaintiff *was a tenant in common* with the defendant whose

interest was owned in fee simple, she was entitled to bring the action.

The applicable rule is stated in Simes and Smith, The Law of Future Interests, § 1769, p. 100, as follows: "Partition involves primarily the idea of a severance of concurrent ownership, not the severance of successive ownerships. Certainly the common-law notion is that the parties are to be permitted to enjoy the possession in severalty; but it does not include a mere severance of title, where joint possession or enjoyment is not involved. And, if the applicable partition statute gives the power to partition only to possessory owners, it seems clear that the statutory provision for partition still, in the main, proceeds upon this common-law doctrine. Thus, if Blackacre is given to A for life, with reversion or remainder to B in fee, A cannot succeed in an action for partition as against B."

Similar statements of the rule are found in American Law of Property: "As partition can be had only between cotenants, it goes without saying that partition cannot be had between owners in severalty of successive estates such as a life tenant and a reversioner or remainderman in fee." Vol. II, § 6.23, p. 101; and "Partition means a severance of interests which to some extent at least are concurrent. It refers to such types of co-ownerships as tenancies in common and joint tenancies. It is true that, if land is conveyed to A for life, remainder to B in fee, A and B have interests in the same land, and in a sense may be said to be co-owners. But it is not the sort of co-ownership to which partition has been applied. This is doubtless true of partition under chancery rules, and it is true of the statutes on partition, with one exception, in all the states. * * * In California, the partition statute does provide for a partition where a life estate and remainder are each held in severalty." Vol. I, § 4.96, p. 568. To the same effect, see, Restatement, Property, § 126, p. 398; Restatement, Property, § 172, p. 665.

The plaintiff in this case owns a life estate in the entire property. She owns no other interest in the property. She is not a cotenant or joint owner with any other person. She has no right to compel a partition of the property over the objections of the remaindermen. The demurrer of the defendants should have been sustained and the action dismissed. It is unnecessary to consider the other assignments of error.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

TOM ROTH, APPELLANT, V. GUS LIESKE, DIRECTOR OF THE DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

201 N. W. 2d 846

Filed November 10, 1972. No. 38464.

1. **Contracts.** It is the rule that there can be no implied contract where there is an express agreement between the parties relative to the same subject matter.
2. **Public Officers and Employees: Work and Labor: Salary or Compensation.** Section 81-117, R. R. S. 1943, has no application to state officers, employees, and others whose basic work week has not been established to be 40 hours under the provisions of Chapter 84, article 10, R. R. S. 1943.

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

Bauer & Galter and Richard Scott, for appellant.

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

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

CLINTON, J.

Plaintiff, formerly a patrolman with the Nebraska

State Patrol, filed under the provisions of section 77-2407, R. R. S. 1943, after his employment had ended, a claim with the State of Nebraska for overtime pay. The claim was denied. Plaintiff appealed to the district court for Lancaster County which affirmed the denial.

Most of the pertinent facts are agreed to by stipulation. The only witness was Col. James E. Kruger, Superintendent of the Nebraska State Patrol. Plaintiff was employed by the patrol from June 13, 1966, to April 30, 1971. It is agreed that he was hired on the basis of a 50-hour work week and at a monthly salary which after September 1, 1969, was $645, and which was ultimately raised to $690; that except for periods barred by the pertinent statute of limitations, he worked hours over 50 per week which would, if he is entitled to recover and if he were compensated for the overtime at an hourly rate computed by dividing his monthly pay by the basic hours, entitle him to recover $2,142.53.

Col. Kruger testified that when patrolmen are hired they are advised they will be required and expected to work overtime whenever it is demanded, and that this information is given to all patrolmen as part of their indoctrination. He also testified it was common knowledge among the personnel of the state patrol that the patrol has, up to the time of trial, been unable to pay any overtime because there never had been an appropriation by the Legislature for that purpose. This has been true during the entire history of the patrol. The record does not disclose that the plaintiff at any time during his employment requested or demanded pay for overtime work, or gave any indication that he expected such payment.

The plaintiff relies upon a theory of implied contract to the effect that since the basic work week was 50 hours, he is entitled to pay for time over 50 hours per week at an hourly rate determined as previously mentioned. Plaintiff cites Wrede v. City of David City, 137 Neb. 194, 288 N. W. 542; 17 Am. Jur. 2d, Contracts, § 4,

p. 337; 17 C. J. S., Contracts, § 6, pp. 570 to 573; Umberger v. Sankey, 154 Neb. 881, 50 N. W. 2d 346. These authorities do not support the plaintiff's position. Here the evidence shows an express contract, namely, a hiring at a monthly salary for a basic work week of 50 hours, but with the understanding that additional hours would be worked when demanded. The evidence negatives any expectation by the plaintiff of additional pay for overtime or any intention on the part of the employer to pay overtime. It is the universal rule that there can be no implied contract where there is an express agreement between the parties relative to the same subject matter. Acton v. Schoenauer, 121 Neb. 62, 236 N. W. 140.

Plaintiff also relies upon a proviso in section 81-117, R. R. S. 1943. This section provides in part as follows: "No head of a department or employee therein employed at a fixed compensation, shall be paid for any extra services, unless expressly authorized by law; Provided, that when any employee is required to work more than forty hours in any week because of emergencies he may, in the discretion of the department head, be granted the equivalent time off in subsequent weeks when his duties will permit, or be paid a sum equivalent to his hourly pay or his monthly pay prorated on an hourly basis for such overtime hours." The parties disagree on the applicability and the interpretation of this statute, i.e., as to whether the department head has complete discretion as to the proviso, or whether this discretion extends only to granting compensatory time off or overtime pay. We note also that a question may exist as to whether the statute pertains only to "emergency" overtime, or time over 40 hours customarily rendered.

We believe the statute must be read in connection with sections 84-1001 to 84-1005, R. R. S. 1943, which provide that state officers and their deputies and assistants, and all heads of institutions and their deputies,

assistants, and employees, "shall render not less than forty hours of labor each week." Section 84-1004, R. R. S. 1943, provides: "The Governor shall have authority, after conferring with the employing officers concerned and with the employees, to make sections 84-1001 to 84-1005 effective to employments in any board, commission, department, or institution at any time on or after January 1, 1958."

It appears that section 81-117, R. R. S. 1943, is not applicable to the Nebraska State Patrol whose basic work week is 50 hours. Plaintiff himself claims compensation only for the hours in excess of 50 per week. Plaintiff's theory is not consistent with section 81-117, R. R. S. 1943.

The record does not disclose that the Governor has ever made Chapter 84, article 10, R. R. S. 1943, effective for the state patrol. We are therefore not called upon to consider the question of the interpretation of section 81-117, R. R. S. 1943.

We are advised the Legislature has now made appropriation for payment of overtime to state patrolmen effective July 1, 1972.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD LINDSEY LAMPKIN, APPELLANT.
201 N. W. 2d 857

Filed November 10, 1972. No. 38480.

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

Richard Lindsey Lampkin, pro se.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

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

McCOWN, J.

This is the second post conviction proceeding directed against the same conviction. On June 15, 1965, the defendant was sentenced to life imprisonment upon a plea of guilty to a charge of first degree murder while in the commission of a robbery.

The allegations here consist of an assortment of conclusionary assertions of deprivations of constitutional rights. These contentions were previously submitted, considered, and ruled upon adversely to the defendant on his first post conviction motion. The order of the trial court here was entered after a full evidentiary hearing. The case is governed by State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826. See Rule 20.

AFFIRMED.

CEDARS CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. H. KRASNE & SON, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

CONSOLIDATED WITH:

CEDARS CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. JACOB J. FRIEDMAN ET AL., APPELLEES.

202 N. W. 2d 205

Filed November 17, 1972. Nos. 38328, 38329.

1. **Actions: Equity: Appeal and Error.** Actions in equity are triable de novo in the Supreme Court.
2. **Evidence: Trial: Contracts.** Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties.
3. ———: ———: ———. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purpose and in the course of the same transaction are, in the eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance.

Appeals from the district court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

John S. Katelman and Frederick S. Cassman of Abrahams, Kaslow & Cassman, Louis A. Seminara of Seminara, Meazell & Turco, Steven J. Lustgarten, and Ernest B. Wintroub of Wall & Wintroub, for appellees.

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

SPENCER, J.

This is an appeal from the refusal of the trial court to order an accounting from other participants in a joint venture. We affirm.

Cedars Corporation, owned and controlled by Edward E. Milder, initially filed its petition against Jacob J. and Willard J. Friedman and the Valley Ho Corporation, seeking an accounting of their management of Sun Valley Development Company, the joint venture. A demurrer was sustained for the failure to include necessary parties. Plaintiff thereupon filed an amended petition naming the Valley Ho Corporation and all the other corporations as defendants. Cedars Corporation also filed an action for an accounting against H. Krasne & Son, Inc., and joined as defendants Concord Corporation, U. S. Investment Company, and Thamco Corporation, Inc., all Nebraska corporations, all of whom are parties in the first action. The actions were thereafter consolidated for trial.

For several years previous to 1959, Jacob J. Friedman and his son Willard had been engaged in the home construction business. The Friedmans, who had successfully developed some smaller tracts, became interested in a 100-acre tract of land in Sarpy County which was listed for sale for the price of $125,000. While the Friedmans desired to acquire the property for the purpose of developing the land into building sites and thereafter to construct houses thereon, they decided it was

not feasible for them to tie up substantial working capital in the cost of the land and development expense. Willard contacted Edward E. Milder, the Friedman's accountant; Howard Kaplan, an insurance man; Maurice Udes, president of a lumber company; and Millard Krasne, his father-in-law, a department store executive, and suggested the formation of a joint venture for the purpose of acquiring and developing the land. The parties were receptive to Willard's suggestion, and the Sun Valley Development Company was formed. To limit their liability the various investors contracted through individual corporations. The Friedmans contracted through Thamco Corporation; Milder through Cedars Corporation; Kaplan through Concord Corporation; Udes through U. S. Investment Company; and Krasne through Mid-States Investment Company. Each of the corporations invested $15,000 in the joint venture except Concord, Kaplan's corporation, which invested $25,000, making a net investment of $85,000.

The agreement of the parties is contained in two documents, the articles of joint venture and a management agreement. The material provisions of the articles of joint venture are the following:

"2. The joint venture shall comprehend all activities and transactions necessary, suitable or calculated to effect the acquisition, development and profitable sale of that one hunded (100) acre tract of land situated in Sarpy County, * * *.

"Without in any way limiting the generality of the foregoing, it is contemplated that the joint venture will undertake and seek to accomplish the completion of the purchase of the above described property, the replatting thereof into suitable blocks, lots and streets, necessary zoning changes, surfacing of streets, installation of water, power, gas and other utility lines, provisions for sewage and drainage, preparation of building sites, including engineering studies, surveys, grading and contouring, the formulation of building pro-

grams (including house designs and plans), and financing, selling and promotion. * * *

"6. The joint venture shall cause the books and accounts thereof to be accurately kept and each and every transaction relating to the business of the venture shall appear therein and the venture's books, records, papers and documents shall always be open to the inspection of each of the adventurers or its legal representatives, with the right to make copies thereof. Periodically the books shall be balanced and audited by an independent certified public accountant, copies of whose reports with respect thereto shall be furnished to each adventurer. Upon the completion of the business of the venture, a final audit shall be similarly made and supplied, and distribution of the net avails, gains and capital less losses, shall be made in accordance therewith."

The material provisions of the management agreement provide:

"4. Friedmans shall, with the prior approval and authorization of Company, cause engineering studies and surveys to be made for the proper subdivision of said real estate into streets, blocks and lots, shall obtain therefor appropriate zoning, plats, street designations, utilities and sewer facilities, and shall undertake and cause to be done such other things as may be necessary and suitable to secure approval therefor from the proper civil authorities.

"5. Friedmans shall, with the prior approval of Company, cause house designs, plans and specifications to be prepared and submitted for Company approval and, when authorized, shall contract for the construction of buildings according to such approved plans and specifications and shall manage, coordinate and supervise all construction activities so as to assure the efficient and economical erection of the specified buildings conforming to proper construction, zoning and financing standards. Friedmans shall negotiate for and arrange required interim, construction and purchase financing

and shall see to the carrying of such insurance coverages as Company shall authorize and direct, and shall draw upon Company for funds to pay costs and expenses during construction within such time as to afford to Company cash discounts and concessions for prompt payment.

"6. Friedmans shall, after consultation with and approval of Company, determine prices for each lot and/or groups of lots as well as house and lot combinations and do all things and perform all acts necessary, suitable and advisable to promote the expeditious and economical development and sale of the entire tract with the view to obtaining the maximum profit and benefit for Company. Friedmans shall be empowered without further authority to accept any purchase offers for any lot, group of lots or house and lot which meet or exceed the price fixed and approved therefor. Except where Company authorizes a larger commission, the sales commissions to a realtor, real estate broker or agent other than Friedmans, shall be two and a half (2½%) percent of the gross sales price."

The Friedmans purchased the land and placed the title in Mid-States Investment Company, Krasne's corporation. The Friedmans hired an engineer and took the necessary steps to prepare the land for the development, including the formation of a sanitary improvement district. The funds of the Sun Valley Development Company were used primarily in payment of the expenses arising from the preparation of the land. When its funds ran short, rather than contacting the investors for more money, the Friedmans through one of their corporations purchased several of the lots in order to increase the capital. Willard Friedman, who was called as a witness for the plaintiff, testified that he told Milder that the Friedmans would be the primary purchasers of the lots although they did intend to sell some to other builders and individuals. Willard also testified that he and his father determined generally the price to be charged for the lots. Yearly and sometimes semi-

annual reports were made to the members of the joint venture over a 7-year period before the question involved in this litigation arose. During this period Milder was the accountant and bookkeeper for the Sun Valley Development Company and for the Friedmans individually, as well as for their corporations. In addition to the question as to plaintiff's right to accounting from the parties herein, the basic issue is whether, under the terms of the joint venture the Friedmans and their corporations are required to account to the joint venture for the profits accruing from the construction of houses on the lots purchased by the Friedman corporations.

This action, being equitable in nature, comes under the provisions of section 25-1925, R. R. S. 1943, and is here for review de novo.

Before considering the question of the right to an accounting, we consider whether the construction of houses was embraced within the ambit of the joint venture. Plaintiff essentially relies on the following language in Article 2: "* * * it is contemplated that the joint venture will undertake * * * the formulation of building programs (including house designs and plans), and financing, selling and promotion." From this the plaintiff argues that the agreement unambiguously defines the scope of the joint venture as including construction, and therefore contends that parol evidence is not admissible to vary its clear terms. There are indeed portions of the joint venture agreement which would indicate that the construction of houses could be within its scope. However, there was a condition precedent which is controlling.

The words quoted above are specifically limited in Article 5 of the management agreement by the words: "Friedmans shall, with the prior approval of Company, cause house designs, plans and specifications to be prepared and submitted for Company approval and, *when authorized,* shall contract for the construction of buildings according to such approved plans and specifica-

tions * * *." (Emphasis supplied.) The plaintiff has offered no evidence that such authorization was given, and in fact, except for plaintiff's testimony as to his understanding, the evidence, as suggested later, is otherwise. Rather than contracting for the construction of houses, the Friedmans purchased the lots and handled the construction through their own corporation. Interpreting the agreements without reference to parol, the plaintiff failed to sustain its burden of proof on this issue.

In Ely Constr. Co. v. S & S Corp. (1969), 184 Neb. 59, 165 N. W. 2d 562, we held: "In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party. * * * Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties."

It is to be noted that there was no provision for the adventurers to add more capital and absolutely no provision for them to share in the losses that might accrue. In fact, the corporate form of the agreement would indicate a specific intent to limit the liability to the amount actually invested. Only the Friedmans obligated themselves for the house construction costs. This was done individually or in the name of their corporation. There is no way in which the joint venture could have been liable for the house construction costs.

We conclude that there was a sufficient ambiguity as to exactly what fell within the scope of the joint venture for the trial court to admit parol evidence to explain the agreement of the parties. The testimony is undisputed that the articles were drawn "in a broad form so that the joint venture could start to do one thing and if it ever had to change its direction, it could do so."

The articles of joint venture and the management agreement were both signed on the same day, December 1, 1959. They were signed for the purpose of establishing and setting in motion the operations of the joint venture, and should be construed together as one instrument. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time by the same parties for the same purpose and in the course of the same transaction are, in the eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. Employers Mutual Casualty Co. v. Brazda (1950), 152 Neb. 633, 42 N. W. 2d 195.

Approximately 6 months after the management agreement was signed, the Friedmans assigned it to Valley Ho Corporation, which was owned and operated by them. The management agreement contained a provision against assignment without written permission. No written permission was obtained. The evidence is conclusive, however, that Milder participated in the assignment; the parties were aware of it; and no objection was raised to it until more than 7 years later. We find the parties acquiesced in it and are now estopped to question the absence of written permission.

Participants other than the plaintiff testified that they were not interested in any construction after the development of the lots. Maurice Udes' testimony on this point is a follows: "A. Of course when he brought it to me in the first place it was discussed as a development company. The purpose of which was to develop lots. Subsequently when I saw the agreement the terminology suggested that there might be some construction or construction could be permitted by the joint venture. And at that time I raised the point. I was not interested in making an investment in a construction company and I would not make an investment in a construction company because it would conflict with

my primary business which is supplying other builders. I told him that I would not be interested in any construction if it were contemplated. Q. Did he make a reply to that? A. Yes. MR. CANNON: Same objection — continuing objection that is. THE COURT: Overruled. A. Yes, he explained that this terminology was simply written into the agreement to give the joint venture a broad enough definition or latitude and that no construction was contemplated and if any construction were to be done it would have to be done with the consent of those involved in the joint venture. Q. Then what was your understanding as to the basic activities contemplated by the joint venture? A. The activities of the Sun Valley Development Company were solely to develop lots and to supply lots primarily for Willard Construction Company and any other builders that might be interested. Willard Construction Company needed lots to build on. So it was a sort of a back to back deal so to speak. We had what I considered to be an assured customer for these lots. Q. Now who are you referring to? A. Willard Construction. I felt he was a locked in customer because Willard was going to look to us for a source of supply for lots. In my opinion on this basis it was a wonderful investment opportunity for us. We had a guaranteed assured customer."

Howard Kaplan testified as follows: "Q. Will you relate what discussion, if any, took place about the business activities contemplated by the joint venture? A. It was my understanding that it was to be a land development project. Q. Will you explain what your understanding was with reference to what is meant by 'land development'? A. Well, it was that this was bare land that was to be developed and sub-divided into lots and that we were to share in the profits from the sale of lots. Q. Was there any information forthcoming as to who might be the purchaser of lots or who might construct houses on the lots? A. We knew

that the Friedmans would purchase lots and houses would be built on the lots by the Friedmans and that there would be lots also available for sale to any other builders who might be interested."

Millard Krasne testified: "Q. Will you continue, Mr. Krasne, and relate your discussion that you had with the Friedmans or anyone else with regard to this development? A. Mr. Friedman came up with the idea of expanding and getting some people into the development company. I made it very clear to him at that time that I was not interested in doing more than just developing the land into lots. I had just acquired some additional parts of the People's store and I did not have any extra capital to go in on any venture other than just the development of the lots which we knew how much money it would take. I indicated to them that was how much I was willing to put in to it. Q. I understand that you were not personally interested in any other type of venture other than land development, is that correct? A. That is correct. Q. Was there any discussion with reference to who might purchase these lots from the joint venture? A. It was understood all along that these lots would be offered to anybody to build on them including Willard."

For more than 7 years Edward E. Milder, the sole owner of Cedars Corporation, the plaintiff, as the accountant for the Friedmans and their corporations, as well as the Sun Valley Development Company, prepared income tax returns for the Friedmans and had them pay the income tax on the house profits. He also prepared income tax returns for the joint venture and made the accountant statement expressing his opinion that all money and accounts were handled by proper accounting procedures. His explanation as to the consistency of his conduct with his present contention is not too convincing.

The question remaining is whether the plaintiff has a right to an accounting from the Friedmans, Valley Ho

Corporation, or H. Krasne & Son, Inc. This is premised on plaintiff's contention that the Friedmans profited, or Krasne permitted them to profit, at the expense of the joint venture. There is no way on the present state of the record to sustain this procedure.

The articles of joint venture provide that: "Periodically the books shall be balanced and audited by an independent certified public accountant, copies of whose reports with respect thereto shall be furnished to each adventurer. Upon the completion of the business of the venture, a final audit shall be similarly made and supplied, and distribution of the net avails, gains and capital less losses, shall be made in accordance therewith."

It is to be noted that the agreement specifically provides that the books are to be periodically audited by an independent certified public accountant. From the formation of the joint venture until May 31, 1967, Edward E. Milder served as the bookkeeper and accountant for it. While he was not a CPA he was a public accountant and as such was operating an accounting firm. He prepared annual and semiannual financial reports on the joint venture and furnished them to the other participants. The following letter, under the signature of Edward E. Milder, as accountant and auditor, under date of June 19, 1967, is the form of cover letter used in each instance for the reports:

"To the Partners
"Sun Valley Development Co.

"We have examined the books and records of the Sun Valley Development Company, a Nebraska Joint Venture, as of May 31, 1967, and have prepared therefrom the accompanying balance sheet as of May 31, 1967, and the related statement of operations and partner's capital analysis for the period then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records, and such other

auditing procedures as we considered necessary in the circumstances.

"In our opinion, the accompanying balance sheet and statement of operations and statement of partner's capital present fairly the financial position of the Sun Valley Development Company at May 31, 1967, and the results of its operations for the period then ended in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

"Respectfully submitted,
"EDWARD E. MILDER /s/
"Edward E. Milder
"Accountant & Auditor."

We can only conclude that by their actions the plaintiff and the other partners accepted this as compliance with the agreement. Since 1967, the reports have been furnished to the adventurers by a certified public accountant.

While all of the joint adventurers, the Friedmans individually and their corporations, are parties herein, the Sun Valley Development Company, the joint venture, is not a party. The business of the joint venture has not yet been completed. The Sun Valley Development Company is still in existence. The testimony indicates that there are several lots to be sold at well as a commercial area to be developed. The agreement provides that upon the completion of the business of the joint venture a final audit shall be made and supplied. Consequently no final accounting is yet due.

The agreement does provide for periodic audits of the joint venture by an independent certified public accountant. While we conclude that the plaintiff by its conduct has waived the provision for a periodic audit in the past, or rather, Milder by his conduct has interpreted the provision to mean the type of report submitted by him, the agreement is specific as to the type of audit to be conducted: "Periodically the books shall

be balanced and audited by an independent certified public accountant, * * *. Upon the completion of the business of the venture, a final audit shall be similarly made and supplied, and distribution of the net avails, gains and capital less losses, shall be made in accordance therewith."

It is an audit of the joint venture which is covered by the agreement. The joint venture is not a party to this action. However, this is an equitable action and all of the joint adventurers are before the court. To avoid further litigation the books of the joint venture should be balanced and audited by a certified public accountant for the period of the joint venture to date, and a copy of this report furnished to each of the participants in the venture. This audit is to be only of the joint venture. It does not include the construction and sale of houses which we have determined are no part of the joint venture. It should include all other items incident to the development and sale of the land.

For the reasons given, we affirm the judgment of dismissal in both cases. This is without prejudice to the right of any of the joint adventurers to file an action for an audit of the books of the joint venture by a certified public accountant unless such audit is furnished to the adventurers within 90 days after the issuance of the mandate herein. Costs are taxed to the plaintiff.

AFFIRMED.

SMITH, J., not participating.

INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLANT, V. OMAHA PAPER STOCK, INC., A CORPORATION, APPELLEE.

202 N. W. 2d 188

Filed November 17, 1972. No. 38374.

1. **Courts: Trial: Verdicts: Appeal and Error.** 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.

2. **Trial: Witnesses: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. However, contradictory statements of nonparty witnesses are not governed by this rule and such contradictions may be submitted to the jury as affecting the weight of the evidence and the credibility of the witnesses.
3. ———: ———: ———. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated.
4. **Attorneys at Law: Fees.** The amount of attorney's fees allowed rests in the sound discretion of the district court, considering the elements of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the professional diligence and skill required, and the result of the services performed.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed as modified.

Haney, Wintroub & Haney, for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellee.

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

NEWTON, J.

This is an action for a declaratory judgment adjudicating appellant's liability under two fire insurance policies. The court found generally for appellee and entered judgment accordingly. We affirm the judgment of the district court.

Appellant's assignments of error deal primarily with the failure of the court to find appellant was exonerated due to increased hazards on the burned premises. The taxing of attorneys' fees is also protested.

The premises destroyed by the fire were used as a collection and baling center for wastepaper. The policy required that due diligence be used to maintain the sprinkler system in working order and prohibited any increase in hazard within the knowledge or control of the insured. After the fire it was discovered that water valves admitting water to the sprinkler system had been closed. Fire originated at two different locations in the building and it was deemed to be the work of an outside arsonist. Evidence of due maintenance of the sprinkler system was conflicting, as was also evidence pertaining to the sufficiency of precautions taken to prevent entry by outsiders when the building was vacated overnight.

"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." Squires v. Implement Dealers Mut. Ins. Co., 188 Neb. 590, 198 N. W. 2d 469. The trial court resolved the questions presented by conflicts in the evidence in favor of the insured or appellee and the record sustains the findings of the court. It is true that some witnesses for the insured appear to have made more or less conflicting statements prior to trial. The court considered the contradictory statements introduced for impeachment purposes, and the explanations given, in weighing the evidence. The burden of establishing any increased hazard or defect in the sprinkler system was upon appellant. We agree with the trial court. Notwithstanding the impeaching evidence, appellant failed to sustain its burden of proof. On the contrary, the sprinkler system appears to have been in working order except for the valves being closed by the arsonist and reasonable precautions appear to have been taken against illegal entry.

In connection with the contradictory statements of witnesses, we call attention to Clark v. Smith, 181 Neb. 461, 149 N. W. 2d 425, wherein it is held: "Where a party without reasonable explanation testifies to facts

materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. However, contradictory statements of nonparty witnesses under circumstances disclosed in this case are not governed by this rule and such contradictions may be submitted to the jury as affecting the weight of the evidence and the credibility of the witnesses." As to nonparties, the conflicting statements simply presented questions of credibility.

A party interested in the appellee firm was also charged with having made a contradictory statement. This statement was not on a crucial point but dealt with the question of whether he, or an employee, had, on one occasion, serviced the sprinkler system. The evidence clearly reflects that the sprinkler system was in working order regardless of who did the servicing. "The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated." State v. Witmer, 174 Neb. 449, 118 N. W. 2d 510. The contradictory statements cannot aid appellant in sustaining its burden of proof.

The foregoing references to contradictory statements by the witnesses for insured are sufficient to show there was not a deliberate misleading of appellant and they can have no bearing on the allowance of attorneys' fees. The trial in this case was a rather lengthy one unduly extended by the admission of irrelevant evidence introduced by appellant pertaining to a different fire. The amount involved in this case was $29,000 and attorneys' fees in the sum of $10,000 were allowed and taxed to appellant. "The amount allowed rests in the sound discretion of the district court, considering the elements of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the

professional diligence and skill required, and the result of the services performed." Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133.

In view of the amount involved in this case, we feel the amount allowed for attorneys' fees is excessive and it is reduced to $7,500. Attorneys' fees of $1,000 are allowed for services in this court.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

ED PEDERSEN, APELLANT, V. WESTROADS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.
202 N. W. 2d 198

Filed November 17, 1972. No. 38446.

1. **Statutes: Res Judicata: Estoppel: Common Law.** Statutory provisions may cut across issue and claim preclusion at common law.
2. **Municipal Corporations: Actions.** An Omahan as such has no derivative right greater than the right the City of Omaha possesses.
3. **Municipal Corporations: Actions: Statutes.** A resident taxpayer's derivative claim on behalf of the City of Omaha may come within the spirit of a statutory provision for derivative defenses, although it is not technically referable to threatened expenditure of public funds.
4. **Municipal Corporations: Contracts: Annexation.** A consent decree transferring assets and liabilities of a sanitary and improvement district to the City of Omaha upon annexation of the land of the district may be insufficient to constitute waiver or claim preclusion of beneficiary rights of Omaha under private covenants relating to rezoning.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

August Ross and Daniel G. Dolan, for appellant.

Fraser, Stryker, Marshall & Veach, Herbert M. Fitle,

Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen L. Morrow, Kent N. Whinnery, George S. Selders, Jr., Verne W. Vance, Roger G. Stanway, Richard A. Cerveny, and Thomas F. Dowd, for appellees.

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

SMITH, J.

Plaintiff, a resident taxpayer, for the benefit of the City of Omaha and on behalf of all taxpayers alleged fraud and breach of covenant on the part of Westroads, Inc., in development of Westroads Shopping Center. Defendants Omaha and Sanitary and Improvement District No. 130 of Douglas County allied themselves with Westroads. The district court at the close of all the evidence rendered judgment for defendants. Plaintiff appeals.

Plaintiff asserts that district No. 130 foisted upon Omaha obligations that Westroads ought to have assumed. He also asserts breach of covenants that were a condition of extraterritorial rezoning by Omaha at Westroads' request. Other assignments of error are resolved against him.

Defendants contend: (1) Plaintiff has no standing to sue; (2) Omaha possessed no power to covenant to curtail exercise of its authority; (3) a consent decree transferring general obligations of district No. 130 on annexation of the land by Omaha barred Omaha from reapportioning special benefits to Westroads' property; and (4) by the consent decree Omaha waived the benefits of the covenants.

In 1959 the land in question was subject to the jurisdiction of Omaha over zoning within 3 miles outside the city boundaries. Rezoning was necessary for the construction of a shopping center, but opposition formed. Neighbors protested and the Omaha planning board disapproved, but the Omaha council recommended reconsideration by the board.

In July 1960 the Omaha council resolved (1) to prepare ordinances for the rezoning that Westroads and the president and majority stockholder, John Wiebe, were requesting, and (2) to require submission of covenants to insure fulfillment of certain representations by Westroads and Wiebe to Omaha.

On October 3, 1960, Westroads and other private parties agreed upon protective covenants for the use and benefit of Omaha. An explanatory provision read: "To secure the requested rezoning . . . (Westroads and Wiebe) represented to . . . Omaha . . . that grade-separated access would be provided without cost to . . . Omaha to eliminate left turns across Dodge Street by vehicular traffic moving into and out from the regional shopping center." The agreement under the subtitle "Covenants" read: "Wiebe and Westroads . . . covenant . . . for the use and benefit of . . . Omaha . . . as follows: . . . e. The regional shopping center . . . may not be opened to the public . . . unless . . . a traffic grade-separated access approved by the Department of Roads of the State of Nebraska has been constructed without cost to . . . Omaha to carry vehicular traffic . . . to and from . . . (the shopping center and parking lot) in such a manner as to eliminate the necessity for left turns across the surface of . . . Dodge Street . . .."

The two subsequent ordinances effecting the rezoning were targets of litigation. Wiebe there testified that he and Westroads on April 20, 1960, had represented to the Omaha planning director the payment for cost of the interchange and two loops as follows: Wiebe and Westroads would pay the cost approximated at $600,000, less any aid that state government might furnish; and they would also pay construction costs of some public streets. The district court declared the ordinances void, but on appeal we reversed the judgment and directed dismissal of the suit. See Bucholz v. City of Omaha, 174 Neb. 862, 120 N. W. 2d 270 (1963).

In the trial of the present case Wiebe conceded hav-

ing stated in effect to the Omaha council that he and Westroads "would find a way to build it free of cost to the City."

To meet the requirement that only public entities were eligible for financial aid from the State, lawyers advised Wiebe to petition the district court for formation of defendant district No. 130. To qualify four representatives of Wiebe Enterprises, Wiebe caused Westroads to convey 1,000 square feet of the land to each of the four. Westroads possessed options to repurchase. The district was formed, and the engineer of Westroads was engaged as engineer of the district. General and special benefits were apportioned after a hearing on a date not expressly stated in the record. The district did not notify Omaha of the hearing, and we assume that a statute required such notification. See, former § 31-749, R. R. S. 1943, as amended by Laws 1961, c. 142, § 7, p. 415, Laws 1965, c. 157, § 1, p. 504, and Laws 1967, c. 190, § 1, p. 524.

The designs for the interchange street improvements, and the two loops in the Bucholz case were approved in substance by Omaha and the State. The district's share of the cost of construction, $230,992.66, was assessed as general benefits by the district. Special assessments out of $1,152,223.20, the cost of all improvements that the district made, totaled only $137,465.59.

The district in June 1968 petitioned the district court for approval of a bond issue of $1,600,000, and it duly notified Omaha of the petition. In June the court in a default decree approved the issue and confirmed all proceedings relating to the validity of the bonds.

Effective May 15, 1969, an Omaha ordinance annexed the land of Westroads, and in June the district court with consent of Omaha decreed transfer of the assets and liabilities of district No. 130 to Omaha. No one appealed from the decree. No one brought an action within 30 days after May 15, as required by section 31-764, R. R. S. 1943, relating to the accounting by the district

trustees. Omaha thus assumed all general obligations which included the item of $230,992.66.

The operation of sanitary and improvement districts under legislation then in force has been criticized. See Comments, 5 Creighton L. Rev. 269 (1971-72). Criticism is one thing, fraud, another. The proceedings concerning the proposed bond issue did not deceive Omaha. Upon dissolution of district No. 130 Omaha was bound by all findings, orders, and assessments made by the district to the same extent the district was bound. § 31-763, R. R. S. 1943. Statutory provisions may cut across issue preclusion at common law. Lost Creek Drainage Dist. v. Elsam, 188 Neb. 705, 199 N. W. 2d 387 (1972). A similar rule applies to claim preclusion. Vestal, Res Judicata/Preclusion, V-504 (1969). Furthermore, an Omahan as such has no derivative right greater than the right Omaha possesses. See Cathers v. Moores, on rehearing, 78 Neb. 17, 113 N. W. 119 (1907). Plaintiff's claim of fraud is not well taken.

The representations by Wiebe and Westroads were made in contemplation of annexation. Omaha would not have been otherwise subject to liability for the project. The written covenants are ambiguous, and we interpret them in conformity with the representations outside the document.

On the issue of standing, no statute expressly authorizes a resident taxpayer to litigate an "affirmative" claim on behalf of Omaha. A derivative "defense" is authorized. See, § 14-810, R. R. S. 1943; Lynch v. City of Omaha, 153 Neb. 147, 43 N. W. 2d 589 (1950). Reasons for allowing derivative "defenses" but not "affirmative" claims were given in Cathers v. Moores, 78 Neb. 13, 110 N. W. 689 (1907), but on rehearing, *supra*, the opinion was modified. The latter without reference to any statutory provision stated: "'. . . If a taxpayer, to avoid the burdens of needless taxation, may sue to prevent public officers from squandering public money, there is, it seems to us, no good reason why he may not

also commence and prosecute to judgment an equitable action for the enforcement of a corporate claim which the officers of the corporation have refused to enforce. . . .'"

Cathers was decided prior to the enactment in 1921 of what is now section 14-810, R. R. S. 1943. In respect to the City of Lincoln the Legislature once expressly authorized affirmative derivative claims by taxpayers, but it subsequently repealed the provision so as to authorize only derivative defenses. See Consentino v. Carver-Greenfield Corp., 433 F. 2d 1274, at 1277, n. 3 (8th Cir., 1970).

We conclude that plaintiff's claim comes within the spirit of section 14-810, R. R. S. 1943, although it is not technically referable to threatened expenditure of public funds. Cf. Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886 (1941). Plaintiff possesses standing.

The argument whether Omaha had power to covenant to curtail exercise of its authority is moot, for Omaha was simply a third party beneficiary. The effect of the protective covenant agreement was to give some further assurance to Omaha and the adjoining landowners that the applicants had made the representations in good faith. Bucholz v. City of Omaha, 174 Neb. 862, at 874, 120 N. W. 2d 270 (1963), cited in the following articles: Shapiro, "The Case for Conditional Zoning," 41 Temple L. Q. 267 (1968); Comments, 12 U. C. L. A. L. Rev. 897 (1965).

Defendants correctly assert that the consent decree in the annexation proceeding prevents Omaha from reapportioning benefits to Westroads' property. The decree did not constitute, however, a waiver by Omaha of the benefit of the private covenants.

The argument on waiver touches the question of claim preclusion by the consent decree. The annexation proceeding was special, and the beneficiary rights of Omaha did not arise out of the transaction or subject of the action on which the annexation proceeding rested;

the provision for cross-claims in section 25-813, R. S. Supp., 1972, did not apply. That aspect of claim preclusion was inoperative, and Omaha ought to recover judgment against Westroads in the present case.

The judgment in favor of Sanitary and Improvement District No. 130 is affirmed. The judgment in favor of the other defendants is reversed and the cause remanded with directions to render judgment for Omaha against Westroads in the amount of $230,992.66 on plaintiff's derivative claim.

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

IN RE ESTATE OF ERNEST TRAVIS, DECEASED.
HOWARD E. TRAVIS, APPELLANT, V. MANFORD TRAVIS, APPELLEE.

202 N. W. 2d 185

Filed November 17, 1972. No. 38450.

1. **Wills.** In construing a will, a court must ascertain the intent and purpose of the testator as disclosed by the language of the will. The object is to carry out the intention of the testator as shown by the will in the light of attendant circumstances.
2. ———. The burden of proving an intention to change the testamentary plan of disposition is on the party claiming the change of intention.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Wright & Simmons, John F. Wright, and John F. Simmons, for appellant.

Van Steenberg, Winner & Brower, for appellee.

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

McCOWN, J.

This is an action to construe the will of Ernest Travis.

The sole issue is whether an inter vivos cancellation of certain indebtedness from one son during the lifetime of the testator should be accounted for and included in the division and distribution of the decedent's estate. The district court construed the will to require accounting for the indebtedness of $15,000 in the distribution of the property of the estate. The debtor son has appealed. We reverse the judgment of the district court.

Ernest Travis executed a will on September 19, 1966, while in the hospital, and died less than 4 months later on January 17, 1967. The decedent was survived by his two sons, Manford Travis and Howard E. Travis. At the time of execution of the will, Howard E. Travis was indebted to the testator in the sum of $15,000. The indebtedness was represented by three promissory notes, one for $5,000 dated July 21, 1964; one for $6,000 dated July 27, 1964; and the third for $4,000 dated October 27, 1965. One note was signed by Howard E. Travis, one was signed by him and his wife, and one by his wife only. All notes bore interest at the rate of 5 percent per annum, and all were for sums advanced as loans and paid to Howard E. Travis by the decedent, Ernest Travis. Manford Travis, the decedent's other son, was not indebted to his father in any amount.

Relevant portions of the testator's will provided: "3) I direct my executors, hereinafter named, to divide the residue of my estate into two shares, designated Share A and Share B, which shall be of equal value * * * In the division of said estate, I direct that the values used shall be as are finally accepted by the Director of Internal Revenue in the audit of my estate tax and gift tax returns. In the making of such division, I do further direct that my executors shall take into account property owned by me and either of my sons as joint tenants with right of survivor, or by me as Trustee for the benefit of either of my sons and such of the gifts made by me after the 18th day of December, 1961,

as are reported on the Federal Gift Tax return. The values of such gifts shall be such as is shown on the gift tax return as it is finally audited and approved by the Director of Internal Revenue. * * *

"4) To my son, Howard E. Travis, I hereby devise and bequeath Share A, and to my son, Manford N. Travis, I hereby devise and bequeath Share B.

"5) In the making of the division of the residue of my estate as aforesaid, I direct that no accounting shall be taken of any moneys due or owing me by either of my sons or any gifts made to them which are not reported on a gift tax return; such obligations and such advances shall not be considered as a part of my estate for any purpose whatsoever, and such obligations, if any, are hereby satisfied and no effort shall be made to collect the same."

After returning home from the hospital about October 1, 1966, the testator made a substantial division of his property between his sons. At about the same time, the testator advised his son, Howard E. Travis, and his wife that he was going to forgive the promissory notes. The notes were delivered to the wife of Howard E. Travis and later the testator marked the notes paid.

Ernest Travis never made a gift tax return. Two years after the testator's death, a federal gift tax return was prepared and filed by the executors which showed the gifts made by the testator when he substantially divided his property on or about October 1, 1966, as well as other gifts in 1966, and included "cancellation of indebtedness Howard Travis $15,000." The items shown were reported on the inventory of the estate and all described as "Property transferred in contemplation of death." They were all accounted for and included in making the division of the residue of the estate. There is no evidence in the record outside the will concerning what the testator's intentions were, other than the testator's conduct in dividing the property and canceling the indebtedness.

The district court determined that the testator intended to treat his two sons equally; that gifts includable on a gift tax return were to be considered in the distribution and division between his sons; and that the cancellation of the $15,000 indebtedness of Howard E. Travis was a gift and was required to be taken into consideration in the final distribution of the assets of Ernest Travis, deceased, and charged to the share of Howard E. Travis.

In construing a will, a court must ascertain the intent and purpose of the testator as disclosed by the language of the will. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself in the light of attendant circumstances under which it was made. Berning v. National Bank of Com. Tr. & Sav. 176 Neb. 856, 127 N. W. 2d 723; Katt v. Claussen, 174 Neb. 603, 118 N. W. 2d 1002.

The problem here is complicated by the fact that the testator, in contemplation of death, made a substantial division of his property and canceled the indebtedness after the execution of the will and before his death. There is no disagreement that if the testator had not forgiven and canceled the indebtedness during his lifetime, the indebtedness would have been satisfied at the testator's death under the specific terms of the will. No accounting was to be taken in that event nor was the indebtedness to be considered a part of his estate for any purpose. The language of paragraph 5 specifically directs that result and also affirmatively demonstrates the intention of the testator to treat his sons unequally insofar as any obligations or indebtedness were concerned.

Paragraph 5 of the testator's will treats indebtedness or obligations as distinct from gifts. It directs that no accounting be taken of "any moneys due or owing me by either of my sons *or* any gifts made to them which are not reported on a gift tax return; * * *." The next

portion of the sentence states that "such obligations *and* such advances shall not be considered as a part of my estate for any purpose whatsoever, * * *." Here again "obligations" and "advances" are separately classified. The final portion of the paragraph, all of which is in one sentence, reads: "and such *obligations,* if any, are hereby satisfied and no effort shall be made to collect the same." Here obligations alone are referred to and not gifts of any kind. There can be no real question but that the testator provided that any obligations or indebtedness of either son were intended to be satisfied under the terms of the will without any accounting for it in the division of the residue.

We note also that the pleadings here admit that, excluding the cancellation of indebtedness involved here, the gifts made by the testator prior to his death totaled $42,675.94 to Howard, and $42,474.85 to Manford. All these gifts were in 1966. In addition, the testator canceled Howard's indebtedness of $15,000. The testator's conduct in canceling the indebtedness of Howard and making substantially equal gifts of other property to both sons seems clearly intended to carry out the testamentary plan provided for by the will, rather than to change it. The burden of proving an intention to change the testamentary plan ought to be upon the party claiming the change of intention.

The foundation of appellee's position is that the testator, by canceling the indebtedness of Howard, technically changed its nature from indebtedness to a gift. The argument then is that the conversion was with the intention and knowledge that it would effectively change the distribution of his testamentary assets under the language of the will. We can find no such intention established by his conduct. We think instead the evidence establishes a desire to carry out the testamentary intent and plan set out in the will.

There is no evidence that the testator had ever made a gift tax return of any kind or that he knew that can-

cellation of this indebtedness constituted a gift and was reportable. One fact is quite clear on the face of the will itself. The testator intended to have any indebtedness of his sons to him forgiven. The fact that he carried out that intention during his lifetime is consistent with the testamentary plan shown in his will. It should not be interpreted as indicating a change of intention.

While the situation here is not identical with the situation involved in the ademption of a legacy, it is analogous. The burden of proving an intention to change the testamentary plan is on the party claiming the change of intention. See, In Re Estate of Wantz, 137 Neb. 307, 289 N. W. 363; Austin v. Austin, 147 Neb. 109, 22 N. W. 2d 560.

The evidence here establishes an intent on the part of the testator to cancel and satisfy any and all indebtedness of his two sons without any accounting against their testamentary shares. He carried out that intent by canceling and satisfying such indebtedness in contemplation of death. The fact that the act of inter vivos cancellation created technical changes in the description of the property and consequent ambiguities in application of the language of the will was insufficient to meet the burden of proving a change of testamentary intent.

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

REVERSED AND REMANDED.

DALE MATHINE ET AL., APPELLANTS, V. KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., A CORPORATION, APPELLEE.
202 N. W. 2d 191

Filed November 17, 1972. No. 38452.

1. **Gas: Negligence.** One engaged in the installation of gas appliances must exercise a high degree of care consistent with the

dangerous nature of the commodity to be used in the appliance.

2. **Witnesses.** There is no exact standard for fixing the qualifications of an expert or skilled witness.
3. ———. An expert or skilled witness will be deemed qualified if, and only if, he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value.
4. ———. An expert may be qualified by his formal education or practical experience.
5. **Witnesses: Trial: Appeal and Error.** The trial court is given large discretion in determining whether or not the witness' qualification to state his opinion has been established and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion.
6. **Witnesses.** An expert may base his opinion upon facts observed by him personally.
7. **Witnesses: Trial.** Whether an expert opinion is necessary or permissible to establish the cause of a fire would depend upon the nature of the case.
8. ———: ———. Who may be competent to testify as an expert in determining the cause or origin of a fire may depend upon the type of the particular fire in question.
9. **Trial: Evidence: Motions, Rules, and Orders.** When the defendant moves for a directed verdict, he admits as true the evidence of the plaintiff who is then entitled to the benefit of every reasonable inference deducible from the evidence submitted.

Appeal from the district court for Kearney County: FRED R. IRONS, Judge. Reversed and remanded.

Ross & Schroeder, for appellants.

James D. Conway, E. J. Jackson, and Robert A. Miller, Jr., for appellee.

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

PER CURIAM.

Plaintiffs brought this action against the defendant gas company to recover for damage to a mobile home and its contents from fire which occurred on January 25, 1967, alleged to have resulted from the negligence of the defendant in the installation of equipment con-

verting the furnace in the mobile home from liquified petroleum to natural gas usage. The conversion kit was furnished by the plaintiffs. The alleged negligence was the failure of the defendant to install a gas pressure regulator which was a part of the kit. At the close of the plaintiffs' evidence the defendant moved for a directed verdict on the grounds of the insufficiency of the evidence to present a jury question. The motion was sustained. Plaintiffs filed a motion for new trial which was overruled and the plaintiffs appeal.

Plaintiffs assign as error the direction of the verdict and the sustention of the defendant's objection to the opinion testimony of one Herman Nolte as to the cause of the fire.

The following is a summary of the pertinent evidence introduced by the plaintiffs. They ordered and received from the manufacturer of the furnace a natural gas conversion kit. The kit consisted of orifices and a pressure regulator. The plaintiffs requested the defendant to convert the furnace in the mobile home from liquified petroleum to natural gas use and this the defendant agreed to do. An employee of the defendant came to do the work and the plaintiffs gave him the conversion kit. The employee installed the orifices but not the gas regulator. Mrs. Mathine testified that the employee, during the course of the work, came to her with the pressure regulator and asked her what it was and if it was to be installed on the furnace. She told him she did not know, but obtained for him the furnace instruction manual which came with the mobile home. The two of them examined the manual together but found nothing with reference to the regulator.

The manual itself was offered and received in evidence at the trial. It contains the following:

"10. ADJUSTING THE UNIT

"General Controls KX36HR combination gas control valve is used on all models *except the 2681B*. This

model uses a General Controls B57 combination valve. . . .
"Gas Controls
"*Included in the KX36HR Control are pressure regulator,* solenoid gas valve, and main manual gas valve. (See Figure 10.) The pressure regulator is adjustable between 3 and 4 inches w.c. *On furnaces equipped for L.P. Gas, working parts have been removed from the pressure regulator.* The valve provides 100% shutoff to both the pilot and main burner.
"*The B57 combination valve* is shown in *Figure 11.* It *includes* a main manual gas valve, diaphragm valve, safety valve which provides 100% shut-off to both the pilot and main burners, and *a pressure regulator on the natural gas control.*
"The pressure regulator is set at 3½" W.C. and is adjustable between 3 and 4 inches W.C.
"*There is no pressure regulator on the L.P. gas valve.*" (Emphasis supplied.)

Figure 10 in the maintenance manual shows a picture of a control including a pressure regulator attached. Figure 11 shows a picture of another control. It appears to contain a regulator within the unit itself.

The plaintiffs retained the pressure regulator when it was returned to them by the defendant's employee when he had finished his work and it was introduced into evidence at the trial.

There was also received and introduced into evidence a furnace operations manual which plaintiffs had received at the time of the purchase of the mobile home. This operations manual included a warranty and in appropriate spaces provided therein there appear in inked handwriting the model number, 2682B, the serial number of the unit, the date of installation, and the name of the installer. This evidence would be sufficient, in the absence of objection, to establish that the furnace was the type which was equipped with the control shown in figure 10.

The conversion was made on September 22, 1966. The

furnace functioned satisfactorily until January 25, 1967, when Mrs. Mathine and the children discovered flames coming from the furnace. She testified that it was "roaring at that time." The fire department was called. It extinguished the fire but not before the mobile home and contents were badly damaged.

After the fire the furnace and mobile home were inspected on separate occasions by Herman Nolte and Jeff Banta. Nolte had been in the heating and air conditioning business since 1946 and was an experienced furnace installer and repairman. He had attended manufacturer's schools on furnace installation and repair. He testified with reference to furnaces that "basically the entrance of gas and burning of gas and exhaust of the fumes is pretty much alike on all of them," and that they all have blowers, burning chambers, valves, and pressure regulators. He further testified that a furnace such as the plaintiffs', while it was burning L.P. gas, did not require a regulator because there was a regulator on the L.P. tank itself, but that upon conversion the natural gas "pressures would have to be a little bit different, and it should have a regulator right on the furnace." The court thereafter struck an immediately following answer to the same effect because "I don't think you have laid the foundation for your question as to this furnace that you are talking about." The court and counsel had apparently overlooked the fact that the insertions in the operations manual identified the plaintiffs' furnace as a model 2682B which, according to the installation manual, uses a KX36HR control from which parts of the pressure regulator have been removed for liquified petroleum use.

Nolte made his inspection of the plaintiffs' furnace on February 3, 1967. At that time he was shown by Mr. Mathine the pressure regulator. This regulator he identified from the witness stand and stated he was familiar with the type of regulator and knew how it worked. He testified that its purpose was "to keep the

pressure constant so that your . . . flame would have proper combustion." He also testified his inspection on February 3 showed that the furnace had no gas pressure regulator on it. It had only a control valve without a pressure regulator.

He noted that the wooden furnace enclosure was charred opposite the openings or "knockouts" of the furnace. The wood was separated from the furnace about 1½ inches. He was asked if he had an opinion as to the cause of the fire. He stated he did. When asked what that opinion was, an objection by the defendant was sustained. The plaintiffs then made the following offer of the witness' answer: ". . . because of the absence of the pressure regulator, the furnace overfired thereby causing flame to occur outside of the natural combustion chamber and traveling in such a direction as to place itself outside the knock-out holes heating the wood paneling to its flush (sic) point and thereby causing the ensuing fire." The ground of the defendant's objection was that "no proper foundation laid to qualify the witness as being competent, able to act as an expert witness in giving the cause of the fire, or being able to testify based on the foundation made as to the cause of the fire."

Jeff Banta, a deputy state fire marshal, was called by the plaintiffs. He testified his duties included the investigation of the causes of fires and the making of reports of such investigations to the State Fire Marshal in Lincoln. He had been a deputy state fire marshal for 22 years and had special training which included methods of investigating and determining the causes of fires.

Banta was asked by the fire chief of Minden, Nebraska, to investigate the fire in question. On February 7, 1967, he made an inspection of the plaintiffs' burned mobile home. His purpose was to "determine the cause of the fire . . . and where it started." He started the inspection at the furnace. He stated: "This is

where the fire itself in our opinion started." He then went on to describe what he had observed and stated: "It started at the heating plant or furnace." He was asked if he had an opinion as to the cause of the fire and he stated he did. He was then asked his opinion and in response he stated: ". . . there was an overburn in the furnace that caused the fire; overheating." He testified there was no pressure regulator on the furnace, but was not asked to express his opinion as to whether the absence of the regulator caused the overheating. This apparently because he did not consider himself qualified in that respect, stating: "I had to get somebody to help me on that."

The basic question that must be answered is whether the above evidence will support a finding that the defendant did not exercise in making the conversion that degree of care which the law requires. It is generally recognized that one engaged in the installation of gas appliances must exercise a high degree of care consistent with the dangerous nature of the commodity to be used in the appliance. Fonda v. Northwestern Public Service Co., 134 Neb. 430, 278 N. W. 836.

The plaintiffs' theory of the case was that the alleged failure of the defendant to include the pressure regulator in the conversion installation was negligence or evidence of negligence. This is an area in which some expertise is required and the average person unfamiliar with the mechanics of gas furnaces would not know what the effect of the failure to install the gas regulator would or could be. In order for such failure to constitute negligence or evidence of negligence one needs to know whether such failure can, could, or is likely to result in harm of the general type which occurred, and whether a skilled or knowledgeable installer or repairman would, in the exercise of that degree of care the law imposes upon him, not fail to install the regulator. There was no direct evidence to this effect either by expert testimony, or someone skilled in the field, or by introduction of

approved industry standards or codes such as those of the National Fire Prevention Association or those promulgated by the gas industry. It is true the installation manual, exhibit 4, would lead to the conclusion that such a pressure regulator would be required, but there is nothing there to establish directly or by reasonable inference that the lack of the pressure regulator would be dangerous. Perhaps, as far as that manual is concerned, the absence of the regulator could simply result in the failure of the furnace to function properly. If that were the case then there would be no evidence of negligence of a type likely to cause the kind of harm which occurred and hence no jury issue.

Nolte's direct testimony was simply that the purpose of the regulator was "to keep the pressure constant so that your . . . flame would have proper combustion." That testimony leads to no conclusion that the absence of the pressure regulator is dangerous in the sense that it might cause a fire. Banta testified, as we have noted, the cause of the fire was the overheating of the furnace but he was not able to state that this was attributable to the absence of the pressure regulator. We must assume, of course, there are other possible causes of the overheating of a furnace such as is here involved. It did apparently function satisfactorily for a period of 4 months following the conversion.

This brings us back to the offer of the opinion testimony of Nolte which was to the effect that the cause of the fire was the failure to install the pressure regulator. Was the trial court correct in ruling that Nolte was not competent to express opinion as to causation? As we will note shortly, the offered testimony has implications extending beyond the issue of proximate cause.

There is no exact standard for fixing the qualifications of an expert or skilled witness. Sioux City & P. R.R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. R. 724. Such a witness will be deemed qualified

if, and only if, he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value. 32 C. J. S., Evidence, § 457, p. 98; Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601. An expert may be qualified by his formal education or practical experience. Allender v. Chicago & N.W. Ry. Co., 119 Neb. 559, 230 N. W. 102; Luedeke v. Chicago & N.W. Ry. Co., 120 Neb. 124, 231 N. W. 695, 71 A. L. R. 912. The trial court is given large discretion in determining whether or not the witness' qualification to state his opinion has been established and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion. Whittington v. Nebraska Nat. Gas. Co., 177 Neb. 264, 128 N. W. 2d 795. An expert may base his opinion upon facts observed by him personally. Kennedy v. Woods, 131 Neb. 217, 267 N. W. 390.

Whether an expert opinion is necessary or permissible to establish the cause of a fire would depend upon the nature of the case. Neal v. Missouri P. Ry. Co., 98 Neb. 460, 153 N. W. 492; Annotation: Cause of Fire—Opinion Evidence, 88 A. L. R. 2d at 247. Who may be competent to testify as an expert in determining the cause or origin of a fire may depend upon the type of the particular fire in question. 88 A. L. R. 2d 253. In Neal v. Missouri P. Ry. Co., *supra,* no expert opinion was permitted because it was within the competency of the jury itself to determine from the facts in evidence the cause of the fire.

As applied to the evidence in this particular case, it requires no expertise to know that if flames project outside a furnace and remain in contact with wood or other combustibles for a sufficiently long time, such material will ignite. This is within the competence of the average layman and juryman and expert testimony would be superfluous.

On the other hand, what might cause the projection

of the flames in the first place may not be within the competence of the average layman or juryman. Electricians, for example, have been held competent to testify to the cause of a fire where the evidence tends to show that the fire was of electrical origin. Sellers v. Montana-Dakota Power Co., 99 Mont. 39, 41 P. 2d 44; Brown v. Eakins, 220 Ore. 122, 348 P. 2d 1116. See, also, Crisman v. Southwest Central Rural Elec. Coop. Corp., 397 Pa. 414, 155 A. 2d 621.

It seems clear to us the qualifications of Nolte were such that he was qualified to give his opinion that the absence of a pressure regulator caused the furnace to overfire resulting in flaming occurring outside the combustion chamber of the furnace through the knockout holes where the flames could come in contact with combustible material.

It is to be observed that a trained and experienced furnace repairman could be expected to know the standards and requirements of a furnace conversion such as is here involved and what would be the possible or probable consequences of a failure to perform some particular element of the conversion. If after qualification for experience or education or both, an expert or skilled witness testifies that he does know and does have an opinion on the particular point in issue, he would normally be qualified to give that opinion. It, of course, may be that the opinion is in fact not well founded or it involves a matter on which expert or skilled witnesses may disagree, but this may be shown by opposing experts and the jury must decide. We hold the trial court abused its discretion in sustaining the objection to the opinion of Nolte.

We now return to the question of whether the evidence received and that properly offered was sufficient to permit a jury to find the defendant was in fact negligent. Because of the failure of the plaintiffs to introduce and direct evidence of standards applicable to such conversions (specifically as to the necessity of the

inclusion of the pressure regulator), and the likely or probable consequences of the failure to include the regulator, a close question is presented. It is a question of inferences. When the defendant moves for a directed verdict, he admits as true the evidence of the plaintiff who is then entitled to the benefit of every reasonable inference deducible from the evidence submitted. Fonda v. Northwestern Public Service Co., *supra;* Driekosen v. Black, Sivalls & Bryson, Inc., 158 Neb. 531, 64 N. W. 2d 88; Wisnieski v. Coufal, 188 Neb. 200, 195 N. W. 2d 750.

The answer of Nolte was relevant and competent for two purposes. Not only on the probable cause of the fire, but on the general question of whether the failure to install a pressure regulator in converting this particular model of furnace from liquified petroleum to natural gas use could result in overheating and fire outside the furnace. The previously quoted provisions of the installation manual indicated such regulators were needed but did not indicate why. Nolte's offered testimony supplied that gap.

Based on the foregoing, we believe if the jury accepted the foregoing testimony and evidence as true, the following inferences of negligence could reasonably be drawn by them. A gas pressure regulator is required to be installed in this model furnace in converting it to natural gas use; and that at least one of the reasons for installation is to prevent the possibility of the furnace overheating and projecting flames from the combustion chamber through knockouts to the exterior of the furnace. It could reasonably then conclude a furnace repairman in the exercise of the care required would or ought to know this and the failure to make such installation was negligence.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

I dissent. Rule 8a2(3), Revised Rules of the Supreme Court, 1971, provides in part as follows: ". . . that

consideration of the cause will be limited to errors assigned and discussed."

The assignment of error relative to exclusion of the opinion of Nolte has not been discussed in the plaintiffs' brief, either in the statement of facts or in argument, and no authorities are cited.

There was no evidence received to show that the lack of the regulator could or might cause the overheating and that if such was the case the installer should have known it. Both of these factors depended upon the opinion which was excluded. I have carefully read the record and considered the plaintiffs' contentions. That examination discloses that the excluded opinion testimony was critical to plaintiffs' case both on the fact of negligence and the question of proximate cause. Because of the failure of the plaintiffs to comply with Rule 8a2(3), I would affirm the judgment.

WHITE, C. J., joins in this dissent.

BOSLAUGH, J., dissenting.

I agree with Judge Clinton that the plaintiffs' failure to discuss the assignment of error relating to the ruling on the objection to the testimony of the witness Nolte waived the error. The case is decided, therefore, on the basis of the plain error rule.

A ruling as to the qualifications of an expert witness is within the discretion of the trial court and ordinarily will not be disturbed in the absence of a clear abuse of discretion. Whittington v. Nebraska Natural Gas Co., 177 Neb. 264, 128 N. W. 2d 795. I find it difficult to say that there was such a clear abuse of discretion in this case that it constituted a plain error.

STATE OF NEBRASKA, APPELLEE, V. MERVIN WHIPPLE, APPELLANT.

202 N. W. 2d 182

Filed November 17, 1972. No. 38459.

1. **Criminal Law: Evidence: Trial.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information that the trial court will be justified in directing a verdict of not guilty.
2. **Criminal Law: Sentences: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

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

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

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

SPENCER, J.

Mervin Whipple appeals his conviction upon a two-count information charging him with assault with intent to inflict great bodily injury, and a forcible taking of property of value with intent to rob and steal. The jury found defendant guilty of the lesser-included offense of assault and battery on the first count, and guilty of the offense of assault with intent to commit robbery on count two.

Defendant assigns as error the refusal to direct a verdict in his favor; the verdicts of the jury are inconsistent as a matter of law; the defendant is being punished twice for the same offense; and the sentence imposed by the court is excessive and an abuse of discretion. We affirm.

The complaining witness, Franklin Davis, was re-

turning from Minatare with his brother when he saw a car in a borrow pit and stopped to render assistance. Defendant approached Davis' pickup and said that he could use some help. Davis told defendant he would get a tow chain. Defendant then told Davis that he wanted his pickup. When Davis refused to give it up, defendant hit him a couple of times through the car window, opened the door, and pulled him out. Davis was then beaten, kicked, slashed with a knife, and placed back in the pickup along with two of defendant's companions. One of defendant's companions drove the pickup, with defendant riding in the rear box. After driving down the road a short distance they saw a police car. Defendant and the driver fled from the pickup. Davis drove it down the road to meet the police car.

We first consider defendant's contention that a verdict should have been directed. In State v. Martin (1964), 177 Neb. 209, 128 N. W. 2d 583, we held: "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information that the trial court will be justified in directing a verdict of not guilty." Here the defendant told Davis he wanted the pickup and when Davis refused to give it up, defendant forcibly took it from him. The evidence is undisputed that the defendant and an accomplice unmercifully beat, kicked, and slashed Davis before taking the pickup.

We consider defendant's second and third contentions together, and determine that the counts are not inconsistent and defendant is not being punished twice for the same offense.

Assault with intent to inflict great bodily injury under the provisions of section 28-413, R. S. Supp., 1972, is a separate and distinct offense from assault with intent to commit robbery under section 28-409, R. R. S. 1943. The court instructed the jury as to the distinctions between the two offenses, and the jury found the defendant guilty of assault and battery on the first count,

and of assault with the intent to commit robbery on the second count.

The defendant cites State v. Hutter (1945), 145 Neb. 798, 18 N. W. 2d 203, to sustain his position. That case involved the different degrees of homicide which were carved out of murder and manslaughter as known to the common law. In creating the different degrees of homicide, our statute did not set up any new offenses, but divided homicide into degrees and graded the punishment to meet the circumstances of the particular case. Here, however, the two counts describe two separate offenses and not one. The first is assault with intent to inflict great bodily injury, and the second is assault with the intent to commit robbery. They are not inconsistent. The jury found the defendant guilty of assault and battery on the first count, and of assault with the attempt to rob on the second count. The trial court, in passing sentence on the verdicts of the jury, made the sentences on the two counts concurrent.

Defendant's final contention is that the sentence imposed is excessive and an abuse of discretion. The defendant was sentenced to 6 months in the county jail on the first count, and to 6 to 8 years in the Nebraska Penal and Correctional Complex on the second count, the sentences to run concurrently. The penalty provided for assault with the intent to commit robbery is not less than 2 nor more than 15 years. The defendant received 6 to 8 years, which is within the limits set by the statute. In State v. Hake (1969), 184 Neb. 381, 168 N. W. 2d 270, we said: "We have on many occasions reiterated the rule that where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion." Defendant's presentence report is not a part of the record herein. If he wished this court to review his sentence in the light of the

presentence report he should have requested that it be made a part of the transcript. There is a suggestion in the record that the defendant was on probation at the time of the offense. In any event, the offense herein was an aggravated one and there is nothing in the record which would indicate that the trial judge abused his discretion.

We affirm the judgment and direct that the defendant be given credit on the sentence on the second count for all time served in the county jail on the first count.

AFFIRMED.

McCOWN, J., concurring only in result and only because of the concurrent sentences.

I cannot concur in the conclusion that a defendant may properly be convicted of the offense of assault with intent to commit robbery and of the offense of assault and battery where both are based upon a single factual assault. See § 1.07, American Law Institute Model Penal Code, proposed official draft, May 4, 1962.

SMITH, J., joins in this concurrence.

GLENN L. BOHLEN, APPELLANT, V. JOHN W. KISSACK, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

202 N. W. 2d 171

Filed November 17, 1972. No. 38478.

Criminal Law: Administrative Law: Evidence: Trial. In addition to the judicial review of records of the Director of Motor Vehicles it is only completely void judgments, erroneous or fraudulent records, and abstracts of convictions which may be challenged at the evidentiary hearing provided for in the district court de novo review of the order revoking a driver's license.

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

Munro, Parker, Munro & Grossart, for appellant.

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

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

SPENCER, J.

This is an appeal from the judgment of the district court for Buffalo County, upholding the revocation of the motor vehicle operator's license of Glenn L. Bohlen by the Director of Motor Vehicles.

The revocation of appellant's license was based upon the accumulation of points in five separate convictions for violations of various traffic laws of Nebraska over a 2-year period. Appellant premises his action on the alleged invalidity of three of those traffic convictions, and the unconstitutionality of section 39-7,129, R. R. S. 1943. We affirm.

Appellant predicates his claim of jurisdictional defects on the fact that the three complaints on which the convictions were obtained were filed by persons other than the county attorney; that the record does not indicate the county attorney consented to their filing; and that the court did not receive from the complainants a bond with sufficient sureties to indemnify for wrongful or malicious prosecution, as required by section 29-404, R. S. Supp., 1972. The statute provides a procedural requirement to protect an individual from the filing of false complaints. Granted that it was not complied with in the three cases as alleged by the appellant, the complaints were processed to conviction and the issue was not raised. The judgments of conviction were not void, nor even voidable. No appeals were taken from the convictions, and those judgments became final.

In Stauffer v. Weedlun (1972), 188 Neb. 105, 195 N. W. 2d 218, we indicated that in addition to the judicial review of records of the Director of Motor Vehicles it is only completely void judgments, erroneous or fraud-

ulent records, and abstracts of convictions which may be challenged at the evidentiary hearing provided for in the district court de novo review of the order revoking a driver's license.

Appellant's attack on the constitutionality of section 39-7,129, R. R. S. 1943, is fully answered in Stauffer v. Weedlun (1972), 188 Neb. 105, 195 N. W. 2d 218, and State v. Lessert (1972), 188 Neb. 243, 196 N. W. 2d 166.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LLOYD R. MEINTS, APPELLANT.
202 N. W. 2d 202

Filed November 17, 1972. No. 38486.

1. **Criminal Law: Intent: Evidence: Trial.** Where proof of a different crime tends to establish motive, criminal intent, or guilty knowledge, it is admissible.
2. **Criminal Law: Intoxicating Liquors: Trial: Evidence: Motor Vehicles.** The refusal of a defendant to submit to a legal chemical test for intoxication is admissible in evidence.
3. **Criminal Law: Intoxicating Liquors: Trial: Motor Vehicles.** The prosecuting attorney may comment to the jury on the refusal of a defendant in a prosecution for driving while under the influence of intoxicating liquor to submit to the chemical test which is required by law.

Appeal from the district court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

John McArthur, for appellant.

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

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

SPENCER, J.

Defendant appeals a third offense drunk drive con-

viction. He predicates his appeal on the admission in evidence of his refusal to give a body fluid specimen, and on the fact that the deputy county attorney commented on that refusal in his closing argument to the jury. We affirm.

Defendant has not raised any question as to the sufficiency of the evidence. We observe, however, that it was ample to sustain the conviction without regard to the disputed testimony.

The offense occurred November 4, 1971, in Gage County, Nebraska. The defendant, who was involved in an accident, refused to give a chemical test for intoxication to comply with the Nebraska Implied Consent Law. In the trial, which took place on January 31 and February 1, 1972, the State was permitted to show that the defendant refused to give a body fluid specimen on seven different occasions.

Section 39-727.03, R. S. Supp., 1971, provides that any person who operates or has in his actual control a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his blood, urine, or breath for the purpose of determining the amount of alcoholic content in his body fluid. It further provides that any person who refuses to submit to a blood, breath, or urine test required pursuant to this section shall be guilty of a crime and upon conviction thereof shall be punished as provided in section 39-727, R. S. Supp., 1971.

Defendant argues it was prejudicial error to permit the State to show he committed another crime in addition to the one for which he was on trial. It is not necessary to discuss the cases cited by the defendant. They are not in point herein. It is the exception to the rule which he urges that is pertinent.

Where proof of a different crime tends to establish motive, criminal intent, or guilty knowledge, it is admissible. See Henry v. State (1939), 136 Neb. 454, 286 N. W. 338. That is the nature of the evidence which

defendant seeks to exclude. It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitudes, and relation toward the crime. These are circumstances to be shown. Their weight is for the jury. These are admissible if the rules governing their admission are strictly observed. A refusal to submit to a sobriety test required by law is such a circumstance.

So far as we can determine, this is the first time that the admission of testimony as to the defendant's refusal to submit to a chemical test for intoxication in his trial for driving while under the influence of alcoholic liquor has been before this court. While there is a division among the various jurisdictions on the admissibility of the evidence of the refusal to submit to the test, we believe the better rule is the majority one which permits the admission of such evidence. Section 39-727.03, R. S. Supp., 1971, is very definite: "Any person who operates * * * shall be deemed to have given his consent * * *." Consent being required, the refusal to give the chemical test should be admissible in evidence against the defendant. We accordingly hold that the refusal of a defendant to submit to a legal chemical test for intoxication is admissible in evidence. See State v. Holt (1968), 261 Iowa 1089, 156 N. W. 2d 884, a case which on its facts is very similar to the instant one; and an Annotation on the point in 87 A. L. R. 2d 370.

In Schmerber v. California (1966), 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908, the United States Supreme Court held that a blood sample withdrawn from a defendant's body without his consent and over his objections did not violate his privilege against self-incrimination.

We now consider defendant's second contention, comment by the prosecutor on such evidence. It would seem that if it is constitutionally permissible to take a blood specimen over objection, and if evidence of the refusal to give a specimen is admissible, it should fol-

low that it is permissible to comment to the jury on the refusal to take the test.

The following language from City of Westerville v. Cunningham (1968), 15 Ohio St. 2d 121, 239 N. E. 2d 40, is very pertinent herein: "Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such a test will provide evidence for him; but, if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt, especially where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt."

In the instant case, the trial court gave instruction No. 11 which is as follows: "Evidence was received in this case purporting to show that defendant was advised by the police of the provisions of the implied consent law dealing with the taking of specimens of body fluid to determine the alcoholic content thereof. Such evidence was received solely and for the limited purpose of showing compliance by the State with the provisions of such law. You must not, therefore, consider such evidence for any other purpose."

Instruction No. 11 would suggest that it may have been improper for the prosecutor to have commented on the evidence as it was admitted solely to show the State was attempting to comply with the law. It is a matter of common knowledge that where a fluid test is not taken the defense usually uses its absence as an argument to question the testimony that the defendant was under the influence of alcoholic liquor. We believe,

however, that the instruction was more favorable than the defendant had any right to expect.

This type of evidence is not in the class proscribed as a violation of the Fifth Amendment by Griffin v. California (1965), 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. That case held a California statute permitting comment on and inferences to be drawn from the failure of a defendant to explain or deny evidence against him violated the Fifth Amendment. Schmerber v. California (1966), 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908, establishes that a chemical test for intoxication is not embraced within the ambit of the Fifth Amendment. There is a vast difference between prohibiting comment on a failure to give incriminating testimony which is within the Fifth Amendment and comment on the refusal to submit to a chemical test which is required by law. Here we have a wrongful refusal to cooperate with a law enforcement officer, a refusal which might operate to suppress evidence of intoxication which disappears rapidly with the passage of time. We would be derelict in our duty if we were to encourage such devices to escape prosecution.

This prosecution was under the law as it existed in 1971. Section 39-727.16, R. S. Supp., 1972, was added to the statute in 1972. It became effective July 6, 1972, after the prosecution herein. Our law now provides that if a person arrested pursuant to section 39-727.03, R. S. Supp., 1972, refuses to submit to the chemical test, the test shall not be given, and the arresting officer shall make a sworn report to the Director of Motor Vehicles. While we are interpreting our law as it existed in 1971 for this case, the 1972 changes in the law will not affect the rules enunciated herein.

Judgment affirmed.

AFFIRMED.

McCOWN, J., concurring in result.

I do not agree with the implications as to issues not directly raised, nor the dicta which places the stamp

of approval upon statutory changes not involved and not before us.

STATE OF NEBRASKA, APPELLEE, V. THOMAS J. CONNOR, APPELLANT.
202 N. W. 2d 172

Filed November 17, 1972. No. 38487.

1. **Searches and Seizures: Motor Vehicles: Criminal Law.** A warrantless search of a motor vehicle may be conducted for probable cause which must be determined by a practical and not by any technical standard.
2. **Criminal Law: Evidence: Appeal and Error.** This court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence unless it is so lacking in probative force as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Homer E. Hurt, Jr., for appellant.

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

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

WHITE, C. J.

The defendant appeals from a conviction for being a minor in possession of alcoholic liquor. His appeal is predicated upon contentions that the evidence was insufficient to sustain the finding of guilt, and the failure of the district court to suppress certain evidence allegedly obtained as the fruit of an illegal search. We affirm the judgment and sentence of the district court.

A brief résumé of the facts is sufficient to dispose of the contentions of the defendant on appeal. The defendant was a passenger in a car driven by another

boy when a State Patrolman, having been advised by a patrol aircraft that the car was speeding, stopped it near Fremont, Nebraska, with the intention of issuing the driver a warning ticket. While examining the operator's license of the driver, the officer detected the odor of alcohol coming from the driver's side of the vehicle. At the same time he determined from his examination of the driver's license that the driver was under 18 years of age. The officer then inquired of the boys whether there was any liquor in the car and received no reply. He opened the left front door of the vehicle and observed a partially full can of beer near the driver. He then circled the car and opened the right front door by which the defendant was seated, and observed a sack containing a number of unopened cans of beer lying on the floor. Lying next to the sack, near the defendant's foot, was an empty can. The defendant was asked whose beer this was and he replied that he guessed it was theirs. After a search of the rear seat of the car the boys were placed under arrest.

The thrust of defendant's principal objection is that the police officer lacked probable cause for a warrantless search of the vehicle under these circumstances. The defendant argues that there is nothing in the record to indicate that the boys might not have consumed the liquor in their own home which is entirely lawful, and, of course, that is true. But the issue here is the reasonableness of the officer's action and what is overlooked by the defendant is that he is not here charged or convicted of the crime of consumption of alcoholic liquor but of a minor in possession of alcoholic liquor. We have recited the facts. It is clear to us that the officer smelling the alcoholic liquor, with the information obtained from the license that the driver was a minor, and what he observed considering the appearance of the occupants in broad daylight, certainly had probable cause to believe that either a crime was being committed in his presence or that there was evidence thereof, and his

opening of the doors and observing what was in plain sight on the floor of the car was not an unreasonable search under these circumstances. Probable cause for searching a motor vehicle is to be determined in view of its mobility and by a practical and not a technical standard, and differs from that required to search a fixed structure. State v. Forney, 182 Neb. 802, 157 N. W. 2d 403, cert. denied, 393 U. S. 1044 (1969). The officer had determined that the driver was a minor, had smelled the presence of alcohol, and was not required to ignore what was apparent from his observation of the defendant and what was in plain sight inside of the automobile. Probable cause may result from the use of any of the senses. 79 C. J. S., Searches and Seizures, § 69e, p. 850.

As to the sufficiency of the evidence, this case is quite similar and is controlled by our holdings in State v. Embrey, 188 Neb. 649, 198 N. W. 2d 322; and State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753. The justification for search in this case was very similar to that in State v. Reeder, *supra*. It was ample to sustain a reasonable inference of conscious possession of alcohol. The evidence was sufficient and there is no merit to this contention.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

PEPSI COLA BOTTLING CO., LINCOLN, NEBRASKA, ET AL., APPELLANTS, V. WILLIAM E. PETERS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
202 N. W. 2d 582

Filed November 24, 1972. No. 38432.

1. **Taxation: Sales.** The sale of reusable bottles, cartons, and shells to bottlers by manufacturers or suppliers is a sale at retail subject to the sales tax imposed by the Nebraska Revenue Act of 1967.

2. **Taxation: Classification.** The Legislature may classify for the purposes of legislation if the classification rests upon a substantial difference of situation or circumstance.

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

J. Taylor Greer and Gilbert G. Lundstrom of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellants.

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

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

BOSLAUGH, J.

This proceeding was commenced by the filing of claims for refund of sales taxes paid to the State of Nebraska upon certain bottles, cartons, and shells sold to the plaintiffs by various manufacturers or suppliers. The Tax Commissioner determined the plaintiffs were not entitled to a refund of the taxes. The plaintiffs then filed their petition for review in the district court pursuant to section 77-27,127, R. R. S. 1943.

The district court found the plaintiffs were not entitled to a refund of the taxes and affirmed the order of the Tax Commissioner. The plaintiffs appeal.

The plaintiffs are bottlers engaged in the business of bottling and distributing at wholesale carbonated beverages commonly known as "soft drinks." The beverages are placed in bottles or cans; the bottles or cans are then placed in plastic or cardboard containers known as cartons or in cases known as shells which are used for carrying case lots of bottles. The bottles, cartons, and shells involved in this litigation are those that are designed for reuse by the bottler. For convenience, they will be referred to as reusable containers. The issue is whether the sale of such reusable containers to the plaintiffs by manufacturers and suppliers is subject to

the sales tax imposed by the Nebraska Revenue Act of 1967.

The general theory of the act is to impose a tax on the sale of each item of property at some point in the chain of commerce. Sales at wholesale and sales of ingredients and component parts to manufacturers are generally not subject to the tax.

Under section 77-2703, R. R. S. 1943, the tax is imposed on the sale of tangible personal property at retail. Section 77-2702 (11) (c), R. R. S. 1943, provides that a sale at retail shall not include the sale of "Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container; containers when sold with the contents if the sales price of the contents is not required to be included in the measure of the taxes imposed by sections 77-2701 to 77-27,135; and returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling. The term returnable containers means containers of a kind customarily returned by the buyer of the contents for reuse. All other containers are nonreturnable containers; * * *."

The record establishes that the reusable containers involved in this case are customarily returned by the buyer of the contents for reuse. The bottles are reused, on the average, 4 to 7 times; the cartons, 3 to 20 times; and the shells, 30 to 45 times.

The plaintiffs argue that reusable containers do not acquire the status or character of "returnable containers" until they are actually put in the channels of trade as such. The record here establishes that there is a difference in fact between reusable containers and nonreusable containers. The reusable bottles are constructed of heavier and more durable material and have a higher cost to the bottler. Thus, at the time of the sale to the plaintiffs, a particular container can be classified as reusable or nonreusable.

A "deposit" system is used to encourage the return of the bottles and shells to the plaintiffs. At the time of delivery of the product to a customer, the plaintiffs collect or charge a "deposit" on each bottle or shell delivered. The customer receives credit for each empty bottle and shell returned. The plaintiffs' customers in turn collect a "deposit" for each bottle or shell at the time the product is sold and delivered by them, and give credit or repay a like amount when empty bottles or shells are returned. Although the payment made is referred to as a "deposit," a sale of the bottle or shell takes place and there is no obligation on the part of any customer to return or account for bottles or shells.

Since the containers are sold to the customers at the time of delivering the product, the plaintiffs contend that the sale of reusable containers to a bottler is a sale for resale and not subject to tax. Under this theory, the sale to the ultimate consumer would be a sale at retail, and the tax would be imposed on each sale of a reusable container to a consumer and again upon its resale by the consumer.

The act provides that the sale of "returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling" is not a sale at retail. This is a legislative recognition of the fact that bottlers do not purchase reusable containers for the purpose of resale, but for use as a means to convey their product to the consumer. See, District of Columbia v. Seven-Up Washington, Inc., 214 F. 2d 197; Consumers Co-operative Assn. v. State Commissioner of Revenue & Taxation, 174 Kan. 461, 256 P. 2d 850. Thus, the sale to the bottler of reusable containers by manufacturers or suppliers is a sale at retail.

Since the deposits collected are less than the cost of new bottles and shells, the plaintiffs contend that some part of the cost of the bottles, cartons, and shells is included in the price of the product and thus should be

subject to the tax only at the time the product is sold to the ultimate consumer.

To the extent that the unreimbursed cost of reusable containers is a part of the cost of doing business, it is included in the price of the product the same as the cost of machinery and equipment in the plant or the trucks used to deliver the product. In reality, the reusable containers are a part of the equipment of the bottler because they are used over and over again until lost or destroyed. This is not a basis upon which to conclude that their sale to the bottler by manufacturers or suppliers is not subject to tax. Rather, it is a basis upon which to conclude that the sale of reusable containers to the bottler is a sale at retail and not a sale for resale.

The plaintiffs further contend that the sale of reusable containers to the bottlers should not be subject to the tax because the containers enter into and become an "ingredient or component part" of the product and are excluded from a retail sale by section 77-2702 (11) (a), R. R. S. 1943. The contention would have more validity if applied to nonreusable containers since they are sold to the consumer with the product and never returned. The act recognizes this difference by excluding the sale of nonreturnable containers from a retail sale when sold without the contents to persons who place the contents in the container and sell the contents together with the container. § 77-2702 (11) (c), R. R. S. 1943. The reusable containers are not an ingredient or component part of the product because they are dealt with separately, through the system of deposit and return, and are reused indefinitely until lost or destroyed.

Finally, the plaintiffs contend that the separate treatment of reusable containers and nonreusable containers for the purposes of the sales tax is arbitrary and unreasonable and, therefore, invalid. The contention is without merit because there is a factual basis for the

classification. The Legislature may classify for the purposes of legislation if the classification rests upon a substantial difference of situation or circumstance. Shear v. County Board of Commissioners, 187 Neb. 849, 195 N. W. 2d 151.

If the plaintiffs' contention that all containers must receive the same treatment for tax purposes were accepted, it would not necessarily follow that the sale of reusable containers to a bottler would not be subject to the tax. It is unnecessary to explore this possibility further because we conclude that a valid basis for classification exists.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALVARO ALVAREZ, APPELLANT.

202 N. W. 2d 600

Filed November 24, 1972. No. 38443.

1. **Criminal Law: Aiders and Abettors.** Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.
2. ———: ———. Mere presence, acquiescence, or silence in the absence of a duty to act is not enough to constitute one an accomplice, and the knowledge that a crime is being or about to be committed does not constitute one an accomplice.
3. ———: ———. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed.
4. ———: ———. The advice or encouragement which will render one an accessory before the fact may be by acts, or words, but it must, to create guilt, be used with the intent to encourage and abet the crime.
5. **Criminal Law: Evidence: Trial.** When the evidence in a crim-

inal prosecution is insufficient to prove guilt beyond a reasonable doubt the court should direct a verdict for the accused.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions to dismiss.

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

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Robert G. Avey, for appellee.

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

CLINTON, J.

The defendant, Alvaro Alvarez, was charged with the unlawful sale of cannabis. He was tried before a jury on December 1, 1971, a verdict of guilty was returned, and the court imposed a sentence of 1 to 2 years in the Nebraska Penal and Correctional Complex. He then perfected his appeal to this court. He makes the following assignments of error: (1) The court erred in denying his motion for absolute discharge because of the failure of the State to bring him to trial within the period provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, which became effective April 30, 1971; (2) the court erred in denying his motion for a directed verdict because the conviction is not sustained by the evidence; and (3) the court erred in refusing to give a requested instruction on a claimed "lesser included offense" of possession of cannabis.

We first consider the claim of the defendant with reference to the sufficiency of the evidence. We conclude that the contention of the defendant is well founded and that the verdict should have been directed for him. This makes it unnecessary to consider the other assignments.

The State's theory of the case is that the defendant aided and abetted one Wagner in the sale of marijuana. The evidence against the defendant consisted of the

testimony of an undercover agent hired by the State and local authorities to procure evidence of marijuana and drug violations. The testimony of the agent briefly summarized is as follows.

The witness had first met Wagner in October 1970. In December 1970, he encountered Wagner at a lunch counter in Scottsbluff. At that time Wagner told the agent and the agent's associate that he, Wagner, had a friend who had marijuana for sale for $15 a lid. The agent agreed to buy a lid and the witness' associate agent, in the presence of the witness, gave Wagner $15. The three persons then, at Wagner's direction, drove to a residence in Scottsbluff where Wagner got out, went into the residence, returned, and angrily reported the marijuana was not where it was supposed to be. Wagner then directed the agents to drive to an apartment house in the 1100 block of Avenue C, Scottsbluff. The three went to a particular apartment. Wagner knocked on the door. There was no response. Wagner forced an entry into the apartment through a rear window and admitted the agents. The agents, apparently alarmed at the method of entry, said they had to leave. Wagner told them if they would come back about 5:30 p.m., he would give them the marijuana. The agents left. Wagner remained at the apartment.

At about 6:15 p.m., the agents returned to the apartment and knocked on the door. The door was opened, they were greeted by the defendant Alvarez and one Brown, and were invited to come in. Alvarez at that time had a large bottle of wine and appeared to be inebriated. The defendant asked the agents why they were there. They told him they were there to pick up the marijuana Wagner had promised them. Brown then stated the marijuana was in the refrigerator. He walked to the refrigerator, opened the door, removed four plastic bags of marijuana, and offered them their choice of the bags. At this point the defendant interjected, saying, "Take that one," giving as a reason that

it was the biggest. At the same time he indicated he would like to have a marijuana cigarette before the two agents left. Brown then interfered and suggested the defendant leave also. During this occurrence there were other unidentified persons in the apartment. Alvarez left with the agents and they dropped him off at a pizza parlor.

The State by other evidence had earlier established that the substance in the bags was marijuana. At the close of the State's case Alvarez moved for a directed verdict. The court denied the motion.

The defendant took the stand in his own behalf and testified he was too intoxicated to remember what had occurred at the apartment. Wagner testified he placed the marijuana in the refrigerator during the afternoon and that Alvarez was not there at the time.

The apartment belonged to or was leased by Brown. He also testified. He stated he came home about 6 p.m. Alvarez was lying in the middle of the living room floor and had been drinking wine as was evidenced by one empty and one partly filled jug. It was at this time the agents rapped on the door. Brown woke Alvarez. When asked by the newcomers about the marijuana Brown told them he knew nothing about it. Brown stated that at that time one of the persons present in the apartment said it was in the refrigerator. The agent in rebuttal testified that only Brown stated the marijuana was in the refrigerator.

Was the above evidence sufficient to permit the jury to find beyond a reasonable doubt that Alvarez aided and abetted Wagner in the sale of the marijuana?

Section 28-201, R. R. S. 1943, provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." The term sale as defined by the applicable statute, section 28-451(11), R. S. Supp., 1969, "includes barter, exchange, gift, or offer therefor, and each transaction made by any person, whether as prin-

cipal, proprietor, agent, servant, or employee."

This court has on many occasions defined what constitutes aiding and abetting. One of the more recent pronouncements is in the case of State v. Breaker, 178 Neb. 887, 136 N. W. 2d 161. We there said: ". . . Mere presence, acquiescence, or silence in the absence of a duty to act is not enough to constitute one an accomplice, and the knowledge that a crime is being or about to be committed does not constitute one an accomplice. . . . Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time that the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. . . . The advice or encouragement which will render one an accessory before the fact may be by acts, or words, but it must, to create guilt, be used with the intent to encourage and abet the crime. . . . The amount of advice or encouragement rendered is not material if it has effect in inducing the commission of the crime."

We have also said that to justify conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought to be proved beyond a reasonable doubt, when taken together, be inconsistent with any reasonable hypotheses of innocence. State v. Williams, 183 Neb. 257, 159 N. W. 2d 549.

There is nothing in the record in this case to connect the defendant with the transaction which occurred earlier in the day between Wagner and the agents. Mere conjecture is insufficient. The defendant was present when the physical delivery by Brown took place. How the defendant came to be in Brown's apartment at that time, or whether his presence was intended to aid or facilitate the delivery of the marijuana, is pure speculation.

The State asserts that the statement of Alvarez to

the agents urging them to choose the largest of the four packages is sufficient to make him an aider and abettor. Without more than is established by the evidence it is not sufficient to show any purpose on Alvarez' part to aid and abet or give actual assistance or inducement to either Wagner or Brown. The State's own evidence of what the defendant stated would lead to the conclusion he hoped the agents would give him enough marijuana to "roll a bomber." If they had done so there would have been a separate crime in which the defendant would have participated. This would not have been the crime of either Wagner or Brown. When Brown produced the four bags and offered the undercover agents their choice whether Alvarez said anything or not did not or could not affect the transfer of the purchased marijuana one way or the other.

We conclude the court erred in not granting the motion of the defendant for a directed verdict.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SPENCER, J., dissenting.

I respectfully dissent because I believe the evidence was sufficient to sustain the conviction of Alvarez as an aider and abettor.

WHITE, C. J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ALVARO ALVAREZ, APPELLANT.
202 N. W. 2d 604

Filed November 24, 1972. No. 38444.

1. **Criminal Law: Trial: Time.** The primary burden is upon the State, that is, the prosecutor and the court, to bring the accused person to trial within the time provided by law.
2. ———: ———: ———. If a defendant is not brought to trial within the time provided for and as determined by valid statutory standards, he is, in the absence of an express waiver or a

waiver as provided by statute, entitled to his absolute discharge from the offense alleged in the indictment or information as well as for any other offense coming within the term "required by law to be joined with that offense."

3. **Criminal Law: Trial: Time: Waiver.** A failure by a defendant to demand a trial within the time he is required to be brought to trial as provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, or to object at the time trial date is set does not constitute a waiver of his rights under either the statutes or the Constitution of Nebraska, but is a factor which, while not constituting good cause by itself, may be considered along with other circumstances in determining whether there was "good cause" for a delay in trial under the provisions of section 29-1207(4)(f), R. S. Supp., 1971.
4. **Criminal Law: Trial: Time.** Where a defendant who has been charged in an indictment or information is not brought to trial within 6 months from the date of the return of the indictment or the filing of the information and before trial or entry of a plea of guilty or nolo contendere moves for his absolute discharge, the burden is upon the State to prove by a substantial preponderance of the evidence that one or more of the excluded periods provided for by section 29-1207(4)(a) through (f), R. S. Supp., 1971, is applicable.
5. **Criminal Law: Trial: Time: Continuances.** From and after 7 days after the filing of this opinion, a general finding of a trial court that "good cause" has existed under the provisions of section 29-1207(4)(f), R. S. Supp., 1971, for extending beyond 6 months from the filing of the information the period for bringing the defendant to trial will no longer suffice, and the trial court will from that time on be required to make specific findings as to the cause or causes of such extensions and the period of extension attributable to such causes. The substantial preponderance of the evidence must support such findings.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

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

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Robert G. Avey, for appellee.

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

CLINTON, J.

The defendant was charged with the unlawful sale of hashish, a form of cannabis or marijuana. On December 6, 1971, he was tried before a jury which returned a verdict of guilty. The court imposed a sentence of 1 to 2 years in the Nebraska Penal and Correctional Complex. He then perfected his appeal to this court.

He makes the following assignments of error: (1) The court erred in denying his motion for absolute discharge because of the failure of the State to bring him to trial within the time provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, which became effective April 30, 1971; (2) the court erred in denying his motion for a directed verdict because the verdict is not sustained by sufficient evidence; and (3) the court erred in overruling objections to alleged hearsay evidence. This last assignment, however, is not discussed in the briefs and we therefore disregard it. Revised Rules of the Supreme Court, Rule 8a 2(3).

We have carefully reviewed the evidence and find the assignment as to the sufficiency of the evidence is not well taken. The record clearly and without contradiction supports a finding that the defendant actually solicited the sale of hashish to two undercover agents and was present when the sale was accomplished by the defendant's associate and accomplice, one Wagner, by the delivery of the hashish to the agents by Wagner and the receipt by him of the agreed price. The defendant did not introduce any evidence in his own behalf. Expert testimony by the State established the nature of the substance sold. It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful of character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant. State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167.

We now turn to the matter of the motion for absolute discharge. In 1971 the Legislature enacted L.B. 436, sections 29-1205 to 29-1209, R. S. Supp., 1971. Section 29-1207, R. S. Supp., 1971, states in part: "Every person indicted or informed against for any offense shall be brought to trial within six months . . .." It then goes on to provide that the 6-month period shall begin to run from the date of indictment or filing of the information and in the case of indictments or informations pending on April 30, 1971, the period begins to run from April 30, 1971. Section 29-1208, R. S. Supp., 1971, provides that: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged . . .."

Section 29-1207, R. S. Supp., 1971, in subsection (4) (a) through (f), also provides that certain periods shall be excluded in the computations. The only possible applicable subsection under the evidence in this case is subsection (4) (f) which reads: "Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause."

The complaint against the defendant was filed in the county court of Scotts Bluff County in January 1971. Thereafter he was accorded a preliminary hearing, released on bail, and bound over to the district court. The information was filed on March 25, 1971. As we have already noted, the defendant was not brought to trial until December 6, 1971. Since the information against the defendant was filed prior to April 30, 1971, the 6-month period began to run on April 30, 1971, and except for any excluded periods, expired the last day of October 1971. The defendant was therefore under the terms of the statute entitled to his absolute discharge unless one of the statutory periods of extension is applicable, or unless he has waived his right to discharge. This has been the uniform holding of this court under statutory provisions which the ones here involved re-

place. Critser v. State, 87 Neb. 727, 127 N. W. 1073; State v. Bruns, 181 Neb. 67, 146 N. W. 2d 786; State v. Fromkin, 174 Neb. 849, 120 N. W. 2d 25.

After the filing of the information on March 25, 1971, there was no further activity in the defendant's case by either the State or the defense until July 29, 1971, when the county attorney filed a motion for appearance of the defendant, which motion also included the following: ". . . that this case be given preference over civil cases presently pending in this Court in order to effectuate the right of the defendant to a speedy trial." The court then entered an order for the defendant to appear on August 5, 1971. He appeared at that time with counsel, was arraigned on the information, stood mute, and a plea of not guilty was entered for him. The court thereupon "ordered the trial of said cause set for hearing before a jury on the 6th day of December 1971, . . . this being the earliest available date that the Court had for trial thereof."

On September 1, 1971, the State filed a motion to consolidate the trial of the defendant with that of Wagner. The matter was heard on November 4, 1971, at which time the defendant was represented by counsel, and the court ordered the consolidation of the two trials.

The record in this case is completely silent as to what, if anything, occurred between the court, defendant, and his counsel at the time the order setting the trial date was entered and at the time the order for consolidation was entered.

On November 10, 1971, the defendant filed his motion for discharge under the terms of the statutes. The court set the motion for hearing and on November 19 and 26, 1971, the hearing was held before the court, at which both the State and the defendant presented evidence.

This evidence related generally to the business of the district court for Scotts Bluff County from May 2, 1971, to the date of hearing, the state of the docket, and

the future business of the court to the time of the scheduled trials. Following the hearing the court entered an order overruling the motion for discharge, which order included the following findings: "The Court being duly advised in the premises finds that good cause has been shown and defendant's motion should be overruled."

The determination of the defendant's claimed right to discharge under the provisions of the statute depends upon an analysis of the statute and its purposes, all as related to the evidence in this case insofar as it pertains to the cause of the failure to bring the defendant to trial within 6 months from the date of April 30, 1971. We will first analyze the statute and then later, as may be necessary, summarize the pertinent evidence.

The statute concerns itself with two things: (a) The right of the accused to a speedy trial, and (b) the promotion of the interest of the public in the prompt disposition of criminal cases. It then directs that "insofar as practicable," (1) the trial of criminal cases shall be given preference over civil cases, and (2) the trial of defendants in custody and those whose pretrial liberty presents unusual risks shall be given preference over other criminal trials. § 29-1205, R. S. Supp., 1971.

Section 29-1206, R. S. Supp., 1971, provides that applications for continuance must be made in accordance with section 25-1148, R. R. S. 1943, "but in criminal cases in the district court the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary." In making such determinations the court is to consider "request or consent of the prosecution or defense," and the "public interest in prompt disposition of the case."

The provisions of the statute for the extension of the 6-month period by reason of the excluded periods where they are applicable necessarily renders mathematically inexact the computation of the period within which the accused must be brought to trial. The Legis-

lature recognized that in some of the district court districts, at least, the imposition of a flat 6-month limitation on the time in which the accused must be brought to trial would not work. The statutory language also seems to recognize that the periods of permissible delay could not be exactly determined. In section 29-1205, R. S. Supp., 1971, where preference is accorded criminal over civil trials and certain criminal trials over others, the term "insofar as practicable" is used. Section 29-1206, R. S. Supp., 1971, in connection with continuances, uses the term "for so long as is necessary," and recites some of the things to be taken into consideration. An examination of the criteria for excluded periods in subsection (4)(a) to (f), of section 29-1207, R. S. Supp., 1971, indicates that none can be determined with exactitude and that the determination of such things as "delay resulting from other proceedings concerning the defendant," "due diligence," "reasonable grounds," "exceptional circumstances," "period of delay resulting from," "reasonable period of delay," and "good cause," will necessarily depend upon the facts in each case when it is claimed that some one or more of the excluded periods is applicable.

It seems to us that the real questions in this case center on the following: (1) What effect is to be given the trial court's general finding of "good cause" for the delayed trial date? (2) Does the record support the finding of the trial court that "good cause" was shown? (3) Where 6 months have elapsed before trial from the date of filing the information and the defendant moves for discharge, who has the burden of proceeding to prove that some one or more of the periods of exclusion provided for by statute are applicable? If a burden of proof exists, on whom does it rest? (4) When the trial court sets a trial date which is more than 6 months after the filing of the information, must the defendant immediately take exception thereto, or may he wait for the 6-month period to elapse and then

file a motion for discharge? If, as here, the record is silent on whether there was any objection or demand for an immediate trial, what presumptions, if any, apply?

The record reflects that in the calendar year 1970, 142 criminal cases and 413 civil cases were filed in the district court for Scotts Bluff County. During the same year, 130 criminal cases and 338 civil cases were disposed of. In the 6-month period from May 1, 1971, to November 2, 1971, a total of 301 cases were filed in the district court and, of these, exhibit 20 indicates that 57 were criminal cases. There is no direct evidence as to the number of cases in either category disposed of durthing this 6-month period.

The record also shows with reasonable accuracy the number of days which were actually utilized for trials during the 6-month period in question. It appears that approximately 40 days were occupied by trials either to the court or jury. Of these days, 15 appear to have been occupied by criminal trials. The record further discloses that, excluding Saturdays, Sundays, and holidays, there was substantial court activity occupying the judge on every court day except three separate short periods. During one of these periods the judge was in attendance at a meeting of district judges, during another in attendance at a bar association convention, and the other constituted a 4-day vacation. During a separate period of 12 days no court reporter was available to the judge.

The evidence indicates that on each of the days, other than time involved in actual trial, on which the judge was present he was engaged in court activity. On those days he attended to approximately 300 matters such as pretrial, conferences, various hearings pertaining to divorce cases, arraignments, probation revocation hearings, arguments on motions, lump sum settlements, and other matters. Admittedly the record does not show the time actually consumed in connection with these items. However, the clerk of the district court was

asked in subpoena compelling her testimony to "complete the ones that I thought took the better part of a day." On cross-examination of this witness it was brought out that her summaries were incomplete and other items numbering at least 50 were omitted. Based upon this evidence it is not possible for us to say that the court's implicit finding that the delay was occasioned by docket congestion is not supported by the evidence.

Did the Legislature intend to include docket congestion in excusable delays and so exclude periods attributable thereto from the statutory 6 months? We think that it did, provided the court found "good cause."

The Nebraska statutes are substantially similar to Standards 2.2 and 2.3 of the Standards Relating to Speedy Trial, recommended by the American Bar Association Project on Minimum Standards for Criminal Justice, Approved Draft, 1968. The commentary with reference thereto rejects "court congestion" as one of the *specific* excuses for delay, stating: "If congestion excuses *long delays,* there is lacking sufficient inducement for the state to remedy congestion." (Emphasis supplied.) It recognizes, however, that there is a split of authority among the courts on the question of whether court congestion constitutes good cause under statutes providing for discharge of the defendant for failure to comply with statutory provisions of speedy trial. See 57 Columbia L. Rev. 846, 857 to 859. This court, however, is not prepared to say that court congestion may not sometimes constitute "good cause."

What we have said is particularly true because situations may exist in which, because of an overload of litigation, two different provisions of the Nebraska Constitution may be brought into competition. Article I, section 11, names the constitutional rights of the accused and this includes the right to "a speedy public trial." Article I, section 13, pertains to civil actions and provides that every person "shall have a remedy by due

course of law, and justice administered *without denial or delay.*" (Emphasis supplied.) The language of the statutes in question, giving preference to trial of criminal cases "insofar as practicable" and the undefined provision re "good cause," are deemed to be at least partially in recognition of these constitutional provisions and the actual congestion which may exist. See State v. Kuhnhausen, 201 Ore. 478, 272 P. 2d 225.

Our Legislature has not been unmindful of the problems confronting the courts in some areas of the State. In the very legislative session following that at which L.B. 436 was enacted the Legislature increased substantially the number of district judges in the state and revised the districts themselves to help equalize the workload. The district court for Scotts Bluff County was formerly a one-judge court. It is now a two-judge district. Delays attributable to regular court congestion are no longer to be anticipated and that district and others will now no doubt be able to fully implement the statutory provisions giving preference to criminal trials.

Most delays in civil cases are attributable to the parties themselves. More often than not the defendant in a criminal case is not anxious for a speedy trial. The Legislature has recognized by enactment of the statutes in question the social desirability for a variety of reasons of bringing the accused to trial at an early date. The mandate of the statute must therefore be followed and such things as improper or inefficient docket management, scheduling of trials, or failure to use available procedures such as obtaining an available judge from another district cannot be deemed "good cause." See, 57 Columbia L. Rev. 846, 858; State v. Kuhn, 154 Ind. 450, 57 N. E. 106; Ex parte Vacca, 125 Cal. App. 2d 751, 271 P. 2d 162; People v. Echols, 125 Cal. App. 2d 810, 271 P. 2d 595; State ex rel. James v. Superior Court, 32 Wash. 2d 451, 202 P. 2d 250; People v. Vasalo, 120 Cal. 168, 52 P. 305; Martens v. Gaffney, 230 Iowa 712,

298 N. W. 801; McDonald v. Hudspeth, 113 F. 2d 984.

We also wish to point out that the implementation by the Legislature of the Nebraska constitutional provisions on speedy trial by virtue of sections 29-1205 to 29-1209, R. S. Supp., 1971, is not a definition of the rights of the accused under similar federal constitutional provisions. A state may adopt more stringent provisions than the United States Constitution demands. Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101, (June 22, 1972). There is no suggestion by the defendant that under the facts of this case the federal constitutional provisions for speedy trial have been violated. Nor could any such valid contention be made. Barker v. Wingo, *supra.*

We hold as follows: The primary burden is upon the State, that is, the prosecutor and the court, to bring the accused person to trial within the time provided by law. Barker v. Wingo, *supra;* United States v. Mann, 291 F. Supp. 268. If a defendant is not brought to trial within the time provided for and as determined by valid statutory standards, he is, in the absence of an express waiver or a waiver as provided by statute, entitled to his absolute discharge from the offense alleged in the indictment or information as well as for any other offense coming within the term "required by law to be joined with that offense." § 29-1208, R. S. Supp., 1971; State v. Fromkin, *supra;* State v. Bruns, *supra;* Critser v. State, *supra.*

The State contends that failure of the defendant to object at the time the court entered its order setting the trial at a date after the 6-month period constitutes a waiver of his rights under the statute. This position is not tenable in light of Barker v. Wingo, *supra.* A failure by a defendant to demand a trial within the time he is required to be brought to trial as provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, or to object at the time trial date is set does not constitute a waiver of his rights under either the statutes or the

Constitution of Nebraska, but is a factor which, while not constituting good cause by itself, may be considered along with other circumstances in determining whether there was "good cause" for a delay in trial under the provisions of section 29-1207(4) (f), R. S. Supp., 1971. Barker v. Wingo, *supra*. Previous holdings of this court that failure of the accused to demand trial constitutes a waiver of the statutory right are overruled on the basis of the rules laid down by the Supreme Court of the United States in Barker v. Wingo, *supra*.

We also hold that where a defendant who has been charged in an indictment or information is not brought to trial within 6 months from the date of the return of the indictment or the filing of the information and before trial or entry of a plea of guilty or nolo contendere moves for his absolute discharge, the burden is upon the State to prove by a substantial preponderance of the evidence that one or more of the excluded periods provided for by section 29-1207(4) (a) through (f), R. S. Supp., 1971, is applicable. 57 Columbia L. Rev. 855; Von Feldstein v. State, 17 Ariz. 245, 150 P. 235; People v. Prosser, 309 N. Y. 353, 130 N. E. 2d 891; State v. Lester, 161 Wash. 227, 296 P. 549.

This court cannot renounce its constitutional function of reviewing rulings of the trial court on applications for discharge under the statutory and constitutional provisions. In order to facilitate that review we hold that from and after 7 days after the filing of this opinion, a general finding of a trial court that "good cause" has existed under the provisions of section 29-1207(4) (f), R. S. Supp., 1971, for extending beyond 6 months from the filing of the information the period for bringing the defendant to trial will no longer suffice, and the trial court will from that time on be required to make specific findings as to the cause or causes of such extensions and the period of extension attributable to such causes. The substantial preponderance of the evidence must support such findings.

This is one of the first cases to reach this court involving sections 29-1205 to 29-1209, R. S. Supp., 1971. Those statutes implemented in detail the state constitutional right to a speedy trial. We now deem it advisable to recommend the following for procedural uniformity.

When the district court sets a date for trial, which date is later than the statutory time allowed by section 29-1207, R. S. Supp., 1971, the court shall:

(1) Advise the defendant of his statutory right to a speedy trial and the effect of his consent to a period of delay, and

(2) Ascertain of record whether the defendant does or does not waive his right to a speedy trial and consent to the trial date set.

AFFIRMED.

McCOWN, J., dissenting

The majority opinion here quite properly imposes upon the State the primary burden of bringing an accused to trial within the statutory time limits set by the Legislature. It also quite properly establishes procedural rules which will assist greatly in determining the factual bases for periods of delay.

I must respectfully differ, however, with the holding that a failure by a defendant to demand a speedy trial may be considered in determining whether there was "good cause" for a delay in bringing an accused to trial. I must also disagree with the finding that the record here establishes "good cause" for any delay.

It can scarcely be doubted that the basic burden of bringing cases to trial is on the prosecution and that the responsibility is also on the State to show a waiver of the right to a speedy trial. To hold that affirmative action by an accused is necessary to protect a constitutional right rather than to waive it emasculates the right just as effectively as to hold that silence or inaction imply a waiver. Both misallocate the burden of proof as well as the burden of insuring a speedy trial. The mere silence of an accused cannot and should not

be treated as "good cause" which excuses the State from compliance with the clear command of the statutes. The defendant certainly has no burden to bring himself to trial. Unless a defendant has affirmatively contributed to the delay, his silence or inaction ought not to diminish the responsibility of the prosecution to bring him to trial within the statutory time.

The remaining issue is whether or not the activity in the district court during the statutory period constituted "good cause" for delaying the defendant's trial beyond the maximum statutory period. The trial here was held approximately a year after the offense was committed and approximately 11 months after the defendant was arrested. There is simply no explanation or excuse in the record for the failure to arraign this defendant for more than 4 months after the information was filed and for more than 3 months after the statutes became effective. The majority opinion ignores the crucial fact that no evidence even remotely establishes "good cause" for this delay. The record also shows with reasonable accuracy the number of days which were actually utilized for trials during the 6-month statutory period. Approximately 40 days of that period were actually occupied by trials, either to the court or to a jury. Only 15 of those days were actually utilized for criminal trials, either to a jury or to the court. During the 6-month period involved, civil cases were tried to juries both before and after August 5th. Although the district court stated on August 5th that the earliest possible date for trial in this case would be in December, nevertheless, the county attorney himself tried a civil case in the same district court in October before the statutory period in this criminal case had expired.

The evidence in this record establishes that the trial of criminal cases was not given preference over civil cases and that there was trial time available if the State had made reasonable efforts to follow the command of

the statutes. There is no evidence of any effort to obtain the assistance of another district judge. Excessive governmental delay is unjustifiable whether it is intentional or negligent. It is quite obvious that it might have been reasonably avoided here.

The Legislature implemented the constitutional right to a speedy trial and imposed specific requirements to protect the interests of the public as well as the accused in the prompt disposition of criminal cases. The statutes do not permit the extension of the statutory time for trial to meet the convenience of courts or prosecutors. The time may be extended for any of the specific reasons set out in the statute or for reasons not specifically enumerated, but only if those reasons constitute "good cause."

The record wholly fails to establish "good cause" for the delay here. In the words of Mr. Justice White in his concurring opinion in Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101: "(U)nreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal justice system are limited and that each case must await its turn. As the court points out, this approach also subverts the State's own goals in seeking to enforce its criminal laws."

The conviction and sentence of the defendant here should have been vacated in accordance with the legislative command.

SMITH, J., joins in this dissent.

BOSLAUGH, J., dissenting.

I agree with Judge McCown that the record in this case does not support the trial court's finding of good cause for the delay in bringing the defendant to trial.

The defendant's statutory right to be discharged if not tried within 6 months from the time the information was filed is separate from and in addition to his constitutional right to a speedy public trial. These rights

in fact are quite different and exist independently of each other.

A determinaton as to whether the constitutional right has been violated involves the balancing of a number of considerations. Among these are the extent of the delay, the reason for the delay, the prejudice if any to the defendant, and whether a speedy trial was requested. The essential factors are discussed in Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101.

The statutory right to discharge under section 29-1207, R. S. Supp., 1971, depends upon the expiration of the 6-month period plus any time excluded as provided in the statute. In this respect the operation of the statute is similar to a statute of limitations. Unlike the constitutional right, there may be no balancing of considerations involved. If there are no periods of time to be excluded, the operation of the statute is automatic. A determination as to whether certain periods of time should be excluded may involve the exercise of judicial discretion.

In addition to the rule of practice "recommended" in the majority opinion, I would suggest that at any hearing on a motion for discharge under section 29-1208, R. S. Supp., 1971, the trial court should make specific findings on the record as to the reasons for and length in days of any period of delay which is to be excluded in computing the statutory time for trial.

STATE OF NEBRASKA, APPELLEE, V. BRIAN T. BROWN, APPELLANT.

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

STATE OF NEBRASKA, APPELLEE, V. THOMAS NEAL SKINNER, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JAMES H. MAI, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JAMES H. MAI, APPELLANT.

202 N. W. 2d 585

Filed November 24, 1972. Nos. 38448, 38498, 38572, 38573, 38574.

The determinations made in State v. Alvarez, No. 38444, *ante* p. 281, 202 N. W. 2d 604, govern the result in these cases.

Appeals from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Van Steenberg, Winner & Brower and Robert P. Chaloupka, for appellants.

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

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

CLINTON, J.

In these cases, the defendants were convicted of offenses involving the possession or sale of prohibited substances. Each defendant appealed and the cases were consolidated on appeal. The sole issue in all cases involves the right of the defendants to a speedy trial under the provisions of sections 29-1205 to 29-1209, R. S. Supp., 1971. Those sections provide that if a defendant is not brought to trial within the time provided therein he is entitled to his absolute discharge.

The offenses charged against the respective defendants were committed on various dates from November 28, 1970, to December 14, 1970. Complaints in the county

court were filed on or about January 18, 1971, and the defendants were arrested shortly thereafter and were released on bond within a few days. Preliminary hearings were held in the first week of February 1971, and the defendants were each bound over to the district court on February 24, 1971. Informations were filed in the district court against the respective defendants on various dates from March 15, 1971, to March 30, 1971. On July 29, 1971, the State requested and the court ordered the defendants to appear on August 5, 1971, for arraignment.

The defendants all appeared for arraignment on August 5, 1971, and pleaded not guilty. Each of the defendants requested "a speedy trial" or "the earliest trial date possible." In one instance the county attorney requested "the earliest possible trial date" and in another he joined in the defendant's motion demanding "a speedy trial." The trial court either specifically stated or clearly implied that the earliest possible trial date in each case was the date set. In four of the cases the journal entry recites that the trial date set was the earliest available date for the trial. The court set the cases for trial on various dates ranging from December 1 to December 29, 1971. There were no specific objections made by any of the defendants to the trial dates set, nor did any of the defendants make any statement withdrawing or modifying the request for a speedy trial. In one case the court stated that the "earliest possible date would be December 29, which is very close to Christmas. By and with the consent of the defendant, it will be set over until early in 1972." The defendant's counsel replied: "Let the record reflect that the defendant has no objection going along with the court's preferences as to a trial date set in early 1972, however, we would not waive any rights as to objections to a speedy trial by going along with that preference."

In November 1971, all the defendants filed motions for an order granting an absolute discharge from the

offense charged, pursuant to section 29-1208, R. S. Supp., 1971. Hearing was held and by stipulation the evidence introduced was made a part of the bill of exceptions in all the cases involved here. The evidence offered and received is that set forth in detail in State v. Alvarez, No. 38444, *ante* p. 281, 202 N. W. 2d 604.

On November 26, 1971, the court found that "good cause has been shown" for the delay and overruled defendants' motions for absolute discharge. Thereafter, the defendants stood trial, were found guilty, and were sentenced or placed on probation, and these appeals followed. The cases were briefed and argued together in this court. The sole issue is whether the defendants were entitled to discharge because of failure of the State to bring them to trial within 6 months from April 30, 1971. This issue is determined by what was said in State v. Alvarez, No. 38444, *supra,* which has been filed this same day.

AFFIRMED.

McCOWN, J., dissents.

I dissent. My reasons are set out in the dissent in State v. Alvarez, No. 38444, *ante* p. 281, 202 N. W. 2d 604.

The defendants here made affirmative reasonable efforts to obtain a speedy trial under the statute, and the reasons for enforcing the statute are even more compelling.

BOSLAUGH and SMITH, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JUDY L. STURM, APPELLANT.

202 N. W. 2d 381

Filed November 24, 1972. No. 38476.

1. **Criminal Law: Sentences.** A sentence to imprisonment ought not exceed the minimum period consistent with protection of

the public, gravity of the offense, and rehabilitative needs of the defendant.

2. ———: ———. Protection of the public encompasses the principle of general deterrence.

3. ———: ———. A technique for deterrence of crime is scaling of penal sanctions.

4. **Criminal Law: Sentences: Appeal and Error.** This court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it is its duty to render such sentence as in its opinion may be warranted by the evidence.

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

T. Clement Gaughan and Paul M. Conley, for appellant.

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

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

SMITH, J.

A jury found Judy L. Sturm guilty of manslaughter, and the court sentenced her to imprisonment for 10 years. Judy appeals. She asserts that the sentence is excessive.

The victim was Judy's third husband, Harvey, whom she had married in 1969. Judy, age 28, was the mother of a daughter, age 7, by a previous marriage, and of a son, age 1½, by her marriage to Harvey.

Harvey had severely beaten Judy on several occasions prior to September 18, 1971, the date of the manslaughter. On the latter date Harvey tardily returned home in the City of Lincoln after 2 a.m. Drunk and violent, he (1) struck Judy in the thigh with a mustard jar; (2) hurled the jar against a wall hard enough to break the jar and splatter the wall; (3) repeatedly slapped Judy and kicked her in the stomach despite her implorations; (4) tore the telephone from a wall and struck the wall hard enough to break plaster and a

lath; (5) fragmented the telephone by beating it against a floor; (6) threatened to strangle Judy with the telephone cord; (7) destroyed a potted plant; (8) burned checks; (9) threw two lamps across the living room; and (10) threatened to strangle Judy with one of the lamp cords.

Finally allowing Judy to attend the children upstairs, Harvey silently retired for the night after he set the alarm clock. A malfunction activating the alarm 10 minutes after the setting had caused him to beat Judy December 31, 1970. She therefore crawled out of bed and adjusted the alarm to prevent the malfunction. She then opened the door to the bedroom closet, removed a 12 guage shotgun and two shells, and went downstairs to load the gun. Fearful that a commotion in a child's bedroom would awaken Harvey, she returned upstairs. As she passed the door of the parental bedroom, she heard movement inside. Entering, she shot Harvey at a distance of 8 feet while he lay in bed. When he bolted upright, she shot him again.

Judy immediately asked neighbors to call the police to protect her from Harvey. On arrival at the hospital he was dead in consequence of the first shot.

Judy had been graduated from high school. In her employment as a clerk-typist from 1961 to 1970 she had performed excellently. There was no history of prior criminal activity on her part.

A physician practicing psychiatry examined Judy after the shooting. Her personality was passive-aggressive, but she was not mentally ill. At the time of the shooting she had been very frightened for the safety of herself and her children. The physician continued: ". . . she is not capable of reasoning in a stressful situation, as stress makes this type of person react impulsively, and they don't stop and think about it as much as the normal person would do."

The minimum and maximum sentences to imprisonment for manslaughter are 1 and 10 years. § 28-403,

R. R. S. 1943. A sentence to imprisonment ought not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. A. B. A. Standards Relating to Sentencing Alternatives and Procedures, § 2.2, p. 14 (Approved Draft, 1968). Protection of the public encompasses the principle of general deterrence. A technique for deterrence of crime is scaling of penal sanctions. State v. Keck, 187 Neb. 794, 194 N. W. 2d 186 (1972).

This court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it is its duty to render such sentence as in its opinion may be warranted by the evidence. § 29-2308, R. R. S. 1943.

Although the crime is manslaughter, we should not overlook circumstances of aggravation—the lapse of time between the violence and the shooting as well as Judy's conduct after Harvey retired. Mitigating circumstances are Harvey's brutality, Judy's great emotional disturbance, needs of the children, absence of prior criminal record, and the likelihood that the circumstances of such a crime by Judy will not recur. See, State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498 (1972); A. B. A. Standards Relating to Sentencing Alternatives and Procedures (Approved Draft, 1968), § 3.2, pp. 21 and 153 to 156; Model Penal Code § 210.6(3), p. 132 (Proposed Official Draft, 1962); cf § 29-2260(3), R. S. Supp., 1972.

The foregoing facts and law lead us to reduce the period of imprisonment to 5 years. The judgment, so modified, is affirmed.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I cannot agree to the reduction of the sentence herein. I do not believe it is excessive under the circumstances.

The county attorney in the first instance, considering the facts of the crime, saw fit to charge the defendant

with second rather than first-degree murder. In charging the jury, the trial court, at the request of the defendant, also gave the lesser-included offense of manslaughter. There is some question in my mind as to whether that charge was pertinent. The jury saw fit to convict the defendant of manslaughter. The trial court imposed the maximum penalty for that offense. In my judgment, he did not abuse his discretion in doing so.

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

KATHLEEN BATTERMAN, APPELLANT, V. EDGAR W. RICHARDSON, APPELLEE.

202 N. W. 2d 613

Filed December 1, 1972. No. 38403.

1. **Evidence.** The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence.
2. **Witnesses: Trial: Jury.** It is fundamental that a jury alone is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony.
3. ———: ———: ———. A jury has the right to test the credibility of witnesses by their self-interest and to weigh disputed parol testimony against all the other facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is either false or incredible of belief. A substantial conflict may arise even though all the evidence is produced by one party.
4. **Evidence: Trial: Damages.** The proof that damage might or could have been caused by an accident is not sufficient to sustain a verdict for a claimant. Such evidence is not of the quality required to satisfy the burden of a claimant to establish by a preponderance of the evidence an injury and the extent thereof.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE and WILLIAM C. HASTINGS, Judges. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, J. S. Berry, and Richard H. Williams, for appellant.

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

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

WHITE, C. J.

The jury returned a verdict for the defendant in this action for damages as a result of a rear-end automobile collision accident occurring on September 3, 1968, at 39th and Van Dorn Streets in Lincoln, Nebraska. The trial court instructed the jury that the defendant was negligent as a matter of law and submitted to the jury only the issues of what injuries, if any, were proximately caused by the defendant's negligence, and the amount of the damages. The plaintiff appeals, claiming passion and prejudice on the part of the jury, and that the verdict was so clearly wrong it cannot stand. These contentions were presented to the district court on motion for a new trial and were overruled. We affirm the judgment of the district court.

The only issue argued on appeal is the sufficiency of the evidence to sustain the verdict. As stated in the traditional language of our cases dealing with this issue the question involved here is whether the verdict was so clearly against the weight of the evidence as to induce this reviewing court to believe that it was the result of passion, prejudice, mistake, or some means not apparent in the record. See, Garfield v. Hodges & Baldwin, 90 Neb. 122, 132 N. W. 923; Pospichal v. Wiley, 163 Neb. 236, 79 N. W. 2d 275; Friesen v. Reimer, 124 Neb. 620, 247 N. W. 561.

We observe that the instructions to the jury, the competency of the witnesses and the foundation for their testimony, and the conduct of the jury are not in any way questioned in this appeal. Consequently, we must come to the conclusion, if we accept the plaintiff's contentions, the verdict was so clearly wrong that we can say as a matter of law the jury disregarded the instructions and clearly returned a verdict for the

defendant when reasonable minds could come to no other conclusion under the evidence that a verdict for the plaintiff was compelled.

Approaching an examination of the evidence in this case we observe, as usual, that the controversy centers primarily around the conflict in the expert testimony between the two expert medical witnesses. Broadly characterized, the plaintiff claims an injury to the neck and the back as a proximate result of the collision, and injury to the knees. The evidence discloses that the plaintiff's right knee had been injured prior to the time of the accident and had been treated by her orthopedist, Dr. Goetowski in January 1967. At that time her doctor diagnosed the problem as an impacted fracture and chondromalacia, a *progressive disease process.* He testified that his treatment improved the condition, but that it continued thereafter. This situation related to her *right knee.* The evidence shows that the plaintiff next saw her doctor on September 9, 1968, *6 days* after the accident when she complained of pain in her neck and *left knee.* The injury to her right knee, treated on January 6, 1967, prior to the accident was with relation to a green stick fracture of the right leg at the base of the knee. The first time the plaintiff complained of her right knee was on October 23, 1968, when she visited her doctor. He treated her with cortisone, "thought she was showing reasonable progress," and did not anticipate any measurable residual. More than a year later the plaintiff visited her doctor on January 15, 1970. X-rays revealed a continuing and progressive condition in her right knee. In June 1970, the doctor injected the knee with cortisone again and stated as his opinion that the condition of the right knee was aggravated by the accident and that she had a 25 to 35 percent permanent partial residual disability of the right knee.

Her doctor stated that whatever right knee injury the plaintiff might have received at the time of the

accident had nothing to do with her joint complaints elsewhere in her body. He also stated that a person having arthritis and suffering a trauma may often have an aggravating influence from the trauma, meaning that it speeds up a dormant situation and makes it active. He also stated that he could find no evidence of this being true in the plaintiff's case. Very significant is his testimony as to permanent partial disability of the body as a whole. He estimated this to be 10 to 15 percent and stated that this was based upon all causes occurring before the accident and afterwards. He stated that it is very difficult to get an honest apportionment of disabilities between those caused by the accident and those not caused by it. Her doctor did not make any test to determine whether or not she was arthritic but did state that she had pain in many joints, which is a finding compatible with arthritis as well as injury from trauma.

The fundamental issue in this case is not the issue of some disability on the part of the plaintiff but whether it was proximately caused by the accident. The questions of direct causation by the accident, contribution or aggravation of her previous knee injury, and the effect of a general arthritic or inflammatory process were issues for the jury to determine. The uncertain nature of the plaintiff's own medical testimony can be illustrated by the following testimony her doctor gave on cross-examination as follows:

"Q Her condition then might or might not include arthritis is that what you're saying? A Yes. Q Did you ever make any test to determine whether or not she's arthritic? A No, sir. This would require a rather extensive checkup, both blood chemistry and the like, and I didn't think it would give us enough information to be worthwhile. Q Specifically, did you ever do a test called, on Mrs. Batterman, called a rheumatoid agglutination test? A No, sir. Q She has had pain in many joints, has she not? A Yes. Q That's a

finding compatible with arthritis as well as injury, is it not? A Yes. Q Would you suspect some possible history of arthritis from a history of joint distress recently or spontaneously without injury? A You may anticipate some arthritic symptoms without injury, yes, sir. Q. If she's had arthritic difficulty or joint distress due to arthritis in some joints could it not be present in other joints as well? A Yes, sir. Q Including the knees? A Yes, sir. Q Both? A Yes, sir. Q Now Doctor, will an injury of a joint cause the onset in your opinion of disease processes in other joints? A Not ordinarily, no, sir. Usually, it's to the specific joint involved. Q In that case then whatever right knee injury Mrs. Batterman received at the time of the automobile accident had nothing whatever to do with her joint complaints elsewhere? A In my opinion, no, sir. Q Yet, as I understand from what you said just a minute ago, those joint complaints elsewhere in the absence of any causative injury could be due to arthritis which might also be affecting the knee joint, is that correct? A Yes, sir."

We summarize the testimony of the defendant's expert witness. It is generally to the effect that the plaintiff had no permanent disability except for the right knee. Dr. Getscher also found that the plaintiff had an infection or disease process going on which was determined by a C reactive protein test for nonspecific inflammation in joints. The results of the test were positive. The evidence also showed that the plaintiff suffered a continuing number of subjective complaints with respect to joint difficulties, for example, her left elbow was X-rayed on June 16, 1970; her finger on her right hand was treated on November 26, 1969; and she had pain in her right shoulder and some other joints at various other times.

Specifically with reference to the claim of neck injuries, Dr. Goetowski testified that he took no X-rays of her neck in 1970 and stated that the plaintiff made

no complaint referable to the neck. It is clear from reading the whole record that the opinion testimony of Dr. Goetowski and Dr. Getscher rested almost entirely upon the *subjective* oral complaints by the plaintiff herself. An examination of portions of her testimony reveals a confusing and contradictory statement of her complaints. For example, the plaintiff testified as follows: "Q Now, what about these headaches that you have mentioned. Have they cleared up and gone away? A Yes, I think so. Q Do you get any headaches when you sew? A Yes. Q Now, wait a minute. You said you thought they cleared up. A Well, I don't get a headache. I just get bothered when I sew or iron or have my head down." And the following testimony of the plaintiff herself is illuminating: "Q Now, during this period of time, what about movement for the first, oh, few months there? Did it hurt to move your head? A Yes. Q If so, whereabouts? A It bothered me, like I say, when I sew or have my head down or to read or even standing doing dishes. Q Are you talking about now? A No. Q Does it bother you to do those things now? A Well, somewhat. I know it's there, especially, sewing or ironing or something where I have to have my head down. Q In other words, if you hold your head up straight it doesn't bother you. A No, it doesn't bother me then. Q But if you tip your head—Is it looking down, is this when it bothers you? A Yes. Q Where does it bother you? A In the back of my neck at the base of this bone here, mainly, and then over into my right side. I don't know what it is. It's bothering me. Q Describe it. A Well, just, I just have a severe pain. I don't know what it is, I haven't—I have had it X-rayed here recently, but just a kind of arthritic condition is what it looks like on the X-rays. * * * Q Has there been any time since this accident that your neck has been completely pain free? A No. * * * A * * * I just get bothered when I sew or iron or have my head down. Q Is this when your

neck bothers you? A Yes. Q Can you turn your head and look down your shoulder? A Yes. Q Can you put your chin down on your chest? A Yes. Q How does it feel when you do this? A Just a slight pulling and tenderness in there. Q Is your neck sore to touch? A No. Well, my right side bothers me, but, like I say, I don't know what this is from."

We review the evidence in this case in the light of several fundamental principles which make the solution clear. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Meadows v. Skinner Manuf. Co., 178 Neb. 856, 136 N. W. 2d 184. It is fundamental in our adversary system that a jury alone is the sole judge of the credibility of the witnesses and of the *weight* to be given to their testimony. We have said many times that a jury has the right to test the credibility of witnesses by their self-interest and to weigh disputed parol testimony against all the other facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is either false or incredible of belief. A substantial conflict may arise even though all the evidence is produced by one party. See Teresi v. Filley, 146 Neb. 797, 21 N. W. 2d 699. More important, the issue in this case is primarily resolved upon the opinions of the experts. The court instructed the jury in this case that it was not required to take the opinions of experts as binding upon it but were only to be used as an aid in coming to a proper conclusion. The court also instructed that it could adopt, or not, the experts' conclusions according to its own best judgment, giving in each instance such weight as the jurors would think should be given under all the facts and circumstances of the case. This instruction is boilerplate law in the State of Nebraska and it is

not challenged for being incorrect by the plaintiff herein. In a very similar case as the one at bar in which a directed verdict on the issue of negligence was given by the court and the jury returned a verdict for the defendant, this court said in pertinent part as follows: "Whether or not plaintiff has sustained damage is a question of fact. Even though there is a direction on liability, the plaintiff must still prove that the negligence on which the direction is given was a proximate cause of the damages alleged to have been sustained by the plaintiff, and must also prove the extent of the damages. * * * The jury is the sole judge on all fact questions. To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of a reviewing court to correct the mistake. * * * In reviewing the evidence herein, we must do so in the light of the fact that the jury verdict was for the defendant. Therefore, the defendant must have the benefit of any and all reasonable inferences deducible from the proof." Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551. We have also said in similar cases involving generally the issue of proof of damages by subjective oral testimony, that the evidence of damages is required to be direct and certain. The proof that damage *might or could have been caused* by the accident is not sufficient to sustain a verdict for a claimant. Such evidence is not of the quality required to satisfy the burden of a claimant to establish by a preponderance of the evidence an injury and the extent thereof. Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254; Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318.

We are required, in the review of this verdict favorable to the defendant, to resolve all conflicts in the testimony in favor of the defendant together with inferences that may reasonably be drawn therefrom. Considering the rules that we have announced and analyz-

ing the testimony of the plaintiff it is clear the jury could have found that the plaintiff after the accident was not shocked or dazed, or at least was not damaged thereby, since she was able to call the school and her husband immediately and then drove her car to the repair garage. Somebody else called the police. It could find that the plaintiff made no complaint of injury at the accident scene and did not even see a doctor until 6 days after the accident. It could further find that the plaintiff's complaints as to her headaches and as to injuries were confused, inconsistent, and contradictory and not sufficient to sustain the burden of proof to show damages and injuries by a preponderance of the evidence. It could have also found that the plaintiff made no complaint of injury to her right knee until 7 weeks after the accident and her own doctor did not feel that even an X-ray of her knee was necessary until almost 3 years after the accident. More important, in the status of the expert testimony, it could have found that the plaintiff's difficulties were the result of conditions preceding and unrelated to the accident, from the previous injury and such general disease conditions as arthritis, arthralgia, myalgia, bursitis, and chondromalacia. It could have further found that the plaintiff had no permanent disability except to her right knee and that this disability in the right knee was about the same at the time of the trial as it was prior to the accident. It could have further found in this respect that whatever aggravation she may have suffered subsequent to the time of the accident rested on subjective oral recitals it did not believe, and could neither be apportioned in any reasonable sense to the trauma of the accident itself or that it may have been a progressive condition from disease arising from general arthritis and other unrelated conditions.

It is quite apparent in the review of this case that the jury simply did not accept the evidence adduced to show that the plaintiff was indeed injured and en-

titled to damages. The jury is the sole judge of the credibility of the testimony and the weighing of the expert testimony. The evidence or lack of evidence in this case is ample to support the jury verdict and it must be permitted to stand.

The judgment of the district court in overruling the motion for a new trial is correct and is affirmed.

AFFIRMED.

WILSON CONCRETE COMPANY, APPELLANT, V. COUNTY OF SARPY ET AL., APPELLEES.
202 N. W. 2d 597

Filed December 1, 1972. No. 38412.

1. **Waters.** It is the duty of those who build structures in a natural watercourse to provide for the passage through such obstruction of all waters which may reasonably be anticipated to flow or be carried therein and this is a continuing duty. What private proprietors may not do neither may the public authorities except in the exercise of eminent domain.
2. **Waters: Injunctions.** Where an obstruction in a natural watercourse constitutes a continuing and permanent injury to adjoining landowners, injunctive relief may be granted upon a proper showing.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Reversed and remanded with directions.

Hird Stryker of Fraser, Stryker, Marshall & Veach, for appellant.

Dixon G. Adams, for appellees.

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

MCCOWN, J.

This is an action by the plaintiff, Wilson Concrete Company, for damages and for an injunction requiring the defendant, Sarpy County, to provide an adequate

passageway under a highway for the water of a natural watercourse. The district court dismissed the action and the plaintiff has appealed from that portion of the judgment denying injunctive relief.

The plaintiff is the owner of a 17-acre tract of land in Sarpy County, Nebraska. The tract is roughly an elongated isosceles triangle. The base and southerly boundary of the triangle is the embankment and right-of-way of old Highway No. 370, now known as Avery Road West. The easterly boundary is the embankment and right-of-way of U. S. Highway No. 73-75. The third side of the triangle is the embankment and right-of-way of the Union Pacific Railroad. The base and south boundary of the triangle is 700 feet long and the other two sides are each approximately 3,000 feet long. Plaintiff purchased a part of the tract in 1949 and the remainder in the early 1950's. Since its purchase, the area has been used for the fabrication of precast pipe and concrete girders.

Mud Creek is a natural watercourse which flows generally north to south through Sarpy County. Mud Creek enters plaintiff's property from the east approximately 1,000 feet south of the north boundary of the tract through two 8 by 10 foot concrete culverts under U. S. Highway No. 73-75. At various other points along both the east and west boundaries of the tract there are other smaller culverts which allow drainage of water into Mud Creek as it crosses plaintiff's property. The aggregate capacity of all culvert inlets to plaintiff's property is 231 square feet. Mud Creek leaves plaintiff's property at a point on the south boundary near the southwest corner of the triangle.

In 1954, the State of Nebraska constructed Highway No. 370 along the entire south boundary of plaintiff's property. An earth embankment 20 to 30 feet in height was erected along the entire distance on what had previously been natural terrain. Prior to this construction, the water of Mud Creek and its flood plain flowed south

unimpeded from the plaintiff's property. In construction, the State placed a single 10 by 10 foot box culvert where there had previously been an open ditch as a waterway for Mud Creek to drain from plaintiff's land. The outlet culvert capacity has been 100 square feet since that time. In 1961, the State transferred title and jurisdiction over Highway No. 370 to the defendant, Sarpy County. The county assumed the responsibility for its maintenance and repair.

Since the time of construction of Highway No. 370, plaintiff's tract has flooded several times to various degrees. The most serious flood occurred in June 1967, when the entire area was covered by water. Plaintiff expended extensive sums in restoring the area after the 1967 flood. Witnesses testified that in floods the water begins to back up next to the culvert area under old Highway No. 370.

The plaintiff's contention is that the culvert under old Highway No. 370 is inadequate and caused and will continue to cause flooding. The defendant's contention is that the culvert was adequate for any reasonably anticipated flow of water. The defendant also contends that the flooding which has resulted was due to plaintiff's negligent actions on its own property. These allegedly consisted of constructing bridges across Mud Creek; placing obstructions, such as buildings and storage, in the flood plain; and allowing vegetation and silt to accumulate in the creek.

The expert witnesses disagreed on many issues. An analysis of their testimony, however, shows they did agree that the culvert was inadequate and that it would have caused considerable backwater when it was originally installed. They also agreed that the increasing urbanization of the area would increase its inadequacy. The testimony of both plaintiff's and defendant's expert witnesses was also that removal of the culvert in question and leaving an open cut would reduce the flooding. The experts tended to disagree as to the extent to which

the culvert contributed to past flooding, and as to how much future flooding would be reduced by its removal. The evidence here is thoroughly persuasive that the construction of the road and culvert obstructed, and continues to obstruct, the passage of the waters flowing in Mud Creek and its flood plain.

In this State, the principle is well established that it is the duty of those who build structures in a natural watercourse to provide for the passage through such obstruction of all waters which may reasonably be anticipated to flow or be carried therein and this is a continuing duty. What private proprietors may not do neither may the public authorities except in the exercise of eminent domain. Fellows v. Buffalo County, 181 Neb. 269, 147 N. W. 2d 801; Crummel v. Nemaha County, 118 Neb. 355, 224 N. W. 864.

Where an obstruction in a natural watercourse constitutes a continuing and permanent injury to adjoining landowners, injunctive relief may be granted upon a proper showing. Olson v. Roscoe, 149 Neb. 189, 30 N. W. 2d 664; Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387.

The defendant contends that injunction should not be granted unless the right is clear, the damage irreparable, and the remedy at law inadequate; and that in any event, a court should not grant injunctive relief where such relief will cause one party great inconvenience or expense while the benefit to the other party is small. It is also argued that the reasons for applying the balance of convenience test are especially strong where the inconvenience or expense is to the public.

The major answer to that contention rests on the constitutional requirement that no property be taken or damaged for public use without just compensation. No issue of eminent domain is directly involved here. A refusal to grant injunctive relief, however, would raise serious constitutional issues. In any event, the balance of convenience rule should not be applied where the

actions were done with full knowledge of the plaintiff's rights and with an understanding of the consequences which might ensue, nor should it be applied where there is a willful invasion of another's rights in real property. For statement of the relative hardship rule and relevant discussion, see, Restatement, Torts, § 941, p. 709, and comments.

In this case, the plaintiff prayed for a decree which would require the defendant to replace the present culvert with a new culvert. Experts from both sides testified that the best solution might be to remove the present culvert and replace it with an open cut. On the evidence here, this court cannot properly shape the specific terms of a mandatory injunction. While it is clear that the plaintiff is entitled to injunctive relief, the specific requirements and practical comparisons as to the method of its accomplishment are uncertain. We therefore direct that upon remand the district court direct the defendant to prepare, within a specified reasonable time, a proposal for the specific terms of the injunction, and submit the same to the court for approval. The plaintiff shall be given opportunity to object or to present proposed alternatives. The court will then fix the terms of the permanent mandatory injunction to be entered against the defendant.

The judgment of the district court is reversed and the cause is remanded to the district court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GLENN E. HAIGH, APPELLANT.

202 N. W. 2d 593

Filed December 1, 1972. No. 38427.

Criminal Law: Sentences: Appeal and Error. A sentence imposed

within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion.

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

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, for appellant.

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

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

WHITE, C. J.

The defendant appeals from an indeterminate sentence of 15 to 18 years for the crime of rape, to which he pled guilty. The only issue presented to this court is whether or not the sentence is excessive.

The defendant was represented by counsel, the trial court made a detailed and exhaustive examination of the defendant to assure itself that the plea was voluntary, and no issue is raised in that respect. The presentence investigation was included in the record and was offered in evidence by the defendant himself.

The statutory penalty for rape has been recently increased (section 28-408, R. S. Supp., 1969), to not less than 3 nor more than 50 years' imprisonment.

The defendant is 24 years of age, above average in intelligence, and with an eleventh-grade education. Briefly, the record reveals a forcible rape upon a young girl involving not only forced intercourse, but forced copulation in perversions of the most hideous type, lasting over a considerable period of time. This incident was preceded earlier in the evening by an attempted assault, property damage, and attempted abduction of another woman. In the previous incident the defendant had stopped the girl by running into her vehicle several times, advising her that he was a police officer,

and attempting to enter her car. The indiscriminate use of violence is apparent over a long period of years in the defendant's conduct. He has served a sentence for burglary, the crime of assault and battery with intent to ravish, parole violation, and other conduct which can only be characterized as establishing that he is a dangerous person to society. In 1969 in Sarpy County, Nebraska, he was charged with rape, assault, and sodomy. He was sentenced to 6 months in jail. In this incident, he forced a woman and her three small children off the highway as she turned onto Interstate 80 from Highway 50 and forced the woman to commit an act of sodomy upon him and then raped her. During the period of time that he was serving the jail term in Sarpy County he was involved in an altercation and attacked an inmate, breaking his nose and jaw and fracturing his skull. A criminal charge is still pending on this matter in Sarpy County. At the time the present offense was committed, he had been involuntarily committed to the Lincoln Regional Center for treatment. He has not been released. A psychiatric examination is in the record by a doctor of the Lincoln Regional Center who states that his continued stay at the Lincoln Regional Center would be inappropriate and suggests that the defendant be returned to Sarpy County to complete the sentence he was serving at the time of his transfer to the Lincoln Regional Center. The official FBI report shows that from a period from December 31, 1964, through October 7, 1969, the defendant in various parts of the United States was charged with burglary; rape; assault and battery with intent to ravish; parole violation, assault and battery with intent to ravish; and rape, assault, battery, and sodomy.

The comprehensive presentence investigation report in this case stretches over 50 pages in length. It reveals a continuous succession of the most degrading conduct, interwoven with violence and with a complete disregard of the rights and well-being of the victims. The record

is barren of the slightest suggestion that the defendant is a fit person for or would be responsive to rehabilitative therapy. In summary, the record in this case demands and compels a judgment by a responsible court, in the interest of protecting society, to separate him from contact with possible victims. We observe that the trial court did, as a part of his sentence, require psychiatric examination and possible treatment during his incarceration.

The record in this case not only demonstrates a lack of an abuse of discretion by the trial court, but it may well be said, considering the maximum sentence of 50 years provided by law, that it was weighted on the lenient side. There is no merit to the defendant's contention.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM BROWN, APPELLANT.

202 N. W. 2d 591

Filed December 1, 1972. No. 38434.

Evidence: Trial: Criminal Law: Homicide. A spontaneous declaration of a homicide victim identifying the attacker is admissible where the declaration and the attack are so clearly connected that the declaration can in the ordinary course of affairs be said to be a spontaneous declaration of the real cause.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

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

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

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

CLINTON, J.

The defendant, William Brown, was charged with manslaughter in the killing of his wife. The jury returned a verdict of guilty. On this appeal the issues are: (1) The sufficiency of the evidence to support the verdict; and (2) whether the trial court erred in admitting over objection the declaration of the victim that the defendant had stabbed her. We affirm.

A brief summary of the evidence will lay the groundwork for dealing with both issues. The State's first witness was Lester T. Ridley, whose mother, Ella Mae Brown, was the homicide victim. Ridley testified that on June 27, 1971, he was living with his mother at 2565 Pratt Street in Omaha. Ridley further testified his mother had married Mr. Brown, the defendant, some time around October 1970. He further stated that approximately 3 o'clock a.m., Brown called and asked to speak to the witness' mother. Ridley put down the phone and told his mother there was a telephone call for her. She came to the phone, however, no one spoke at the other end of the line and she hung up. At about the same time she hung up the receiver Brown appeared at the front door and asked to be admitted, saying that he wanted to talk. Mrs. Brown let him in. Ridley stated he saw Brown and his mother go through the house into the bedroom and that Brown grabbed her by the arm and pulled her into the kitchen. He then heard his mother call to him and Ridley went into the bedroom, got a pistol out of her purse, and proceeded to the kitchen. He observed his mother up against the wall and Brown had a butcher knife in his hand. Ridley stated he pointed the gun at Brown, that Brown pulled his mother to the floor by the hair and told her to tell him to drop the gun or that he was going to stab her. Mrs. Brown told her son to go back into the bedroom and this he pro-

ceeded to do. He put on his pants and told his wife to call the police. The witness then ran outside to the side of the house to see if he could get his mother clear from Brown. He was outside when he heard his mother yell: "Lester, Bill done stabbed me." He then observed Brown running from the bedroom into the living room and heard him exit out the rear of the house. Ridley fired a shot at the fleeing Brown.

The police arrived approximately 10 minutes later. Ridley stated that when they entered his mother was lying on the couch covered from head to foot with blood. Mrs. Ridley, the wife of Lester, testified that she was staying with her husband in Ella Mae Brown's house on the night of June 27, 1971. Her testimony corroborated that of Ridley.

Police officer George Lynch testified that on June 27, 1971, he received a call to proceed to 2565 Pratt Street and that upon arriving he walked in the front door and observed the lady sitting on the couch with blood on her nightgown, her hands, and her body. He observed there was a lot of blood throughout the house and the kitchen seemed to have been the scene of a struggle. First aid was administered. Other officers corroborated the testimony of Lynch. Mrs. Brown was taken to the hospital where she died before any emergency treatment could be rendered. Expert testimony established the cause of death as a stab wound in the right chest which penetrated the right lung.

A civilian employee of the police department, a radio operator, testified that about 5:10 a.m., on June 27, 1971, the defendant who identified himself as William Brown appeared and told the witness he wished to turn himself in and then spontaneously made admissions. These admissions amounted essentially to a confession but with mitigating circumstances.

The defendant did not testify in his own behalf and the witnesses testifying for him testified on irrelevant matters.

The evidence is clearly sufficient to support the verdict.

The defendant, in support of his contention that the declaration of Ella Mae Brown was not admissible, cites Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916; and State v. Worley, 178 Neb. 232, 132 N. W. 2d 764. Neither case supports the defendant's position. The State urges that the declaration is admissible as a dying declaration and cites the following cases: Penn v. State, 119 Neb. 95, 227 N. W. 314; Edwards v. State, 113 Neb. 698, 204 N. W. 780; Johnson v. State, 112 Neb. 530, 199 N. W. 808; Tongue v. Perrigo, 130 Neb. 564, 265 N. W. 737. These cases stand for the proposition that the dying declaration is admissible on a prosecution for homicide of the declarant, if the declaration relates to the cause of the declarant's death and is made when the declarant is conscious of the fact that death is imminent. The defendant urges the inapplicability of these cases because there is no evidence that the declarant was conscious of the fact that death was imminent. Evidence of such consciousness here is purely circumstantial.

We need not decide, however, whether the declarations are in the dying declaration category. The evidence was clearly sufficient to warrant the submission of the victim's statements as spontaneous declarations so clearly and closely connected in time with the stabbing as to be admissible as evidence of the real cause. This is one of the exceptions to the hearsay rule which has long been recognized by this court. This court has usually applied the label of res gestae. There is here an overriding coincidence of the time of the declaration and the main transaction. "The consensus of authorities seems to be that a declaration, to be part of the res gestae, need not be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can in the ordinary course of affairs be said to be a spontaneous declaration of the real cause." Evidence, Nebraska State Bar Assn. (1966), c. 5, IV D3, p. 5-8. See, also Missouri

P. Ry. Co. v. Baier, 37 Neb. 235, 55 N. W. 913, cert. den. 154 U. S. 510, 14 S. Ct. 1149, 38 L. Ed. 1083; Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1. See, also, Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701, for another example of spontaneous declaration of a victim.

AFFIRMED.

ROBERT G. HOUSER, APPELLANT, V. SCHOOL DISTRICT OF SOUTH SIOUX CITY, DAKOTA COUNTY, STATE OF NEBRASKA, ALSO KNOWN AS SOUTH SIOUX CITY COMMUNITY SCHOOLS, SOUTH SIOUX CITY, NEBRASKA, APPELLEE.
202 N. W. 2d 621

Filed December 1, 1972. No. 38454.

1. **Parliamentary Law: Statutes.** In the absence of a contrary statutory provision, a majority of a quorum which constitutes a simple majority of a collective body may act for that body.
2. **Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict.
3. **Statutes: Words and Phrases: Schools and School Districts.** The words "a majority of the members of the board," as used in section 79-1254, R. R. S. 1943 (Reissue 1966), means a majority of all members of the board.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded.

Crosby, Pansing, Guenzel & Binning and Steven G. Seglin, for appellant.

Smith, Smith & Boyd, for appellee.

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

SPENCER, J.

Plaintiff-appellant instituted this declaratory judgment action seeking an interpretation and construction of section 79-1254, R. R. S. 1943 (Reissue 1966). What

interpretation is to be placed upon the words "majority of the members of the board?" Does it mean a majority of a legally constituted and acting quorum of said board, or does it mean a majority of all the members elected to said board? Also involved is whether plaintiff waived his right to question the validity of the board's vote to terminate his teaching contract by requesting a hearing pursuant to section 79-1254, R. R. S. 1943.

Plaintiff was a football coach and school teacher employed by the school district of South Sioux City, Nebraska, a Class III district. The school board, hereinafter referred to as board, is composed of six members. On March 17, 1971, the board held a special meeting with five members present. At that meeting, by a three to two vote, the board terminated plaintiff's contract at the end of the 1970-71 school term, pursuant to section 79-1254, R. R. S. 1943. On March 22, 1971, the secretary sent plaintiff a letter informing him that he would not be rehired for the following school year. The letter did not disclose the vote nor the date when the vote was taken. The plaintiff wrote the school superintendent, requesting a hearing. The board in reply informed plaintiff by letter dated April 1, 1971, that a hearing was scheduled for April 8, 1971.

On or about April 5, 1971, plaintiff discovered that the vote taken by the board on March 17, 1971, was three in favor and two against termination. He appeared with counsel at the April 8 meeting. Plaintiff's counsel informed the board that plaintiff would take no part in any hearing since the board had not legally terminated his contract prior to April 1, as required by law. Plaintiff then tendered a letter to the secretary accepting his contract for the 1971-72 school term, pursuant to section 79-1254, R. R. S. 1943. The board then voted four to two to reaffirm the action taken March 17, 1971.

Section 79-439, R. R. S. 1943, reads as follows: "In all meetings of any school board, or board of education,

a majority of the members shall constitute a quorum for the transaction of business. Regular meetings shall be held on the first Monday of every month. Special meetings may be called by the president or any two members, but all members shall have notice of the time and place of meeting; Provided, the provisions of sections 79-439 to 79-444 shall not apply to Class V districts."

Section 79-1254, R. R. S. 1943, before the 1971 amendment, which is not material on the issue herein, provided: "The original contract of employment with a superintendent or a teacher and a school board or board of education of a Class I, II, III, or VI district shall require the sanction of a majority of the members of the board. Any contract of employment between a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before April 1 to amend or to terminate the contract at the close of the contract period; Provided, that the secretary of the board shall, not later than April 15, notify each teacher in writing of any amendments to his contract or the termination of his contract; and provided further, that a teacher whose contract is terminated shall have the right to file a written request with the board of education for a hearing before the board. Such request shall be filed within fifteen days after receipt of the notice of termination and such request shall be granted by the school board or board of education. After such hearing a written statement as to the termination shall be given if requested by the teacher. Any superintendent or teacher whose contract is amended or automatically renewed according to the provisions of this section shall file written notice with the secretary of the board within fifteen days after receiving such notice of his acceptance of the amendments to or renewal of such contract, and failure to file such notice shall be regarded as conclusive evi-

dence of his nonacceptance of the amendments to or renewal of his contract. No member of the school board or board of education may cast a vote in favor of the election of any teacher when such member of the board is related by blood or marriage to such teacher."

Plaintiff concedes that the common law rule, in the absence of a contrary statutory provision, applies: A majority of a quorum which constitutes a simple majority of a collective body may act for that body. Federal Trade Commission v. Flotill Products, Inc. (1967), 389 U. S. 179, 88 S. Ct. 401, 19 L. Ed. 2d 398. It is plaintiff's contention that section 79-1254, R. R. S. 1943, is a contrary statutory provision.

Section 79-439, R. R. S. 1943, is a general statute dealing with the transactions of school business. Section 79-1254, R. R. S. 1943, contains special provisions specifically applicable to voting on teachers in Class I, II, III, and VI districts. Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. In the early case of Albertson v. State (1879), 9 Neb. 429, 2 N. W. 742, Chief Justice Maxwell, writing for the court, held: "Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict."

The board argues a "majority of the members of the board" means a majority of a quorum, and not all the members of the board. It insists if the Legislature had intended otherwise, it would have said a majority of *all* members. In section 79-439, R. R. S. 1943, where there is no question a majority of all members is necessary to constitute a quorum, the language used is a "majority of the members."

It is true, in sections governing Class IV and V schools, the word "all" is used. Section 79-525, R. R. S. 1943, for a Class IV district, has the following: "The election of all officers of the board, principals, teachers, and

regular janitors, and all elections for filling vacancies on the board, shall be by ballot. No person shall be declared elected unless he receives the vote of a majority of *all* the members of the board." (Italics supplied.)

The provision in section 79-1004, R. R. S. 1943, covering Class V schools, reads: "The election of such officers of the board, teachers, and janitors shall be by ballot and no person shall be declared elected unless he receives a vote of a majority of *all* the members of the board." (Italics supplied.)

Section 6589, Compiled Statutes, 1922, covering cities over 1,000 population, had the following language: "The election of the officers of the board, of the superintendent and teachers, and all elections for filling vacancies on the board shall be by ballot, and no person shall be declared elected except he receive the vote of a majority of *all* the members of the board." (Italics supplied.) This exact language had been carried in the statute since it came into the law in 1881.

The present language came into the law in 1937. (Section 4 of LB 212, Laws 1937, c. 182, p. 716.) The pertinent portion reads as follows: "The election of the officers of the board, and all elections for filling vacancies on the board shall be by ballot, and no person shall be declared elected except he receive the vote of a majority of all the members of the board. The original contract of employment with a superintendent or a teacher shall require the sanction of a majority of the members of the board, but thereafter said contract shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before April first to terminate the contract at the close of the contract period, * * *."

When the law was revised in 1949, the provisions for board members were put in other sections, and the language "the original contract of employment with a superintendent or a teacher shall require the sanc-

tion of a majority of the members of the board," became part of the opening sentence in new section 79-1254, R. S. Supp., 1949. This would appear to give substance to the board's argument. We see no distinction between the phrasing "a majority of all members," and "a majority of members." We do not believe that the Legislature intended to treat the teachers in Class I, II, III, or VI districts different than those in Classes IV and V. If a different result were intended, it would have been very easy to have clarified the language to so indicate. The language used indicates to us the intention to require a majority of all members of the board, and not a majority of the quorum.

Board's final contention is that the plaintiff is estopped from asserting the invalidity of his termination because he requested a hearing pursuant to section 79-1254, R. R. S. 1943. Board argues that if it had known the nature of plaintiff's objections before the April 1 deadline, a full board would have voted in favor of the termination by a four to two vote. Be that as it may, the termination of plaintiff's contract required the concurrence of a majority of the full board. We assume that the board is attempting to raise an issue of waiver or estoppel, neither of which can be sustained on the facts herein. The trial court made no finding on this issue. Plaintiff did not know the nature of the vote at the March 17 meeting until April 5, and acted immediately, Plaintiff, who had a right to assume the board was acting legally, was notified of the board action by letter dated March 22, 1971. He immediately requested a hearing to determine the reason for his termination. As soon as he learned he had not been validly terminated, he promptly advised the board to that effect. There is no waiver nor estoppel present herein.

For the reasons given, the judgment is reversed and the cause remanded for further proceedings to determine and assess plaintiff's damages herein.

REVERSED AND REMANDED.

LOTUS JOAN PERSON, APPELLANT AND CROSS-APPELLEE, V. LEWIS E. PERSON, APPELLEE AND CROSS-APPELLANT.

202 N. W. 2d 629

Filed December 1, 1972. No. 38456.

Divorce: Appeal and Error: Parent and Child. The fixing of child support and alimony rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be disturbed.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed as modified.

Alfred A. Fiedler of Fiedler & Fiedler, for appellant.

McGroarty & Welch, for appellee.

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

NEWTON, J.

This is a divorce action. On appeal plaintiff contends that allowances for child support, alimony, and attorney's fees are inadequate. Defendant cross-appeals because the decree fails to provide for adjustment or termination of alimony payments in the event of a material change in the circumstances of the parties or the death or remarriage of plaintiff. We affirm the judgment subject to modifications set out herein.

The parties had two minor children remaining in the home. Custody of the son, age 10, was awarded to plaintiff, and custody of the 19-year-old daughter to defendant.

The only property owned by the parties was their home, household goods, and two automobiles. There were stock brokerage accounts in the names of defendant and his widowed mother as joint tenants. The undisputed evidence reflects that these accounts were the separately property of the mother placed in joint tenancy so that defendant could handle them for her and as compensation he was permitted to draw on the earnings

of the accounts. The trial court correctly refused to consider the stock accounts in fixing alimony, with the exception of the income received by defendant from them. The residence was subsequently sold and netted approximately $15,000 over and above liens.

Under the decree the proceeds from the home were equally divided. Each party received an automobile and the household goods were divided.

Defendant was 53 years of age. It was stipulated that his take-home pay was $1,606.82 monthly. In addition, during the years 1969 and 1970, he received from the stock accounts $1,424.60 and $5,655.65 respectively.

The decree awarded to plaintiff the sum of $150 per month as support for the 10-year-old boy and required defendant to carry adequate medical and hospital insurance to cover him. Defendant was also to pay any unusual medical or dental charges and was allowed to claim him as a dependent for tax exemption purposes.

Plaintiff was awarded alimony in the sum of $70,000, payable at the rate of $500 per month for a period of 11 years and 8 months. Defendant was required to maintain his present life insurance program. The evidence is not entirely clear in regard to the insurance but apparently plaintiff is the principal beneficiary. Defendant was directed to pay costs, including fees for plaintiff's attorney.

With the exception of his share of the money received from the sale of the residence, defendant has no assets of consequence. He is dependent upon his earnings. Under the circumstances we find plaintiff to have been very fairly treated.

Defendant has cross-appealed requesting that the alimony payments be terminated in the event of the death or remarriage of plaintiff. Since alimony is designed to provide necessary support, it would seem superfluous to require the continuance of the payments under such circumstances. The decree is modified in this respect.

The fixing of child support and alimony rests in the

sound discretion of the court and, in the absence of an abuse of discretion, will not be disturbed. See, Neeman v. Neeman, 183 Neb. 105, 158 N. W. 2d 236; Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262.

On examination of the record, we believe that the allowance of fees for plaintiff's attorney in the district court was fair and adequate.

The judgment of the district court is affirmed except that alimony payments shall cease in the event of the death or remarriage of plaintiff. Plaintiff is allowed $350 for services of her attorney in this court.

AFFIRMED AS MODIFIED.

SMITH, J., dissents.

STATE OF NEBRASKA, APPELLEE, V. JAMES S. HYSLOP, APPELLANT.
202 N. W. 2d 595

Filed December 1, 1972. No. 38462.

Criminal Law: Guilty Plea. The standard for determining the validity of guilty and nolo contendere pleas is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.

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

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

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

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

WHITE, C. J.

The defendant, 29 years of age, with 6 or 7 years of college education, and who was represented by counsel at all stages of the proceedings, pleaded nolo contendere

to the charge of willfully uttering an insufficient fund check. He appeals from the judgment and sentence of the district court on that charge. We affirm the judgment of the district court.

The defendant contends generally that he was not advised of the nature and elements of the charge against him. The record shows that on two occasions during the arraignment, the defendant was asked whether he had read the information and whether he had any questions at all about the charge against him. The defendant directly answered that he had read the amended information and that he had no questions about the charge. The defendant's own counsel then asked the defendant whether or not they had discussed the matter and whether the defendant understood the essentials of the charge. The defendant, in response to these questions from his own counsel, answered in the affirmative.

It is obvious, without further discussion, that there is no merit to this contention. The trial court's interrogation and the answers of the defendant show full compliance with the basic standard of taking a plea of guilty set out by this court in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, in which we stated that the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. We point out further that Section 1.4 of the A. B. A. Standards Relating to Pleas of Guilty (Approved Draft, 1968), provides that the trial judge should address the defendant personally and determine whether he understands the nature of the charge and that the commentary to this section provides generally that the responsibility of the judge varies, depending upon all the circumstances as to the complexity and comprehensibility of the charge and the defendant's intelligence, education, age, and experience. It is clear from the record that there was full compliance with the basic standards for taking

the plea and also that the defendant had a full understanding of the nature of the charge and the offense and the possible impact of his plea. It appears further, from the record, that the defendant had on previous occasions been charged with offenses of the same general nature to which he pleaded nolo contendere here.

The defendant again contends that the court failed to make a proper inquiry as to the factual basis of his plea. This contention, in his brief, is founded upon an argument that Section 1.6 of the A. B. A. Standards Relating to Pleas of Guilty (Approved Draft, 1968), states that no judgment should be entered on a plea of guilty before the court has made such an inquiry so as to satisfy itself that there is a basis in fact for the plea. This argument fails basically, because the defendant here entered a plea of nolo contendere, and the very purpose of the plea is to afford a defendant an opportunity to avoid an outright admission of facts as the basis for the plea of nolo contendere. Neither the court nor the defendant is required to take a paradoxical position in the application of this standard with relation to a plea of nolo contendere. The commentary to Section 1.6 of the A. B. A. Standards Relating to Pleas of Guilty states as follows: "Consistent with the position taken in the recent revision of Federal Rule 11, inquiry into accuracy is not required when the defendant enters a plea of nolo contendere. * * * For one thing, the risk of inaccuracy when a nolo plea is tendered is relatively slight, as in such cases there is usually a sophisticated defendant, * * * who has been fully advised by retained counsel. Moreover, the advantages to be gained from such a plea might be diminished or lost if there were a subsequent inquiry into the underlying facts."

We observe that the court went as far as was possible in this respect. It asked the following question of the defendant: "* * * do you plead guilty because you did what is actually charged against you in the

Information, or because at least you are convinced that should you go to trial on this Information the jury would find you guilty?" The defendant then answered that he so pled for at least one of those two reasons. There is no merit to this contention.

We have examined the other contentions of the defendant and they are without merit. Examining the record as a whole in this case, it is clear that the defendant was fully informed of the charge against him and that the court made as full an inquiry as possible into the factual basis of the nolo contendere plea. The defendant was represented by counsel, was an educated and sophisticated person, fully conversant with the nature of the offense he was charged with from previous experience, and knowingly, voluntarily, and understandingly entered the plea that he made.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE, V. EARL B. SELDERS, APPELLANT, IMPLEADED WITH ILA SELDERS ET AL., APPELLEES.

202 N. W. 2d 625

Filed December 1, 1972. No. 38481.

Insurance: Attorneys at Law: Fees. Where an insurer brings an action for declaratory judgment to have coverage determined and the insured prevails, the latter is entitled to an attorney's fee under the provisions of section 44-359, R. S. Supp., 1972.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed in part, and in part reversed and remanded with directions.

Moyer & Moyer, for appellant.

Deutsch & Hagen and Thomas H. DeLay, for appellee State Farm Mut. Auto. Ins. Co.

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

CLINTON, J.

This appeal involves the question of the right to an allowance of attorney's fees under section 44-359, R. S. Supp., 1972. The defendant (appellant here), Earl B. Selders, was successful in this court in an action for a declaratory judgment initiated by the plaintiff in having determined that his deceased children, victims of an uninsured motorist, were insureds under the policy issued to him. The children thus came within the uninsured motorist coverage of that policy. We held that Selders would be entitled to recover under the policy for losses he incurred by reason of the death of the children if the uninsured motorist was liable. See State Farm Mut. Auto. Ins. Co. v. Selders, 187 Neb. 342, 190 N. W. 2d 789. Upon remand Selders filed motion for judgment on the mandate and allowance of attorney's fees as part of the costs. At that time no judgment had been rendered in an action pending against the uninsured motorist. The allowance of attorney's fees was denied. The defendant filed motion for new trial which was overruled and he appealed.

Selders relies upon our recent decision in Workman v. Great Plains Ins. Co., Inc., *ante* p. 22, 200 N. W. 2d 8, where we held in an action by the insured for a declaratory judgment to determine policy coverage that section 44-359, R. R. S. 1943, was applicable to an action for declaratory judgment by the insured and supported the allowance of an attorney's fee. We are now asked to extend that holding to this case where the insurer brings the action and the insured prevails.

The plaintiff cites and relies upon Cunningham v. Northwestern Mut. Life Ins. Co., 148 Neb. 250, 27 N. W. 2d 221. The case is clearly distinguishable on two grounds. At the time of that action the statute provided for attorney's fees only in "an action at law" upon

the policy. As we pointed out in Workman v. Great Plains Ins. Co., Inc., *supra,* the Legislature amended the statute to strike the words "at law." The recited purpose of the amendment as set forth in the title to L.B. 958, Laws 1971, was "to broaden the scope of the awarding of attorney fees as prescribed." It can be argued that certain language in the act is subject to the interpretation that applies only where the object of the action is a money judgment. Our decision in Workman rejects this contention without noting the contention specifically. Under the provisions of the act the only exception to allowance of attorney's fees appears to be where the action is for a money judgment and the insurer has offered to confess judgment under section 25-901, R. R. S. 1943, and the insured has failed to recover more than was offered.

We do not think the allowance of the attorney's fee should depend upon who brings the action. The insured prevailed and the allowance of attorney's fee is under the circumstances within the purposes of the statute as interpreted by this court in Workman v. Great Plains Ins. Co., Inc., *supra.* At the time the trial court made its order in this case Workman v. Great Plains Ins. Co., Inc., *supra,* had not been decided.

Cunningham v. Northwestern Mut. Life Ins. Co., *supra,* was not an action upon the policy in the ordinary sense of that term. That was an action by the insured during his lifetime to have a determination made as to whether a premium upon his life insurance policy had been paid in time and so avoid a forfeiture of the policy.

The plaintiff contends that no attorney's fees can be allowed because the defendant presented no evidence from which the reasonable value of the services could be determined. The plaintiff says that Luikart v. Flannigan, 130 Neb. 901, 267 N. W. 165, cited by the defendant, in which this court held an allowance of attorney's fees was supported by the record independently of any

evidence of reasonable value, does not apply because the trial judge who ruled on the motion for attorney's fees did not preside at the declaratory judgment hearing. Luikart v. Flannigan, *supra,* does not stand for the proposition that only the presiding judge may make an award of attorney's fees without specific evidence of the value thereof. That case points out that the judge is one who has the knowledge of the value of legal services and may rely upon the record for a determination of the amount to be allowed.

In the instant case the judge by whom the motion for attorney's fees was heard had available to him by reason of the previous appeal the trial record in the form of the bill of exceptions used in the appeal in the declaratory judgment action. No doubt the judge conducting the trial has a more detailed and personal knowledge of the services rendered. Certainly either the presiding judge or the judge who hears the motion for attorney's fees may receive additional evidence of value. In this case the record supports an inference that the court denied the attorney's fees, not because of lack of evidence of value, but because it considered that the defendant as a matter of law was not entitled to an award of attorney's fees under the statute.

That part of the judgment of the court below denying the allowance of the attorney's fees is reversed and the cause is remanded with directions for further proceedings consonant with this opinion. The defendant is allowed a fee of $250 for services of his attorney in this court.

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

IN RE INTERESTS OF SUSAN MEALS AND JEAN MEALS, CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ARTILIA MEALS, APPELLANT, IMPLEADED WITH JOE CARLS, APPELLEE.
202 N. W. 2d 628

Filed December 1, 1972. No. 38493.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

Robert M. Oberman, for appellant.

Donald L. Knowles and Colleen R. Buckley, for appellee State of Nebraska.

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

SPENCER, J.

This is an appeal from the separate juvenile court of Douglas County, Nebraska. It involves the question of the fitness of Artilia Meals to retain the custody and control of her children, Susan and Precious Bertha Jean Meals, also known as Mils, also known as Mels. Joe Carls, the natural father, was constructively served but entered no appearance herein. The court appointed a guardian ad litem and separate counsel for Artilia Meals.

After hearing, the trial court terminated the parental rights; found the children were dependent and neglected children within the meaning of the Juvenile Court Act; and committed them to the Department of Public Welfare, State of Nebraska, with authority to consent to the legal adoption of said children. We affirm.

We do not deem it necesasry to either review the evidence in detail or set forth the substance thereof. Suffice it to say that we have carefully examined the record and are convinced that the evidence is ample to sustain the judgment of the trial court.

Judgment affirmed. See Rule 20.

AFFIRMED.

JOHN HARTWIG, APPELLANT, V. EDUCATIONAL SERVICE UNIT NO. 13, FORMERLY EDUCATIONAL SERVICE UNIT NO. 18, ET AL., APPELLEES.

202 N. W. 2d 618

Filed December 1, 1972. No. 38538.

1. **Workmen's Compensation: Trial: Evidence.** In a workmen's compensation case, the burden of proof is upon the claimant to establish that his disability was caused by an accident arising out of and in the course of his employment.
2. ———: ———: ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law but not to the evidence offered in support of a claim for benefits under the act.
3. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to the Supreme Court, where there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. The cause will be considered de novo in this court only where the findings of fact are not supported by the evidence as disclosed by the record.
4. **Workmen's Compensation: Trial: Evidence.** Where the claimant in a workmen's compensation case fails to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment, the proceeding will be dismissed.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Lyman, Meister & Olsen, for appellant.

James R. Hancock, for appellees.

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

MCCOWN, J.

This is a workmen's compensation case. The Workmen's Compensation Court dismissed plaintiff's petition. On appeal to the district court, the dismissal was affirmed. We affirm the judgment of the district court.

The plaintiff, John Hartwig, was employed by the defendant in September 1968. His duties consisted of

picking up and delivering various educational materials. The evidence as to the date of the alleged accident is extremely indefinite. The three separate medical histories all show the date as late 1968. Plaintiff's evidence was that sometime in October or November 1969, while plaintiff was lifting a box, he felt a pain in his back and complained to another person present. Plaintiff thought it was a pulled muscle and continued to work that day, and worked regularly until approximately June 1, 1970. He testified that the pain progressed as time passed. He testified that in April or May of 1970, serious pain developed in his leg. On July 27, 1970, he consulted a doctor in Scottsbluff, Nebraska. He was hospitalized in Scottsbluff from August 10 to August 23, 1970, for examination, tests, and treatment. He was then sent to Denver, Colorado, on August 26, 1970. There he was examined by Dr. Markheim, an orthopedic surgeon, who operated on plaintiff's back on September 1, 1970. Plaintiff returned to Scottsbluff on September 9, 1970, and filed his claim in the Workmen's Compensation Court on November 23, 1970.

The medical issue of causation is critical here. Dr. Markheim performed a laminectomy decompressing the nerve roots at the L-4, L-5 level and removed the portion of an old spinal fusion in this area which was not solid. His opinion was that plaintiff's difficulty was caused by the pseudoarthrosis or false joint produced as a result of a partially unsuccessful fusion operation on the plaintiff's back performed many years before. He testified that the plaintiff's condition was the natural progression of this preexisting condition and was based entirely on his pseudoarthrosis rather than on any industrial accident which he claimed.

The two other physicians who testified felt that plaintiff had suffered a partial disability as a result of the accident and previously existing pseudoarthrosis, but conceded that Dr. Markheim's conclusions may have been correct. Both agree that the pseudoarthrosis was

the basis of plaintiff's condition, and both conceded it was possible that plaintiff's condition could have or might have developed without any traumatic intervention.

The single judge Workmen's Compensation Court found that plaintiff had failed to maintain the burden of proving he sustained an accident and injury arising out of and in the course of his employment and dismissed plaintiff's petition. The Workmen's Compensation Court en banc reaffirmed that finding and judgment and also found that the alleged injury occurred in October or November 1968 and plaintiff's action was therefore filed out of time. The judgment of the Workmen's Compensation Court was affirmed by the district court.

The matters at issue here turn on factual determinations. In a workmen's compensation case, the burden of proof is upon the claimant to establish that his disability was caused by an accident arising out of and in the course of his employment. Satterfield v. Nagel, 186 Neb. 332, 183 N. W. 2d 237.

The issue of causation is critical. It is urged that the rule of liberal construction of the Workmen's Compensation Act should be applied to aid the plaintiff in carrying the burden of proving his case by a preponderance of the evidence. The rule of liberal construction of the Workmen's Compensation Act applies to the law but it is not applicable to the evidence offered in support of a claim made for benefits under the act. Parrish v. Karl Kehm & Sons Contractors, 186 Neb. 252, 182 N. W. 2d 422.

In this case two trials in the Workmen's Compensation Court determined the facts adversely to the plaintiff. On appeal to the district court, those factual determinations were again affirmed on all critical issues. On appeal of a workmen's compensation case to the Supreme Court, where there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set

aside for insufficiency of the evidence. The cause will be considered de novo in this court only where the findings of fact are not supported by the evidence as disclosed by the record. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285.

Where the claimant fails to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment, the proceeding will be dismissed. Satterfield v. Nagel, *supra*.

In this case the evidence is clearly sufficient to support the finding that the disability of which the plaintiff complains did not arise out of and in the course of his employment.

In view of the determinations made, it is unnecessary to reach the issues of whether the injury was latent and progressive or whether the claim was barred by the statute of limitations.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

SMITH, J., concurring in the result.

The court applies the same standard of review to findings in favor of the proponent of the issue and to findings in favor of the opponent of the issue. It is mistaken. I would affirm on authority of the rule in Adler v. Jerryco Motors, Inc., 187 Neb. 757, 193 N. W. 2d 757 (1972). See, also, Klein v. Trinity Industries, Inc., *ante* p. 117, 201 N. W. 2d 200 (1972) (Smith, J., concurring); cf. St. Paul Fire & Marine Ins. Co. v. Hoffman, 184 Neb. 247, 166 N. W. 2d 731 (1969); Prosser (4th Ed., 1971), Law of Torts, p. 205.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY SANDERS, APPELLANT.
202 N. W. 2d 589

Filed December 1, 1972. No. 38547.

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

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

Thomas J. Monaghan, for appellant.

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

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

WHITE, C. J.

The only issue raised in this appeal by the defendant from his plea of guilty to a burglary charge is the excessiveness of the sentence of an indeterminate period of 3 to 5 years in the Nebraska Penal and Correctional Complex. The evidence shows that on January 28, 1972, the defendant pled guilty to the charge of burglary. The guilty plea was the result of a plea bargain, to which no objection is made, entered into by the defendant's counsel and the Douglas county attorney's office as a result of which an additional burglary charge and a felonious assault charge were dropped by the State of Nebraska. The record shows that the State performed its part of the plea bargain, dismissed the other charges, and took no position with reference to the request for probation.

The essence of the defendant's contention seems to be the hardship impact of the sentence upon his wife and family preventing him from making a living. We do not doubt that this may be a factor for the court to

take into consideration under all the circumstances and probably was by the experienced trial judge in this case. But we are not aware of any reasoning or authority that compels a finding that a man can escape a penalty for the commission of a felony offense simply because he has a wife and family who need support. It is clear from the record that the defendant had been arrested 45 times in the last 12 years and had 1 previous conviction in federal court for transportation of a stolen motor vehicle across a state line, which is a felony. 18 F. C. A. § 2312, p. 581.

Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. No such abuse of discretion appears.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HOWARD A. CROOKS, APPELLANT.
202 N. W. 2d 627

Filed December 1, 1972. No. 38557.

Criminal Law: Sentences: Constitutional Law. The imposition of a sentence of 10 to 15 years which sentence is to be consecutive to a life sentence previously imposed for an unrelated crime is not a cruel and unusual punishment such as to be in conflict with the Eighth Amendment to the Constitution of the United States.

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

Howard A. Crooks, pro se.

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

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

WHITE, C. J.

This is a post conviction case. The defendant already incarcerated in the Nebraska Penal and Correctional Complex under a life sentence was sentenced to a period of from 10 to 15 years for another offense committed while incarcerated. The sentence specifically provided that it should be consecutive to the serving of the life sentence.

The defendant has filed a pro se brief in this court to sustain his contention. It is difficult to understand the defendant's argument but giving it its maximum import it constitutes a claim that such a sentence can never be put into effect and that it is a cruel and unusual punishment under the federal Constitution. No authority is cited by the defendant for his contention nor can we find any. The statutes of the State of Nebraska specifically provide for consecutive sentences. The argument that a consecutive sentence to a life sentence is void because of the impossibility of serving such a sentence is untenable. The statutes of the State of Nebraska vest in the Board of Pardons the authority to commute sentences. We take judicial notice of the fact that a life sentence frequently ends long before the prisoner's life ends, and that in many, if not most, cases the Board of Pardons has commuted the life sentence to a term of years. The offense committed in this case is a serious one. To give credence to the defendant's contention would permit inmates serving life sentences freedom to commit such offenses without any fear of additional punishment. It is clear that the second sentencing in this case for a separate offense of 10 to 15 years is not a vain and useless sentence, but is a real and vital threat of actual punishment and serves a useful deterrent purpose for the commission of other offenses while incarcerated under the life sen-

tence in the Nebraska Penal and Correctional Complex. There is no merit to the defendant's contention.

The judgment of the trial court denying post conviction relief is correct and is affirmed.

AFFIRMED.

REID HALBERT, APPELLEE, V. FOOD HOST U.S.A., INC., A CORPORATION, APPELLANT.
202 N. W. 2d 735

Filed December 8, 1972. No. 38472.

1. **Contracts: Trial: Evidence.** In an ambiguous contract the court may look at the preliminary negotiations to determine the intent of the parties.
2. **Equity.** Equity, once it assumes jurisdiction, has the power to devise a remedy which will do complete justice and eliminate further litigation.
3. **Interest.** Interest is allowable where the conduct of a party justifies its allowance, particularly where money or property belonging to another is wrongfully withheld to the enrichment of the debtor and to the detriment of the creditor.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

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

Perry, Perry & Witthoff, Robert E. McKelvie, and Davis, Bailey, Polsky & Huff, for appellee.

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

WHITE, C. J.

In this jury-waived case the district court entered a judgment in favor of the plaintiff in a suit on an exchange contract for stock in the defendant corporation. Plaintiff asserted he was entitled to registered shares in the defendant corporation and the defendant guaranteed him that such registered shares would be worth at least

$15 per share. The district court, on the facts, found in favor of the plaintiff and required the defendant to replace the unregistered shares with registered shares, and to purchase the latter from the plaintiff at the guaranteed price of $15 per share. We affirm the judgment of the district court with a modification as to the amount of interest allowable.

The background facts are that plaintiff Halbert owned all of the corporate stock of Kings Food Host of Hastings, Inc., and Kings Food Host of Grand Island, Inc., hereinafter referred to as "the companies." Each of these companies owned by Halbert operated a restaurant business in its respective city. In the month of August 1968, plaintiff entered into negotiations with L. C. Price, president of the defendant Food Host U.S.A., Inc. Because of tax advantages it was decided that plaintiff's shares in the companies would be exchanged for Food Host shares. The evidence shows that at that time Food Host had plans to make a public offering of its stock in the near future; and that Price was willing to guarantee that the shares would come out to the public at a cost of not less than $37.50 per share. On September 30, 1968, plaintiff and an officer of Food Host signed a stock exchange contract. In pertinent part, the contract provided:

"(b) On date of closing, Food Host will transfer that number of shares of Food Host stock which, when multiplied by $37.50 per share and added to the $15,000.00 debenture bond which will also be issued at the same time, will equal $139,987.50 less all liabilities, obligations, taxes, debts, claims and causes of action of whatsoever nature, whether known or unknown, existing now, incurred between date of the agreement and closing date, or accrued to closing date.

"(c) The corporation will, on or before October 1, 1970, file for registration with the Securities Exchange Commission and within said time, the market value of the said stock of Food Host will not be less than $37.50

per share; that in the event the market value does not reach $37.50 within said time, Food Host will issue to Halbert, within 60 days after October 1, 1970, an additional debenture bond for the difference between the value of the stock issued (based upon the highest price that said stock reached before October 1, 1970) and the value of the stock computed at $37.50 per share. * * *

"5. This contract will be closed on or before October 1, 1968, at the office of Food Host."

In the performance of this agreement Food Host immediately took over the operation of the companies on October 1, 1968. Food Host stock was not issued to the plaintiff immediately because of the necessary period of time to compute, as an accounting matter, the liabilities of Halbert's companies so that the exact amount of stock called for by the contract could be transferred. However, from February until April of 1969, the evidence shows that the plaintiff repeatedly communicated with Food Host asking it to return his companies to him or issue him the stock, but no action was taken by Food Host.

The accounting finally revealed that the companies had net liabilities of approximately $22,462.50. Subtracting this from the contract price of $139,987.50 left a net figure of $117,525 which, divided by $37.50 per share guarantee, meant that Food Host was to deliver 3,134 shares of its stock to the plaintiff. On April 30, 1969, after the repeated demands of the plaintiff, Food Host issued a certificate representing the shares, but did not deliver it giving as the reason, "pending the closing of the contract."

While it held the stock, "pending the closing of the contract" Food Host split its stock two-and-one-half to one, reducing the contract price per share to $15 and increasing the number of shares deliverable to a total of 7,835 shares. Then, on June 11, 1969, Food Host filed a registration statement with the Securities Exchange Commission. On July 21, 1969, a certificate

representing the 4,701 additional shares was issued, but was again held by Food Host pending closing, as was the original issue of 3,134 shares. During this entire period of time, from February through July, the plaintiff continued to demand delivery of his stock, to no avail.

On September 4, 1969, the registration statement became effective. The plaintiff learned of this and telephoned Food Host (L. C. Price) and again demanded his stock. On September 13, plaintiff received the two previously issued certificates by certified mail. They were unregistered and one of the certificates bore the following barely legible stamped legend: "The shares represented by this certificate have *not* been registered under the Securities Act of 1933. The shares have been acquired for investment and may not be pledged or hypothecated, and may not be sold or transferred in the absence of an effective registration statement for the shares under the Securities Act of 1933 or an opinion of counsel to the company that registration is not required under said Act."

On September 15, 1969, the plaintiff attempted to sell the shares through a broker, but was advised, in effect, that since the shares had not been registered they could not be sold "over the counter." It appears from the evidence that the only available market for the stock then was with private investors possessing a sufficiently sophisticated knowledge of the market to accept it without the protection provided by the Securities Exchange Act, in registering the stock. Again Halbert contacted Food Host (L. C. Price) and was told that the Food Host guarantee was still good. At that time the market price for Food Host registered stock was about $16 per share.

Subsequently, plaintiff made two unsuccessful attempts to sell the shares through private placement. Having failed to divest himself of the unregistered shares and being unable to secure the return of his companies

from Food Host, as we have pointed out above, the plaintiff commenced this action to secure registered and saleable shares. The action was commenced in January 1971.

The first question we are presented with is the right to resort to parol or extrinsic evidence in order to properly interpret this contract. Halbert claims that he was entitled to registered shares with a guaranteed price of $37.50 per share. We hold, as the trial court must have, that there is ambiguity in this contract. The uncertainty arises from the fact that no specific provision as to the type of shares to be issued to the plaintiff appears in the instrument, and yet Food Host promises to file for Securities Exchange Commission registration, an action in which the plaintiff would seem to have no interest if his shares were to be restricted and unregistered. Moreover, the contract was executed on September 30, 1968, and calls for a closing date on October 1, 1968. Despite the fact that it was impossible, under the terms of the contract for the issuance of the stock on October 1, 1968, since Food Host had to make its own post-acquisition accounting in order to determine the number of deliverable shares. Parol evidence is admissible to explain and clarify the contract under these circumstances. Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336; Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301; Stillinger & Napier v. Central States Grain Co., Inc., 164 Neb. 458, 82 N. W. 2d 637. It also appears that Food Host drew the contract with the seller and the construction of the ambiguities will be weighted against the drafter. Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497. We therefore hold that the trial court's finding that the contract contemplated the transference of registered stock was supported by the evidence and should be affirmed.

Food Host argues that by accepting and retaining the unregistered stock for a period of time, the plaintiff

waived any objections he might have to Food Host's performance. This argument is realistically refuted by the evidence that shows that Halbert continuously and consistently demanded his stock from sometime in February 1969, and the provisions of the contract which clearly contemplated that the stock, whether registered or not, was convertible into cash at the price of $15 per share under the guarantee given by Food Host. Food Host first raises this issue in this court and did not raise it in the district court. It is not available here. Hancock v. Parks, 172 Neb. 442, 110 N. W. 2d 69; Lucht v. American Propane Gas Co., 183 Neb. 583, 162 N. W. 2d 891.

The next objections of Food Host are procedural in nature. It objects to the decree below on the ground that it was an improper exercise of equity jurisdiction because the court, in effect, entered an award of money damages. It is therefore asserted that the plaintiff had an adequate remedy at law and that equity had no jurisdiction. No prejudicial error could have resulted to Food Host because the record shows that it waived a jury trial and thus subjected itself to a trial of facts by the court.

Was the remedy fashioned a proper one? It is elementary that equity, once it assumes jurisdiction, has the power to devise a remedy which will do complete justice and eliminate further litigation. Penn Mut. Life Ins. Co. v. Katz, 139 Neb. 501, 297 N. W. 899; Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227.

The evidence shows that the market value of Food Host stock declined during the period of time the plaintiff was attempting to sell and to convert his unregistered shares into cash. It is clear that the mere issuance of registered shares after the long period of time in which there was delay in the delivery of the stock, would not give effect to the $15 per share guarantee which the contract specifically provides for. And yet Food Host still argues that in the event the court should make such a finding, effect must be given to

that portion of the contract which provides for the issuance of a Food Host debenture in the event the plaintiff realizes less than $15 per share on a sale of the stock. But the evidence shows that on September 15, 1969, the plaintiff attempted to sell the stock which had been held by Food Host "pending closing." It is clear all the way through the record in this case that the plaintiff did not care to speculate on the market price of Food Host shares and desired to convert the registered shares he was entitled to at the guaranteed price of $15 per share. Had his stock been registered at that time, September 15, as the evidence shows it should have been, plaintiff would have realized at least $15 per share, thus eliminating the need for the issuance of the debenture. The contract contemplates that the plaintiff had a right under his contract to sell his holdings for cash and avoid the issuance of the debenture. This he tried to do but was prevented from doing so by the defendant Food Host's failure to issue him the registered stock as was required by the contract. It is elementary that equity should restore the injured party, as nearly as possible, to the position required by the contract. The repurchase requirement of the contract was fashioned to achieve that end. To allow Food Host to postpone making good on its guarantee for 10 years, during which time the plaintiff would be an unwilling speculator in Food Host's solvency, would hardly do equity between the parties. There is no merit to this contention.

Food Host argues that the plaintiff did not make a sufficient effort to mitigate his damages. We agree with the trial court on this issue. The evidence shows that from the beginning Halbert did everything reasonable to market the shares of stock he was to receive and to convert them into cash. The only reason he was unable to do this was the failure of Food Host to deliver to him registered shares as was contemplated by the contract. There is no merit to this contention.

The last contention that Food Host makes is meritorious. The trial court allowed interest from the date of December 1, 1968. Food Host argues that this was an improper date and that prejudgment interest is not allowable. We hold that interest is allowable where the conduct of a party justifies its allowance, particularly where money or property belonging to another is wrongfully withheld to the enrichment of the debtor and to the detriment of the creditor. This is clearly what happened under all the facts and circumstances in this case. See, 47 C. J. S., Interest, § 13, p. 23; Workman v. Workman, 174 Neb. 471, 118 N. W. 2d 764.

In broad perspective Food Host retained the benefit of the restaurant operations, including the profits or possible profits and capital growth, during the very period of time when the plaintiff was vainly trying to sell his stock, which under the terms of the contract he was entitled to do and upon which there was a guarantee of $15 per share. It is clear that the plaintiff is entitled to interest from the delivery date of the stock, September 13, 1969. The facts show that Food Host was given a reasonable time following the effective date of the registration statement during which to issue plaintiff the registered shares which it did not do. We feel that at that point Food Host prevented the plaintiff from securing the benefit of his bargain while it retained his companies and operated them, and at that point interest began to accrue.

The judgment of the district court is affirmed as modified to include only an allowance of interest from the date of September 13, 1969. Costs taxed to appellant.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. MOORE, APPELLANT.

202 N. W. 2d 740

Filed December 8, 1972. No. 38477.

1. **Criminal Law: Right to Counsel: Confessions.** The doctrine of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, comes into play when the individual is first subjected to police interrogation while in custody.
2. ———: ———: ———. If a person in custody indicates that he wishes the assistance of counsel before an interrogation, the authorities cannot ignore that request and he must be offered counsel.
3. ———: ———: ———. Once the Miranda warnings have been given the procedure is clear. If the individual indicates prior to or during questioning that he wishes to remain silent, the interrogation must cease.
4. ———: ———: ———. If an individual held for interrogation by the police states that he wants an attorney, the interrogation must cease until an attorney is present and the person must have an opportunity to confer with the attorney and to have him present during subsequent questioning.
5. **Criminal Law: Right to Counsel: Confessions: Waiver.** An express declaration that an individual held for interrogation by police is willing to make a statement and to do so without an attorney being present, followed closely by the statement, may constitute a waiver of the privilege against self-incrimination and the right to counsel.
6. **Criminal Law: Right to Counsel.** The fact that counsel may have been appointed or retained prior to any interrogation by police does not prevent the police from administering the Miranda warnings.
7. **Criminal Law: Right to Counsel: Confessions: Waiver.** That police who knew that the defendant was represented by an attorney and failed to give the attorney notice of an intended interview of the defendant did not under the evidence in this case make inadmissible statements made by the defendant because it was violative of the right to counsel where defendant clearly, intelligently, knowingly, and voluntarily waived his right to have counsel present.
8. **Criminal Law: Waiver.** That a waiver may seem or be unwise or not smart, where either prospectively or retrospectively considered, does not necessarily import that it was not intelligently made.

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

Richard L. Goos, for appellant.

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

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

CLINTON, J.

The defendant was charged with assault with intent to commit rape and with sodomy, was found guilty by a jury on both counts, and sentenced to 2 5-year concurrent terms in the Nebraska Penal and Correctional Complex.

This appeal involves the question of whether the constitutional rights of the defendant to counsel and against self-incrimination were violated by the admission of oral incriminatory statements, amounting substantially to a confession. The admissions were made during an in-custody interrogation which followed immediately upon the giving of the Miranda warnings and a waiver by the defendant of his right against self-incrimination and to counsel. Previous to the interrogation counsel had been appointed for him at his request. Also at issue is the question of whether or not the evidence without the incriminating admissions is sufficient to sustain the convictions.

The record discloses the following: The defendant was brought before the county court on October 5, 1971, and the complaint read to him. He was without counsel. His constitutional rights were explained to him by the court. He requested counsel and executed an affidavit of poverty. The court then appointed the public defender to represent him and the date for preliminary hearing was set. The poverty affidavit on which the public defender acknowledged receipt of a copy was filed in the county court that same day. There was

apparently no communication between the public defender and the defendant before the interrogation which thereafter occurred. On that same day at about 6:30 p.m., while the defendant was in custody, he was interviewed by a detective of the Lincoln police department. A portion of this interview involving the Miranda warnings took place in the presence of one Cleveland Narcisse, an alleged accomplice, and in the presence of two of the interviewing officer's associates.

At the trial in the district court defendant's counsel objected to the admission of the incriminating statements on the grounds they were made after the appointment of counsel and to an officer who knew counsel had been appointed and without notification of counsel, and that they were therefore taken in violation of the defendant's rights under the Fifth and Sixth Amendments to the Constitution of the United States. The court held a hearing on admissibility outside the presence of the jury.

The evidence presented at the hearing and later to the jury, insofar as it is pertinent to the first issue, was that the interviewing officer, with the use of a forewarning card, gave the Miranda warnings and received answers in the following form: "A- The first question: 'I would like to advise you that I am a police officer. Do you understand that?' And he stated, 'Uh-huh.' And I asked him at that time to please state 'Yes' or 'No' to the questions. I re-asked him that question. He stated, 'Yes.'

"The second question: 'You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that?' His answer was 'Yes.'

" 'Anything you say can and will be used against you in a court of law. Do you understand that?' 'Yes.' — His answer was 'Yes.'

" 'You have a right to talk to a lawyer and have him

present with you during questioning. Do you understand that?' His answer was 'Yes.'

" 'If you can not afford a lawyer, you have a right to have a lawyer appointed for you prior to questioning. Do you understand that?' His answer was 'Yes.'

" 'Do you willingly do without the services of a lawyer at this time?' His answer was 'Yes.'

" 'Knowing your rights in this matter, are you willing to make a statement to me now?' His answer was 'Yes.' "

The defendant testified at the hearing with the jury absent and said: ". . . he read me the rights, and so forth, which I understood very plainly, you know, and he just asked me questions, you know." At this hearing the defendant stated he had acknowledged to the interviewing officer his part in the incident substantially as that detective had related to the court. He also stated that when asked to give the same information in writing he declined to do so because he wanted to talk to his lawyer about that. This conformed to the testimony of the interrogating officer. Both the defendant and the officer stated the interrogation ceased when the defendant indicated he would not give a written statement until he consulted his lawyer. There was also testimony by the defendant that the officer told the alleged accomplice in defendent's presence that if he would "cop-out" it would go easier on him. The officer denied making such a statement. Before defendant made the admissions he at his request had a private conference with the alleged accomplice.

At the time of the interview the defendant was uncertain whether a lawyer had been appointed for him but knew that one would be. The officer knew at the time of the interview that legal counsel had been appointed for the defendant. The record does not disclose that the police had made or attempted to make any earlier in-custody interrogation of the defendant.

The court made a preliminary determination that the Miranda warnings had been properly given; that the

defendant had waived his privilege against self-incrimination and his right to have counsel present at the interrogation; and that the oral statements were voluntarily, knowingly, and intelligently made. We interpret this also as a finding by the court that the waivers were voluntary, knowing, and intelligent, which is what Miranda requires.

The court then permitted the evidence of the waivers and the admissions to be presented to the jury through the testimony of the officer. The defendant did not testify before the jury. Neither did the accomplice. The court gave the jury NJI No. 14.52 defining the findings the jury must make before considering the admissions as evidence.

Defendant's position as he succinctly states it in his brief is that a confession or admission resulting from an in-custody interrogation in the absence of counsel after defendant requested and had counsel appointed for him is inadmissible under the Sixth Amendment to the Constitution of the United States. The defendant relies upon the following language of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."

He also cites People v. Fioritto, 68 Cal. 2d 714, 68 Cal. Rptr. 817, 441 P. 2d 625; and State v. Johns, 185 Neb. 590, 177 N. W. 2d 580. Also having application or touching the issue, we believe, are State v. Godfrey, 182 Neb. 451, 155 N. W 2d 438, cert. den. 392 U. S. 937; and State v. Woods, 182 Neb. 668, 156 N. W. 2d 786. The State cites and relies upon Coughlan v. United States, 391 F. 2d 371, cert. den. 393 U. S. 870, for the proposition that an accused may waive his right against self-incrimina-

tion and to have counsel present at interrogation even after counsel had been appointed at his request.

Miranda does not cover precisely the situation with which we are confronted here. The application which the defendant argues for would be an extension or enlargement of the doctrine of Miranda. The defendant's position is that if the defendant has an attorney, either retained or appointed, then there may be no interrogation of the defendant even if there has been no prior in-custody interrogation or attempts to interrogate. This position in substance amounts to the contention that once counsel is appointed or has been retained there can be no waiver unless it be by counsel or in his presence.

Miranda does not go that far.

In Miranda the court said: "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is *first subjected to police interrogation while in custody* at the station or otherwise deprived of his freedom . . .." (Emphasis supplied.) Miranda concerns itself primarily with removing the inherent intimidation of custodial interrogation by assuring that the defendant knows he does not need to say anything, that anything he does say can and will be used against him, that he has the right to counsel during the interrogation, that counsel will be provided by the State if necessary, and that the authorities will respect his right to remain silent if he wishes. In this way there is an objective standard to use in determining whether a waiver is voluntary, knowing, and intelligent, and the need for a subjective examination of these matters by the court is to a large extent removed. In Miranda and its companion cases the defendants did not have counsel and were interrogated without having been previously advised of their rights. These cases have no direct application to the situation where the defendant asked for and receives counsel at his preliminary arraignment

and there has been no attempt at custodial questioning.

In Miranda it was said: "If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on *the basis that the individual does not have . . . retained attorney.*" (Emphasis supplied.) This language does not imply that a defendant who does have counsel may not be interrogated. On the contrary, it seems to recognize that the Miranda warning must be given even to those who have counsel. Miranda also says: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, *that he wishes to remain silent,* the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." (Emphasis supplied.)

When the defendant asked to have an attorney appointed he was not being interrogated by the police. he was before the magistrate. There was no custodial interrogation until after the warning had been given and an express waiver made.

The doctrine for which the defendant contends is a logical expansion of the Miranda doctrine, but so far it has not been so extended by the Supreme Court of the United States. That court has not expanded the rule in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, in cases where only that rule was applicable. It may not expand Miranda. See Frazier v. Cupp, 394 U. S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684. There the court held that there was no denial of the right to counsel by the police on interrogation of a suspect, so as to render a confession inadmissible in a State prosecution, notwithstanding the suspect showed signs of reluctance during questioning and stated: " 'I think

I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now.' " The officer replied: " 'You can't be in any more trouble than you are in now.' " The court said it was possible that the questioning officer took the defendant's remark not as a request that the interrogation cease but merely as a passing comment. The defendant did not pursue the matter but continued answering questions.

The defendant's position in this case is very eloquently stated by Judge Hamley in a forceful dissent in Coughlan v. United States, *supra.* Among other things he quoted Chief Justice Burger (then Circuit Judge) as follows: " 'The prospective application of Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), plainly will require that such interviews [interviews of defendants without notice to their then retained or appointed counsel] can be conducted only after counsel has been given an opportunity to be present.' (374 F. 2d 316, n. 3)"

A logical extension of the language of our own cases lends some support to the plaintiff's position. In State v. Godfrey, *supra,* the defendant was arrested in connection with a burglary. At the police station he was read his Miranda rights and replied in the negative when asked if he cared to give a statement. He was then booked and placed in a cell. Later he was called back, reread his rights, and after responding yes to the crucial questions, he then made a confession. He would not sign the statement, however, and at the trial the unsigned statement was introduced into evidence over the defendant's objection. This court affirmed the conviction, saying that merely answering no to the initial request to make a statement was not sufficient to invoke the right to counsel, and that this also did not invalidate a later waiver that is voluntary, knowing, and intelligent. The only real difference between Godfrey and the present case is that Moore had requested and had counsel appointed at his preliminary arraignment

and prior to any interrogation. In State v. Godfrey, *supra,* this court said: "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." (Emphasis supplied.) That language does not apply to the situation here because the defendant had not indicated he wanted an attorney "before speaking to the police" as there was no interrogation in progress and none had even been attempted. When the defendant was first confronted with police in-custody interrogation he expressly waived his rights to remain silent and to counsel. When asked to give the statement in writing, he then stated he wanted to talk to his counsel about that. This right was respected and the interrogation did in fact cease.

In State v. Woods, *supra,* the decision of this court turned upon the determination of the trial court made at an admissibility hearing that following a first demand for counsel defendant had subsequently waived his rights in writing and made a voluntary confession. No counsel had been appointed before the final waiver. It seems to simply stand for the proposition that although the defendant had previously demanded counsel he could thereafter waive that right. To us it seems simply to say that a second giving of the Miranda warnings is not part of the interrogation prohibited after either right to remain silent or right to counsel has been invoked. We caution, however, against any delay whatsoever in appointment of counsel or giving access to counsel, once right to counsel has been invoked, in order to repeatedly administer the warnings in the hope of ultimately securing a waiver.

Defendant places primary reliance upon State v. Johns, *supra.* In that case the defendant was represented by retained counsel. He was arrested in Douglas County

and this is where his counsel had his office. He asked to see his attorney. He was told he could but he was unable to contact his attorney immediately. The Miranda warnings were given and he stated in writing: " 'I would like to have my attorney present.' " He was then taken by officers to the Dodge County jail. When the defendant's attorney learned of his whereabouts and before any interrogation in Dodge County began, counsel called the county attorney of that county and advised him that he did not wish to have the defendant questioned. The county attorney agreed to advise the police department but for some reason did not until after the waiver of rights had been secured from the defendant and a confession obtained. This court held the confession was inadmissible and reversed the conviction. A dissenting opinion in Johns interpreted the majority as being in conflict with State v. Godfrey, *supra,* and indicated that the majority opinion meant that "once a defendant has demanded or obtained a lawyer, he cannot thereafter be questioned under any circumstances in the absence of his lawyer and cannot waive the right to have his lawyer present, at least unless such waiver is made in the presence of his lawyer," and that this interpretation of the majority opinion made the statements inadmissible in the Johns case.

We do not think the majority opinion in State v. Johns, *supra,* goes so far as the defendant here seems to believe or as the above dissenting opinion indicated. We think there are at least two substantial distinctions between Johns and this case: (1) The defendant in Johns had *during a police interrogation once unequivocally* invoked the right to have counsel present during questioning, and (2) the delay by the county attorney in relaying to the police counsel's request that his client be not questioned constituted at least a negligent interference by the State with the defendant's right to counsel and was in effect an unconstitutional deprivation of right to counsel.

People v. Fioritto, *supra,* is not applicable. It involved continued questioning of a defendant who had invoked his rights.

We determine that the incriminating statements of the defendant were properly received. Except for the question of the absence of counsel, neither the evidence here nor the applicable rules require that we overturn the trial judge's preliminary determination that the waiver was voluntary, knowing, and intelligent. State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66; State v. Long, 179 Neb. 606, 139 N. W. 2d 813. The fact that a waiver may seem or be unwise or not smart when either prospectively or retrospectively considered does not necessarily import that it was not intelligently made. United States v. Hall, 396 F. 2d 841; Pettyjohn v. United States, 419 F. 2d 651. The precise situation we have here was considered by the Ninth Circuit in Coughlan v. United States, *supra,* and that court determined adversely to the defendant's position. A situation analogous to that here presented was considered by the Fifth Circuit in Narro v. United States, 370 F. 2d 329, cert. den. 387 U. S. 946. In that case the defendant indicated that her family *would be getting* an attorney for her. She, however, waived her right to have counsel at the interrogation. The court held the waiver was valid. From the standpoint of the defendant Moore his position and that of Narro is the same where as here the defendant knew counsel would be, if not already, appointed. Some state courts have expanded the Miranda doctrine and support the defendant's contention. State v. Witt (Mo., 1967), 422 S. W. 2d 304; State v. Herman, 3 Ariz. App. 323, 414 P. 2d 172.

We, as all courts, are bound of course to follow the mandates of the Constitution of the United States as interpreted by the Supreme Court of the United States. But what we are asked to do here is to anticipate a possible expansion of the Miranda doctrine which may or may not develop. We do not feel constrained to

lead the way. The pronouncements of Miranda at the time of their promulgation represented new constitutional theory designed to correct perceived imbalances in the criminal processes. The decision in this case involves closely competing values, to wit, the implementation of the constitutional rights of the accused and the effectiveness of the police investigatory process. The need for further correction of an imbalance is not apparent.

This opinion should in no way be interpreted as lessening the ethical responsibilities of the prosecutor to observe the obligations imposed upon him by Canon 7 of the Code of Professional Responsibility with reference to communication with parties represented by counsel and he cannot countenance violations by those in the investigatory process who are or when they become subject to his supervision and control. This much certainly is implicit in State v. Johns, *supra.*

We have, of course, examined the whole record. That the alleged crimes occurred is unquestionable. The victim's male companion identified the defendant. There was some corroboration of this identification by the victim and an additional witness who happened to come upon the parties. The evidence to convict would have been legally sufficient to support a jury verdict even without the admissions but, of course, would have been much less persuasive. Had the rulings of the court on the admission been erroneous the error would without question have been reversible.

AFFIRMED.

NEWTON, J., concurring.

I concur in the result arrived at in the majority opinion for the reasons, and on the basis of citations, appearing in my dissent in State v. Johns, 185 Neb. 590, 177 N. W. 2d 580.

ANTHONY M. ERA, SR., APPELLANT, V. SAPP BROS. GMC, INC., APPELLEE.
202 N. W. 2d 750

Filed December 8, 1972. No. 38482.

Trial: Evidence: Jury. Before the evidence is submitted to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Frank Meares, for appellant.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

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

WHITE, C. J.

In this case the trial court sustained the defendant's motion for a directed verdict on plaintiff's action for damages from the loss of use of his 1960 G.M.C. truck allegedly caused by negligent performance of repairs to said truck performed by the defendant Sapp Bros. We hold that the trial court's finding of the insufficiency of the evidence to submit the case to the jury is correct and we affirm the judgment of the district court.

Plaintiff's evidence consisted of his own oral testimony, certain written repair orders made out by the defendant Sapp Bros., a list of requested repairs made out by the plaintiff, and numerous canceled checks which allegedly represented payments made by the plaintiff to other haulers during the period of time he alleges that his 1960 truck was out of service.

The plaintiff testified on direct examination that he was the sole hauler of residue for the Quaker Oats plant in Omaha. He used two trucks in this business, the one involved here and a 1963 truck, both of which had

been and were serviced quite regularly at the defendant's repair shop.

The solution to this case is foreshadowed by an examination of the pleadings. It is elementary that the pleadings frame the issues between the parties, and the evidence must be confined to those issues. § 25-846, R. R. S. 1943; Pinkerton v. Leonhardt, 184 Neb. 430, 168 N. W. 2d 272; Watson Bros. Transp. Co. v. Jacobson, 168 Neb. 862, 97 N. W. 2d 521. Giving the plaintiff's petition the most liberal construction possible under law, his petition states a cause of action for recovery for the loss of use of his dump truck due to the alleged negligent repair of the transmission by the defendant on or about October 10, 1968. This is the issue and the only issue that is framed by the pleadings in the case. It is the theory upon which both parties prepared for trial and attempted to introduce evidence.

In the plaintiff's petition he claims negligent repair of the transmission on October 10, 1968. We will not repeat the testimony by the plaintiff in this area. Suffice to say it is confusing, contradictory, and uncertain. Certain undisputed facts, however, stand out in the record. The evidence as to the actual work performed by the defendant Sapp Bros. consisted of recitals in "repair orders." The repair order of October 10, 1968, the date alleged in the petition, is totally silent on any matter of transmission repair. It includes other items. Nor do the other repair orders of September 27, 1968, October 7, 1968, October 20, 1968, or October 25, 1968, have any suggestion or mention of transmission difficulty nor do they direct or report any transmission repair. The evidence does show, both by the plaintiff's own oral testimony and the written repair orders, that numerous other items of repair were requested and were performed. The most that could be said from this evidence is that it is clear the plaintiff's truck was in need of repair, not because of an inoperative transmission but because of inoperative brakes.

The evidence shows that the period of time the plaintiff claimed the truck was out of service was from October 10, 1968, through December 31, 1968. The plaintiff's own testimony is that the repairs on the order of October 10, 1968, which did not include transmission work as shown by exhibit 2, were not completed until approximately October 16. He makes no complaint that the repairs took too long a time. It appears that after October 16, 1968, the plaintiff used the truck. A few days later, on October 20, 1968, the truck was brought in for repairs on the brakes. The plaintiff's own words were "The brakes never worked right." This evidence indicates that the truck was in use between October 16 and October 20, 1968. The plaintiff's testimony is uncertain but it is clear that the truck was used after October 20, 1968, because on October 25, 1968, it was towed to the defendant's garage for the repair of the brakes again. After that day, October 25, 1968, the truck was again used by the plaintiff and thereafter was traded off. The exact testimony in this respect by the plaintiff is as follows: "Q. Then how long did you have it after they fixed it that time? A. A couple days or maybe a day. The brakes - I finally took the truck over to Spring Service, and they couldn't even fix the brakes. I finally got rid of the truck." It appears from the evidence that if the truck was out of service after October, it was because the plaintiff no longer owned it or because the brakes did not work. Without going into further detail, we conclude that the only possible proof of loss of use is for the period of time between October 16, 1968, through October 29, 1968. But it is equally clear there is absolutely no evidence in the record that would support a conclusion the truck was out of service during that period of time because of any fault of the defendant or because of an inoperative transmission. No evidence was presented in the case that anyone worked on the transmission *at any time*, but it is clear that if after October 16, 1968, the truck was out of service be-

cause of a bad transmission, there would be evidence that someone repaired it or someone requested the repair for it. As we have pointed out the only testimony as to repairs during this period of time was with relation to the brakes. The plaintiff's own evidence showed the truck was in use at least a part of the time between October 16 and the time when he traded it off. Moreover, the plaintiff conceded on cross-examination that the truck was traded to the International Harvester and stated "they tried to put brakes on it. They couldn't do it, and they got rid of the truck 'as is.'" The only reasonable inference to be drawn from the plaintiff's testimony as a whole is that the 1960 truck was out of service for the period of time it was, because of bad brakes.

The controlling principle of law applicable to the evidence in this case has recently been stated by this court as follows: "A verdict should be directed if the evidence is undisputed or if the evidence, even though conflicting, is so conclusive that it is insufficient to justify a verdict or sustain the judgment." Stewart v. Ritz Cab Co., 185 Neb. 692, 178 N. W. 2d 577. Our court has said many times that in every case, before the evidence is submitted to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Where an issue even assuming it is properly pleaded, affords no basis for recovery under the evidence actually introduced in the case, the trial court's submission of such an issue to a jury constitutes error. Baker v. Daly, 188 Neb. 156, 195 N. W. 2d 755.

The trial court found as we do that the plaintiff, under the pleaded issue presented in this case, utterly failed to meet the requisite burden of proof placed upon him by his own petition. There is no evidence to support the cause of action alleged in his petition which

was for the loss of use from the negligent repair of the transmission of his truck.

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

AFFIRMED.

F. HOYTE FREEMAN ET AL., APPELLEES, V. GEORGE ROSE, APPELLANT.
202 N. W. 2d 586

Filed December 8, 1972. No. 38492.

Evidence: Actions. Where cases are interwoven and interdependent, and the controversy involved has already been considered and determined by the Supreme Court in former proceedings, this court may examine its own records and take judicial notice of its own proceedings and its judgment in the former action.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Ralph R. Bremers, for appellant.

Keith I. Frederick of Schmid, Ford, Mooney, Frederick & Caporale, for appellees.

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

WHITE, C. J.

The Freemans, plaintiffs, brought this action to recover the unpaid balance of rent due under a written lease agreement with the defendant Rose. The jury returned a verdict for the plaintiffs in the amount of $58,301.05, for which the district court entered judgment. We affirm the judgment of the district court.

It is undisputed that the lease agreement provided for the lease of a sod farm of approximately 100 acres to the defendant for the term of 4 years with a minimum annual rental of $23,450. The plaintiffs sought

and were given judgment for $58,301.05 as the balance of the rent due for the years 1967, 1968, and 1969, the 3 years of the rental period during which the defendant was in possession of the premises. The defendant himself testified that he had paid only $12,048.95 in rent during the period of 1967, 1968, and 1969.

This action, involving the same parties, the same land, and the same lease agreement is a sequel to a previous action between the parties which reached final determination by this court in the case of Freeman v. Rose, 187 Neb. 176, 188 N. W. 2d 682. That was a declaratory judgment action involving the rights of the parties under the lease agreement and in which it was sought to establish that the defendant had rights under a clause in a lease giving him an option to purchase. We take judicial notice of that action and the findings and determinations made in that case. They are binding on both parties in this litigation. Our judgment in the former case reveals this court found there was a valid written lease agreement between the parties and the defendant was in default of payments under the lease agreement. We therefore quieted title to the real estate in the plaintiffs. The defendant in the prior action litigated his cross-petition for damages, arising out of a claim to rights to purchase under an option. The cross-petition was dismissed with prejudice. This court has stated the general rule to be that where cases are interwoven and interdependent, and the controversy involved has already been considered and determined by the Supreme Court in former proceedings, this court may examine its own records and take judicial notice of its own proceedings and its judgment in the former action. Glissmann v. Orchard, 152 Neb. 500, 41 N. W. 2d 756; Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224.

The assignments of error by the defendant in this second action and his contention in his brief are premised upon a right to relitigate the same issues this

court decided in the previous case cited *supra*. This he may not do. The district court in this action therefore properly found that the only issue to be tried under the pleadings in this case was whether or not the plaintiffs were entitled to damages for nonpayment of the rent, and if so, how much. It is undisputedly true that in the former litigation there was no allegation or attempt to recover damages in the declaratory judgment action for the breach of the lease payment agreement. That issue was not raised previously in the declaratory judgment action decided by this court. It is now the subject of the litigation in this second subsequent and independent action. The above elaboration of the background in this case is sufficient for a determination of the issues involved herein. For clarity purposes we will briefly review the background and the determination of this court of the previous action. The plaintiffs in this present action, F. Hoyte Freeman and Ina W. Freeman, in 1967 were the owners of approximately 100 acres of land located in Sarpy County, Nebraska. Sometime prior to June 1967, the defendant, George Rose, approached Mr. Freeman about leasing the land for use as a sod farm. On June 22, 1967, the parties entered into a written lease agreement which also provided for option to purchase under certain conditions. In the fall of 1969, more than 2 years later, the defendant was in default of his rental payments. He recorded the written agreement including the option to purchase in the real estate records of Sarpy County and notified the plaintiffs that he was exercising such purchase option. The plaintiffs then notified the defendant in writing that he was in default of his rental payments and the previous action of Freeman v. Rose, cited *supra*, was filed, seeking a declaratory judgment. That action terminated in findings and declarations that we have already discussed in this opinion. The declaratory judgment action was decided in an opinion by this court filed on July 2, 1971.

We will briefly mention the assignments of error that relate to alleged error in the trial of the precise issues presented to the jury for determination as to whether there was a failure to pay the rental payments and their amount. The defendant now contends, in substance, that the evidence is insufficient to sustain the jury's finding and the judgment in the amount of $58,301.05. The only evidence before the jury was that the defendant had, in fact, assumed and taken possession of the real estate for the years 1967, 1968, and 1969, all of which possession occurred prior to the termination of any of the defendant's rights in the real estate. A detailed computation from the record is not necessary. The defendant's own testimony was that the total payment he made was in the sum of $12,048.95. After allocation of the payments received, the plaintiffs asked for and the jury verdict was for default in the rentals on February 28, 1968, of $16,917.50; on February 28, 1969, of $20,948.55; on February 28, 1970, of $20,435, or a total sum of $58,301.05, the amount of the judgment entered in this case. We observe that no rental or damages were claimed or alleged by the plaintiffs after February 28, 1970, although the defendant, the evidence shows, continued to claim the premises in the prior action and continued to store his machinery on the property up through the final determination of that action and through the present action. It is obvious there was sufficient evidence to support the jury's verdict as to the default in the lease and the amount of the verdict in the sum of $58,301.05. The defendant attempted to prove that he did not receive the use of all the land provided for by the lease. The lease referred to "100 acres, more or less." A survey by the defendant 4 years after the lease was executed showed there were, in fact, 95.68 acres in the tract leased to the defendant. The undisputed evidence, elicited from the defendant on direct examination is that he viewed the premises prior to entering into the lease, that he was

shown the complete boundaries in the area involved in the property, the buildings, the dikes, and other included fixtures. The evidence is undisputed that he entered into the lease, making no objection to the boundaries or the buildings or the amount of growing sod and no such objection was ever made prior to the time of the trial in this case or the declaratory judgment action, although the lease agreement commenced in early 1967. There is no merit to this contention.

We have examined the defendant's contentions with reference to alleged error in the giving of certain instructions. The record shows in this case that after the court had inquired as to whether the parties had rested, he submitted his proposed instructions to counsel. A conference was had upon the proposed instructions and no objections were then made by counsel for the defendant to the instructions. Instruction No. 5 which is specifically objected to by the defendant in this court was discussed by the court and counsel in detail in the conference on instructions. No objection was made by the defendant and he may not assert one now. Martinez v. Hoveling, 184 Neb. 560, 169 N. W. 2d 428; Beveridge v. State, 183 Neb. 406, 160 N. W. 2d 229.

In conclusion, the assignments of error mainly relate to an attempt to relitigate the issues in this case which were previously tried in the lower court and finally determined by this court in the previous case. The issues of breach of the payment of lease rentals and the amount thereof were properly instructed upon by the trial court, and the jury returned a verdict amply supported by the evidence.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY DUITSMAN, APPELLANT.

202 N. W. 2d 749

Filed December 8, 1972. No. 38520.

Criminal Law: Sentences: Appeal and Error. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion.

Appeal from the district court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Bauer, Galter & Scott and Paul E. Galter, for appellant.

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

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

MCCOWN, J.

The defendant pleaded guilty to a charge of assault and battery. He was sentenced to 90 days in the county jail. The only issue on appeal is his claim that the sentence was excessive.

The record reveals that defendant attacked the victim with a 14-inch wrench which had a sharp edge on it. The victim had two cuts on his head which required stitches. Under a plea bargain, the original charge of felonious assault was amended to the misdemeanor charge here and the defendant pleaded guilty. In addition, the defendant's previous record shows multiple misdemeanor convictions, at least one of which was a conviction for assault and battery. It also includes at least one violation of probation. See State v. Duitsman, 186 Neb. 39, 180 N. W. 2d 685.

The authorized penalties here include a jail sentence not exceeding 6 months. See § 28-411, R. S. Supp., 1972. The 90-day sentence demonstrates the exercise of sound judicial discretion. The appeal here is utterly frivolous. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an

abuse of judicial discretion. State v. Ernest, 188 Neb. 648, 198 N. W. 2d 335.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY RAY MCELROY, APPELLANT.

202 N. W. 2d 752

Filed December 8, 1972. No. 38521.

1. **Criminal Law: Searches and Seizures: Time.** In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard: Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate?
2. **Criminal Law: Searches and Seizures: Arrest.** When an officer makes an arrest, it is reasonable for him to search the person arrested and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. That justification is absent where a search is remote from the arrest.
3. **Criminal Law: Right of Privacy.** Wherever an individual may harbor a reasonable expectation of privacy he ought to be free from unreasonable governmental intrusion.
4. **Criminal Law: Searches and Seizures.** The constitutional validity of a warrantless search can only be decided in the concrete factual context of the individual case.
5. **Criminal Law: Controlled Substances.** In the absence of a legislative declaration to the contrary, a quantity with a potential for abuse is not an essential element of the offense of unlawful possession of a controlled substance.

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

Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellant.

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

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

SMITH, J.

Defendant was convicted of unlawful possession of

cocaine. On appeal he contends (1) no probable cause existed for the warrantless arrest of defendant, (2) seizure of the cocaine in a warrantless search of defendant at the station house subjected the evidence to the exclusionary rules, and (3) conviction without proof of possession of a quantity with a potential for abuse entitled defendant to a new trial.

On October 7, 1971, David Jansa, a police officer, through binoculars observed the driver of a van in a parking space of a drive-in light a pipe. A flame of 4 inches arose. It indicated marijuana or hashish to Jansa, whose training and experience in such investigations were wide.

Ten minutes after the observation the van proceeded to a point where Jansa stopped it. Defendant, the operator, stepped out and walked back to meet Jansa. While defendant was producing his operator's license, Jansa at a distance of 3 feet smelled "suspected" marjuana which emitted a weedy odor. The two men then walked to the van for Jansa ostensibly to examine the vehicle registration. There Jansa, looking over defendant's shoulder, smelled a marijuana odor that was emanating from the van. He saw a passenger who was smoking a cigarette, a paper bag on the floor, and a pipe between the driver's and passenger's seats. The pipe with a cover of cellophane outside and inside the bowl was smoldering. Having seized the pipe and looked inside the bowl, Jansa arrested both men. The vehicle registration was not checked. In a search at the scene a small bag thought to contain marijuana was found in the overcoat pocket of defendant.

At the police station defendant disrobed on orders of Jansa. In the search Jansa removed from defendant's wallet this item: A folded opaque newspaper, 1½ by 2 inches, that enclosed a minute quantity of cocaine hydrocloride, container and contents together weighing only 5 milligrams. Defendant said he had possessed the substance for a long time and "a guy has got to

make a living." The substance was consumed in the chemical tests for cocaine.

An incident search may not precede an arrest and serve as part of its justification. Sibron v. New York, 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard. Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate? Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

When an officer makes an arrest, it is reasonable for him to search the person arrested and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. That justification is absent where a search is remote from the arrest. See Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). Wherever an individual may harbor a reasonable expectation of privacy he ought to be free from unreasonable governmental intrusion. Terry v. Ohio, *supra*. The constitutional validity of a warrantless search can only be decided in the concrete factual context of the individual case. Sibron v. New York, *supra*.

Probable cause existed for the conduct of Jansa at the scene, and the search and seizure at the station were not remote. The latter furthermore served to protect defendant and others from use of dangerous drugs, such as lysergic acid diethylamide, at the station. The district court correctly denied defendant the benefit of the exclusionary rules.

The Uniform Controlled Substances Act, which governed, does not expressly define the offense of unlawful possession of cocaine in terms of quantity with a potential for abuse. See § 28-4,125(3), R. S. Supp., 1972. Some courts have so interpolated the act or a

similar statute, but others have not. Watson v. Nevada (Nev., 1972), 495 P. 2d 365.

The argument in favor of the requirement is well stated by counsel for defendant: "It is inconceivable that 5 mg. of cocaine, even unadulterated, might have any potential for abuse . . . . To assume that 5 mg. of cocaine (100% pure) can produce any effects on an individual is an assumption not sustained by scientific literature. Sollman, A Manual of Pharmacology, 8th Ed., (1957), p. 334; Whealy, Drugs and the Criminal Law, 12 Crim. L.Q. 254 (1970); Eldridge, Narcotics and the Law (1962), pp. 1-34."

A relatively minor problem with the rule urged by defendant might be the overburdening of qualified chemists and laboratories. See ALI-ABA, Course of Study on Defense of Drug Cases (1971), Segal, "Defense in Possession and Sale Cases," 272 at 276. More important, the statutory provision does not specify a quantity with a potential for abuse. On balance the following rule is adopted: In the absence of a legislative declaration to the contrary, a quantity with a potential for abuse is not an essential element of the offense of unlawful possession of a controlled substance. Possession of course must be knowing and intentional.

Defendant was not entitled to a new trial.

AFFIRMED.

McCOWN, J., dissenting.

The total weight of the "controlled substance" involved here, including the 1½ by 2 inch piece of newspaper in which it was folded was only 5 milligrams. In terms of ordinary American usage, that is less than 2/10,000's of an ounce. The laboratory technician did not know how much of that infinitesimal weight was the piece of newspaper. The substance was washed out of the newspaper before testing and the newspaper was discarded. The tests did not ascertain the percentage of cocaine. There was no test as to purity. There was no test as to whether the substance was active or inactive

biologically or physiologically. The substance was entirely used up in the tests to determine what it was.

The Uniform Controlled Substances Act makes possession of a controlled substance a crime unless the possession is authorized by the act. The Legislature did not establish any minimum amounts of a controlled substance, possession of which is requisite for a criminal conviction.

Under similar statutes, some courts, and now this court, have interpreted the language to ban the possession of even the most minute traces of any narcotic or controlled substance. Other courts have held to the contrary. We believe the better rule to be that possession of a minute quantity of a controlled substance, useless as a drug, is insufficient to sustain a conviction for knowing possession of a controlled substance. See, People v. Leal, 50 Cal. Rptr. 777, 413 P. 2d 665 (1966); Watson v. State (Nev., 1972), 495 P. 2d 365; State v. Haddock, 101 Ariz. 240, 418 P. 2d 577 (1966).

The substance used as the basis for prosecution ought to be of such a quantity and quality as to be susceptible of use as a drug. The intent necessary to establish the crime of possession simply does not exist when the amount is so minute as to be incapable of being applied to any use, even though chemical analysis may identify a trace of a prohibited drug.

BOSLAUGH and CLINTON, JJ., join in this dissent.

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

STATE OF NEBRASKA, APPELLEE, V. BETTY GREEN JONES, APPELLANT.

202 N. W. 2d 747

Filed December 8, 1972. Nos. 38524, 38580.

Criminal Law: Searches and Seizures: Motor Vehicles. When materials in an automobile which are indicative of a criminal offense are in plain sight of an officer looking into the auto-

mobile from the outside, a search is justified and legal.

Appeals from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

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

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

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

NEWTON, J.

Defendants, together with one Kathy Moran, were tried with two of four men caught red-handed in an attempt to break into and enter a Safeway Store in Scottsbluff, Nebraska, on the night of May 16, 1971, at 11:57 p.m. The four men were Lonnie Norman, Charles Watkins, Terry Benson, and Michael Ware. Ware and Benson had entered pleas of guilty and the rest were found guilty by the jury. We affirm.

Jones, Moran, and Moore were apprehended at about 1:15 the following morning in Minatare which is 10 or 12 miles from Scottsbluff. They occupied an automobile bearing Wyoming plates and registered in the name of Ware, one of the defendants who plead guilty. Several tools suitable for use in breaking and entering were observed in sight on the floor of the back-seat area. Found in the automobile were wallets containing papers indicating they belonged to Ware and Benson, two persons apprehended during the course of the burglary. Also found in the car were the drivers' licenses of these two individuals and men's clothing. Some of the tools found were of the same make as those left at the scene of the crime and one had a red substance on the tip similar to that observed on some of the tools at the scene. An army-type laundry bag was found in the car similar to one found on the Safeway Store premises. Each bore price tags in like amounts and in similar handwriting.

Defendants contend the search of the automobile and the seizure of certain contents lying within were illegal. After driving the car from Minatare to Scottsbluff at the request of the state police, the defendants were arrested and booked by the Scottsbluff police. The car was locked by the driver but the burglary tools and laundry bag it contained were observed when the officers looked through the windows. Later the car keys were obtained and the contents first above mentioned removed. "A search implies some exploratory investigation. It is not a search to observe that which is open and patent either in daylight or in artificial light." State v. Howard, 184 Neb. 274, 167 N. W. 2d 80.

"When materials in an automobile which are indicative of a criminal offense are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal." State v. Rys, 186 Neb. 341, 183 N. W. 2d 253. See, also, State v. Oltjenbruns, 187 Neb. 694, 193 N. W. 2d 744.

"Objects which are in plain view are subject to seizure by an officer who has a right to be in the position to have that view." State v. Collins, 186 Neb. 50, 180 N. W. 2d 687.

Defendants' final contention is that error was committed when the State called Ware and Benson to the witness stand, inquired if each had entered a plea to the offense with which defendants were charged, and receiving affirmative answers asked them to tell the facts of the attempted burglary which they declined to do. This evidence was not objected to and, in any event, in the light of the testimony of the officers regarding the apprehension and arrest of Ware and Benson could not have been prejudicial. In addition, the court gave NJI No. 14.54 which would adequately guard against prejudice.

The judgments of the district court are affirmed.

AFFIRMED.

IN RE INTEREST OF PATRICK MARK MILLER.
STATE OF NEBRASKA, APPELLEE, V. PATRICK MARK MILLER, APPELLANT.
203 N. W. 2d 97

Filed December 15, 1972. No. 38318.

1. **Courts: Infants: Clerks of Court: Records.** All records in the juvenile court pertaining to proceedings relating to a particular child may be filed together.
2. **Courts: Infants: Trial.** The juvenile court is presumed to disregard all irrelevant matters in determining whether a child is a delinquent child.
3. **Courts: Infants: Trial: Evidence: Records.** In a disposition hearing the juvenile court may consider all previous matters in the juvenile court pertaining to the child.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

N. Michael Fitzgerald of Matthews, Kelley, Cannon & Carpenter, for appellant.

Donald L. Knowles and Colleen R. Buckley, for appellee.

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

BOSLAUGH, J.

Patrick Mark Miller, the defendant, was charged in juvenile court with stabbing with intent to kill, wound, or maim. On July 8, 1971, the court found the charge was true and the defendant was a delinquent child. On July 30, 1971, the court ordered the defendant committed to the care of the Department of Public Institutions. The defendant appeals contending the judgment is contrary to the evidence; the petition was improperly filed; and the court erred in considering the defendant's prior record.

The evidence shows that George William Zaracki was stabbed outside the Sokol Bowling Alley in Omaha, Nebraska, on March 2, 1971. The defendant was identi-

fied by Zaracki and several eyewitnesses as the person who stabbed Zaracki. Although there was evidence to the contrary, the evidence clearly sustains the adjudication beyond a reasonable doubt. See Grant v. Doeschot, *ante* p. 121, 201 N. W. 2d 252.

The defendant was first brought before the juvenile court in October 1969. The petition filed at that time contained four counts. The juvenile court found the defendant was a child in need of special supervision and placed him on probation for 6 months.

The present charge was contained in a supplemental petition filed on March 4, 1971, which was placed in the folder containing the petition and other papers relating to the proceedings in 1969. The defendant contends this was prejudicial to him because it served to remind the court of his previous record.

The statute does not prescribe a particular method for filing petitions in juvenile court. Section 43-206.04, R. S. Supp., 1969, provided in part: "Juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, certificates or receipts of mailing, minutes of the court, findings, orders, decrees, judgments and motions." Section 43-205, R. R. S. 1943, prescribes the title to be used for the original petition and all subsequent proceedings. Section 43-209, R. R. S. 1943, refers to supplemental petitions. After a child has been adjudged to be a neglected or delinquent child the jurisdiction of the juvenile court is continuing. Miller v. Department of Public Welfare, 182 Neb. 155, 153 N. W. 2d 737. It would seem to be a reasonable and logical procedure to keep all records pertaining to a particular child in one folder.

The defendant's claim of prejudice lacks substance. The prior hearing was before the same judge but this affords the defendant no basis for complaint. It is presumed the trial court disregarded all irrelevant matters in making the adjudication. Krell v. Sanders, 168 Neb. 458, 96 N. W. 2d 218. The fact that the second petition

was denominated a supplemental petition and placed in the folder containing the original petition gives him no basis for relief.

It was proper for the juvenile court to consider the previous record of the defendant at the disposition hearing on July 30, 1971. For this purpose it was unnecessary to make a formal offer of the record of the 1969 proceeding and receive it in evidence. Where proceedings are interwoven and interdependent the trial court may take judicial notice of its own proceedings and records. Hubbard v. Loewenstein, 181 Neb. 96, 147 N. W. 2d 164.

There being no error in the record, the judgment of the juvenile court is affirmed.

AFFIRMED.

JOHN GUBALKE, FATHER AND NEXT FRIEND OF JOSEPH GUBALKE, A MINOR, APPELLANT, V. ESTATE OF RUEBEN G. ANTHES ET AL., APPELLEES.

202 N. W. 2d 836

Filed December 15, 1972. No. 38422.

1. **Property: Infants: Negligence: Trespass: Nuisances.** A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if: (a) The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass; (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children; (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it; (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

2. **Statutes: Ordinances: Time: Evidence.** In order that an ordinance or statute be relevant on an issue of a standard of care, it must have been in effect at the time of the claimed violation and by its terms be applicable to the situation.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Alfred A. Fiedler of Fiedler & Fiedler, for appellant.

Emil F. Sodoro, Ronald H. Stave, and Richard Jeffries, for appellees.

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

CLINTON, J.

This is an action brought by the plaintiff as father and next friend of Joseph Gubalke to recover for personal injury, consisting of the loss of an eye, to Joseph, then 7 years of age, allegedly caused by the negligence of the defendants in installing and maintaining on residential property which they occupied a chain link fence, the upper edge of which was "raw." The injury occurred when Joseph ran or slipped into the fence while playing. At the close of the plaintiff's evidence, the trial court sustained the motion of the defendants for a directed verdict. The errors assigned, insofar as they require consideration on this appeal, are: (1) Refusal of the trial court to submit the case to the jury; and (2) refusal of the trial court to receive into evidence a purported copy of a building permit issued by the city of Omaha authorizing the construction of the fence, and the refusal of the trial court to receive a purported copy of an ordinance of the city of Omaha regulating the construction of fences. We affirm.

The evidence was sufficient to permit a jury to find as follows: The defendants were the occupants on September 13, 1967, the date of the accident, of the property on which the fence was constructed and maintained; the upper edge of the wire mesh extended an

inch or two above the upper horizontal tubing on which the mesh was mounted and this exposed edge consisted of intertwined ends of the wire of which the mesh was made; the tips of the intertwining wires made a "Y" consisting of the sharp ends of two wires; the fence was located on the street side of the defendants' home about midway between the street curb and the side of the house, and on the approximate upper edge of a grassed embankment which rose gently from the curb to the general yard level; and children sometimes walked or played on this embankment and the defendants made no objection. The record does not show whether the fence was located at the defendants' property line or within it. The property occupied by defendants had no sidewalk on the fence side and the embankment does not appear to have been used as a walkway. The evidence further would permit a jury to find that on the evening of the accident in question Joseph and two of his companions were playing 1 block east of the property occupied by the defendants; and that in the course of play, Joseph, while being chased by a companion, ran down the street towards the defendants' house, up the embankment, and into the fence, striking his right eye on one of the exposed ends, injurying it, and necessitating after a period of several months its removal and replacement with a prosthesis.

The evidence disclosed that Joseph knew of the existence of the fence from having played adjacent to it and that he "forgot the fence was there and . . . ran into it." The fence had been there as long as Joseph and an older sister, age 16 at the time of accident, who had lived in the neighborhood since birth, could remember. The actual date of the construction of the fence is not shown. The height of the fence is not shown and cannot be ascertained accurately from the photographic exhibits. Joseph testified that the top of the fence at the time of the accident came about to his eye level or "a little bit down." His height at the time of

the accident is not shown but at the time of trial, November 11, 1971, he was about 4 feet 10 inches tall.

The plaintiff offered into evidence a copy of a building permit signed by one Ray DuBois, as applicant, for a chain link fence upon property purportedly owned by R. G. Anthes at 5069 South 40th Street in Omaha. This is the address the evidence shows is that of the defendants. The permit bears date of 11-10-59. Plaintiff also offered a copy of an ordinance of the city of Omaha making it unlawful to "erect or construct any fence . . . except as provided for." An amendment of this ordinance, upon which the plaintiff relies, has an effective date of 15 days after February 21, 1961, and provides: "Any such fence . . . shall not have barbed selvage at its top, nor be more than four feet in height above the ground level." The amendment permits fences with barbed selvage at the top if the fence is more than 5 feet high and if a permit therefor is obtained from the public safety department. Webster's Third New International Dictionary, Unabridged, p. 2062, indicates that selvage is the cut edge of a material.

We will first deal with the question of the propriety of the ruling of the court on the offer of the building permit and the ordinance. As to the building permit the court sustained the objection on the grounds of lack of foundation. The plaintiff does not discuss his theory of the relevance of the building permit. Our examination of the instrument indicates it does not have relevance to the issues of the case. It does indicate that R. G. Anthes is the owner of the property in question and if we assume it was competent evidence of ownership it is still irrelevant. Other evidence shows the defendants were the occupiers and possessors of the premises. Proof of ownership would at most be merely cumulative. Whatever duties the defendants may have had devolved upon them by virtue of their occupation and possession of the premises. Prosser, Law of Torts (4th Ed.), §§ 57, 59, pp. 351, 364; Restatement, Torts

2d, § 333, p. 183; Presho v. J. M. McDonald Co., 181 Neb. 840, 151 N. W. 2d 451. There was no error in the rejection of the building permit.

An examination of the proffered ordinance reveals that the pertinent provisions of the ordinance became effective, as we have already noted, 15 days after February 21, 1961. The ordinance pertains only to the erection and construction of fences and has no application as to fences constructed prior to the effective date. The date the fence was constructed is not shown by the evidence. It is the usual rule that in order that an ordinance or statute be relevant on the issue of a standard of care, it must have been in effect at the time of the claimed violation and by its terms be applicable to the situation to which it is sought to be applied. Chicago Lumber Co. v. Gibson, 179 Neb. 461, 138 N. W. 2d 832; Cronk v. Iowa Power & Light Co., 258 Iowa 603, 138 N. W. 2d 843; Ellis v. Caprice, 96 N. J. Super. 539, 233 A. 2d 654; Akins v. County of Sonoma, 67 Cal. 2d 185, 60 Cal. Rptr. 499, 430 P. 2d 57; Klein v. Montgomery Ward & Co., 235 Ore. 315, 384 P. 2d 978. The court did not err in the rejection of the ordinance as evidence.

Was the evidence otherwise sufficient to present a jury issue? Neither party cites a Nebraska case or a case from any other jurisdiction which has direct application. The Nebraska cases which touch upon the question of the duty of an owner or occupier of land to children coming upon the premises lawfully or otherwise are not numerous. They seem in general to be in accord with the rule laid down in Restatement, Torts 2d, §§ 339, 343B, pp. 197, 222; Chicago, B. & Q. R.R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920. In the above case the court said that in the determination of the question of negligence, regard must be had to the character and location of the premises, the purposes for which they are used, the probability of injury therefrom, the precautions necessary to prevent such injury, and the relation such precautions bear to

the beneficial use of the premises. If under all the circumstances the owner or occupier omits such precautions as a man of ordinary care and prudence would take under the circumstances, he is negligent and ordinarily the question of negligence is for the jury. See, also, Ramirez v. Chicago, B. & Q. R.R. Co., 116 Neb. 740, 219 N. W. 1; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Krummack v. Missouri P. Ry. Co., 98 Neb. 773, 154 N. W. 541; Spence v. Polenski Bros., Schellak & Co., 110 Neb. 56, 193 N. W. 101; Richards v. Connell, 45 Neb. 467, 63 N. W. 915.

The standard of the occupier's duty, at least insofar as it pertains to children of tender years, does not depend upon whether the child is an invitee, licensee, or trespasser. Restatement, Torts 2d, § 343B, p. 222; Chicago, B. & Q. R.R. Co. v. Krayenbuhl, *supra*. The status of the child is merely one of the factors to be taken into consideration.

In Restatement, Torts 2d, § 339, p. 197, the applicable principles are stated in the following language:

"Artificial Conditions Highly Dangerous to Trespassing Children

"A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

"(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

"(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are

slight as compared with the risk to children involved, and

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

The evidence supports the conclusion that the defendants would know the nature of the upper edge of the fence and for present purposes we assume they had such knowledge. The question we must answer is whether the condition was one which offered an unreasonable danger of serious bodily injury to children and a danger which was reasonably to be anticipated by the defendants. If not, then there is no jury question and no liability.

Each case depends upon its own facts. "The stress here is upon 'unreasonable.' There is virtually no condition upon any land with which a child may not possibly get himself into trouble. He may choke to death upon a green apple, pick up a stick and poke it into his eye, or have his skull fractured by a rock found and thrown by his companion. Unless the possessor is to shoulder the impossible burden of making his land completely 'child-proof,' which might mean razing it to the bare earth, something more is called for than the general possibility of somehow coming to some harm which follows the child everywhere throughout his daily existence." Prosser, Law of Torts (4th Ed.), § 59, p. 369.

Under the facts of this case and considering the nature of the claimed dangerous condition, its location, and the child's status, it seems clear to us there was a low degree of both probability of harm and probability of serious injury. We hold as a matter of law that condition (b) of Restatement, Torts 2d, § 339, p. 197, is not supported by the evidence. The defendants were not guilty of any violation of duty to the plaintiff.

It may be true it could be reasonably anticipated that a child playing near the fence or attempting to climb

it might sustain torn clothing or a scratch, but it is not reasonably to be anticipated that a child of the age of 7 years who knows of the existence of the fence, even though he may not be conscious of the pointed upper edge, will run full tilt into the fence and suffer such serious injury as the loss of an eye. Such injury could occur under the circumstances if the obstacle had been a picket fence, or a hedge, the branches of which by reason of trimming were sharp and stiff.

This case is not unlike Mail v. M. R. Smith Lumber & Shingle Co., 47 Wash. 2d 447, 287 P. 2d 877, where the child suffered the loss of an eye by in some manner striking his eye on the tip of a pike pole used in handling logs on a millpond; or Massino v. Smaglick, 3 Wis. 2d 607, 89 N. W. 2d 223, where the child lost an eye at the site of a building under construction when a piece of shingle trimmed by carpenters was thrown from the roof of a building by another child and struck the plaintiff. Similar also is Morril v. Morril, 104 N. J. L. 557, 142 A. 337, 60 A. L. R. 102, where a child playing ball fell against an open garage door and lost an eye when he struck it on a defective door latch. The wind had blown the door open because the latch was defective. The defendant had knowledge of the defective latch and had intended to repair it.

Diglio v. Jersey Central Power & Light Co., 39 N. J. Super. 140, 120 A. 2d 650, involved a situation somewhat similar to our present case and the court affirmed a verdict for the plaintiff who was climbing the fence and was injured. In that case, however, the defendant permitted its yard to be used as a playground and the fence was so constructed as to invite climbing. We do not, however, think the case is sound and decline to adopt its holding.

AFFIRMED.

BOSLAUGH, J., dissenting.

It would seem to me that in a proper case the maintenance of a fence with "barbed selvage" or the sharp

ends of wire extending above the upper rail would present a question for the jury on the issue of negligence. See, Barr v. Green, 210 N. Y. 252, 104 N. E. 619; Marton v. Jones, 44 Cal. 299, 186 P. 410; Skaling v. Sheedy, 101 Conn. 545, 126 A. 721, 36 A. L. R. 540.

JAMES BAGLEY ET AL., APPELLANTS, V. COUNTY OF SARPY, NEBRASKA, ET AL., APPELLEES.
NELS ELIASON ET AL., APPELLANTS, V. BOARD OF COUNTY COMMISSIONERS OF SARPY COUNTY, NEBRASKA, ET AL., APPELLEES.

202 N. W. 2d 841

Filed December 15, 1972. No. 38436.

1. **Zoning: Time: Counties.** Timely objection by a litigant with standing may nullify a rezoning resolution by a county board that has not adopted a comprehensive development plan conformable to statute.
2. ———: ———: ———. Under statutory provisions enacted in 1967 a county engaged in zoning or rezoning ought to adopt a comprehensive development plan within a reasonable time.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Reversed and remanded with directions.

Marks, Clare, Hopkins, Rauth & Barber and Dale D. Kuhlmann, for appellants.

Clarence E. Heaney, Jr., of Kennedy, Holland, DeLacy & Svoboda and Dixon G. Adams, for appellees.

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

SMITH, J.

Plaintiffs challenged a county board resolution that rezoned a tract of land from residential to industrial. The district court found for the defendants, Sarpy

County, members of the board, and the owner of the tract. It dismissed the petitions, and plaintiffs appeal. They contend that the board in adopting the resolution exceeded its statutory authority.

The approximate size and boundaries of the tract, owned by Omaha Industrial Foundation, were 456 acres, Harrison Street on the north, One Hundred Twenty-Sixth Street on the east, and Highway No. 50 on the west. The centerline of Harrison Street, an east-west street, formed a boundary between Douglas and Sarpy counties. Plaintiffs' property was located in Douglas County.

Plaintiffs commenced these suits 2 weeks after the county board of Sarpy County on May 10, 1971, passed the rezoning resolution under attack. The resolution conformed to statutory procedure effective prior to 1967. We conclude as a matter of law, however, that the county then lacked a comprehensive development plan conformable to a legislative act of 1967.

Defendants assert that the legislative act of 1967 imposed no condition referable to a comprehensive development plan in the case of a county already properly engaged in zoning. Zoning districts, we are told, otherwise would be frozen during the long period of study reasonably necessary for adoption of a plan.

The 1967 act, effective May 22, 1967, with an emergency clause, provided: "Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board . . .." § 23-114.03, R. R. S. 1943; Laws 1967, c. 117, §§ 4 and 20, pp. 368 and 378. The act also repealed most existing provisions for exercise of the zoning power by counties. It did not, however, repeal sections 23-164 and 23-165, R. R. S. 1943, relating to notification and protests. It kept this language: "Such regulations, restrictions and boundaries (pertaining to county zoning districts) may . . . be amended, supplemented, changed, modified or repealed . . .." § 23-165, R. R. S. 1943.

A comprehensive development plan is not created overnight. In populous areas several years of study may reasonably precede its adoption, and Sarpy County is now our third most populous county. The act, on the other hand, exempted no county from its operation.

Timely objection by a litigant with standing may nullify a rezoning resolution by a county board that has not adopted a comprehensive development plan conformable to statute. Under the 1967 act a county engaged in rezoning ought to adopt a comprehensive development plan within a reasonable time.

It would be idle for us here to examine the validity of interim or stopgap zoning during development of the plan. See, generally, 1 Anderson, American Law of Zoning, § 5.15, p. 275 (1968); 1 Rathkopf, The Law of Zoning and Planning, 8-11 (3d Ed., 1972). The lapse of almost 4 years without adoption of the plan by Sarpy County was unreasonable. Plaintiffs, who possessed standing, acted promptly. Enforcement of the rezoning resolution in question ought to be enjoined permanently.

The judgment is reversed and the cause remanded with directions to order an injunction in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SCHOOL DISTRICT OF MINATARE, COUNTY OF SCOTTS BLUFF, STATE OF NEBRASKA, APPELLANT, V. COUNTY OF SCOTTS BLUFF ET AL., APPELLEES.

202 N. W. 2d 825

Filed December 15, 1972. No. 38468.

1. **Statutes: Taxation: Words and Phrases.** Under the provisions of section 77-1734.01, R. R. S. 1943, the term "clerical error" is not restricted to a clerical error made by a taxpayer on the face of a personal property tax return.
2. **Statutes: Taxation: Words and Phrases: Counties: Jurisdiction.** The county board is the only "authority" whose approval is required for payment of a tax refund claim under section 77-

1734.01, R. R. S. 1943. A failure to transmit a copy of the claim to other taxing entities does not deprive the county board of jurisdiction and authority to determine and approve a proper claim.

3. **Statutes: Taxation: Counties.** Section 77-1737, R. R. S. 1943, providing that a county board does not have power to release, discharge, remit, or commute taxes for any reason, does not prevent the proper authority from refunding taxes as authorized by any specific tax refund statute.
4. **Public Officers and Employees: Administrative Law.** When the law commits to any officer the duty of looking into the facts and acting upon them, not in a way which it specifically directs but after a discretion in its nature judicial, the function is quasi-judicial. Where the officer or official body has no judicial power or discretion as to interpretation of the law, and the course to be pursued is fixed by law, their acts are ministerial only.
5. **Public Officers and Employees: Administrative law: Taxation.** The allowance of a tax refund claim, where the county board acts quasi-judicially and within the scope of its jurisdiction and authority, is not open to collateral attack in the absence of fraud.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Atkins, Ferguson, Nichols & Hahn, for appellant.

Marvin L. Holscher and W. H. Kirwin, for appellees.

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

MCCOWN, J.

The plaintiff school district brought this action against Scotts Bluff County, the county treasurer, and the individual members of the board of county commissioners to recover from defendants certain personal property taxes refunded to a taxpayer. The refund involved was paid in part from tax funds held for the credit of plaintiff school district. The district court sustained defendants' demurrers to the petition and dismissed plaintiff's action. We affirm.

Plaintiff's petition alleges that it is a Class III school

district, located wholly within Scotts Bluff County, Nebraska. During 1968, Kern County Land Company, a corporation, owned personal property subject to taxation by the plaintiff and other taxing entities. This property was reported for assessment and taxation to the county assessor of Scotts Bluff County, Nebraska, and personal property taxes were levied against it by various taxing districts including the plaintiff. The taxes were paid to the county treasurer in two installments, $54,986.29 on November 29, 1968, and $54,986.31 on June 26, 1969. Sometime after July 26, 1969, Kern County Land Company filed a claim with the county treasurer for a refund of $4,432. At a regular meeting of the board of commissioners on November 3, 1969, the county board authorized and directed the county treasurer to refund $4,406.19 to Kern County Land Company on the basis of its claim for refund.

The county board did not make a specific finding that the tax refunded or any part thereof was "clearly invalid." The meeting at which the refund was authorized was not preceded by publicized notice of the time and place of the meeting, and the proceedings of the meeting were not published.

On the basis of the resolution of the county board, the defendant county treasurer paid to Kern County Land Company the sum of $4,406.19. Of this amount, $3,443.87 was from funds in the county treasurer's office held for the credit of the plaintiff school district.

No officer or employee of the plaintiff was ever notified of any hearing or action on the claim for refund. No copy of the claim for refund was ever transmitted to the plaintiff school district or any officer thereof, and no notice of the action of the county board was given to the plaintiff prior to the payment of the claim for refund.

A copy of the claim for refund together with an affidavit of a certified public accountant in support of it are attached to the petition and incorporated by refer-

ence. A copy of the resolution of the county board directing the refund is also attached.

The refund claim bears the typewritten date of July 21, 1969. No filing or receipt date appears. The accountant's affidavit is dated June 30, 1969. These documents show that the amount of personal property returned for 1968 personal property taxes by the taxpayer was based on the market value of property recorded in the company books of account and based on its 1967 recorded inventory. Because of defalcations and misappropriations of certain Kern County Land Company employees, the inventory records from which the reported amounts were taken were in error. The value of the personal property listed was less than the value reported on the return in three separate categories, and totaled $145,301. The personal property taxes for 1968 were therefore overpaid $4,432.

The refund claim states that it is made under the provisions of section 77-1734.01, R. R. S. 1943, and within 9 months after payment of the tax as required by that statute. The overpayment was unknowingly made because of erroneous personal property values recorded in the company's books of account, and the erroneous values were not discovered until after the lien date and then through an outside audit.

The resoluton of the county board attached to the petition recites that the Kern County Land Company had requested refund of 1968 personal taxes "due to erroneous reporting * * *" and that the "request for refund was made within the lawful period of time after payment of said taxes" and authorized and directed the refund in the amount of $4,406.19.

Section 77-1734.01, R. R. S. 1943, provides: "In case of payment made of any taxes as a result of a clerical error on the part of taxing officials of the state, county, or other political subdivision of the state, or any taxpayer, the county treasurer is authorized to refund that portion of the tax paid as a result of the clerical error

upon verification by the county assessor or other taxing official, that such error has been made and upon approval by the county board. The tax refunded shall be charged against any undistributed money on hand in such treasurer's office belonging to the political subdivisions which received the benefit from the first payment. A claim for a refund under the provisions of this section shall be made in writing to the county treasurer within nine months after payment of such tax."

Section 77-1735, R. R. S. 1943, provides that any person who claims a tax or any part thereof to be invalid for any reason may "at any time within thirty days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he may sue such county treasurer for the amount so demanded."

The plaintiff's basic contention is that the defendants had no jurisdiction or authority to refund personal property taxes here under either of the two refund statutes on the basis of the facts as set out in the petition. It is contended that the refund claim was filed after July 26, 1969, and therefore was out of time and forever barred under section 77-1735, R. R. S. 1943.

In Satterfield v. Britton, 163 Neb. 161, 78 N. W. 2d 817, this court held that a taxpayer who voluntarily pays an unauthorized and illegal tax and who does not make a demand for its return within 30 days of the time of the payment of the tax as required by section 77-1735. R. R. S. 1943, is forever barred and has no capacity to contest the validity of the tax by any legal proceeding. That case was decided at a time when section 77-1735, R. R. S. 1943, was the only applicable refund section. There is now an additional refund statute which provides a longer period of time for making refund claims under certain conditions. Although there may be constitutional problems as to differing limitation periods,

we shall assume for purposes of this decision that the rule of Satterfield v. Britton, *supra,* is still in effect as to a refund claim grounded on section 77-1735, R. R. S. 1943. Against a challenge by demurrer, the allegations of fact in the petition must be accepted as true. Therefore, the refund claim here was out of time under section 77-1735, R. R. S. 1943, and barred unless it was authorized under some other statutory refund provisions.

The plaintiff also contends that there was no jurisdiction or authority to allow the refund under section 77-1734.01, R. R. S. 1943. Plaintiff's argument is that the term "clerical error" as used in that section refers only to an error in the amount of tax paid, and not to an error in the amount or value of the property returned for assessment. We can find no support for that position in the statute. We point out also that to exclude authority to refund under section 77-1734.01, R. R. S. 1943, would require us to hold as a matter of law that the county board could not have found as a fact that the tax refunded was paid as a result of a clerical error on the part of the taxpayer. That is so, regardless of the interpretation placed upon the term "clerical error."

Section 77-1734.01 was first adopted in 1957. At that time it applied only to "a clerical error on the part of taxing officials of the county" and it had a limitation period of 30 days, identical with section 77-1735, R. R. S. 1943. In 1959, the statute was changed by extending the time for filing a refund claim to 6 months after payment of the tax. In 1961, the statute was again altered to its present form to extend time for filing claims to 9 months, and broaden its application to cover "a clerical error on the part of taxing officials of the state, county, or other political subdivision of the state, or any taxpayer." For the first time, "a clerical error on the part of * * * any taxpayer" became an authorized basis for a refund claim.

In the 1961 Legislature, the introducer of L.B. 256 (§ 77-1734.01), stated that it was "a measure intended

to correct human error." At one point he stated: "As I mentioned before, we overlooked including the taxpayer, which was originally intended, so we have to have the amendment. All this bill does, it just provides for an opportunity to correct human error and provides a limit of 9 months after payment of the tax for making the application for the refund." It was specifically stated that the man the bill was intended to help was the taxpayer, "so it became necessary * * * to insert three words 'or any taxpayer' to have the bill carry out the intent of the bill."

The statute does not limit the "clerical error" to an error made on the return or to an error in the amount of the tax paid. Neither does it limit the "clerical error" to one made in computing the value of the property listed. In view of this legislative history and the language of the statute itself, we do not think the Legislature intended to require proof of what caused the individual to make a clerical error or what motivated his action when he made it. The only requirement of the statute is that some portion of the tax was paid as a result of the "clerical error."

The statute requires that the county assessor or other taxing officer verify the fact that a "clerical error" has been made, and also requires the approval of the county board. No one disputes the fact that an error was made by the taxpayer in its inventory records as a result of which an erroneous and excessive tax was paid. Nevertheless, plaintiff contends that no refund was authorized because the error was not a clerical error within the meaning of the statute. Under the provisions of section 77-1734.01, R. R. S. 1943, the term "clerical error" is not restricted to a clerical error made by a taxpayer on the face of a personal property tax return.

The plaintiff also asserts that section 77-1736, R. R. S. 1943, requires the county treasurer to transmit a copy of the claim for refund to each taxing entity affected,

and that a county board has no jurisdiction or authority to refund any taxes until each taxing entity has had notice of and has passed upon and approved the claim for refund. Section 77-1736, R. R. S. 1943, provides: "When any demand to refund taxes paid is made upon any treasurer, such treasurer shall transmit a copy of the same to the authorities authorized by law to audit and pay accounts against the state, county, city, township, village, or district, as the case may be, who shall pass upon the same as upon any other claim, but no claim for refunding such taxes shall be allowed unless it appears to the satisfaction of such authorities that the tax, or a part thereof, was clearly invalid."

It is quite clear under section 77-1734.01, R. R. S. 1943, that a refund claim under that section requires approval by the county board only. The term "authorities" in section 77-1736, R. R. S. 1943, therefore means the county board where the claim is filed under section 77-1734.01, R. R. S. 1943. In such a case the county treasurer is not required to submit copies of the refund claim to every taxing entity that may be affected, but only to the county board. The county board is the only "authority" whose approval is required for payment of a tax refund claim under section 77-1734.01, R. R. S. 1943. A failure to transmit a copy of the claim to other taxing entities does not deprive the county board of jurisdiction and authority to determine and approve a proper claim.

The plaintiff also contends that the county board has no power to release, discharge, remit, or commute any taxes except for the refunding of taxes paid under section 77-1735, R. R. S. 1943. Section 77-1737, R. R. S. 1943, provides that the county board does not have power to release, discharge, remit, or commute any taxes for any reason whatever. It also provides that the section shall not be construed to prevent the proper authority from refunding taxes, as provided in section 77-1735, R. R. S. 1943, nor to interfere with the powers

of any officer or board sitting as a board of equalization of taxes. It will be noted that section 77-1737, R. R. S. 1943, was last amended in 1955. At that time section 77-1734.01, R. R. S. 1943, did not even exist. Obviously the Legislature did not intend to prevent refunding of taxes under one section of the statutes and not under another, nor to impose individual liability on officers for making refunds authorized under the provisions of one statute but not under another. The provisions of section 77-1737, R. R. S. 1943, should not be construed to prevent the proper authority from refunding taxes as authorized by any specific tax refund statute, whether the authorizing statute be section 77-1735, R. R. S. 1943, or some other.

The remaining contentions of the plaintiff and, to a degree, the contentions already dealt with, constitute a collateral attack on the proceedings by which the county board approved and authorized the payment of the refund claim here. The principles and rules governing the critical issues were enunciated by Roscoe Pound in 1903 in the case of Mitchell v. County of Clay, 69 Neb. 779, 96 N. W. 673. The basic problem is whether the action of the county board in this case was ministerial or quasi-judicial in nature. The Mitchell case stated the rules. When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi-judicial. Where the officer or official body has no judicial power or discretion as to the interpretation of the law, and the course to be pursued is fixed by law, their acts are ministerial only. In this case there is no question but that the action of the county board in passing upon and approving the claim for refund was quasi-judicial. The allowance of a tax refund claim, where the county board acts quasi-judicially and within the scope of its jurisdiction and authority, is not open to collateral attack in the absence of fraud. See Mit-

chell v. County of Clay, *supra*. In this case there is no allegation of fraud nor of collusion, and the plaintiff was not entitled to attack the refund in a collateral proceeding.

As this court said in Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627: "Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without willfulness, malice, or corruption."

The structure of the property tax laws of this state makes the county board, as well as the county treasurer, the agent for other political subdivisions and taxing entities in connection with many functions of property taxation. Their action here affected other political subdivisions, as well as the plaintiff. Where those actions are taken in good faith and were done within the scope of their jurisdiction and authority, they should be protected from collateral attack by another political and taxing entity as well as from another citizen.

The action of the district court in sustaining the demurrers and dismissing plaintiff's cause of action was correct and the judgment is affirmed.

AFFIRMED.

A. J. HARRE ET AL., APPELLANTS, V. HAROLD V. WHITE ET AL., APPELLEES.
203 N. W. 2d 99

Filed December 15, 1972. No. 38483.

Equity: Appeal and Error: Evidence: Witnesses. Actions in equity on appeal to this court are subject to the rule that when credible evidence on material questions of fact is in irreconcilable con-

flict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Donald R. Hays, for appellants.

Robert R. Gibson and Bernard J. McGinn, for appellees.

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

MCCOWN, J.

Plaintiffs sought specific performance of an agreement to sell real property. The district court entered a decree directing specific performance, and the defendant owners have appealed. We affirm the judgment and decree of the district court.

On June 8, 1970, the defendants entered into a written listing agreement with one Sam Ely to sell 80 acres of real estate in Lancaster County, Nebraska, specifically described. Ely was an agent for First Realty of Lincoln, Inc. Following the execution of the listing contract, the defendants had no further contact with Ely. In July and August of 1970, another agent for First Realty, Clare West, brought the plaintiffs to look at the property and obtained an offer of purchase from the plaintiffs which was rejected by the defendants. Later the defendants went to First Realty, reduced the listing price, and encouraged West to attempt to obtain submission of another offer to purchase from the plaintiffs. On August 12, 1970, plaintiffs executed another written offer to purchase the property for $30,000. The offer to purchase was presented to the defendants by West. On August 16, 1970, the defendants signed and acknowledged an acceptance of the offer to purchase. Thereafter the defendants refused to convey the property according to the terms of the agreement and this action for specific performance was commenced.

The defendants contend that First Realty of Lincoln acted as agent of the plaintiffs and not of the defendants and also that First Realty represented to the defendants that the purchase price specified in the contract would be net to the defendants.

The evidence in this case was in conflict in some particulars and even if all the presumptions in favor of written instruments be disregarded, the defendants still failed to establish their defensive allegations. The trial court saw and heard the witnesses and the record fully supports the findings of fact. Actions in equity on appeal to this court are subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. See Keenan v. Keenan, 187 Neb. 686, 193 N. W. 2d 568.

Defendants also assign as error the admission into evidence of testimony by a real estate salesman as to the reasonable rental value of the property involved. The evidence reflects that the witness not only had an acquaintance with the property, but also was informed as to the state of the market and had some experience in the rental of similar properties. Whether he be regarded as a lay or an expert witness, the foundation was clearly sufficient.

The judgment and decree of the district court was correct and is affirmed.

AFFIRMED.

AMANDA C. BODENSTEDT ET AL., APPELLANTS, V. FRED RICKERS, COUNTY SUPERINTENDENT OF WAYNE COUNTY, APPELLEE.

203 N. W. 2d 110

Filed December 15, 1972. No. 38503.

1. **Statutes: Constitutional Law.** If an act is complete and independent in itself, it may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments set out in Article III, section 14.
2. ———: ———. If a statute is subject to more than one reasonable construction, the court will adopt the one which will make the act constitutional.

Appeal from the district court for Wayne County: MERRITT C. WARREN, Judge. Affirmed.

John V. Addison, for appellants.

B. B. Bornhoft, for appellee.

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

WHITE, C. J.

The issue raised in this case is narrow. It is simply whether section 79-603, R. R. S. 1943, is an act independent in nature or whether it is purely amendatory of existing legislation and therefore runs afoul of Article III, section 14, Constitution of Nebraska, requiring that the title to amendatory acts state the section or sections of the law to be amended. The district court held the section constitutional, and we affirm the judgment of the district court.

Under the provisions of section 79-603, R. R. S. 1943, no Class I school district which contracts for instruction after June 1, 1970, of all its pupils with a Class I, II, III, IV, or V district shall merge with another Class I district. The question arose in this case because School District No. 80 contracted with the Laurel School District after the applicable date so, District No. 80 being

a Class I district, under the provisions of the statute it cannot merge with School Districts No. 75 and No. 76, both of which are Class I districts.

Section 79-603, R. R. S. 1943, under attack here, is a part of L.B. 1377, Laws 1969, c. 703, § 3, p. 2703, passed by the 1969 Legislature. The title to the act is as follows: "An Act relating to schools; to prohibit the formation of new school districts except as prescribed; to provide for mergers and *prohibit them in certain cases;* to restrict contracting for instruction; and to declare an emergency." (Emphasis supplied.) The court has had this problem before it in many previous cases. We have consistently held that if an act is complete and independent in itself, it may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments set out in Article III, section 14, Constitution of Nebraska. Blair Co. v. American Savings Co., 184 Neb. 557, 169 N. W. 2d 292; Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N. W. 515; Hinman v. Temple, 133 Neb. 268, 274 N. W. 605. Perhaps the best statement of the rule is in Live Stock Nat. Bank v. Jackson, *supra,* in which the court stated as follows: "The modern rule is: 'Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts or parts thereof.' (Citing cases).

"An examination of the act in question (Comp. St. 1929, sec. 20-1559) discloses that it is a complete and independent act. Such being the case, section 14, art. III of the Constitution, does not require that the statute with which it purports to conflict, should be set out as amended and accompanied by a repeal of such statute.

"As stated in 59 C. J. 871: *'If an act or statute is in itself complete* and *intelligible without reference to other legislation,* it is not within the prohibition of the con-

stitutional provisions by reason of the fact that it amends other statutes by implication, and it is not necessary that such statutes should be reenacted and set out at length as modified.' " (Emphasis supplied.)

It is clear that section 79-603, R. R. S. 1943, not only purports to be a complete and independent act, but that it is "intelligible without reference to other legislation." The section under attack simply provides, that under certain circumstances, no Class I district shall merge with another Class I district. There are no prior statutes that have been called to our attention which prohibit the merger of Class I districts. It is true that other sections of our school statutes provide for the procedure to be used in case of merger. We agree that if the legislation attacked is meaningless standing alone, or that it makes changes in existing law by adding new provisions and mingling the new with the old on the same subject in such a manner as to confuse the interpretation and the application of the whole legislation, then such legislation is purely amendatory in nature and falls within the prohibition of Article III, section 14, of the Constitution. But it is very clear that no such situation exists in the enactment of section 79-603, R. R. S. 1943. The other statutes cited by the appellants to bolster the contention that this is an amendatory act are for the most part procedural and deal with how to effect a merger, and not that such districts may or may not merge. This statute makes no amendments in the procedural method for accomplishing a merger. It simply and clearly provides and prohibits the merger of Class I districts under certain circumstances. Section 79-603, R. R. S. 1943, therefore, is an act complete in itself in that it simply prescribes that Class I districts, under the circumstances detailed, may not merge. It does not purport to cover the entire subject of school mergers or the procedures involved therein. It is intelligible without reference to other legislation. We fail to see how it could possibly be confusing or render difficult the

enforcement or the understanding of the other related legislation concerning school mergers. We also observe that there is a presumption of the constitutionality of a statute duly enacted by the Legislature and all reasonable doubt must be resolved in favor of constitutionality, and that if a statute is subject to more than one reasonable construction, the court will adopt the one which will make the act constitutional. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N. W. 2d 88; Schurmann v. Curtiss, 183 Neb. 277, 159 N. W. 2d 554. Broadly speaking the provisions of Article III, section 14, of our Constitution, relating to the breadth of the title to the act and requiring the recitation of statutes being amended, have as their purpose the prevention of surrepetitious legislation and an impermissible confusion in the enactment of amendatory statutes. Neither one of these mischiefs sought to be prevented by the constitutional prohibition are present in this case. The title to the act specifically contains a provision, "to provide for mergers and prohibit them in certain cases." The act itself leaves no doubt as to its precise application with reference to the capacity of Class I districts to merge. As such, it is complete and independent legislation and to the extent that it may have impact upon the other merger statutes and the scope of their application they are modified by implication. See Blair Co. v. American Savings Co., *supra.*

The judgment of the district court finding that the statute under attack was constitutional was correct and is affirmed.

AFFIRMED.

MIDSTATES ACCEPTANCE, A CORPORATION, APPELLEE, V. FRANCIS D. VOSS, DOING BUSINESS AS EMERSON MANUFACTURING COMPANY, APPELLANT.
202 N. W. 2d 822

Filed December 15, 1972. No. 38504.

1. **Sales.** An essential of a valid time sale price is a price agreed upon between the parties where the buyer is actually informed of and has at the time the sale is made an opportunity to choose between a cash and a time sale price.
2. **Interest: Usury.** Regardless of the term used, if the result is a charge for the loan of money or for forbearance of a debt the result is interest.
3. **Sales: Usury.** Whether or not a transaction is a bona fide time sale or the financing of the balance of a cash purchase price is a question of fact.
4. ———: ———. In considering whether or not a transaction is a time sale made in good faith or a loan of money or the forbearance of a debt, the court will look through form and examine its substance.
5. **Usury.** The defense of usury is ordinarily available to a surety or guarantor.

Appeal from the district court for Dixon County: JOSEPH E. MARSH, Judge. Reversed and remanded for further proceedings.

John V. Addison, for appellant.

Leamer & Galvin, for appellee.

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

NEWTON, J.

This is an action to recover on a conditional sale contract. A plea of usury was disallowed. Judgment was recovered by plaintiff. The judgment is reversed.

LeRoy Jones desired to purchase from the defendant, a manufacturer of air jacks, a quantity of jacks for the sum of $10,000. Jones did not have the purchase price but made arrangements with Great Plains Acceptance for the required money. Great Plains Ac-

ceptance prepared a conditional sales contract in the sum of $12,480 drawing 6 percent interest and payable in 24 installments. The contract was executed by Jones. It was simultaneously executed by defendant as the "seller," together with an assignment of the contract to Great Plains Acceptance which paid defendant the $10,000 due on the jacks. The contract was subsequently assigned by Great Plains Acceptance to the plaintiff Midstates Acceptance. Jones defaulted and plaintiff seeks to hold defendant as assignor and guarantor.

Although the contract refers to a time price or time price differential, the record fails to disclose that a time price was quoted to the purchaser. The undisputed evidence of the defendant indicates that only one price, the cash price, was considered by buyer and seller. We have repeatedly held that under such circumstances there cannot be a valid time sale. "An essential of a valid time sale price is a price agreed upon between the parties where the buyer is actually informed of and has at the time the sale is made an opportunity to choose between a cash and a time sale price.

"Regardless of the term used, if the result is a charge for the loan of money or for forbearance of a debt the result is interest." General Motors Acceptance Corp. v. Mackrill, 175 Neb. 631, 122 N. W. 2d 742.

Plaintiff contends that it did not make a loan to Jones but purchased the contract from defendant at a discount. This cannot avail plaintiff. Even if the transaction is regarded as a sale rather than a loan, the excess charges, as mentioned above, must be regarded as interest since there was not a valid time sale.

The primary dispute between the parties is in regard to whether the transaction was a time sale or a loan. "Whether or not a transaction is a bona fide time sale or the financing of the balance of a cash purchase price is a question of fact.

"In considering whether or not a transaction is a time sale made in good faith or a loan of money or the

forbearance of a debt, the court will look through form and examine its substance." Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528. See, also, Lloyd v. Gutgsell, 175 Neb. 775, 124 N. W. 2d 198.

In Nelson v. General Credit Corp., 166 Neb. 770, 90 N. W. 2d 799, Worthing Motor Company sold an automobile to plaintiff. The transaction was financed by the defendant General Credit Corporation which took an assignment of the note and mortgage from Worthing. The court stated in ruling that the transaction was a loan: "The facts and circumstances here point to the conclusion that this transaction originated as a loan by General Credit to the plaintiff. Plaintiff desired a loan. Worthing contacted General Credit, and gave it the base figures upon which to calculate the amount of the loan so that Worthing would receive its cash price. The transaction was thereafter the proceeding of General Credit in securing a credit report on plaintiff, in calculating the amount of the loan and the amount of the payments, and in determining insurance which General Credit required and its cost. It is clear that Worthing drafted the note and mortgage for General Credit so as to secure its cash price together with interest, insurance, and other charges exacted by General Credit." See, also, Frankfurt Finance Corporation v. Cox (Tex. Civ. App.), 142 S. W. 2d 553, wherein, under circumstances practically identical to those in the present case, the transaction was held to be a loan and not a time sale.

In the case before us, the financing was arranged by the borrower Jones, the terms settled between Jones and plaintiff, and the papers prepared by plaintiff without consulting the defendant. It appears quite clearly that the transaction was a loan to Jones disguised as a conditional or time sale with defendant as surety or guarantor. As such it is usurious and subject to the forfeiture of interest. See §§ 45-105 and 45-138 (3), R. R. S. 1943.

As the loan was made by plaintiff to Jones, in signing the contract and guaranteeing payment, defendant is placed in the position of a surety or guarantor. Can a surety or guarantor raise the issue of usury when it is sought to hold him under the contract? In Keim & Co. v. Avery, 7 Neb. 54, it is held: "A surety may plead as a defense to a promissory note, that usurious interest was agreed upon by the parties at the time of the execution of the note."

It was held in Male v. Wink, 61 Neb. 748, 86 N. W. 472, and in Pitman v. Ireland, 64 Neb. 675, 90 N. W. 540, that a mortgagor of real estate could raise the defense of usury, notwithstanding he had sold the premises, if made party to a foreclosure action and a deficiency judgment could be rendered against him.

"The purpose and policy of the laws against usury are the protection of necessitous borrowers against the oppressive exactions of moneylenders, and the right to claim the protection of those laws is confined to the debtor and those in legal privity with him." 55 Am. Jur., Usury, § 121, p. 409.

As to persons in privity: "The rule embraces the heirs, legal representatives, and devisees of the borrower or debtor and those who stand in the relation of sureties, guarantors, or accommodation indorsers, with respect to the tainted obligation." 55 Am. Jur., Usury, § 122, p. 410. See, also, Rader v. Burnett, 175 Neb. 663, 122 N. W. 2d 747. To the same effect are Tomihiro v. United Hotel Corp., 145 Ore. 629, 28 P. 2d 880; Silverman v. Bernstein, 191 N. Y. Supp. 192; Lydick v. Stamps (Tex. Civ. App.), 316 S. W. 2d 107; Drew v. Skeena Lumber Co., 180 Minn. 358, 230 N. W. 819. See, also, Annotation, 70 A. L. R. 359.

The principal amount due on the contract in issue has not been fully paid. It being a usurious loan, it is subject to the penalty specified in the statutes above cited, namely, forfeiture of interest and other charges. The judgment is reversed and the cause remanded with

instructions to the trial court to ascertain the total of payments made on the contract, credit them on the principal amount of $10,000, and enter judgment for plaintiff for the balance.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DONALD L. MANLEY, APPELLANT.
202 N. W. 2d 831

Filed December 15, 1972. No. 38517.

1. **Implied Consent Law: Constitutional Law: Intoxicating Liquors.** The Implied Consent Law, enacted in 1971, is constitutional.
2. **Constitutional Law: Evidence: Witnesses.** The Fifth Amendment privilege protects an accused from being compelled to testify against himself only as to evidence of a testimonial or communicative nature.
3. ———: ———: ———. The withdrawal of blood, and the use of the analysis in evidence, does not involve compulsion within the Fifth Amendment.
4. **Constitutional Law: Statutes.** It is the duty of this court to give a statute an interpretation which meets constitutional requirements if it can.

Appeal from the district court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Douglas McArthur, for appellant.

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

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

SPENCER, J.

Defendant, Donald L. Manley, was charged with second offense operation of a motor vehicle while under the influence of alcoholic liquor, and with refusal to submit to a chemical test. The jury found him guilty

on both counts. The defendant predicates this appeal on the unconstitutionality of section 39-727.03, R. S. Supp., 1971; the giving of instructions Nos. 4 and 6; and the failure to give defendant's requested instruction No. 1. We affirm.

Defendant was arrested September 20, 1971, in Gage County, Nebraska. The state trooper who made the arrest had observed defendant's vehicle weaving. He stopped it and, after observing the defendant's condition, made the arrest. Defendant was taken to the Gage County sheriff's office where the trooper read the Implied Consent Law to him, but omitted the first paragraph relating to a breath test because breath test equipment was not available. Defendant refused the trooper's request for a blood or urine test, but did offer to give a breath test.

Section 39-727.03, R. S. Supp., 1971, provides as follows: "Any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his blood, urine, or breath, for the purpose of determining the amount of alcoholic content in his body fluid. Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village may require any such person to submit to a test of his breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his body, or has committed a moving traffic violation, or has been involved in a traffic accident. Any person who refuses to submit to such breath test or whose breath test results indicate an alcohol content of ten-hundredths of one per cent or more shall be placed under arrest. Any person so arrested may then, upon the direction of the law enforcement officer, be required to submit to a test of his blood, breath, or urine for a determination of the alcohol content. The law enforcement officer requiring such breath,

blood, or urine tests shall advise such persons of the consequences of refusing to submit to such tests. Any person who refuses to submit to a breath test required pursuant to this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars. Any person who refuses to submit to a blood, breath, or urine test required pursuant to this section shall be guilty of a crime and, upon conviction thereof, shall be punished in the same manner as he would be if convicted for a violation of section 39-727."

This section must be read in connection with section 39-727.15, R. S. Supp., 1971, which provides as follows: "Any person arrested for any offense involving the operation of a motor vehicle while under the influence of alcoholic liquor shall be required to submit to a blood or urine test as provided in section 39-727.03 without the preliminary breath test if the arresting officer does not have available the necessary equipment for administering a breath test. Any person refusing to submit to the test required by this section shall be subject to the same penalties provided for violation of section 39-727.03."

In State v. Williams (1972), *ante* p. 127, 201 N. W. 2d 241, we determined that the Implied Consent Law as it existed previous to the 1971 amendment was constitutional. The 1971 amendment made the refusal to take the test a separate crime, whereas previously the penalty was merely the suspension of the driver's license of defendant. It is this fact which defendant contends makes the difference. We do not agree. The Implied Consent Law, as amended in 1971, is constitutional.

In Schmerber v. California (1966), 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908, the United States Supreme Court held the Fifth Amendment privilege protects an accused from being compelled to testify against himself only as to evidence of a testimonial or communicative nature. The withdrawal of blood and the use of the

analysis in evidence does not involve compulsion within the Fifth Amendment.

See, also, State v. Meints (1972), *ante* p. 264, 202 N. W. 2d 202, where there were two separate prosecutions. We there permitted the State to introduce evidence of the defendant's refusal to give a body specimen, although he was being prosecuted in another action for that refusal.

Defendant further contends the statute is so vague and indefinite as to create doubt and uncertainty as to its meaning and is therefore violative of his right to due process. Defendant argues it is impossible to determine from the terms of section 39-727.03, R. S. Supp., 1971, what penalty will result from refusal to take the chemical test. He questions whether his punishment should be for the crime of first, second, or third offense. There is no merit to this contention. It is the duty of this court to give a statute an interpretation which meets constitutional requirements, if it can. State v. Simants (1968), 182 Neb. 491, 155 N. W. 2d 788. The language, "upon conviction thereof, shall be punished in the same manner as he would be if convicted for a violation of section 39-727," can only be read to mean that if it is a first offense the penalty shall be as provided for a first offense in that statute; if a second offense, the penalty shall be the one provided for a second offense in that statute; and likewise, if the conviction is for a third offense, it shall be the penalty provided for a third offense in section 39-727, R. S. Supp., 1971.

The trial court's instruction No. 4, so far as material herein, is as follows: "Any person arrested for any offense involving the operation of a motor vehicle while under the influence of alcoholic liquor, shall be required to submit to a blood or urine test for a determination of the alcoholic content thereof, without a preliminary breath test if the arresting officer does not have available the necessary equipment for administering a breath test."

The trial court's instruction No. 6, so far as material herein, is as follows: "The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged in the second count are: 1. That on or about the 20th day of September, 1971, in Gage County, Nebraska, the defendant was arrested for an offense involving the operation of a motor vehicle while under the influence of alcoholic liquor; 2. That the arresting officer did not have available the necessary equipment for administering a breath test to determine alcoholic content; 3. That the arresting officer requested the defendant to submit to a blood or a urine test for a determination of alcoholic content thereof, and advised the defendant of the consequences of refusing to submit to such tests; and 4. That the defendant then refused to submit to such blood or urine test."

Defendant's proposed instruction No. 1, so far as material herein, provided: "Any person arrested for any offense involving the operation of a motor vehicle while under the influence of alcoholic liquor shall be required to submit to a blood, urine or breath test, for a determination of the alcoholic content. If equipment for testing a breath sample is not available then such person shall be required to submit to a blood or urine test. The officer requesting such tests shall advise such person of the consequences of refusing to submit to such tests. Any persons refusing to submit to such test as required above shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as provided by law."

It is apparent that defendant's proposed instruction No. 1 was essentially covered in the court's instruction No. 4. Instruction No. 6 required the jury to find, before it could find defendant guilty, that the arresting officer did not have available the necessary equipment for administering a breath test to determine alcoholic

content. The instructions as a whole adequately presented the issues to the jury.

The fact that defendant attempted to give a conditional or qualified consent to the chemical tests does not meet the statutory requirement. The jury was required to find that breath testing equipment was not available. A qualified consent or refusal is considered to be a refusal. Rusho v. Johns (1970), 186 Neb. 131, 181 N. W. 2d 448.

Judgment affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion holds: "The Implied Consent Law, enacted in 1971, is constitutional." That holding compounds the obvious legislative confusion apparent in the 1971 and 1972 attempts to revise statutes dealing primarily with drunken driving. It places the stamp of judicial approval upon an involved and confused statutory structure.

The 1971 Legislature repealed the former provisions of the Implied Consent Law which provided for a civil revocation procedure before the Director of Motor Vehicles for refusal to submit to a chemical test, formerly sections 39-727.08 through 39-727.12, R. R. S. 1943. At the same time section 39-727.03, R. R. S. 1943, was converted into a criminal statute which made refusals two separate crimes, and provided that a refusal to submit to a blood, breath, or urine test was to be punished "in the same manner" as a violation of the drunken driving statute.

The defendant here was charged, convicted, and sentenced separately on counts for drunken driving and for refusing to submit to a chemical test. During the time the 1971 laws were in effect, there was no civil proceeding of any kind for revocation of a driver's license for refusal to submit to a chemical test. The repeal of those previous provisions also repealed the statutory requirement that if the test was refused, it

should not be given. In the absence of that provision, Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908, was obviously controlling. In 1971, the State could compel an arrested driver to submit to such a test whether he objected or not.

In this context, section 39-727.03, R. S. Supp., 1971, made it a crime to refuse to consent to a test which legally required no consent. The State could make the test whether the request was refused or not. Although the refusal was gratuitous and could be wholly disregarded by the State, nevertheless the statute provided that any person who refuses to submit "shall be punished in the same manner" as if convicted of drunken driving. That punishment included mandatory fines of $100 to $300; confinement ranging from less than 3 months in jail to 1 to 3 years in the Penal Complex; and included as an automatic provision, a revocation of driver's license for periods of 6 months to a year after discharge from confinement or payment of fine. Obviously, the penalty for refusing a test which could be given anyway had no relationship to the seriousness of the crime. Neither did it prevent the imposition of duplicate penalties for a drunken driving conviction.

The original purpose of the implied consent laws was to encourage persons suspected of driving under the influence of alcohol to submit to chemical tests by making a refusal result in the loss of a driver's license. The 1971 Nebraska statutes completely altered that situation and created a separate criminal offense, related to but entirely separate from the offense of drunken driving, and also removed the statutory proviso that if a test was refused, it should not be given. The statute also failed to specify whether a conviction for either a refusal or for drunken driving would eliminate the other; or whether refusal to take a chemical test should be treated as a lesser included offense in a prosecution for drunken driving; or whether charges could be filed separately.

The 1972 Legislature substantially reenacted the civil revocation statutes but new numbers were put on them and they are now sections 39-727.16 to 39-727.20, R. S. Supp., 1972. The Legislature also amended section 39-727.03, R. S. Supp., 1971, by making a more definite separation of the crime of refusing a preliminary breath test and the crime of refusing after arrest. It also provided that upon refusal the person not only "shall be punished in the same manner" as a violation of the drunken driving section but also "shall be subject to the administrative revocation procedures of the Director of Motor Vehicles." The reenactment of the old administrative revocation procedures also brought with it the revival of the statutory requirement that when a test was refused, "the test shall not be given."

The practical effect of the 1972 act was to revive the Implied Consent Law which had been in effect prior to 1971, and couple with it the two new crimes for refusal which were created in the 1971 law for the first time. Under the provisions of the 1972 law, for one occasion of suspected and actual drunken driving, a person may find himself convicted of three crimes: (1) The misdemeanor offense of refusing a breath test before arrest; (2) refusing a chemical test after arrest; and (3) the principal crime of drunken driving. In addition, for refusal after arrest he will have his driver's license revoked for 1 year by the Director of Motor Vehicles. Two of the three crimes also provide automatic license revocations as well as fines and possible jail or prison sentences. Under the current 1972 law, the punishments and penalties for a refusal to take a chemical test after arrest are greater than the punishments and penalties for drunken driving! The 1972 legislation serves to further complicate an already complicated and confused statutory structure, but those statutory provisions are not presently before us. It is nevertheless an appropriate time to call the attention of the Legislature to the problem.

It is extremely important that drunken drivers be taken off the highways. It is equally important that the removal be accomplished validly and justly.

STATE OF NEBRASKA, APPELLEE, V. EDWARD D. KENNEDY, APPELLANT.
203 N. W. 2d 106

Filed December 20, 1972. No. 38442.

1. **Right to Counsel: Records: Appeal and Error: Criminal Law.** A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy.
2. **Continuances: Criminal Law.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.
3. **Right to Counsel: Criminal Law.** An accused is not free to manipulate his right to counsel for the purpose of obstructing orderly procedure or other phases of judicial administration.
4. **Evidence: Criminal Law.** The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
5. **Appeal and Error: Trial: Jury.** The voir dire examination of jurors, the opening statements, and the final arguments to the jury are not customarily included in a bill of exceptions, and will not be included unless a request is made to the reporter that they be reported and included.
6. **Criminal Law: Trial: Instructions.** An instruction that the jury is to draw no inferences from the fact a defendant did not testify is a cautionary instruction for the benefit of the defendant.

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

Edward D. Kennedy, pro se.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

SPENCER, J.

Defendant, pro se, appeals his conviction on a charge of burglary with explosives. He assigns as error inadequacy of counsel; denial of a speedy trial; insufficiency of the evidence to sustain a conviction; the giving of an instruction on aiding and abetting; suppression of a portion of the bill of exceptions; and the giving of a cautionary instruction on the failure of the defendant to testify. We affirm.

At approximately 1 a. m., April 19, 1971, the police were notified that a citizen had observed some people prowling around a grocery store adjoining his home. The police investigated but found nothing. At about 2:35 a. m., the same morning, the officers again checked the store and found a hat which had not been present before. This excited suspicion and a closer check was made. The defendant was found on the roof of the store. The skylights had been removed and were on the roof. There was a large screwdriver with a wooden handle lying near the skylights. At the time of defendant's arrest on the roof, he gave the police officer a two-way radio. Inspection of the store itself disclosed that doors had been forced and preparation had been made to open the safe. The officers found a large bag or sack with tanks, welding equipment, and a burning bar near the safe, and the space around the safe appeared to be wet. The tanks found in the store contained acetylene gas and oxygen.

We first consider defendant's claim that he was denied a speedy trial. Defendant's preliminary hearing was held May 5, 1971. On that date he was bound over to the district court for trial. The next jury held in Lancaster County after May 5 was from May 10 to May 24.

By May 5, however, cases to be tried to that jury had already been arraigned and those cases were tried during that jury term. The next jury session was September 20 to October 1. The cases to be tried at that session were arraigned on August 25. Appellant's counsel was notified of the date of arraignment but could not be present. Because appellant wanted to wait for his attorney, he was not arraigned and was not tried to that jury panel. Defendant's counsel was notified on October 8 that the case was to be tried on October 11. He again said that he could not be present, and the case was continued until October 14, when the appellant was arraigned. Trial did not actually begin until October 19, although arguments were had on preliminary matters on October 14, 15, and 18.

Defendant is relying primarily on sections 29-1205 to 29-1209, R. S. Supp., 1972, which require an accused to be brought to trial within 6 months from the date the information was filed, or within 6 months of April 30, 1971. It is evident that defendant's trial was held within the 6-month period, so defendant received a speedy trial within the ambit of these provisions. In any event, the delays herein were caused not by the prosecution but by the defense.

Defendant contends that he was denied effective assistance of counsel in his defense. This appears to be predicated on the fact that defendant's counsel had done little on the case between the date of his preliminary hearing, May 5, and October 14. The record is barren of any showing of what might have been done by way of preparation for the trial of the case during that period. The defendant was apprehended on the roof of the building, in possession of incriminating evidence. The record itself shows a vigorous defense by defense counsel during the trial of the case, hampered, however, by defendant's attempt to run his own defense. In State v. Oziah (1971), 186 Neb. 541, 184 N. W. 2d 725, we said: "A claim of error on the ground of in-

effective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy." Regardless of what defense counsel may have done between May 5 and October 14, it cannot be denied that he had the time between October 14 and October 19 to make adequate preparations for trial.

Defendant obviously was attempting to run his own defense. He asked the court to discharge counsel because counsel refused to file certain preliminary motions requested by him. He coupled these requests with requests for a continuance to permit him to secure other counsel. In State v. Woods (1968), 182 Neb. 668, 156 N. W. 2d 786, we said: "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby." The court did not abuse its discretion herein. An accused is not free to manipulate his right to counsel for the purpose of obstructing orderly procedure or other phases of judicial administration. See State v. Kirby (1971), 187 Neb. 380, 191 N. W. 2d 162. The record herein amply demonstrates that the court did not abuse its discretion in refusing to permit the discharge or withdrawal of defendant's counsel.

Defendant's argument on the insufficiency of the evidence to sustain the charge is predicated on his thought that he was not expressly shown to be connected with the explosives. He suggests that there could have been another burglary attempt that evening, and the burglars with the explosives were scared off. He suggests that he might have been convicted of attempted burglary but not burglary with explosives. Defendant overlooks the fact that if he were ascending or descending, some type of equipment would have been necessary. No such equipment was found, either on

the roof or in the store. All he had with him was the two-way radio and the screwdriver. The jury could reasonably have found that he was stationed on the roof as a lookout for an accomplice who was to use the explosives. While the evidence of defendant's participation in the burglary with explosives is circumstantial, it is adequate to sustain the conviction. When apprehended, the defendant gave an assumed name, and said he was sleeping on the roof. The evidence herein meets the test set out in State v. Morgan (1972), 187 Neb. 706, 193 N. W. 2d 742: "The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt."

Defendant attacks the giving of an instruction on aiding and abetting. What we have said in the preceding paragraphs amply disposes of this contention. The instruction was given because there was no direct evidence that the defendant had himself entered into the building in question, or had personally attempted to open the safe. The instruction was given for the purpose of informing the jury that the defendant could be guilty of participation even though he had not actually committed the acts but was aiding in their commission. There was no prejudice in the giving of the instruction on aiding and abetting.

Defendant's claim of the suppression of a portion of the bill of exceptions refers to the fact that the record does not include the voir dire examination of the jurors, the opening statements, and the final arguments to the jury. It is not customary for these to be included in a bill of exceptions unless a request is made to the reporter that they be reported and included. No such request was made herein. The praecipe filed for a transcript requests a bill of exceptions "which shall include all of the evidence at the trial and all rulings

thereon." The bill of exceptions does meet that requirement. What we said in State v. McDonnell (1971), 186 Neb. 316, 182 N. W. 2d 903, is applicable herein: "Defendant's last assignment of error alleges the failure to supply him with a complete record of his proceedings. He was furnished with a complete transcript of all of the recorded proceedings, at state expense. These proceedings did not include the voir dire examinations nor the opening and closing arguments to the jury, one of which closing arguments was made by the defendant himself, because no request was made that they be recorded. If defendant's counsel had made the request for the record of these proceedings, it would have been granted as a matter of course. Poverty was not the basis for the omissions because they are never included unless specifically requested." Defendant, after filing a poverty affidavit, was permitted to appeal in forma pauperis.

Defendant's last assignment of error attacks the cautionary instruction on the failure of the defendant to testify. The instruction given is as follows: "You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusion or inferences as to his reasons in that regard." Before the giving of the instruction the court informed the defendant and his attorney that such an instruction would be given. Later, the court asked defendant and his counsel if they had any objection to any of the instructions as proposed. No objection was made to this instruction. As we said in State v. Johnson (1972), 188 Neb. 151, 195 N. W. 2d 517: "An instruction that the jury is to make no inferences from the fact a defendant did not testify is a cautionary instruction for the benefit of the defendant."

For the reasons given, the judgment is affirmed.

AFFIRMED.

MARY ALLGOOD, APPELLANT, V. DONALD ALLGOOD, APPELLEE.
203 N. W. 2d 102

Filed December 20, 1972. No. 38460.

Divorce. If sustained by the pleadings and evidence, it is within the sound discretion of the court as to whether a divorce from bed and board or an absolute divorce shall be granted.

Appeal from the district court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

Boyle & Hetzner, for appellee.

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

BOSLAUGH, J.

This is an action for divorce brought by Mary Allgood against Donald Allgood. The plaintiff sought a decree of separate maintenance. By cross-petition, the defendant sought an absolute divorce. Both parties charged the other with extreme cruelty. The trial court awarded an absolute divorce to the defendant, made a division of the property, and awarded the plaintiff $3,900 alimony payable in monthly installments. The plaintiff appeals.

The parties were married in 1938 and have one child, 29 years of age, who is not dependent upon them for support. The parties first separated on July 27, 1969, but were reconciled on December 24, 1969. The defendant left the family home again on January 12, 1970. He returned on June 5, 1970, and left again on October 27, 1970.

There was evidence that the defendant was guilty of adultery between January 12 and June 5, 1970. However, the reconciliation on June 5, 1970, condoned the offense and prevented that misconduct from being a ground for divorce. Schwarck v. Schwarck, 175 Neb. 560, 122 N. W. 2d 489.

The defendant's evidence indicated that for the last 25 years the plaintiff has been critical of the defendant and has constantly nagged and argued with him. This evidence was sufficient to support a finding of extreme cruelty and justify the award of an absolute divorce to the defendant.

Where sustained by the pleadings and evidence, it is within the sound discretion of the court as to whether a divorce from bed and board or an absolute divorce shall be granted. Beals v. Beals, 152 Neb. 364, 41 N. W. 2d 152. The evidence in this case shows clearly that the legitimate ends and objects of matrimony have been destroyed and that an absolute divorce should be granted.

The plaintiff's complaint in regard to the property division and alimony award is that she would have preferred an award of $200 per month support until the defendant reaches age 65 (he is now 55) or retires under social security, or until the plaintiff remarries. As we understand the record, the property awarded to the plaintiff has a value in excess of $27,000 and amounts to more than 50 percent of the estate of the parties. The plaintiff is approximately 55 years of age and in reasonably good health. The alimony is payable over 26 months which will allow the plaintiff a time in which to adjust. The award which was made is realistic and proper under the circumstances in this case.

The judgment of the district court is affirmed. The plaintiff is allowed the sum of $250 for the services of her attorney in this court.

AFFIRMED.

MARVIN HASEMANN, EXECUTOR, ESTATE OF FRED H. HASEMANN, DECEASED, APPELLANT, V. FRED JR. HASEMANN, APPELLEE.
203 N. W. 2d 100

Filed December 20, 1972. No. 38494.

1. **Contracts.** A simple promise to pay money is not made impossible of performance by the death or illness of either the debtor or the creditor.
2. ———. Parties to a contract can, by express terms, make their mutual duties terminate upon the death of one of them, even though the promised performances are not personal.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Homer E. Hurt, Jr., for appellant.

Moodie & Moodie, for appellee.

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

SMITH, J.

Plaintiff as executor sought to recover money that the deceased had lent defendant. After conclusion of all the evidence in a trial without a jury the court dismissed the claim. On appeal the questions are related to the weight of the evidence and the dead man's statute.

Marvin, defendant, and Verlin survived their father, who died August 2, 1969. After appointment of plaintiff as executor of the estate on September 8, the three brothers opened the safe deposit box of the deceased. They were alone.

Plaintiff's testimony on his case-in-chief is as follows: The box contained a promissory note that defendant had made on March 1, 1960, to his father for $7,873 payable March 1, 1965, with interest at 4 per cent a year. Defendant admitted liability on the note, having earlier admitted the indebtedness. The note was not produced, for its whereabouts was unknown to plaintiff. At the bank Verlin and defendant each

had agreed to pay plaintiff $500 on his indebtedness to defray expenses of administration.

On plaintiff's offer a letter from defendant's counsel to plaintiff's counsel was received in evidence. Referring to the controversy, it read: "This disagreement involves the extent to which . . . (Verlin and defendant) may have been indebted to their father . . . at his death. . . . there is reason to believe that the brothers may not be liable for the indebtedness. . . . the correct figures are . . . : (defendant) 7873.00."

Defendant during his case-in-chief testified as follows: "I bought a farm from my father in 1951 . . . and I wanted to pay him and he didn't believe in leaving money in the bank and he said that if he wanted it he would ask for it and otherwise to keep the rest of it." He had therefore paid all but $7,800 of the price and expenses of $73. He and his father then and there had agreed on an interest rate of 4 per cent a year. The agreement was reaffirmed from time to time over the years. Defendant paid none of the principal, but in 1966, 1967, and 1968 he paid his father $317.60, $315, and $315 respectively. He made no promissory note in connection with the transaction, and the safe deposit box contained none.

According to Verlin, he looked in the safe deposit box, but he saw no promissory note made by defendant. Both men testified that the three of them agreed to advance $500 for administration expenses. Plaintiff alone made no advance and he conceded that $1,000 was insufficient.

We summarily reject three of plaintiff's arguments. First, the implied finding that defendant did not execute the promissory note in question is not clearly wrong. Stauffer v. Wilson, 182 Neb. 129, 153 N. W. 2d 454 (1967). Second, it is unnecessary for us to consider admissibility of conversations with the deceased after the sale of the land. Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116 (1948).

Third, a legal representative waives the protection of the dead man's statute by introducing a witness who testifies to the conversation or transaction. See § 25-1202, R. S. Supp., 1972. Waiver respecting defendant's testimony to the terms of the sale is clear.

The remaining question is whether the death of the father discharged the duty of defendant to pay principal or interest under the contract. A simple promise to pay money is not made impossible of performance by the death or illness of either the debtor or the creditor. Parties can, by express terms, make their mutual duties terminate upon the death of one of them, even though the promised performances are not personal. See, 6 Corbin on Contracts, § 1334, p. 377; Restatement, Contracts, § 460, p. 859 (1932). Defendant and his father contemplated that the latter's death would terminate the duty of defendant to pay any principal or interest he owed the father.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM WAECHTER, APPELLANT.

203 N. W. 2d 104

Filed December 20, 1972. No. 38510.

1. **Searches and Seizures: Evidence: Trial: Criminal Law.** The invalidity of a search warrant does not of itself automatically make evidence seized inadmissible.
2. **Motions, Rules, and Orders: Evidence: Trial: Criminal Law.** A motion to suppress can be urged only by one whose rights are violated, not by one aggrieved solely by the introduction of damaging evidence.
3. **Controlled Substances: Constitutional Law: Statutes.** The Depressant and Stimulant Drugs Act of 1967 did not violate Article III, section 14, of the Constitution of Nebraska.
4. **Controlled Substances: Criminal Law: Trial: Evidence.** A party who claims that an exception contained in the Depressant and

Stimulant Drugs Act is applicable to him has the burden of proof to establish that the exception is applicable.

5. **Sentences: Appeal and Error: Criminal Law.** A sentence within statutory limits will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Lincoln County: JACK HENDRIX, Judge. Affirmed.

Beatty, Morgan & Vyhnalek, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of unlawful possession of a depressant or stimulant drug and sentenced to imprisonment for 2 years. He appeals, contending the trial court should have suppressed certain items of evidence; the statute involved was unconstitutional; and there was a failure of proof regarding the exceptions contained in the act.

The evidence showed the defendant and Ray Evans lived in an apartment at 108 East F Street in North Platte, Nebraska. On December 31, 1970, this property was under surveillance by the police. Between 5:20 and 5:40 p. m., an officer saw the defendant place a plastic bag on the ground between a garage and a picket fence on property adjacent to 108 East F Street, known as 609 South Jeffers. The officer picked up the plastic bag at about 6 p. m., which bag was found to contain seven tablets of lysergic acid diethylamide, also known as LSD.

After the officer had picked up the plastic bag containing LSD, he entered the apartment at 108 East F Street, served a search warrant on Evans, and conducted a search of the premises. The warrant was subsequently determined to be void. The defendant contends the contents of the plastic bag should have been suppressed

because it was listed in the inventory and return to the search warrant.

The fact that the tablets were listed in the inventory and return to the void search warrant is not controlling in this case. The invalidity of a search warrant does not of itself automatically make evidence seized inadmissible. State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85. If the defendant does not have standing to challenge the validity of the search, the evidence may be admissible. A motion to suppress can be urged only by one whose rights were violated, not by one aggrieved solely by the introduction of damaging evidence. State v. McCune, *ante* p. 165, 201 N. W. 2d 852.

The evidence clearly shows that the bag containing the tablets had been placed on the ground between a picket fence and a garage. The location was on adjoining property and was not in an area in which the defendant could have a reasonable expectation of privacy. Under the circumstances in this case the motion to suppress was properly overruled as to the tablets contained in the plastic bag.

The defendant was charged with unlawful possession of a depressant or stimulant drug, a violation of section 28-487 (3), R. S. Supp., 1969. The information alleged possession of a hallucinogenic drug which is included within the statutory definition of a depressant or stimulant drug. § 28-486 (8) (c), R. S. Supp., 1969. These sections are part of a law enacted by the 1967 Legislature relating to depressant, stimulant, hallucinogenic, and counterfeit drugs. Laws 1967, c. 161, p. 460.

The defendant contends the 1967 act was invalid because it was amendatory of the Narcotic Drugs Law and did not comply with the constitutional requirement that an amendatory act shall contain the sections amended and repeal the sections so amended. Art. III, § 14, Constitution of Nebraska. The sections of the 1967 act relating to depressant and stimulant drugs were new and independent legislation and were not amendatory

of existing statutes. The constitutional requirement was not applicable to these sections.

The defendant's contention that the act contained an unconstitutional delegation of legislative power is fully answered in State v. Workman, 186 Neb. 467, 183 N. W. 2d 911.

The defendant complains that there was a failure of proof as to the exceptions contained in the act. A defendant charged with a violation of the Depressant and Stimulant Drugs Act has the burden of proof to establish that his possession was authorized if he claims that one of the exceptions contained in the act was applicable to him. State v. Minor, 188 Neb. 23, 195 N. W. 2d 155. There is nothing in the evidence in this case to suggest that any of the exceptions were applicable, and the State is not required to negative each exception.

The defendant also claims that the sentence was excessive. The sentence imposed was the minimum period of imprisonment prescribed in the act for a first offense. § 28-489, R. S. Supp., 1969. A sentence within statutory limits will not be disturbed in the absence of an abuse of discretion. State v. Melvin, 187 Neb. 797, 194 N. W. 2d 178.

Although the defendant had not been convicted of any felonies previous to this offense, the record shows that he had supplied drugs to other persons on many occasions. The record also indicates that the defendant continued to use drugs after his arrest for this offense. There is nothing in the record to show the sentence imposed here was an abuse of discretion.

The judgment of the trial court is affirmed.

AFFIRMED.

NORDEN LABORATORIES, INC., A CORPORATION, APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF THE COUNTY OF LANCASTER, NEBRASKA, ET AL., APPELLANTS.
203 N. W. 2d 152

Filed January 5, 1973. No. 38356.

1. **Statutes: Legislature.** In the Legislature the record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation.
2. **Statutes.** Legislative history cannot ordinarily serve to import an intent into legislation devoid of language fit to express it.
3. **Warehouses: Taxation.** The exemption under the free port laws in 1969 was not open to a warehouseman that failed to make available and use the warehouse facilities for public storage for compensation.
4. **Warehouses: Taxation: Constitutional Law.** The free port law in force in 1969 did not violate state constitutional provisions for uniformity and against special privileges.
5. **Classification: Taxation: Constitutional Law.** A reasonable classification under the federal constitutional guarantee of equal protection includes all persons in similar situations with respect to the purpose of the law.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

Paul L. Douglas and Floyd A. Sterns, for appellants.

Cline, Williams, Wright, Johnson & Oldfather and Donald F. Burt, for appellee.

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

SMITH, J.

The question is whether goods manufactured and stored by the owner in its licensed, bonded warehouse are exempt from taxation under free port laws. The district court rendered judgment for the taxpayer, and Lancaster county appeals. The latter contends undisputed facts fail to entitle the taxpayer, Norden Laboratories, Inc., to the exemption. Norden counters with a statutory interpretation and state and federal constitutional provisions.

In 1969 Norden mainly manufactured pharmaceutical products in Lancaster county. The products were moved from the factory to the warehouse for shipment, both factory and warehouse being located in one building. Norden marketed the products through 1 branch in Omaha and 25 branches outside Nebraska.

The Nebraska State Railway Commission in 1968 had granted Norden a public storage warehouse license, Norden having furnished bond. During 1969 Norden owned all products in its warehouse. At no time did it solicit or accept goods of others for storage.

Norden maintained a running inventory—comprehensive manual and computer records. Products in storage moved in accordance with the first-in, first-out rule because of their limited life. The records enabled Norden accurately to determine when the products moved out of the warehouse. Products sold to Nebraska residents were returned for taxation, small adjustments being made retroactively to the taxable date when the products were in the warehouse.

Norden in 1969 reported the total actual value of its taxable personal property in Lancaster county to be $665,520. It claimed an exemption of $412,000 for products it intended to ship outside Nebraska. The county assessor denied the exemption, increasing actual

value to $1,077,520. On appeal the county board of equalization dismissed Norden's protest. The district court on appeal upheld the exemption claim, decreasing the valuation by $412,000.

Applicable statutes provided as follows: ". . . (b) goods . . . stored in transit in the state in bonded and licensed warehouses or storage areas and which are intended for and which are shipped to destinations outside this state upon leaving such warehouses or storage areas need not be . . . listed or reported." § 77-1226.01, R. R. S. 1943; Laws 1961, c. 379, § 2(2), p. 1165.

"Bonded and licensed warehouses . . . shall mean warehouses established and licensed on January 1, 1961, . . . engaged in the business of storing goods . . . for compensation, which issues warehouse receipts . . ., operating under a bailor - bailee relationship, offering and making available its facilities to the public generally . . . and continuously making available and using its facilities for public storage for compensation, and such . . . warehouses established on or after January 1, 1961, which thereafter are licensed . . . ." § 77-1226.02, R. R. S. 1943; Laws 1965, c. 484, § 1, p. 1563 (L.B. 125). The latter amended a prior amendment at the same session, Laws 1965, c. 485, § 1, p. 1564 (L.B. 195), by deleting the phrase "or storage areas" wherever it appeared in the section and deleting the clause "which do not use such warehouse . . . for goods . . . directly or indirectly owned or controlled by the warehouse owner or operator . . . ."

An explanation of L.B. 125 on the floor of the Legislature explicitly supports an interpretation in favor of Norden. See, 1 Leg. J. 1603 (75th Sess., 1965); L.B. 125, Floor Debate, p. 1490 (May 14, 1965) (official, unpublished, verbatim record). The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. See, Folsom, Legislative History 30 (1972); 2 Sutherland, Statutory Construction, § 5001, p. 481 (3d

Ed., 1943); cf. Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692 (1959). It cannot ordinarily serve to " 'import an intent into legislation devoid of language fit to express it.' " Folsum, op. cit. 15.

L.B. 125 and L.B. 195 prevent resort to a secondary source. L.B. 195 excluded from the exemption goods owned and stored by a warehouseman. L.B. 125 in deleting the exclusionary language opened the exemption to such goods. It did not, however, rule out the requirements in the first part of the bill. Norden failed to make available and use its facilities for public storage for compensation, and it therefore did not gain an exemption.

Norden argues that our interpretation violates state constitutional provisions for uniformity and against special privileges, Art. III, § 18, and Art. VIII, § 1, Constitution of Nebraska. Specific constitutional authority for a free port exemption is found in Article VIII, section 2A, Constitution of Nebraska. Interpreting the provisions together, we conclude that the free port laws were not violative of the state Constitution in the respects that Norden argues. See Rehkopf v. Board of Equalization, 180 Neb. 90, 141 N. W. 2d 462 (1966).

Norden asserts that the free port laws with our interpretation violate the federal constitutional guarantee of equal protection of the laws. It argues that we are upholding an unreasonable under-classification.

A reasonable classification under the federal guarantee is one that includes all persons in a similar situation with respect to the purpose of the law. See Tussman and tenBroek, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341 at 346 (1949). The free port laws do not trench upon the federal guarantee.

The judgment is reversed and the cause remanded with directions to affirm the action taken by the county board of equalization.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

It seems to me that both the purpose and effect of L.B. 125, Laws 1965, c. 484, p. 1562, was to exclude warehouses licensed after January 1, 1961, from the requirement that the facilities be offered and available for use by the public generally. I would affirm the judgment of the district court.

McCOWN, J., joins in this dissent.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, V. AMERICAN THEATER CORPORATION, A CORPORATION, DOING BUSINESS AS "PUSSY CAT THEATER," ET AL., APPELLANTS.

203 N. W. 2d 155

Filed January 5, 1973. No. 38470.

1. **Evidence: Trial.** A party who is under a duty to bring before the court some circumstance may, by his inexcusable failure to do so, imply that the exposed circumstance would be unfavorable to him.
2. ———: ———. Failure of a party under a duty to produce matter specified in a subpoena duces tecum may satisfy the burden of his opponent to produce evidence.
3. **Evidence: Trial: Witnesses.** A subpoena duces tecum for trial imposes a duty upon the witness to bring with him sought-after matter that is under his control and that the law requires him to produce as evidence.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

D. Freeman Hutton, Robert Eugene Smith, and Stern, Harris, Feldman, Becker & Thompson, for appellants.

Herbert M. Fitle, Gary P. Bucchino, and Richard L. Dunning, for appellee.

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

SMITH, J.

The City of Omaha petitioned for a declaratory judgment and injunction against defendants exhibiting obscene motion pictures to the public for a price. After a trial the district court found generally against defendants, declaring certain films obscene and ordering the injunction. It also sentenced defendant Richard Berry to 60 days in jail for contempt of court on the ground that Berry had disobeyed a subpoena duces tecum.

On appeal defendants contend in part that (1) oral testimony to contents of the films was insufficient to prove obscenity and (2) Berry was not guilty of contempt.

Defendant American Theater Corporation operated the Pussy Cat Theater in Omaha, and its resident agent and manager of the theater was Berry. Under ex parte orders in this suit the sheriff in February 1971, seized 29 films. On motion of defendants the court in July ordered return of the films. The order also stated that "said films may not be used in any subsequent civil or criminal proceedings against the defendants."

In October 1971 Omaha caused the sheriff to serve subpoenas duces tecum upon Berry as agent of American and of Global Leasing, Inc., to bring 3 feature-length, sound films and 5 untitled short, silent films with him. These films were the subject of the judgment and injunctive order under review. At the hearing Berry testified as follows: He was not in possession or control of the films, for he had returned them to Global, the distributor. American and Global, as far as Berry knew, were not related.

The Omaha manager of Wells Fargo Alarm Services in December 1970, negotiated with persons other than Berry for a burglar alarm in the Pussy Cat Theater. The alarm system was then installed and was still operating in October 1971, payments having been made in due course. The Omaha manager had understood that

Berry would sign the written agreement, and Berry did so as agent of Global.

Police officers who had attended the Pussy Cat Theater identified the films by oral testimony. Their testimony to obscenity was somewhat weakened by circumstances. Some officers had viewed only parts of films, and none of course could recall every detail. Defendants offered no evidence.

Several rules of law govern. A party who is under a duty to bring before the court some circumstance may, by his inexcusable failure to do so, imply that the exposed circumstance would be unfavorable to him. Failure of a party under a duty to produce matter specified in a subpoena duces tecum may satisfy the burden of his opponent to produce evidence. See, 2 Wigmore on Evidence, §§ 278, 285, and 291, pp. 124, 162, and 185, 186 (3d Ed., 1940); 1 Jones on Evidence, § 29, p. 63 (5th Ed., 1958). A subpoena duces tecum for trial imposes a duty upon the witness to bring with him sought-after matter that is under his control and that the law requires him to produce as evidence. See § 25-1224, R. R. S. 1943.

Without vertical integration of Global and American the Wells Fargo agreement would have been extraordinary. It called for an explanation of the relationship between American and Global, but American remained silent. Omaha satisfied its burden to produce evidence that American was controlling the films. The July order was interlocutory, and the court in October was not bound to follow it. Cf. 9 Moore's Federal Practice, par. 110.13, p. 152 (1972). Nonproduction of the films under the circumstances established violations of the obscenity laws. §§ 28-926.01 through 28-926.08, R. R. S. 1943. The judgment and injunctive order were correct.

Berry in response to the subpoena duces tecum denied possession or control of any of the films. It is not fairly inferable that the facts were otherwise. In the

normal course of distribution and exhibition the films which defendants exhibited in February 1971 would have passed beyond Berry's control prior to October, for he was only a local agent. In that respect integration of American and Global was immaterial. The district court erred in adjudging Berry guilty of contempt.

Other contentions are resolved against defendants. The declaratory judgment and injunctive order are affirmed. The judgment of contempt is reversed and the cause remanded with directions to dismiss that proceeding.

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

JOHN GILLOTTE, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, A CORPORATION, APPELLEE, IMPLEADED WITH LARSON CEMENT STONE CO., A CORPORATION, APPELLANT.
203 N. W. 2d 163

Filed January 5, 1973. No. 38497.

1. **Notice: Waiver: Employer and Employee.** Under the provisions of section 48-118, R. R. S. 1943, requiring the giving of notice of claim or suit against a third person, and opportunity to join and be represented by counsel, substantial compliance is sufficient when the other party had actual notice and opportunity. Notice may be waived in writing or waiver may be implied from unequivocal conduct.
2. **Parties: Jurisdiction: Employer and Employee: Attorneys at Law: Fees.** Under section 48-118, R. R. S. 1943, where employer and employee join in a suit against a third person, the district court has jurisdiction to determine all disputes between employer and employee, including the setting and allocation of attorney's fees and expenses.
3. **Workmen's Compensation: Attorneys at Law: Fees.** Under section 48-118, R. R. S. 1943, the subrogated interest of the employer, for computation and allocation of fees and expenses, is not restricted to the workmen's compensation benefits actually paid, but is measured by the workmen's compensation lia-

bility relieved or discharged by the recovery against the third party.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Haney, Wintroub & Haney, for appellant.

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

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

McCOWN, J.

This case involves the allocation of reasonable expenses of trial and attorney's fees between employer and employee under section 48-118, R. R. S. 1943. That statute applies to suits brought against third parties for injuries to an employee entitled to workmen's compensation benefits from his employer for the same injuries. The employer has appealed from an order of the trial court allocating fees and expenses following a successful recovery from a third party. We affirm the judgment of the trial court.

The plaintiff, John Gillotte, was an employee of the defendant, Larson Cement Stone Company. While in the course of his employment, he was seriously injured by the negligence of the defendant, Omaha Public Power District. The accident occurred August 25, 1967. On several occasions between August 25 and October 19, 1967, plaintiff's attorneys contacted the claims manager for the workmen's compensation insurance carrier of the employer. They discussed with him the progress of their investigation, inquired as to subrogation representation, and were informed that he fully expected to refer the subrogation interest to plaintiff's attorneys. When the suit was ready for filing, the claims manager suggested that the employer rather than the employer's workmen's compensation insurance carrier be named

as the subrogee defendant and served in the ordinary way. On October 19, 1967, suit was filed by plaintiff's attorneys against Omaha Public Power District. Larson Cement Stone Company was a subrogated defendant as to workmen's compensation. On November 2, 1967, plaintiff's counsel was advised by letter that the workmen's compensation insurer had concluded it would be better if they retained their local counsel to represent them in connection with the subrogation matter. Thereafter, employer's counsel filed pleadings claiming subrogation interests on behalf of the employer and advised plaintiff's attorney that they were representing the subrogation interest. The employer's attorneys offered to take part in the trial but were requested not to do so by plaintiff's attorney. They did not participate in the trial although they did, on one occasion, furnish some minor research assistance. The trial resulted in a verdict in plaintiff's favor against the Omaha Public Power District in the sum of $79,263. The judgment was successfully defended on appeal to this court and the judgment was paid. The employer took no part in the appeal.

Thereafter, plaintiff filed an application for determination of the amount of the defendant employer's subrogated interest and future liability and for the allocation of fees and costs. Affidavits, stipulations, and documentary evidence were introduced at the hearing on the application. The workmen's compensation insurance carrier for the employer at appropriate times had paid to or for the benefit of the plaintiff $9,909.24 medical expenses, and $1,764 temporary total disability benefits. Plaintiff suffered a permanent partial disability of 35 percent of each leg and foot, and under Nebraska Workmen's Compensation Act, the present value of such disability at the time the judgment was paid in this third party suit was $18,167.75. No action was ever filed by the plaintiff in the Workmen's Compensation Court to recover amounts due under the Workmen's

Compensation Act, and no judgment was ever entered there.

The trial court determined that the total advantage to the defendant employer and its insurer which resulted from plaintiff's successful recovery from Omaha Public Power District amounted to $29,840.99, and that the reasonable value of the services of plaintiff's attorney to the defendant employer and its insurer was $10,000. The court also determined that reasonable expenses incurred by the plaintiff in preparing the cause for trial were $1,142.75. The court therefore allocated $428.53 of these expenses to the employer and his insurer, along with the attorney's fee of $10,000, and directed the payment of $1,244.71 of the judgment to the defendant employer as satisfaction of the subrogation claim, and the balance of the judgment to the plaintiff.

Section 48-118, R. R. S. 1943, after providing for subrogation to an employer and suits by the employer against third parties, provides that "nothing in this section or act shall be construed to deny the right of an injured employee * * * to bring suit against such third person" for his injuries. The statute then directs that in such event an employer having paid or paying compensation to the employee shall be made a party to the suit for the purpose of reimbursement and subrogation. Additions to that section in 1963 provided in part: "Before the making of a claim or the bringing of suit against such third person by the employee or his personal representative or by the employer or his insurer, each shall give to all others, unless waived in writing, notice of not less than thirty days, by certified or registered mail, an opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel."

After the giving of notice, if either party fails to join in the making of the claim and the prosecution of the suit, the party bringing the claim or prosecuting the suit shall be entitled to deduct from any amount recovered

the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees. The expenses and fees shall be prorated to amounts payable to the employer or his insurer under the right of subrogation and to amounts in excess of the subrogation, "and which expenses and attorney's fees shall be apportioned by the court between the parties as their interests appear at the time of such recovery."

The statute also provides: "If either party makes the claim or prosecutes such action without the giving of a notice to the other party, the party bringing the claim and prosecuting such action shall not deduct expenses or attorney's fees from the amount payable to the other party."

The 1963 amendments also provide that if the employee and employer join in the prosecution of such claim and are represented by counsel, "the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought."

This is a case of first impression in interpreting the 1963 additions to section 48-118, R. R. S. 1943, dealing with the allocation of fees and expenses in actions against third persons for injuries to employees, which injuries are also covered by workmen's compensation.

The defendant employer first contends that the plaintiff did not give the 30-day notice by certified or registered mail of the bringing of the suit against the third party and did not give the defendant employer an opportunity to join in the instituting of the action. The trial court specifically found that the correspondence and conferences between plaintiff's attorney and the claims manager of the workmen's compensation carrier of the employer as set out in the affidavits and exhibits substantially satisfied the requirements of section 48-118, R. R. S. 1943.

A reading of the entire statute makes it quite clear that a strict compliance with the written, certified, or registered mail notice provision was not intended to be mandatory and jurisdictional. The basic purpose was to give notice to the other party. In this case, there is no question but that the employer or its insurance carrier had actual notice of more than 30 days. The statute specifically provides that after the expiration of 30 days, for failure to receive notice or other good cause shown, the district court shall allow either party to intervene. The statute also provides that expenses and fees shall not be deducted where the action has been prosecuted without the giving of "a notice" to the other party. Here too, it should be noted that the action in this case was not tried to a jury until February 1969, almost a year and a half after the petition had been filed; the employer had been served with summons; and had entered its appearance in the action. During that period there were telephone conversations, as well as correspondence, between the parties' attorneys. There is simply no doubt in this case that the defendant employer had actual notice of the making of the claim and the bringing and prosecution of the action. The facts in this case establish either substantial compliance with the notice requirements, or a waiver of those requirements by the defendant employer, or both. Under the provisions of section 48-118, R. R. S. 1943, requiring the giving of notice of claim or suit against a third person, and opportunity to join and be represented by counsel, substantial compliance is sufficient when the other party had actual notice and opportunity. Notice may be waived in writing or waiver may be implied from unequivocal conduct.

The workmen's compensation insurer contends that where the employer or his workmen's compensation insurer is represented by its own counsel and its attorney offers to assist in the preparation and trial, the district

court may not deduct any attorney's fees from the insurer's share of the judgment.

That contention is disposed of by the terms of section 48-118, R. R. S. 1943, itself. Even if the employee and employer or his insurer join in the prosecuting of a claim and are represented by counsel, the reasonable expenses and attorney's fees, in the absence of agreement, are to be divided between such attorneys as directed by the court. To permit an employer or his workmen's compensation insurer to refuse to reimburse an employee for reasonable expenses and fees incurred in the recovery of a judgment against a third party for the benefit of the employer or his insurer under their right of equitable subrogation simply because a pleading had been filed by employer's counsel asserting the admitted right of subrogation would twist the statute and destroy its purpose. It would constitute a return to the situation as it existed prior to the amendment of section 48-118, R. R. S. 1943, in 1963. It would also be in violation of the principles set out in United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N. W. 2d 174. There we held that one who incurs expenses and attorney's fees for the recovery of money for the benefit of a holder of a right of equitable subrogation should be permitted to reimburse himself for the share of the expense that was for the benefit of the holder of the subrogation right. It may well be that the 1963 amendments to section 48-118, R. R. S. 1943, were influenced by the Hills decision. The principle of the Hills case is confirmed by the language of the statute. Under section 48-118, R. R. S. 1943, where employer and employee join in a suit against a third person, the district court has jurisdiction to determine all disputes between employer and employee, including the setting and allocation of attorney's fees and expenses.

The defendant employer also contends that the district court has no original jurisdiction to determine the extent of plaintiff's claim for benefits under the Ne-

braska Workmen's Compensation Act and therefore, in any event, the employer cannot be charged with its share of expenses and fees as to any amounts of compensation benefits not yet paid. The contention is that the employer's subrogation must be limited to the amounts of compensation benefits actually paid at the time of the recovery against the third party, but cannot extend to liabilities under the Workmen's Compensation Act which have not been fixed by the Workmen's Compensation Court and have not been and will not thereafter be paid.

Cases such as Johnson v. L.D.S. Trucking Co., 254 Cal. App. 2d 496, 62 Cal. Rptr. 501, are based upon different statutes, and are not persuasive. We believe the principles set out in Graham v. Industrial Commission, 26 Utah 2d 424, 491 P. 2d 223 (1971), are applicable here. In that case, the employee's widow settled a death case against a third party tort-feasor for a sum in excess of any workmen's compensation award to which she would be entitled under Utah law. The Industrial Commission then refused to make an award upon grounds that the plaintiff had already received more than the amount of any possible award. The Supreme Court of Utah stated: "It is clear that had the Industrial Commission made the award required by the statute, the insurance carrier would have been obligated to pay its share of expenses before it could be reimbursed for the money it had paid plaintiff.

"Under the rulings made by the Industrial Commission in this case, the plaintiff by her efforts caused an undeserved windfall to the insurance carrier in that it was required to pay nothing whatsoever on its obligation to the plaintiff—not even a proportionate share of the expenses incurred by the plaintiff for the carrier's benefit.

"We can see no reason why there should be any difference in the final result whether the third party pays before or after an award is made."

The same basic principles apply here. The determination of the issue under section 48-118, R. R. S. 1943, ought not to turn on the payment or nonpayment but on the extent of the liability relieved or discharged by reason of the recovery against the third party. Even though it be conceded that the district court has no original jurisdiction to determine the extent of an employee's claim for workmen's compensation benefits, that is not the issue here. The issue here is simply the statutory allocation of attorney's fees and expenses between employer and employee in connection with the recovery of a judgment against a third party in which both have interests. Here the affidavits and evidence establish a 35 percent two-member disability and the present value of that disability under the applicable statutes governing Nebraska workmen's compensation benefits. The employer makes no claim that these percentages of disability and amounts of benefits are incorrect but asserts instead that only the Nebraska Workmen's Compensation Court has original jurisdiction to enter an award for such benefits. There can be no question but that the employer had a liability to the plaintiff under the Workmen's Compensation Act, and there is no serious dispute as to the extent of the injuries. The trial court which heard all the evidence as to the injuries in the suit against the third party defendant was certainly in a position to determine on the evidence here what the probable liability of the employer would have been under the Workmen's Compensation Act had the employee's efforts against the third party here been unsuccessful. Such a determination does not constitute an original judgment for workmen's compensation benefits, but is merely a measurement of the interests of the employer, upon which to base a reasonable allocation of fees and expenses in the third party action.

Under section 48-118, R. R. S. 1943, the subrogated interest of the employer, for computation and allocation of fees and expenses, is not restricted to the workmen's

compensation benefits actually paid, but is measured by the workmen's compensation liability relieved or discharged by the recovery against the third party.

Under section 48-118, R. R. S. 1943, the trial court has discretion to prorate and apportion the reasonable expenses and fees between the employer and employee as their interests appear at the time of recovery in a suit against a third party. The trial court specifically found that the defendant employer and its insurer, by reason of plaintiff's successful recovery from Omaha Public Power District, recovered not only the $11,673.24 already paid to or for the plaintiff, but were also relieved of the obligation to pay the plaintiff disability benefits of a present value of $18,167.75. The court determined that the total advantage to the defendant employer and its insurer that resulted from plaintiff's successful recovery against the third party defendant amounted to $29,840.99. The court also determined that the reasonable value of the services of plaintiff's attorney to the defendant employer and its insurer was $10,000. Those determinations were neither arbitrary nor unreasonable. Under the terms of section 48-118, R. R. S. 1943, they should be specifically approved.

The judgment of the trial court was correct and is affirmed.

AFFIRMED.

KINGERY CONSTRUCTION COMPANY, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

203 N. W. 2d 150

Filed January 5, 1973. No. 38518.

Contracts. The intention of the parties to a written contract expressed in unambiguous terms must be determined from its contents.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Alan E. Peterson, for appellees.

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

NEWTON, J.

This is an action for a declaratory judgment to determine plaintiff's liability under a contract for the construction of a chemistry building. Judgment was entered for defendants in the district court. We affirm that judgment.

Defendant Board of Regents let contracts to three independent contractors. One contract was for the electrical work, another for the mechanical aspects of the construction, and the third, to plaintiff, for the general construction of the building. The contract provided: "22. *PAINTING.*

"*a.* All painting of the Contractor's work will be done by the General Contractor except for the following items which shall be painted by the Mechanical Contractor:

"(1) Factory applied prime coats on mechanical equipment.

"(2) Factory applied finish coat on all air supply grilles, air return grilles and air supply diffusers, color to be selected.

"(3) Contractor applied prime coat on access doors.

"(4) Pipe identification and/or painting.

"*b.* If the factory finish on any equipment furnished by the Contractor is damaged in shipment or during construction of the building, the equipment shall be refinished by the Contractor to the satisfaction of the Engineer."

Addendum No. 3 to plaintiff's contract provided: " 'f. Painting on all items of mechanical and electrical equipment, and machinery, ductwork, conduit and other mechanical and electrical items in all equipment rooms and elsewhere where exposed in the building shall be required.' "

In the rooms containing mechanical equipment, all painting was done by the mechanical contractor in accordance with the requirements of the contract. Plaintiff was required to paint all uninsulated, exposed piping in the rest of the building and contends that this was the obligation of the mechanical contractor. Unless the foregoing excerpts can be construed to require the mechanical contractor to perform painting tasks outside the mechanical rooms, the contract is without such requirement. Although other provisions of the contract clearly required the mechanical contractor to paint the so-called "mechanical rooms," the provisions found in the foregoing paragraph 22 do not clearly place a further burden upon it. Items (1) and (2) specify factory applied paint, item (3) painting by the contractor, and item (4) specifies neither but appears to be concerned primarily with pipe identification by painting *or other means*. This is borne out by paragraphs 33. *c.* (2) through *d.* of Division 15A which provide: "(2) All piping outside of mechanical equipment rooms, and including pipe chases, crawl spaces, tunnels, ceiling spaces and piping exposed in rooms shall be identified in each room with a minimum of thirty feet with a pipe marker and flow direction arrow. Markers shall give pipe content name in full.

"*d.* Pipe markers and flow directional arrows shall be Brady self stocking pipe markers as manufactured by the W. H. Brady Company, 727 West Glendale Avenue, Milwaukee 9, Wisconsin, or approved equal." It does not appear that such identification was lacking.

Athough the mechanical and electrical contractors were made party defendants to this action, no relief was

prayed for as to them. Judgment against the Board of Regents was requested. The only question presented therefore is whether or not, as to the Board of Regents, plaintiff had a contractual duty to do the disputed painting. Quite possibly the contract, in part, duplicated requirements for painting as pertains to plaintiff and the mechanical contractor. This could not excuse plaintiff from performing the clear requirements of the contract which pertained to it. The contractual provisions appearing in Addendum No. 3 as above quoted require the general contractor to paint "all items of mechanical and electrical equipment" and "other mechanical and electrical items" throughout the building. It is not disputed that electrical equipment includes electrical conduits throughout the building. In other words, the terminology used includes all wiring in the building as well as equipment found in the mechanical rooms. Applying the same reasoning, it appears to be clear that the term "mechanical equipment" includes not only the heating, plumbing, and air conditioning equipment in the mechanical rooms but also, as adjuncts thereto, the heating, plumbing, and air conditioning conduits, pipes, etc., running through the building. They cannot reasonably be considered equipment of any other type or falling under any other contract classification.

The intention of the parties to a written contract expressed in unambiguous terms must be determined from its contents. See Strickland v. Omaha Nat. Bank, 181 Neb. 478, 149 N. W. 2d 344.

We conclude that under the terms of the contract, plaintiff was required to do the disputed painting. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL SKINNER, APPELLANT.
203 N. W. 2d 161

Filed January 5, 1973. No. 38530.

1. **Appeal and Error: Evidence: Trial.** Unless otherwise prejudicial, error in the admission of evidence relating to a count upon which there was an acquittal is not ground for reversal.
2. **Statutes: Constitutional Law.** Section 28-1011.15, R. S. Supp., 1972, held constitutional.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Leroy Shuster, for appellant.

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

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

BOSLAUGH, J.

The defendant was charged with assault with intent to inflict great bodily injury and with possession of a firearm by a felon. The jury found the defendant not guilty of assault but guilty on the second count. The defendant appeals, contending that the trial court erred in the admission of evidence and that section 28-1011.15, R. S. Supp., 1972, is invalid.

The record shows that on December 24, 1971, the defendant shot Charles F. Runninghawk, Jr., with a 4-inch, .22 automatic pistol. The record also shows that the defendant was convicted of a felony on August 11, 1965.

Over proper objection, Runninghawk was permitted to testify that a doctor and nurse told him he had a gunshot wound. Runninghawk had already testified that he had been shot and other witnesses testified to the fact. The evidence related to the count upon which the defendant was acquitted and could not have been prejudicial. See State v. McDonnell, 186 Neb. 316, 182 N. W. 2d 903.

The defendant's second contention is that section 28-1011.15, R. S. Supp., 1972, which prohibits any person who has been convicted of a felony from having possession of a firearm with a barrel less than 12 inches in length, violates the Second Amendment to the United States Constitution. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State the right of the people to keep and bear Arms, shall not be infringed."

The right to keep and bear arms, which is guaranteed by the Second Amendment, has relationship to the preservation or efficiency of a well-regulated militia. United States v. Miller, 307 U. S. 174, 59 S. Ct. 816, 83 L. Ed. 1206. The Omnibus Crime Control and Safe Streets Act of 1968, which prohibits possession "in interstate commerce" of any firearm by a felon, has been held not to violate the Second Amendment. United States v. Synnes, 438 F. 2d 764, vacated on other grounds in Synnes v. United States, 404 U. S. 1009, 92 S. Ct. 687, 30 L. Ed. 2d 657. As stated in the Synnes case, prohibiting the possession of firearms by felons does not obstruct the maintenance of a well-regulated militia. See, also, Burton v. Sills, 53 N. J. 86, 248 A. 2d 521, 28 A. L. R. 3d 829. The defendant's contention is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

HAROLD BAYSE, DOING BUSINESS AS BAYSE POULTRY FARM, APPELLEE, V. TRI-COUNTY FEEDS, INC., A CORPORATION, APPELLANT.

203 N. W. 2d 171

Filed January 5, 1973. No. 38536.

1. **Evidence: Witnesses.** It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury is to decide, if the case is one to be wholly resolved by such evidence.

2. **Negligence: Pleading.** Contributory negligence is an affirmative defense which must be pleaded.
3. **Negligence: Trial.** Ordinarily the question of the existence of negligence or contributory negligence is one for the jury.

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

Haessler, Sullivan & Inbody, for appellant.

Michael R. O'Malley of Walsh, Walentine, Wolfe & Miles and David A. Johnson, for appellee.

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

NEWTON, J.

This is an action to recover for fire damage to a building alleged to have occurred as a result of defendant's negligence. Verdict and judgment were for plaintiff. We affirm the judgment of the district court.

Defendant leased three frame structures from plaintiff for use in raising chickens. The undisputed evidence reflects the following facts. The buildings were 20 feet by 320 feet and situated about 40 feet apart. In the center between two of the buildings was located a wire mesh incinerator used to burn dead chickens. There were dead grass and weeds between buildings but a space of 1 to 2 feet around the incinerator was bare. A center room in each building contained hoppers for automatic feeders and a furnace. The burned building also contained electric motors to operate fans and feed augers, and three gas-fired brooders. The incinerator was made use of about 9:30 a.m. on the day of the fire. At noon defendant's employee sprayed the contents of the incinerator with water and left for lunch. He drove by on the road at about 1 p.m. and did not notice anything amiss but on returning 30 minutes later found the building was on fire. The fire started near the central part of the 320-foot-long building.

The brooders were in operation and the defendant's

employee testified he shut off the gas and electricity on discovering the fire. An expert witness testified that in his opinion the fire originated in the incinerator, giving as his principal reason the existence of a fire path between the incinerator and the central portion of the building.

Assignments of error refer to the admission of the expert testimony as to the cause of the fire, the denial of an instruction on contributory negligence, and the sufficiency of the evidence.

The objection to the expert testimony is that it refers to an ultimate fact relating to the cause of the fire. The witness was a local fire chief with many years experience and although some of the facts upon which his opinion was based were questionable, this presented a question of credibility for the jury. In McNaught v. New York Life Ins. Co., on rehearing, 143 Neb. 220, 12 N. W. 2d 108, it is stated that: "It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury are to decide, if the case is one to be wholly resolved by such evidence." To the same effect is Petracek v. Haas O.K. Rubber Welders, Inc., 176 Neb. 438, 126 N. W. 2d 466. Determination of the cause of a fire is often beyond the knowledge and experience of the ordinary person and requires a special type of training and experience.

In regard to the failure to instruct on contributory negligence, the transcript reveals that contributory negligence was not pleaded. Contributory negligence is an affirmative defense which must be pleaded. See Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604.

The assignment that the evidence is insufficient to support the judgment presents a more serious problem. This appears to be a borderline case. On the basis of the evidence adduced, we believe the jury could reasonably have found that the fire originated with the incinerator, but was negligence established? Three grounds of negligence are alleged, viz., starting a fire in a wire

mesh incinerator in close proximity to the buildings; permitting a fire in an area surrounded by dry weeds; and in leaving the fire unattended. There is evidence that all three factors were present and we are constrained to hold that whether or not it constituted negligence was for the jury to determine. Ordinarily the question of the existence of negligence or contributory negligence is one for the jury. See, O'Dell v. Goodsell, 149 Neb. 261, 30 N. W. 2d 906; Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN RAYMOND CRAIG, APPELLANT.
203 N. W. 2d 158

Filed January 5, 1973. No. 38551.

1. **Continuances: Motions, Rules, and Orders.** A motion for continuance is addressed to the sound discretion of the court, and, in the absence of an abuse of discretion, its denial is not error.
2. **Trial: View of Premises: Criminal Law.** In the absence of an abuse of discretion, it is entirely within the discretion of the trial court to order, or refuse to permit, the jury to inspect the scene of the alleged crime.
3. **Criminal Law: Evidence.** 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.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

John McArthur, for appellant.

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

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

NEWTON, J.

Defendant was convicted of statutory rape. He assigns as error the admission of evidence of another crime, the failure to grant a continuance, the refusal to permit the jury to view the scene of the offense, and that the court erred in submitting the sufficiency of the evidence to the jury. We affirm the judgment of the district court.

Evidence was introduced of a statement, attributed to defendant in explanation of blood spots on his jeans, to the effect that he had earlier had sexual intercourse with another girl. The statutes of Nebraska do not make it a criminal offense for unmarried persons who have attained the age of 18 years to indulge in sexual intercourse. It is apparent that this assignment is without foundation.

A witness erroneously testified that the defendant's jeans had been sent to the F.B.I. and not returned. At the conclusion of the State's case, defendant moved for a continuance and requested that the State be required to produce the defendant's jeans. The trousers were produced prior to the conclusion of the trial, were examined, identified, and introduced as evidence by the defendant. A motion for continuance is addressed to the sound discretion of the court, and, in the absence of an abuse of discretion, its denial is not error. See State v. Martinez, 181 Neb. 392, 148 N. W. 2d 841. Under the circumstances presented, we are unable to perceive the slightest degree of prejudice to defendant.

After the jury had retired, it requested permission to view the scene of the crime. The request was denied. Neither party had requested that the jury be permitted to view the premises and, in consequence, it must be assumed that such viewing was not considered material or essential to defendant's defense. There was some

disagreement as to the location of certain shrubs and the view afforded of a portion of the premises where defendant asserted he was at the time of the offense. However, the evidence of defendant's guilt was quite conclusive and the jury could not have been misled by the defendant's statement that he was elsewhere. There was no prejudice. In the absence of an abuse of discretion, it is entirely within the discretion of the trial court to order, or refuse to permit, the jury to inspect the scene of the alleged crime. See, § 29-2017, R. R. S. 1943; Fouse v. State, 83 Neb. 258, 119 N. W. 478.

In another assignment of error, defendant asserts that the court erred in submitting the sufficiency of the evidence to the jury, which was raised in the trial court by defendant's motion for dismissal at the close of the State's case, in effect a motion for a directed verdict. We will not attempt to set out the evidence in detail. Suffice it to say that at the conclusion of the State's case-in-chief the undisputed evidence showed the site of the offense, that the defendant was in the area of the crime at the time it occurred, the ages of the parties, positive identification of him as the offender by the complaining witness, definite medical evidence that she had had sexual intercourse, and an immediate complaint by the girl to her brother that she had been raped. The evidence was certainly ample to warrant the overruling of the motion. "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." State v. Edmonds, 182 Neb. 140, 153 N. W. 2d 364.

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

AFFIRMED.

IN RE CONDEMNATION BY THE STATE FIRE MARSHAL OF BUILDING LOCATED ON LOTS 985, 986, 987 AND PART OF LOT 988, ORIGINAL TOWN OF DORCHESTER, SALINE COUNTY, NEBRASKA.

STATE FIRE MARSHAL OF THE STATE OF NEBRASKA, APPELLEE, V. VILLAGE OF DORCHESTER ET AL., APPELLEES, J. FRANK LONGNECKER ET AL., INTERVENERS-APPELLANTS.

203 N. W. 2d 160

Filed January 5, 1973. No. 38555.

1. **Equity: Assistance, Writ of.** A writ of assistance is nothing more than the process by which a court of equity finally carries its judgment or decree into effect.
2. **Judgments.** A judgment on the merits ordinarily concludes the parties and their privies, not only as to the things determined, but also as to matters that might have been litigated.

Appeal from the district court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Clarence C. Kunc, for appellants.

Clarence A. H. Meyer, Attorney General, Chauncey C. Sheldon, Thomas J. Dredla, and Bernard J. Ach, for appellees.

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

NEWTON, J.

This is a condemnation action instituted by the State Fire Marshal to secure the repair or demolition of a building in Dorchester, Nebraska. The property was owned by the Village of Dorchester. The interest of the interveners in the building is not clear but they appear to be simply squatters.

The condemnation proceeding was previously affirmed by this court. See State Fire Marshal v. Village of Dorchester, 186 Neb. 94, 180 N. W. 2d 919. The present proceeding is an appeal from an order directing the issuance of a writ of assistance.

Interveners contend that section 81-519, R. R. S. 1943, is unconstitutional and the title acquired thereunder by the County of Saline void. Not having challenged the constitutionality of the statute in the original action, the proceedings had and the order of condemnation must be considered valid. As to whether or not the County of Saline has a valid title to the building, the question of ownership is immaterial. All parties in interest were made parties to the original action and an order of condemnation was entered which is valid and enforceable regardless of whether the county acquired the building or it remained the property of the village. Furthermore, no appeal was taken from the order finding title to be in the county.

All rights of the parties in the property have been finally determined in prior proceedings. A writ of assistance is nothing more than the process by which a court of equity finally carries its judgment or decree into effect. See 6 Am. Jur. 2d, Assistance, Writ of, § 1, p. 414. It cannot be used as a vehicle to relitigate matters previously and finally determined. A judgment on the merits ordinarily concludes the parties and their privies, not only as to the things determined, but also as to matters that might have been litigated. See Niklaus v. Phoenix Indemnity Co., 166 Neb. 438, 89 N. W. 2d 258.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARL V. SULLIVAN, APPELLANT.
203 N. W. 2d 169

Filed January 5, 1973. No. 38558.

1. **Statutes.** A statute that clearly and precisely delineates its reach in words of common understanding is not void for vagueness.

2. **Words and Phrases.** "Unreasonably interferes with or obstructs" are words of common understanding.
3. **Statutes: Constitutional Law: Disturbance of Meetings.** A statute that (1) proscribes unreasonable interference or obstruction by conduct intertwined with expression and association and (2) vindicates important interests of society is not void for "overbreadth."

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Wilbur L. Phillips, for appellant.

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

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

SMITH, J.

A complaint charged defendant with willful refusal to leave property of an educational institution upon proper request. After a finding of guilt defendant appealed. He mainly contends the statute under which the State charged him was unconstitutional on its face for vagueness and "overbreadth."

The facts are stipulated. On November 10, 1969, defendant and 54 other black students met Dr. Kirk Naylor, President of the University of Nebraska at Omaha, in the Regents Room. The students, who represented an organization known as "Black Liberators for Action on Campus" presented alleged grievances that Naylor rejected. They thought the rejection was not fair and therefore refused to leave the room. Counsel for defendant concedes that Naylor ordered them to leave. The students were otherwise orderly, walking peaceably to buses for transportation to a police station.

The complaint rested on the following statutory provisions: "(3) No person shall willfully refuse or fail to leave . . . any building or other facility owned, operated, or controlled by the governing board of any

educational institution upon being requested to do so by the chief administrative officer . . ., if such person is committing, or threatening to commit and the commission is imminent, any act which unreasonably interferes with or obstructs the lawful missions, processes, functions or discipline of such institution. (4) Nothing in this section shall be construed to prevent lawful assembly and peaceful and orderly petition for the redress of grievances." § 28-831, R. S. Supp., 1972.

In Cameron v. Johnson, 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), a statute proscribed picketing in a manner that unreasonably obstructed or interfered with ingress or egress to or from the courthouse. Appellants attacked the constitutionality of the statute on its face for vagueness and "overbreadth." The court upheld the statute, saying:

"The terms 'obstruct' and 'unreasonably interfere' plainly require no 'guess(ing) at (their) meaning.' Appellants focus on the word 'unreasonably.' It is a widely used and well understood word and clearly so when juxtaposed with 'obstruct' and 'interfere.' We conclude that the statute clearly and precisely delineates its reach in words of common understanding. . . .

"The second prong of appellants' argument is that the statute . . . 'is void for "overbreadth," that is, that it offends the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."' . . . But 'picketing and parading (are) subject to regulation even though intertwined with expression and association,' . . . and this statute does not prohibit picketing so intertwined unless engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect does not abridge constitutional liberty 'since such activity bears no necessary

relationship to the freedom to . . . distribute information or opinion.' . . . The statute is therefore 'a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.'"

The principles of Cameron have been recognized in cases that are related to the educational community. See, Healy v. James, 408 U. S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); Police Department of Chicago v. Mosley, 408 U. S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

We conclude that the statute is not vulnerable to defendant's attack. Other contentions are resolved against defendant. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY WERTS, APPELLANT.

203 N. W. 2d 157

Filed January 5, 1973. No. 38731.

Post Conviction: Time. A motion for post conviction relief is premature if there is no judgment or final order which might be vacated or set aside.

Appeal from the district court for Butler County: HOWARD W. KANOUFF, Judge. Affirmed.

Robak & Geshell, for appellant.

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

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

BOSLAUGH, J.

On June 29, 1972, the defendant was sentenced to imprisonment for 1 year upon a plea of guilty to grand larceny. On July 10, 1972, he filed a motion for new trial which the record indicates is still pending. On July 25, 1972, the defendant filed a motion for post conviction relief. He appeals from an order denying that motion.

Since the original proceeding is still pending, there is no judgment or final order which might be vacated or set aside. The judgment denying post conviction relief is, therefore, affirmed.

AFFIRMED.

FAYE I. BOERSEN, APPELLEE, V. HAROLD EUGENE HUFFMAN, APPELLANT.
203 N. W. 2d 489

Filed January 12, 1973. No. 38080.

1. **Marriage.** A marriage contract between a man and a woman, one of whom is married, is contrary to public policy, illegal, and void.
2. **Equity: Annulment of Marriage.** The doctrine that a party seeking equitable relief must come with clean hands is not applicable in an annulment proceeding where the marriage is void.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Harold Eugene Huffman, pro se.

Vincent L. Dowding of Luebs, Tracy, Huebner, Dowding & Beltzer, for appellee.

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

BOSLAUGH, J.

This is a suit for an annulment brought by Faye I.

Boersen against Harold Eugene Huffman. The trial court declared the ceremonial marriage between the parties to be void. The defendant appeals.

The record shows the parties participated in a marriage ceremony at Las Vegas, Nevada, on March 5, 1969. On that date the plaintiff was married to Richard A. Boersen, a fact which was not denied in any of the numerous pleadings filed by the defendant. Consequently, the Nevada marriage was absolutely void. § 42-103 (1), R. R. S. 1943; Copple v. Bowlin, 172 Neb. 467, 110 N. W. 2d 117; Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431.

The defendant's contention was that the plaintiff was barred from relief by the clean hands doctrine because she knew she was still married to Boersen at the time of the Nevada ceremony. The contention has no merit because the doctrine does not apply where the marriage is absolutely void. Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613.

The defendant's other contentions relate to his claim that he was the father of the plaintiff's son born October 31, 1969. The trial court made no finding concerning the paternity of the child. It was not a proper issue in the annulment case because there was no claim for support or custody. Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135, 65 A. L. R. 2d 1372; Paltani v. Creel, 169 Neb. 591, 100 N. W. 2d 736.

There has been no determination on the paternity issue adverse to the defendant and of which he can complain. If he has any right which should be litigated, it may be asserted in a proper proceeding.

The judgment of the district court is affirmed.

AFFIRMED.

KEITH MESSERSMITH ET AL., APPELLEES, V. LOUIS J. KLEIN ET AL., APPELLANTS.
203 N. W. 2d 443

Filed January 12, 1973. No. 38491.

1. **Easements: Adverse Possession: Notice.** A prescriptive right to property being used by permission cannot arise until 10 years after it has been brought home to the owner in some plain and unequivocal manner that the person in possession is claiming adversely to him.
2. **Easements: Adverse Possession.** To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription.
3. **Equity: Appeal and Error: Evidence: Witnesses.** On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.

Appeal from the district court for Frontier County: JACK H. HENDRIX, Judge. Affirmed.

Padley & Dudden, for appellants.

Bernard B. Smith and Byron W. Fallesen for Smith Bros., for appellees.

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

MCCOWN, J.

This is an action under section 34-301, R. R. S. 1943, to determine and establish the boundaries between lands owned by plaintiffs and defendants. The trial court fixed the boundary lines and the defendants have appealed. We affirm.

Plaintiffs are the owners of 100 acres of agricultural land located in Frontier County, Nebraska, acquired in 1963. The defendants' land adjoins plaintiffs on the west, and also on the north, all in the same section. The defendants acquired the westerly portion in 1960,

and the land to the north in 1961. A county road runs north and south along the east side of the property.

Along the west line of plaintiffs' land there were certain posts and visible monuments and the trial court also determined that there was a ridge of dirt at all times from 1945 to 1956 which marked the boundary. This boundary is not involved in this appeal.

Along the north boundary of plaintiffs' land there were no fences, monuments, nor markers. The defendants used the boundary area to move farm machinery to the west portion of their land for some years prior to the time they acquired ownership of the property to the north. Permission for this access was obtained from the prior owners of the property immediately north of plaintiffs' land. There was a telephone pole at the northeast corner of plaintiffs' land. Some 3 years before trial, the public road along the east boundary was elevated and a culvert was installed near the northeast corner of plaintiffs' land but south of where it had been before. The telephone pole was moved west and reset. Thereafter, the defendants used the new culvert for access.

The evidence was persuasive that the boundary between the properties on the north side of plaintiffs' land had no fixed locations or markings and varied from time to time depending, in some instances, on which property owner cultivated the land first. The border area was used to some degree as a joint turnrow.

When the dispute here arose, the plaintiffs employed a surveyor to establish and stake the boundaries of the properties. The survey markers were removed by the defendants' sons and a temporary electric fence was installed at a location south of the line of the survey stakes. The district court specifically found that the boundary line on the north side of plaintiffs' land had "wandered around, and that the present electric fence and trail are just arbitrary locations." The plaintiffs brought the action here to establish the boundary at

the survey lines. The defendants pleaded adverse possession and a prescriptive easement.

The district court fixed the west boundary line on the line marked by fixed monuments and that line is no longer involved. The court fixed the north boundary line on the survey line, and granted the defendants the prescriptive right to move farm machinery and vehicles north to their land after crossing the culvert from the road near the northeast corner of the plaintiffs' land.

The defendants contend that they have established adverse possession and a prescriptive easement on the strip of land along the north edge of plaintiffs' property. One foundation fact is clear. The defendants obtained a right to use the disputed strip by specific permission from the owner of the land now owned by the defendants and not from plaintiffs or their predecessors. A prescriptive right to property being used by permission cannot arise until 10 years after it has been brought home to the owner in some plain and unequivocal manner that the person in possession is claiming adversely to him. Walsh v. Walsh, 156 Neb. 867, 58 N. W. 2d 337.

To establish a prescriptive right to an easement, it must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription. Scoville v. Fisher, 181 Neb. 496, 149 N. W. 2d 339.

This case turns on the determination of factual issues. Those issues were in some conflict but the trial court resolved that conflict in favor of the plaintiffs on the issues involved in this appeal. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Harre v. White, *ante* p. 404, 203 N. W. 2d 99.

The record fully supports the findings of fact and

the judgment of the district court. The judgment is affirmed.

AFFIRMED.

PATRICK W. ANTRIM, APPELLANT, V. CLYDE PITTMAN, APPELLEE.
203 N. W. 2d 510

Filed January 12, 1973. No. 38519.

1. **Contracts: Corporations: Vendors and Vendees.** Officers or shareholders upon selling their individual shares may make reasonable restrictive agreements not to compete with the corporation.
2. **Contracts: Evidence: Vendors and Vendees.** In a sale of corporate shares a common law test of the reasonableness of a covenant not to compete is whether the seller's opening a business of his own would substantially affect the corporate good will.
3. **Contracts: Evidence: Damages.** At common law the invalidity of a promise not to compete does not depend upon proof of actual harm.

Appeal from the district court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Respeliers & DiMari, for appellant.

Otto G. Spielhagen of Spielhagen, Matejka & Spielhagen and Arthur S. Raznick, for appellee.

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

SMITH, J.

Clyde Pittman, a buyer of corporate shares, claimed breach of an ancillary covenant by the seller not to compete. Part of the covenant restrained the seller, Patrick Antrim, from engaging in a "similar business as conducted by the corporation. . . ." A jury returned a verdict for Pittman, and the district court overruled the motion of Antrim for judgment notwithstanding the

verdict. Antrim appeals. He asserts that the interpretation of the covenant in the district court was erroneous and that it imposed on him a restraint unreasonable in character.

Antrim, owner of two-thirds of the issued and outstanding shares of AAA Heating & Air Conditioning, Inc., actively participated in the business. His acquaintance with the customers was wide. On June 3, 1970, he sold all his shares to Pittman, the only other stockholder, Antrim then making the negative covenant.

The corporate books, but no sales slips or invoices, were transferred to Pittman. According to Antrim, AAA was then engaged in the heating and air conditioning business but not in the plumbing or any other business.

Within the time frame of the covenant Antrim successively managed two companies that retailed water softeners but not heating or air conditioning equipment. The second company was owned by his wife.

Pittman testified that the business of AAA on June 3, 1970, encompassed sales of water softeners. We weigh that statement with other testimony by Pittman, relevant parts forming an appendix to this opinion. The evidence of such sales was weakened by derivative inferences. The corporate books must have contained names of suppliers, and he could have easily ascertained whether AAA had received water softeners. Pittman's lack of knowledge was singular. His testimony to AAA's water softener business prior to sale of the shares is unbelievable. Conjecture is not proof. Barkalow Bros. Co. v. Floor-Brite, Inc., 188 Neb. 568, 198 N. W. 2d 329 (1972). See, also, Dow, "Judicial Determination of Credibility in Jury Tried Actions," 38 Neb. L. Rev. 835 at 848 (1959). No other evidence on the point is noteworthy.

Pittman adduced evidence that the business of selling water softeners was similar within the language of the

negative covenant. Assuming that meaning, we review the applicable law.

Officers or shareholders upon selling their individual shares may make reasonable restrictive agreements not to compete with the corporation. Farmers State Bank v. Petersburg State Bank, 108 Neb. 54, 187 N. W. 117 (1922); 14 Williston on Contracts, § 1641, p. 134 (Jaeger, 3d Ed., 1972). Rules similar to those that govern sales of going businesses and employment contracts apply. Calamari and Perillo, Contracts, § 356, p. 540, n. 3 (1970).

Behind the requirement of reasonableness of a covenant in restraint of trade at common law lies a public policy that balances certain social interests. They are the social detriment in the restriction upon the promisor, the social advantage in protection of legitimate interests of the promisee under the contract, and the desirability of good will that is vendible. The permissible degree of restraint is the restraint necessary to prevent interference with the good will. See, Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842 (1900); Carpenter, "Validity of Contracts Not to Compete," 76 U. Pa. L. Rev. 244 at 254, 255 (1928). In a sale of corporate shares the test is whether the seller's opening a business of his own would substantially affect the corporate good will. The test was endorsed by Professor Corbin. See 6A Corbin on Contracts, § 1388, p. 60 (1962). In the sale of a business the restraining promise is illegal as to lines of trade other than those sold by the party whom the covenant restrains. There is a possible exception if the lines are so intermingled that one cannot be protected without inclusion of the other. 6A Corbin, op. cit., § 1387, p. 57.

Invalidity of the promise at common law does not depend upon proof of actual harm. "The belief that such promises are harmful has been so generally and firmly held for some centuries that their enforcement has been refused by the courts, . . . (unless) accompanying factors counterbalance the harm. That the

promise is only a part of a larger transaction of purchase and sale is such a factor; but it is not one that will invariably save the validity of the promise," 6A Corbin, op. cit., § 1384, p. 44.

Inclusion of the water softener business in the negative covenant of Antrim would have been unreasonable. No intermingling line of trade, no accompanying factor, counter-balanced the harm in enforcement. Such a covenant to the extent that it covered the water softener business would have been unenforceable.

For the foregoing reasons the judgment for Pittman on his claim under the negative covenant was erroneous. The judgment is reversed and the cause remanded with directions to render judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

APPENDIX

TESTIMONY OF CLYDE PITTMAN

"Q . . . What type of a business was . . . (AAA) in? A It did heating and air conditioning and plumbing work. Q At the time of the purchase of your stock, was this also a plumbing operation? A Well, the company had a plumber. I didn't get involved in that part of it . . . I understand . . . (the plumber) was employed with me after we bought this stock as a plumber. We had another plumber for a while also. Q Were these plumbers there prior to your purchase of the stock? A They had been there before. At the exact date of the sale of the agreement of the corporation, I'm not sure. Q Were they employed as plumbers? A Well, I'm not sure. . . . I don't know what he carried them on the books as. I didn't get involved in that. Q Did they perform any plumbing operations? A Not that I ever saw. I mean, I didn't work in that part of it. . . . Q . . . Do you know of any specific instances that AAA was in the plumbing operation at the time of the sale of stock? A No, I can't give you a specific job, or — Q To your knowledge

did it perform any plumbing operations? A Well, we — Q Without going into any specific jobs? A No, the company is a heating, air conditioning and plumbing company as we bought the corporation. . . . Q Now, prior to your purchase of the stock, did AAA . . . sell water softeners? A Yes, sir. . . .

"Q You indicated that you never observed any plumbing work being done by AAA prior to the time that you bought the last of the stock? A . . . I didn't go on service trucks or that sort of thing. I didn't see anybody doing plumbing. . . .

"Q . . . (H)ow many units of water softeners had AAA sold prior to June 1 of 1970? A I don't really know. Q Do you know of any? A I know of one in my own house, for instance. . . . Q But how many customers for profit? . . . A I don't know. . . .Q And you were working full time in this business from . . . 1969 . . . until . . . you bought the business? A I was working for six months in the business, yes. Q During that time of your own personal knowledge, did you know of water softeners being sold by AAA? A I can't give you the names of any, no. Q . . . (A)t this time you did not have a master plumber on your payroll? A That's right. . . . Q Isn't it true that the plumbing aspect of the AAA . . . started when you took over the business and . . . Antrim left? A Well, we made a lot of changes, but I wouldn't say it started there. I bought a mechanical contracting business and they handled a lot of things. . . . Q . . . (Y)ou testified . . . (to no) personal knowledge that AAA . . . sold water softeners; is that correct? A I don't know of specific accounts or people they sold it to, no. Q That is not to say that the air conditioners or soft water conditioners weren't sold by AAA . . . without your knowledge; is that correct? A That's correct."