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REPORTS OF CASES

DECIDED BETWEEN

MARCH 30, 1973 and DECEMBER 7, 1973

IN THE

Supreme Court of Nebraska

JANUARY TERM 1973 and SEPTEMBER TERM 1973

VOLUME CXC

H. EMERSON KOKJER

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1973

STATE OF NEBRASKA, APPELLEE, V. JESSIE GODINEZ, APPELLANT.
205 N. W. 2d 644

Filed March 30, 1973. No. 38537.

1. **Trial: Juries: Witnesses.** In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment.
2. **Trial: Prosecuting Attorneys: Records.** Objection to misconduct of the prosecutor in argument to the jury must be made at the time and a record must be made then. It is too late to object for the first time on the motion for new trial upon a showing by affidavit of defendant's attorney.

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

Bertrand V. Tibbels, 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.

WHITE, C. J.

In a jury trial the defendant was convicted of assaulting and stabbing one Lupe Trejo with intent to wound.

In this appeal he contends that the evidence was insufficient to support the verdict of guilt and that there was prejudicial error in the remarks of the deputy county attorney in final argument. We hold that the defendant's contentions are without merit, and the sentence and judgment of the District Court should be affirmed.

The evidence is ample to sustain the finding of the jury as to the guilt of the defendant. On April 11, 1971, the defendant and Trejo engaged in a fist fight in the parking lot of Paul's Club in Scottsbluff, Nebraska. The evidence indicates that the defendant was the loser in this altercation and that a short while after the fist fight was broken up outside the club Trejo entered the club and was standing near the dance floor. The defendant entered the club armed with a knife. Trejo testified that he was standing near the dance floor when he felt a knife enter his stomach. At the time of the entry of the knife he did not see who had stabbed him, but his testimony is that he grabbed the withdrawing knife-hand of his assailant and then saw and realized that it was the defendant.

The defendant's version, of course, is in conflict. His testimony is that upon entering the club he merely went over to speak with Trejo and that Trejo suddenly renewed his attack upon the defendant. His contention is that he drew the knife in self-defense and that Trejo, in lunging forward to hit him, simply impaled himself upon the knife. The undisputed testimony is that Trejo's wound penetrated through the abdominal wall. It is apparent that the jury rejected this almost incredible version of the wounding.

In other words, the jury clearly found a stabbing and not an impaling since it found the defendant guilty. The defendant, however, contends that the verdict rests upon a physical impossibility. This contention is based upon the expert testimony of one Dr. Gerhard Schmitz. Dr. Schmitz testified that Trejo's wound pene-

trated the abdominal wall in a vertical manner which showed that the wound was not from a slicing blow, but went straight in from front to back. From this testimony alone, the defendant asserts, this court should conclude that Trejo's version of the incident was physically impossible because the stab wound itself demonstrates that it could have been inflicted only from a position directly in front of the victim. In the first place, the term "vertical" is a relative one depending upon the positioning of the bodies of the two men as Trejo was "facing" the dance floor. The defendant's theory is postured upon the proposition that there was a mathematically precise right angle in the positioning of the bodies of the two men at the time the wound was inflicted. It is clear that a very small distortion in the positioning of the bodies of the two men, especially with one of them moving, could easily convince the jury that the defendant's theory was invalid. Second, assuming that the wound was inflicted in a completely vertical fashion, common experience tells us a person could approach from the rear and the side of Trejo and twist or cock the wrist in such a way as to cause a vertical incision. There is further testimony by Trejo that his head was turned to one side at the time he was stabbed and the jury could have found that the defendant could have moved in front of Trejo and stabbed him without Trejo seeing him. Third, the jury may not have believed Trejo's version of the incident in its entirety and still have found the defendant to have been the aggressor.

In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole *or any part* of the testimony of a witness in the exercise of their judgment. Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291; State v. May, 174 Neb. 717, 119 N. W. 2d 307. A verdict under such circumstances will not be set

aside unless clearly wrong. Chaloupka v. State, *supra*. We come to the conclusion that the verdict neither rests upon a physical impossibility nor is it clearly wrong. Consequently, it will not be disturbed on this appeal.

The defendant's only other contention is that remarks made by the deputy county attorney in his argument to the jury resulted in a verdict based on bias and prejudice. The alleged prejudicial remarks were not objected to at the time they were made, were not made part of the record, and are found only in the affidavit filed along with the motion for a new trial. The objection as to misconduct of the prosecutor in argument to the jury must be made at the time and a record must be made then. It is too late to object for the first time on the motion for a new trial. Benton v. State, 124 Neb. 485, 247 N. W. 21.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT JULIAN JACOBS, APPELLANT.
205 N. W. 2d 662

Filed March 30, 1973. No. 38559.

1. **Criminal Law: Insane Persons: Trial.** A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed.
2. **Criminal Law: Insane Persons.** The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
3. ———: ———. The fact that a defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility.
4. ———: ———. The law recognizes no form of insanity or un-

controlled impulse as a defense even though the mental faculties are disordered or deranged if the defendant had the capacity to know what he was doing and to understand the act was wrong.

5. **Criminal Law: Evidence: Insane Persons.** The issue of criminal responsibility is to be determined from all the evidence.

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

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

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

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

BOSLAUGH, J.

The defendant was charged with first degree murder in the death of Allen Dale Schmidt, and with stabbing Leslie Eugene Schmidt with intent to kill, wound, or maim. A jury was waived and the trial court found the defendant guilty on both counts. The defendant was sentenced to life imprisonment on the murder count and to imprisonment for 50 years on the stabbing count, the sentences to run consecutively.

There is little or no dispute concerning the facts of the case. The principal controversy relates to the standard to be used in determining whether the defendant was criminally responsible for his acts and whether the evidence was sufficient to sustain the finding that defendant was responsible. The record shows the defendant was mentally competent to stand trial.

On Saturday, October 16, 1971, the defendant spent a part of the afternoon drinking and playing cards with friends. At about 5 p.m., while driving his mother's automobile, he came upon Allen Dale Schmidt, 12 years old and Leslie Eugene Schmidt, 10 years old, who were selling candy for a PTA project. The defendant offered the boys $5 if they would help him

find his prize dog which was lost. The statement was false, but the boys agreed to help the defendant look for the dog. The defendant drove to a secluded area along the river north of the South Omaha Bridge in Omaha, Nebraska. On the way he stopped at a grocery store and purchased or stole a paring knife. The defendant parked the automobile near a creek and told the boys to go across the creek. Leslie refused so the defendant placed him in the trunk of the automobile. The defendant had anal intercourse with Allen and killed him with the paring knife. There were 29 stab wounds, and the head was nearly severed from the body. The defendant returned to the automobile, removed Leslie from the trunk, and attempted to kill him by choking, stabbing, and striking him with a tire iron. The defendant then left the area.

Allen's body was discovered the following day. Leslie was found alive but badly injured.

The defendant left Omaha on Monday and was apprehended in Rock Island, Illinois, on October 19, 1971.

The defendant was 31 years of age and employed as a packinghouse worker. He was of average intelligence with no organic brain disorder. He has a long history of violent, sadistic, antisocial conduct.

A defendant in a criminal action is presumed sane until evidence of insanity is produced. The State then has the burden of proving beyond a reasonable doubt that the defendant was sane at the time the crime was committed. State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821.

The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. State v. Long, 179 Neb. 606, 139 N. W. 2d 813. The doctrine of irresistible impulse or "moral insanity" has not been recognized as a defense or excuse for crime in this state.

The fact that a defendant may have some form of

mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility. State v. Newson, 183 Neb. 750, 164 N. W. 2d 211; Washington v. State, 165 Neb. 275, 85 N. W. 2d 509. The law recognizes no form of insanity or uncontrolled impulse as a defense even though the mental faculties are disordered or deranged if the defendant had the capacity to know what he was doing and to understand the act was wrong. Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349. It is only when the defendant is unable to understand the nature and quality of his act or unable to distinguish between right and wrong with respect to it that he cannot be held responsible.

Two psychiatrists were called by the defense. Dr. Herbert C. Modlin testified it was his opinion the defendant knew what he was doing and his acts were illegal, but not wrong in the sense they were a violation of an "internal moral code." He also testified the defendant's acts were the product of a mental disease or defect described as antisocial personality with periods of episodic discontrol or temporary psychosis. He further testified the defendant lacked substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

Dr. William Burrows described the defendant as an antisocial personality who was fully aware of the nature of his acts and that they were wrong, but on an intellectual basis rather than on an emotional basis. He defined irresistible impulse as an urge to do an act known to be wrong but without sufficient conscience to prevent doing the act. He testified he thought the defendant's acts were the product of a mental disease or defect and the defendant lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

On cross-examination Dr. Burrows acknowledged the defendant was able to control his impulses until he had

arrived at a place where no one could see him and "then he could give way to his impulses." The impulse was not irresistible until he felt it was safe to give in to it. He further stated the impulse had run its course when the defendant had finished with Allen, and the defendant was not acting under an irresistible impulse when he tried to kill Leslie.

In a written report, which was received in evidence, Dr. Burrows stated: "Under the terms of the M'Naghten Rule I can see absolutely no reason whatsoever why this man should not be held accountable for his behavior. He was fully aware of the nature of his act when he committed it, was fully aware of the consequences of it and certainly was able to recognize right from wrong, although this is, I suspect, at an intellectual level rather than at an emotional level since he takes great pleasure in violence and aberrant behavior."

Although the doctrine of irresistible impulse has not been recognized as a defense in this state, the trial court indicated by a written memorandum that he found the defendant was not acting under an irresistible impulse at the time the crimes were committed. Such a finding is fully supported by the evidence. As the facts of this case show, and as conceded by Dr. Burrows, the defendant was quite capable of resisting his impulses until he felt it was safe to give in to them. The evidence did not show an irresistible impulse or such a lack of capacity to control his behavior as would constitute a defense to the crimes charged.

The defendant contends that the test to determine criminal responsibility used in this state is inconsistent with generally accepted scientific knowledge of the functioning of the human mind, as well as emerging legal policy, and is unconstitutional. He urges that a test conforming to the rule announced in Durham v. United States, 214 F. 2d 862, 45 A. L. R. 2d 1430, or as set forth in section 4.01 of the Model Penal Code proposed

by the American Law Institute, be declared to be the law of this state.

Under the Durham rule an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect. The rule set forth in the Model Penal Code states that a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The Durham rule is followed by only a very few courts. The Model Penal Code rule has received somewhat wider acceptance.

In Leland v. Oregon, 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302, the United States Supreme Court held that the states may use the M'Naghten rule to determine criminal responsibility and are not required by the Fourteenth Amendment to adopt an irresistible impulse test. As stated by Mr. Justice Clark, the choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. The adoption of an irresistible impulse test is not implicit in the concept of ordered liberty.

In Bothwell v. State, 71 Neb. 747, 99 N. W. 669, in rejecting a contention that the irresistible impulse test should be adopted as the test of criminal responsibility. this court stated that greater evils would flow from a departure than in continuing to travel along the well-beaten paths which guide and determine legal responsibility for violations of the law.

The rule contained in the Model Penal Code inserts new terminology in this area of the law. We hesitate to introduce uncertainty in this area where concepts are now quite well-defined and understood. If the proposed rule, properly understood, would require the acquittal of the defendant in this case, then we reject it as an incorrect statement of the law in this state. For

the purposes of this case, it is sufficient to say that we find no merit in the defendant's contentions and the evidence clearly supports the trial court's finding the defendant was sane and criminally responsible at the time he killed Allen Schmidt and stabbed Leslie Schmidt.

In sentencing the defendant, the trial court ordered that at 2 o'clock on each anniversary of the crime, until he becomes 50 years of age, the defendant shall "be placed in solitary confinement and held there for a period of 24 hours, to be on a bland diet, and not to be held there upon bread and water," and the period of 24 hours shall be without labor. The direction relating to a "bland diet" does not appear in the judgment as entered upon the journal. Consequently, it is unnecessary to consider the defendant's contention that it was erroneous and unauthorized.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurring in result only.

The majority opinion reaffirms the M'Naghten test for legal insanity first enunciated by the House of Lords in 1843. In this century many jurisdictions have extended its application by engrafting some form of irresistible impulse concept. More frequently in recent years courts have adopted the American Law Institute test of legal insanity set out in section 4.01 of the Model Penal Code or a variation of it. That section provides:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

"(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

Undoubtedly the most significant distinction between the M'Naghten test and the American Law Institute test

is that the latter takes into account volitional impairment. It regards as being also legally insane those who, although they knew the act was wrong, were nevertheless unable to control their conduct.

Under the M'Naghten rule, a defendant who had the capacity to know what he was doing and to understand that the act was wrong is legally sane even though he is wholly unable to prevent himself from doing the act because of mental illness. Both the irresistible impulse test and the A.L.I. test expand the M'Naghten rule to include the case where mental disease produced a total incapacity for self control, even though the defendant may know the act is wrong. See Comments, Model Penal Code, § 4.01, Tent. Draft No. 4.

While several jurisdictions have adopted an irresistible impulse test, the basic objection to that test is that it is too narrow and carries a misleading implication that it applies only to sudden spontaneous acts as distinguished from insane propulsions which are accompanied by brooding or reflection.

Subsection (2) of the A.L.I. Model Penal Code test has been criticized by some psychiatrists as an unjustified restriction not psychiatrically sound and some courts have adopted only subsection (1) of the test. See, for example, United States v. Smith, 404 F. 2d 720 (6th Cir., 1968); United States v. Shapiro, 383 F. 2d 680 (7th Cir., 1967); Wion v. United States, 325 F. 2d 420 (10th Cir., 1963).

The overwhelming majority of all courts that have considered the issue within the past 25 years have recognized the inadequacy and insufficiency of the old M'Naghten test. A number of jurisdictions which generally follow the M'Naghten rule have adopted the irresistible impulse test. The A.L.I. test contained in the Model Penal Code, sometimes with minor variations, has already been approved by virtually all the United States Courts of Appeals and has also been accepted by the Legislatures and courts of a number of states.

It deserves to be adopted by this court and this case presents a direct opportunity to do so.

GEORGE ROSE SODDING & GRADING COMANY, INC., APPELLANT, V. CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
205 N. W. 2d 655

Filed March 30, 1973. No. 38603.

1. **Pleadings: Damages.** One who seeks to recover multiple damages given by statute must distinctly claim these in his petition. It is insufficient merely to set forth facts upon which a liability therefor might arise. It is sufficient to recite the facts constituting a cause of action within the statute and then to give a reference to the act itself.
2. **Trial: Appeal and Error: New Trial.** Alleged errors of the trial court in an action at law which are not referred to in a motion for a new trial will not be considered in this court.
3. **Trial: Appeal and Error: Verdicts.** A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or instructions of the court.

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

Frank Meares, for appellant.

Herbert M. Fitle, for appellee.

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

SPENCER, J.

Plaintiff prosecutes this appeal, alleging the inadequacy of a jury verdict of $4,500 in its favor. This is the second appearance of this case in this court. In the first appeal, 187 Neb. 683, 193 N. W. 2d 556, we filed an opin-

ion January 21, 1972, reversing a directed verdict for the city of Omaha, and remanding the cause for trial. The trespass being admitted, the plaintiff was entitled to at least nominal damages. We affirm.

An extensive discussion of the facts is unnecessary. Because of inadequacies and defects in an old pump station at approximately Fiftieth and C streets in Omaha, Nebraska, city personnel on occasion pumped sewage into an 18-inch culvert under Fiftieth Street. This culvert dumps into a small ditch or swale on the north end of the property leased by the plaintiff. For lack of a defined drainage channel the ditch would become full, and the sewage would spread out onto the plaintiff's property. The trial court directed on liability in favor of the plaintiff, and the jury returned a verdict of $4,500.

Plaintiff's assignments of error are as follows: "1. The trial court erred in failing to instruct the jury to award the plaintiff treble damages if it found that willful trespass occurred injuring the trees or shrubs of the plaintiff.

"2. That the trial court erred in overruling plaintiff's motion for new trial complaining of Instructions 5, 6, 10, 11 and 12."

Plaintiff's first assignment of error is premised on section 25-2130, R. R. S. 1943, which is as follows: "For willful trespass, injuring any timber, tree or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard, or town lot, or on the public grounds of any town, or any land held by this state, for any purpose whatever, the trespasser shall pay treble damages at the suit of any person entitled to protect or enjoy the property aforesaid."

The difficulty with plaintiff's assignment of error is that it failed to plead for statutory treble damages under the statute. The general rule is evidenced by the following from 22 Am. Jur. 2d, Damages, § 294, p. 390, which provides: "One who seeks to recover multiple—that is, double or treble—damages given by statute must

distinctly claim them in his complaint. It is insufficient merely to set forth facts upon which a liability therefor might arise. If the case is one where there is also a common-law remedy, they must be claimed by reference to the statute. It is sufficient, however, to recite the facts constituting a cause of action within the statute and then to give a reference to the act itself.

"The complaint must state such facts as will clearly bring the defendant within the provisions of the statute. For example, if the statute authorizes the recovery of such damages for a wilful act, it must be alleged that such act was wilful in order to recover them. A mere allegation that it was done unlawfully is insufficient."

Even if a willful trespass had been pleaded and proved, the defendant failed to assign the failure to give the instruction in its motion for a new trial. We said in Stauffer v. Wilson (1967), 182 Neb. 129, 153 N. W. 2d 454: "The law is well established in this jurisdiction that alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered in this court."

We find no merit in plaintiff's second assignment of error. The instructions complained of are not prejudicially erroneous in any particular. In any event, the notes of the trial judge indicate that the parties approved the proposed instructions. If plaintiff was not satisfied with the instructions it should have made a record at that time.

Plaintiff's chief complaint is that the damages allowed are clearly inadequate under the evidence. We do not find the evidence to be so conclusive as the plaintiff believes it to be. The evidence would support a verdict in a lesser or a greater amount. There is enough conflict in the evidence to permit the jury to go either way, depending upon its determination of the facts. In Cover v. Platte Valley Public Power &. Irr. Dist. (1962), 173 Neb. 751, 115 N. W. 2d 133, this court said: "The

remaining question is whether the verdict is so inadequate that it must be set aside. A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law."

The judgment herein is affirmed.

AFFIRMED.

LOWELL A. JONES, APPELLANT, V. ELMER BROCKMAN, APPELLEE.

205 N. W. 2d 657

Filed March 30, 1973. No. 38612.

Malicious Prosecution: Trial. In an action for malicious prosecution whether the facts and circumstances established by uncontradicted evidence amount to probable cause for criminal prosecution is a question of law for the court and not an issue of fact for the jury.

Appeal from the District Court for Valley County: WILLIAM F. MANASIL, Judge. Affirmed.

Richard L. Huber, for appellant.

Deutsch & Hagen and Thomas H. DeLay, for appellee.

Wiems & Mankin, for amicus curiae.

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

SPENCER, J.

This is an appeal from the sustaining of a summary judgment in a damage action for malicious prosecution. We affirm.

Defendant, Elmer Brockman, was the superintendent of the weed control authority of Garfield and Valley

counties, and a deputy sheriff of Valley county. Brockman had sent a letter by certified mail to plaintiff, Lowell A. Jones, requesting him to spray various noxious weeds. The letter was refused.

On July 19, 1969, Brockman, accompanied by the chairman of the weed board, drove to Jones' farm for the purpose of serving a notice on him personally. They met Jones on the road heading for town. They drove back to Ord where they met Jones on the street. Brockman then attempted to serve the notice.

Brockman's version of what happened is that he handed the notice to Jones and Jones slapped it out of his hand. Jones then swung at his head and at his stomach, and starting cussing. Jones' version of the incident differs. He testified Brockman tried to jam the notice into his pocket. He denies that he ever struck at Brockman. His version is that he only attempted to keep Brockman from jamming the notice in his pocket. He did this by putting his hands down and stopping the notice from going into his pocket. He denies that he ever saw the paper until the hearing in court.

The complaint was titled "Resisting an Officer Sec. 28-729.01." It alleges that Lowell A. Jones, on the 19th day of July 1969, in the County of Valley, in the State of Nebraska, did "unlawfully and wilfully assault, resist, abuse, strike, and threaten to do bodily harm to the said Elmer Brockman, special deputy sheriff of Valley County, Nebraska, while said officer was in the lawful performance of his duties as police officer, then and there being within the limits of the City of Ord, Valley County, Nebraska, and in the proper execution of his office; said Lowell A. Jones knowing said Elmer Brockman to be special deputy sheriff and weed superintendent of Valley County, Nebraska * * *." The complaint, which was signed by Brockman, was prepared by the county attorney of Valley county. The warrant issued on the complaint also carried the title, "Resisting an Officer Sec. 28-729.01."

While it is apparent section 28-729.01, R. S. Supp., 1969, describes a felony and the county judge would serve only as a magistrate, the offense was tried to a jury in the county court as a misdemeanor. Section 28-729, R. R. S. 1943, is the misdemeanor statute covering the offense. It is a lesser included offense and within the jurisdiction of the county court. No question is raised on this point, so we assume the intention was to prosecute the misdemeanor.

The defendant filed a motion for summary judgment. The trial court found there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. We assume the trial judge predicated his ruling on the premise that the facts and circumstances established by uncontradicated evidence were sufficient to establish probable cause for the criminal prosecution. The existence or lack of probable cause is the very gist of an action for malicious prosecution. The question to be decided is whether there is sufficient uncontradicated evidence to show the existence of probable cause at the time the complaint was filed.

In Kersenbrock v. Security State Bank (1931), 120 Neb. 561, 234 N. W. 419, this court said: " 'Whether facts and circumstances established by uncontradicted evidence amount to probable cause for a criminal prosecution is a question of law for the court, and not an issue of fact for the jury. This is not only the law of Nebraska, but is a generally accepted rule.' "

While some of the facts supporting probable cause were disputed by the plaintiff's testimony, yet there were others undisputed upon which the defense of probable cause might be predicated. In such circumstances the question of probable cause is one of law for the court. See Bronnenkant v. Kucera (1942), 141 Neb. 408, 3 N. W. 2d 913.

Paraphrasing the language of Commissioner Pound in Bechel v. Pacific Express Co. (1902), 65 Neb. 826,

91 N. W. 853, the question is whether a reasonable man in defendant's position, in light of the facts and circumstances as they existed, had probable cause to believe that plaintiff was resisting arrest. While the issue is a very close one, we cannot say that the trial judge was wrong in sustaining the motion for summary judgment.

AFFIRMED.

CLINTON, J., concurs in the result.

McCOWN, J., dissenting.

The majority opinion treats the evidence in this case as though it were uncontradicted to an extent necessary to establish the guilt of the plaintiff of the crime for which he was tried and acquitted, and therefore as establishing probable cause for his prosecution as a matter of law. There were disputed issues of material fact which might or might not be controlling, both on the issue of probable cause and on the issue of malice. The testimony of the plaintiff and the defendant as to what occurred on the occasion out of which the criminal prosecution arose is almost diametrically opposed. It is only when there is sufficient undisputed evidence to show probable cause that the trial court should direct a verdict for the defendant in an action for malicious prosecution. See Annotation, 87 A. L. R. 2d 183.

On a motion for summary judgment, the question is whether there is any genuine issue of material fact and not how that issue should be decided. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed. Piper v. Hill, 185 Neb. 568, 177 N. W. 2d 509.

This court has repeatedly stated that summary judgment is an extreme remedy. It should only be awarded when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving

party. Hollamon v. Eagle Raceway, Inc., 187 Neb. 221, 188 N. W. 2d 710.

There are substantial and genuine issues of material fact here and the motion for summary judgment should have been denied.

NEWTON, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DON BRODRICK, APPELLANT.
205 N. W. 2d 660

Filed March 30, 1973. No. 38615.

Criminal Law: Controlled Substances: Evidence. Evidence relating to tests or analyses by the State may be suppressed where, as a result of neglect by a representative of the State, the evidence necessary to enable the defense to conduct tests or analyses is unavailable. § 29-1913 (2), R. S. Supp., 1972.

Appeal from the District Court for Dawes County: ROBERT R. MORAN, Judge. Reversed and remanded.

Harris W. Snyder, 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.

BOSLAUGH, J.

The defendant was charged with unlawful sale, delivery, and distribution of amphetamine sulfate, a controlled substance. He was found guilty of unlawful possession of a controlled substance. He appeals from a sentence of imprisonment for 1 year. The principal controversy concerns the overruling of a motion to suppress the results of a scientific test.

The evidence shows the defendant and a number of other people participated in a party at Wanda's Cafe in Chadron, Nebraska, on the night of February 12-13,

1972. There was testimony the defendant had in his possession two plastic sandwich bags containing a number of pills or tablets. A witness who had been granted immunity testified the defendant gave him four tablets described as "speed" from one bag and another tablet described as "acid" from the other bag. The witness took three tablets home with him the next day. He gave one to his sister and hid the other two in his room. His mother discovered the pills and delivered them to the county attorney.

An analysis by a State chemist on February 18, 1972, disclosed the "speed" tablet contained dl-amphetamine sulfate. The other tablet is not involved in this case. A witness for the State testified that he took one of each type of the tablets but had no reaction from either one.

On April 10, 1972, the defendant moved for a discovery order to permit him to have an analysis made of the substance described in the information. The State could not produce any part of the tablet because it had been destroyed during the analysis made by the State chemist. The defendant then moved to suppress the testimony of the State chemist which motion was overruled.

The amphetamine or "speed" tablet which was analyzed was approximately 4 to 5 millimeters in diameter and about the thickness of a dime. It did not appear to have been of commercial origin.

The State chemist who performed the analysis testified that he performed four tests on the tablet. The first test was a spot test. The tablet was ground into powder and a small portion of the powder was added to five or six different reagents in porcelain dishes. The resulting colors gave some indication of the chemical composition of the tablet.

The second test was a crystal test. Different reagents were added to portions of the powdered tablet and the resulting crystals were examined under a microscope.

The third test was an ultraviolet spectrophotometer

test. The remaining powder was dissolved in water, the solution filtered, and then placed in an instrument and subjected to ultraviolet rays. The chemical composition of the solution was indicated by the absorption peaks.

The fourth test was an infrared spectrophotometer test. The water was extracted from the solution used in the third test and the resulting precipitate combined with potassium bromide to make a clear pellet. The pellet was then examined in an instrument which produced a tracing or "fingerprint" of the drug. At the conclusion of the test the pellet was discarded.

Section 29-1913 (2), R. S. Supp., 1972, provides: "If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the state, other than alterations necessary to conduct the initial tests, the tests or analyses by the state shall not be admitted into evidence."

There was no evidence in this case of intentional alteration other than alteration necessary to conduct proper tests on the substance in question. There was, however, evidence of neglect by representatives of the State which resulted in the substance being unavailable for analysis by experts selected by the defendant.

The State chemist testified the pellet would have remained stable for several months and could have been subjected to an infrared spectrophotometer test by another chemist. Also it was possible the remaining substance could have been extracted from the pellet and subjected to other tests. The situation is complicated by an additional circumstance. The county attorney had called the State chemist who performed the tests and requested that a part of the tablets be preserved if possible. The chemist testified that before the tests were started the county attorney had requested him to save a part of the tablets if he could, but at the end of the tests he discarded the pellet.

Under the circumstances in this case, the motion to

suppress should have been sustained. It is unnecessary to discuss the other assignments of error.

The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. CAMPBELL, APPELLANT.
206 N. W. 2d 53

Filed March 30, 1973. No. 38632.

1. **Criminal Law: Rape.** In a prosecution for forcible rape, the degree of force required to sustain a conviction and the degree of resistance required of the prosecutrix are both relative depending upon the particular circumstances.
2. ———: ———. In a prosecution for forcible rape, it is only required that the female make reasonable resistance in good faith under all the circumstances and that the resistance be such as to make nonconsent and actual opposition genuine and real.

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 Betsy G. Berger, for appellee.

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

MCCOWN, J.

A jury found the defendant, Richard L. Campbell, guilty of rape. He appeals from the conviction and sentence of not less than 5 nor more than 8 years.

On the evening of February 14, 1972, the prosecutrix, a 20-year-old music student at the University of Nebraska, entered the Westbrook Music Building on the campus at about 6 p. m. to practice. As a music major, she had an individually assigned key which permitted

her to enter the locked soundproof practice rooms located in the basement of the building. She unlocked and entered an organ practice room and the door automatically locked behind her. She began to practice on the organ located in the practice room. After a time she heard the defendant knock on the door. The young man was a complete stranger to her. He sought admission on the pretext that he was waiting for a girl friend who was scheduled to use the practice room shortly. The prosecutrix allowed him to enter and began to practice again, but very quickly became nervous and suspicious of the defendant's actions and tried to leave the room. The defendant blocked the doorway, grabbed her arm, and prevented her escape. He told her he wanted to make love to her; threatened a severe physical beating; ordered her to take off her clothing; complained and swore at her when she was slow in complying; and forcibly removed part of her clothing. The defendant did not actually strike her but continued to threaten her with a severe beating. She offered little resistance and sexual intercourse was effected by the defendant.

When the defendant left the room, the prosecutrix went upstairs and told a janitor that she had been raped. A second janitor asked what was the matter and she again reported the rape. The janitors did not seem to believe her although one of them testified that she was in a state of shock, and that he began to believe her later.

Prosecutrix left the building and returned to her dormitory. She told her roommate of the entire incident, lay down on her bed, and fell asleep. The roommate contacted university officials and at about midnight the prosecutrix was taken to the student health center and examined by a physician. The doctor found spermatozoa present indicating sexual intercourse within the preceding 24 hours. At the health center, the prosecutrix also repeated her story to a university

police official. At about 9:30 a.m. the next morning, the prosecutrix was interviewed by Lieutenant Edmunds of the university police and she again made complaint to him. From police photographs prosecutrix later identified the defendant as her assailant. Witnesses for the defendant testified that defendant was with them at the time of the alleged rape.

The defendant's principal contentions are that the complaint by the prosecutrix was not voluntarily made nor timely, and that the evidence was insufficient to establish resistance on the part of the prosecutrix.

The defendant relies on Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358, to support his contention that the complaint was not voluntary nor timely. That case holds that if the complaint is involuntary or delayed without sufficient reason, the complaint has no force and is inadmissible. The complaint which was held inadmissible in Sherrick was not made until after school on the day following the alleged rape, and then only in response to direct questioning by the 14-year-old school girl's mother. The rule of Sherrick has no application here.

Defendant contends that the complaint here was not voluntary because a janitor initiated a conversation by inquiring of the prosecutrix: "What is the matter?" and therefore her answer became involuntary because it was only in response to the question. There is simply no support for such an assertion. We have previously rejected any hard and fast rule that a complaint in the form of an answer to a question is involuntary. See State v. Deardurff, 186 Neb. 92, 180 N. W. 2d 890.

The contention that the complaint was not timely is equally frivolous. Within a matter of minutes after the defendant left the room, prosecutrix made complaint to two janitors, one of whom testified at the trial. She complained to her roommate within an hour of the incident, and was medically examined within a matter of hours. She complained to a university police officer

about midnight and was formally interviewed again the next morning by a police official and again repeated her complaint. The facts of this case fully demonstrate that the complaint was timely and voluntarily made.

The defendant's argument that the evidence was insufficient to establish resistance by the prosecutrix rests on an often-expressed rule that a woman must in good faith "resist to the utmost" so long as she has the physical power to do so. That rule is the corollary of another rule that where a woman yields because of fear caused by threats of immediate great bodily injury or death, actual physical resistance by her is not required.

The rule of resistance to the utmost was originally held to be applicable only "in the absence of threats and fear." See Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897. Even where the rule has been recognized, this court has always held that the degree of force and the degree of resistance required are relative, depending upon the particular circumstances. See, State v. Hunt, 178 Neb. 783, 135 N. W. 2d 475; Cascio v. State, *supra*.

Clearly the law does not require that when an attempt is made to rape a woman she must subject herself to threatened serious bodily harm or death by resisting to the utmost of her physical ability as long as she has the strength to do so. Where resistance would obviously be useless, futile, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the female's opposition and lack of consent. It is only required that the female make reasonable resistance in good faith under all the circumstances, and that the resistance be such as to make nonconsent and actual opposition genuine and real. To the extent that State v. Hunt, 178 Neb. 783, 135 N. W. 2d 475, and similar cases may be in conflict, they are overruled.

The defendant also contends that the sentence was excessive. An examination of the presentence investigation report clearly demonstrates that there was no

abuse of discretion here. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Chaney, 184 Neb. 734, 171 N. W. 2d 787.

The judgment is affirmed.

AFFIRMED.

LUCILLE M. WHITCOMB, APPELLANT, V. STATE FEDERAL SAVINGS & LOAN ASSOCIATION, A CORPORATION, APPELLEE.
205 N. W. 2d 652

Filed March 30, 1973. No. 38640.

1. **Negligence: Evidence.** Violation of a city ordinance is evidence of negligence.
2. **Buildings: Negligence.** A change of level at the entrances or exits of buildings is to be expected and sidewalk and entrance elevations to most places, public and private, are quite without uniformity.
3. **Buildings: Negligence: Inviter and Invitee.** The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise a presumption of negligence.
4. ———: ———: ———. 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.
5. **Trial: Negligence: Evidence.** The burden is upon plaintiff to show that the violation of a city ordinance contributed to her accident.
6. **Negligence: Inviter and Invitee.** If conditions and circumstances are such that an invitee has knowledge of a condition in advance or should have knowledge comparable to that of the inviter, it may not be said that the inviter is guilty of actionable negligence.
7. ———: ———. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.

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

Merrell L. Andersen, Andersen & Hubka, and Russell L. Daub, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit and Donald R. Witt, for appellee.

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

NEWTON, J.

This is an action to recover for personal injuries sustained as the result of a fall in an entranceway. A verdict was directed and judgment entered for defendant. We affirm the judgment of the District Court.

The entranceway and doors to defendant's building had been remodeled in 1957. Between January and March 20, 1970, the glass doors were replaced and a new aluminum threshold was installed. The new threshold was ½ inch higher than the old. It was constructed in violation of a city ordinance in that the reconstruction had not been authorized and it was ½ inch higher than permitted under the ordinance. Plaintiff had been a patron of defendant for many years and had entered the building many times over the former 2 inch high threshold. She had also entered over the new 2½ inch high threshold on at least one occasion before she fell on May 6, 1970. She states that on entering she did not look at the threshold. She further states that she opened the outward swinging door and started to step in when she stubbed her toe and fell but failed to state what she had tripped on.

The threshold, as to height, was in violation of the city ordinance and such violation is evidence of negligence See Winterson v. Pantel Realty Co., 135 Neb. 472, 282 N. W. 393. Without this factor there could be no negligence, however slight, attributed to defendant. See Beck v. Ideal Super Markets of Nebraska, Inc., 181

Neb. 381, 148 N. W. 2d 839, wherein it is held that a change of level at the entrances or exits of buildings is to be expected and sidewalk and entrance elevations to most places, public and private, are quite without uniformity. The mere fact that an invitee falls at the entrance of a building where a difference in level is present does not raise a presumption of negligence. See, also, Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868.

What was the duty owed by defendant to plaintiff as an invitee? "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." Costello v. Simon, 180 Neb. 35, 141 N. W. 2d 412. See, also, Laaker v. Hartman, 186 Neb. 774, 186 N. W. 2d 494; Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578.

In a somewhat similar case involving stairs with risers ¼ to ½ inch higher, and treads 1¼ to 1⅜ inches narrower than prescribed by ordinance, the court stated: "There is no evidence in the record that defendant's failure to comply with the building ordinances of the city of Omaha was the proximate cause of the injury. The only evidence on the subject is that plaintiff 'opened the door and stepped down and fell.' For aught we know she may have done any number of things that would have caused the accident and for which the defendant would not have been liable. The burden is upon the plaintiff and she has failed to produce any evidence to show that the act of defendant in violating the ordinance in any way contributed to this accident." Winterson v. Pantel Realty Co., *supra*.

In the present instance there is no evidence that plain-

tiff's fall was due to the ½ inch raise in the threshold, she may have fallen due to other causes, or might have tripped under the same circumstances over the old 2 inch high threshold.

The cases are legion wherein it is held under many varying situations that: "If conditions and circumstances are such that an invitee has knowledge of a condition in advance or should have knowledge comparable to that of the inviter, it may not be said that the inviter is guilty of actionable negligence." Nance v. Ames Plaza, Inc., 177 Neb. 88, 128 N. W. 2d 564. That case together with Crawford v. Soennichsen, *supra;* Costello v. Simon, *supra;* Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515, are cases involving invitees. Disney v. Butler County Rural P.P. Dist., 183 Neb. 420, 160 N. W. 2d 757, involved a farmer pulling an irrigation sprinkler into an electric line. Runge v. Travis, 178 Neb. 562, 134 N. W. 2d 291; and Mendoza v. Aguilera, 184 Neb. 94, 165 N. W. 2d 360, involve master and servant relationships. Mason v. Western Power & Gas Co., 183 Neb. 392, 160 N. W. 2d 204, involves a public service excavation on plaintiff's premises.

The plaintiff was familiar with the entranceway in which she fell. She had entered the building on numerous occasions and at least once after the entrance had been reconstructed. She was fully aware that there was a slight step or raise in the entrance. The threshold was open and obvious to all persons entering or leaving the building. Notwithstanding her knowledge of, and ability to see what was plainly before her, she failed to look and in some manner stumbled and fell. "One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent." Omaha Nat. Bank v. Omaha P. P. Dist., 186 Neb. 6, 180 N. W. 2d 229. See, also, Mendoza v. Aguilera, *supra;* Costello v. Simon, *supra.*

We conclude that judgment was properly entered for

the defendant and that the judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, APPELLANT, V. LOUIS WEINER ET AL., APPELLEES.

205 N. W. 2d 649

Filed March 30, 1973. No. 38657.

1. **Equity: Statutes: Injunction.** Courts of equity will not enjoin the commission of acts for the sole reason that they constitute violations of the criminal statutes.
2. **Injunction: Statutes.** Injunction is a proper remedy to be used by the State in the protection of public rights, property, or welfare, whether or not the acts complained of violate a criminal statute or whether or not they constitute a nuisance.
3. **Injunction: Statutes: Equity.** Acts constituting continuous violations of the Real Estate Brokers Act, sections 81-862 to 81-887, R. R. S. 1943, may be enjoined by a court of equity in the protection of public rights, property, or welfare.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Robert H. Petersen, for appellant.

Alfred A. Fiedler of Fiedler & Fiedler, for appellees.

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

RONIN, District Judge.

This is an action in equity wherein Clarence A. H. Meyer, Attorney General of the State of Nebraska, seeks to enjoin the defendants, Louis Weiner and Robert L. Solomon, from continuously engaging in unlicensed real estate practices. The trial court refused to issue a permanent injunction. On appeal the judgment of the trial court is reversed.

The parties stipulated that the real estate licenses of the defendants were previously revoked by the Real Estate Commission on September 1, 1967, which order of revocation was affirmed by this court on November 7, 1969. Weiner v. State Real Estate Commission, 184 Neb. 752, 171 N. W. 2d 783.

The record discloses that the defendant Louis Weiner was actively involved in three different sales of real estate and three attempted sales, or a total of six different incidents occurring in 1970 and 1971. Weiner maintained an office identified as Weiner Real Estate, and used forms for settling real estate transactions with the caption "Louis Weiner Real Estate." On the three sales that were completed, Weiner showed the property, negotiated the final purchase price, presented the purchase agreement for execution by the buyer, and collected the earnest deposit money with checks payable to him personally. Weiner contacted the loan company for financing, personally advanced money for necessary appraisal fees and credit reports on the purchasers, and was present at the closing of the sales. Louis Weiner's brother, H. H. Weiner, signed the purchase agreements as the real estate agent for the seller. None of the purchasers knew H. H. Weiner and stated all their dealings were with the defendant Weiner.

The defendant Solomon is involved in three of these six real estate transactions with Weiner. In the Corner purchase agreement the purchasers originally contacted Solomon who took them out and showed them the property. The purchasers first met Weiner when Solomon brought Weiner with him and presented a purchase agreement which was executed by them. The earnest money was paid either to Solomon or Weiner. Weiner arranged for the loan and was present for the closing.

In an attempt to sell real estate, Solomon brought a written offer to purchase with deposit to Jan Pusch who had verbally listed property with Weiner for sale. The seller discussed and objected to the amount of the

real estate commission. Solomon stated that the amount of the commission would have to be resolved with Weiner. Later the purchase agreement was signed, but the purchasers were unable to finance a loan.

In the Charles Hammel real estate transaction which resulted in a sale, both Weiner and Solomon showed him the property and discussed with him the necessary requirements of a purchase agreement which was signed in Weiner's office, with Weiner receiving the downpayment with check made payable to him and Weiner signing a receipt for $50 for cash received in connection with the downpayment.

Weiner testified that Solomon worked for him at the time they had their real estate licenses, that Solomon is helping him now by being his car driver, and that he was loaning Solomon money "and helping him out until he gets the license."

Section 81-867, R. R. S. 1943, defines the term real estate broker as one who for another and for valuable consideration sells or negotiates for sale any real estate, or who assists or directs in the procuring of prospects, "or the negotiation or closing of any transaction which does or is calculated to result in the sale, exchange, leasing or renting of any real estate."

Section 81-868, R. R. S. 1943, defines the term real estate salesman as one who for compensation of any kind is employed, either directly or indirectly, by any real estate broker to sell, purchase, or negotiate for the sale, purchase, exchange, or renting of any real estate.

Section 81-869, R. R. S. 1943, provides as follows: "It shall be unlawful for any person to act as a real estate broker or real estate salesman without first having procured a license to be issued by the State Real Estate Commission, as hereinafter provided for."

The District Court made no findings of fact as to whether the activities of the defendants as shown by the record constituted continuing violations in 1970 and 1971 of section 81-869, R. R. S. 1943. While the num-

ber and extent of the foregoing violations of the defendant Solomon are substantially less than those of the defendant Weiner, we hold that the record supports a finding that the activities of both defendants constituted open, continuous, and intentional violations of the foregoing statutes regulating the sale of real estate.

The trial court found that no criminal action was ever filed against either defendant as provided in section 81-887, R. R. S. 1943, which provides for a fine upon conviction for any person acting as a real estate broker or real estate salesman without having first obtained a proper license. It was apparently for this reason the trial court found that the plaintiff had an adequate remedy at law and denied injunctive relief.

Our court held in State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824, that the Attorney General could enjoin a railroad company from using reflectorized discs on switchstands and stated as follows: "We recognize the general rule that acts punishable by fine will not ordinarily be enjoined. But this rule does not have the force of denying such a remedy in the prevention of public wrongs arising out of repeated violations of a penalty statute which harmfully affects the interests of the public. And this rule does not require that such acts should create a nuisance. Injunction is properly used for the protection of public rights, property, or welfare, whether or not such acts violate a penalty statute and whether or not they constitute a nuisance." See, also, State ex rel. Spillman v. Heldt, 115 Neb. 435, 213 N. W. 578.

The foregoing rule was cited with approval in the case of State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N. W. 2d 577. In that case the State brought an action to enjoin the defendant from the practice of professional architecture. The defendant was not a registered architect as required by law, the violation of which on conviction provided a criminal penalty

therefor. Injunction was held therein to be a proper remedy in the protection of public rights, property, or welfare.

The obvious legislative intent in the detailed regulatory and licensing requirements governing the sale of real estate as provided in sections 81-862 to 81-887, R. R. S. 1943, is for the protection of public rights, property, or welfare. We hold that a court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the real estate law even though these acts may be subject to criminal prosecution. We hold that injunction is a proper remedy in this case.

The judgment is reversed and the cause remanded with directions to the trial court to issue forthwith a permanent injunction against the defendants in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KENNETH WULF, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLANT.
205 N. W. 2d 640

Filed March 30, 1973. No. 38661.

1. **Insurance: Contracts: Statutes.** By its terms, section 44-501, R. R. S. 1943, mandatorily requiring the inclusion of the provisions of the 1943 Standard Fire Insurance Policy of the State of New York are applicable only to a policy or contract of fire and lightning insurance.
2. **Insurance: Contracts: Statutes: Limitations of Actions.** A fire insurance policy legally issued in this state which contains a provision requiring suit to be brought within 12 months after the inception of the loss, but which also contains provisions amending any terms of the policy which are in conflict with state statutes to conform with such statutes, is subject to the limitations set out in section 44-357, R. R. S. 1943.

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

Luebs, Tracy, Huebner, Dowding & Beltzer and D. Steven Leininger, for appellant.

Downing & Downing, for appellee.

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

WHITE, C. J.

The plaintiff recovered a judgment in the sum of $3,761.59 for windstorm loss under a policy of insurance issued by the defendant, Farm Bureau Insurance Company of Nebraska. The defendant appeals, asserting that the action is barred by the statute of limitations and that the evidence is insufficient to support the jury's verdict on the issue of damages. The trial court determined these issues adversely to the defendant. We affirm the judgment of the District Court.

The first contention of the defendant is this action is barred by the statute of limitations, having been commenced more than 1 year after the occurrence of the loss. The policy and insurance contract were introduced in evidence and admitted by both parties. The first page of the policy or contract is a copy of the 1943 Standard Fire Insurance Policy of the State of New York. It contains (lines 157 to 161) a provision for a 1-year statute of limitations, which provision is not in conformity with section 44-357, R. R. S. 1943, which provides that no insurance company shall issue in this state any policy or contract of insurance containing any provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statutes of limitations of this state. The statutes of this state prescribe a 5-year limitation period for an action on an insurance contract.

The defendant's contention is a closely reasoned argument that section 44-501, R. R. S. 1943, mandatorily requires that the provisions of the 1943 Standard Fire

Insurance Policy of the State of New York are applicable and that the action is therefore barred. There are two answers to this contention. First, the section of the statute relied upon by the defendant, by its very terms, restricts its application to only fire and lightning insurance policies. The statute says in precise terms: "No policy or contract of *fire and lightning insurance*, including a renewal thereof, shall be made * * *." (Emphasis supplied.) The petition in this case alleges, and indeed there is no dispute in either the pleadings or the evidence, that the loss resulted from tornado and windstorm damage. The whole contract of insurance, including the first page under the provisions of the New York Standard Fire Insurance Policy of 1943, contains provisions and agreements and exclusions with reference to several types of coverage other than fire and lightning. It therefore becomes abundantly clear that the limitation period with reference to the other coverages besides fire and lightning contravenes the prohibition of section 44-357, R. R. S. 1943, and any such provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statute of limitations in this state is invalid.

But the defendant's argument must fall for another reason. It is clear, under the very terms and conditions of the whole policy of insurance, including the 1943 New York standard form, that the defendant has waived the application of the 1-year statute of limitations and has entered into an agreement conforming the limitation period to the Nebraska statute of limitations, pursuant to section 44-357, R. R. S. 1943. The pertinent and unambiguous provisions of the policy of insurance, admitted by the parties to be applicable in this case, provides as follows: "Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto." (Lines 38 to 40.) And at lines 49

to 52, we find the following: "No permission affecting this insurance shall exist, or waiver of any provision be valid, *unless granted herein or expressed in writing added hereto.*" (Emphasis supplied.) In pursuance of this waiver provision in the New York standard policy, the parties agreed under section 7, page 12, of the contract of insurance, as follows: "7. Conformity With Statute: The terms of this policy and forms attached hereto which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes." The policy of insurance was drawn by the insurer. The insured had a right to rely upon the clear and explicit terms and waivers provided in the policy of insurance as written. They clearly provide, independent of section 44-357, R. R. S. 1943, that the statutes of limitations in the State of Nebraska shall be applicable and that the policy is amended to conform to such statutes.

Our interpretation of the conforming clause in this contract harmonizes with and is reenforced by our holding in the quite recent case of Dunlop Tire & Rubber Corp. v. Ryan, 171 Neb. 820, 108 N. W. 2d 84 (1961), in which this court reaffirmed our previous holdings that it was against the public policy of the State of Nebraska to enter into an agreement changing the statutory limitation period for bringing an action. We said: "The attempt to so extend the right was void. In Miller v. State Ins. Co., 54 Neb. 121, 74 N. W. 416, 69 Am. S. R. 709, this court said: 'The statutes of this state provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, *is against public policy and will not be enforced by the courts of this state.*' This pronouncement was approved in the following cases: Omaha Fire Ins. Co. v. Drennan, 56 Neb. 623, 77 N. W.

67; Grand View Building Assn. v. Northern Assurance Co., 73 Neb. 149, 102 N. W. 246, affirmed 203 U. S. 106, 27 S. Ct. 27, 51 L. Ed. 109; Williams v. Western Travelers Accident Assn., 97 Neb. 352, 149 N. W. 822; Avondale v. Sovereign Camp, W.O.W., supra; Young v. Order of United Commercial Travelers, supra." (Emphasis supplied.)

Directly controlling of this issue with relation to a fire insurance policy is our recent holding in Hiram Scott College v. Insurance Co. of North America, 187 Neb. 290, 188 N. W. 2d 688. Therein we held as follows: "We therefore hold that a fire insurance policy legally issued in this state which contains a provision requiring suit to be brought within 12 months after the inception of the loss, but which also contains provisions amending any terms of the policy which are in conflict with state statutes to conform with such statutes, is subject to the limitations set out in section 44-357, R. R. S. 1943." In reaffirming the holding in the Hiram Scott College case, we point out that our decision in Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415, is not in conflict with our holding in the Hiram Scott College case and our holding herein. As was pointed out in the opinion in Hiram Scott College v. Insurance Co. of North America, *supra,* on the record presented to the court in that case there was no evidence of a conforming provision in the policy of insurance, or issue presented on appeal as to the applicability of the waiver provisions and the conforming clauses executed in pursuance thereof.

In the remaining contention of the defendant, it argues that the evidence is insufficient to sustain the plaintiff's burden of proof as to damages. There is no question under the evidence, and the defendant does not contend otherwise, that the insured dwelling of the plaintiff suffered damage as a result of a tornado and windstorm occurring on June 11, 1967. It argues that there is no evidence in the record of the amount of

damages suffered by the plaintiff as the result of the windstorm and that no evidence was introduced to prove the cost of the repairs the plaintiff actually made on the house. It also argues that the evidence as to damages was defective because no evidence was produced showing whether the house was in plumb before the storm. Briefly reviewing the evidence, it shows that the tornado of June 11, 1967, twisted the house, causing it to lean to the north and to the east, and otherwise out of plumb in many respects. The evidence is circumstantial, it is true. There is no evidence in the record to prove that on the exact date of the tornado and windstorm of June 11, 1967, the house, foundation, joists, door jambs, and other structures were exactly in plumb. Indeed if such proof were necessary for a recovery, it would probably bar recovery in all cases of this nature. Reviewing the circumstantial evidence, it shows that the storm caused trees to be twisted and uprooted, grain bins tossed around, the windmill of the plaintiff was twisted beyond recognition, and a barn just north of the house was totally demolished. It further shows that the west base of the house was flush with a concrete apron which had been poured to keep skunks out; and that after the tornado there was about a quarter of an inch separation between the base of the house and the concrete. After the storm the doors in the house would not open and close freely and it was necessary to take them down and plane them off so that they would swing freely. The evidence shows that the southwest corner of the roof of the house had been ripped up and partially torn off; that the windows were blown out; that tin on the roof was torn off; and that on the inside of the house dust had been forced out from the electrical outlets. Extensive amounts of plaster fell off the walls and it was necessary to drive nails in them to keep the plaster from further falling off. The defendant's expert, one Mr. Benjamin, testified that the forces at

work when a tornado passes into a building include wind velocities from 300 to 500 miles per hour; that explosive forces are caused by changes in air pressure; and a strong and lifting force due to the updraft of the air in the funnel.

The plaintiff's expert, a contractor with 19 years of experience, examined the house on three different occasions subsequent to the time of the loss. He observed that the house was out of plumb; that the plaster was cracked; and that the doors were dragging and sticking. He observed the separation between the poured concrete on the west side of the house and the house itself; and he found that the house leaned to the east and north. The defendant does not challenge the qualifications of this witness but asserts that his opinion was without proper foundation. The plaintiff's expert testified that it would cost $7,744 as a reasonable and necessary cost to put the house into plumb. The plaintiff testified that in his opinion the house was worth between $8,000 and $9,000 on June 10, 1967.

It is obvious, from the above recital of some of the testimony, that there was ample circumstantial evidence to show a severe loss and damage to the plaintiff's house. While it is true there is no evidence as to the precise variation, if any, of the plaintiff's house from plumb prior to the date of the storm, the evidence is almost conclusive that the force of the tornado threw it not only further out of plumb but that such condition required repairs to restore the house to its condition before the storm. The plaintiff's expert witness so testified. We come to the conclusion that there is ample evidence of the severe loss and damage to the plaintiff's house; that it was thrown out of plumb to an extent requiring extensive repairs to restore it to its former condition; and that there was sufficient foundation for the admission of opinion testimony of plaintiff's expert as to the amount of the damage in the sum of $7,744. The defendant's expert witness

testified himself that it was possible the house was moved out of plumb as a result of "an external force" but that he doubted it. The most that can be said is there was a conflict in testimony, and the jury resolved the conflict in favor of the plaintiff. There was ample evidence as to the amount of damages and to sustain the jury's verdict.

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

AFFIRMED.

SMITH and CLINTON, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. KENNETH EUGENE KELLY, APPELLANT.
205 N. W. 646

Filed March 30, 1973. No. 38727.

1. **Criminal Law: Sentences.** Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, the sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
2. **Criminal Law: Sentences: Trial.** In examining the question of an abuse of discretion in imposing a sentence, significance may be given to the fact that the crime committed involved violence and great moral turpitude.
3. **Criminal Law: Attorney and Client.** An allegation concerning ineffectiveness of counsel must be supported by facts which establish that counsel failed in his duty to carefully investigate and failed to present an issue which would assist his client, and that prejudice resulted from these failures.
4. **Criminal Law: Attorney and Client: Trial.** The person challenging the competence of counsel has the burden of proof to establish counsel's incompetence.

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

Jeffrey L. Orr, 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.

WHITE, C. J.

In this appeal from the jury conviction and a sentence from 6 to 10 years for the crime of rape, the defendant asserts that the indeterminate sentence of 6 to 10 years was excessive and that at trial he was represented by ineffective and inadequate counsel. From adverse rulings on these issues by the District Court, the defendant appeals. We affirm the judgment and sentence of the District Court.

The defendant was 14 years of age and was confined to the Boys' Training School in Kearney, Nebraska, at the time of the offense. A detailed review of the circumstances of the offense is not necessary. Suffice to say, it is undisputed that a vicious and brutal rape was perpetrated upon a female office employee of the school while the defendant was acting as her office boy. The evidence shows that the defendant administered a brutal beating to the prosecutrix before and during the commission of the offense. The record further indicates that there was a previous incident in which the defendant grabbed a 50-year-old female counselor by the throat during a counseling session, attempted to open a door of a closet nearby, but the counselor was able to get control of the situation and subdue the defendant before anything serious occurred.

It may fairly be said that the primary thrust of the defendant's argument is the defendant's age. The District Court, in its discretion, recognized this problem and the record shows a careful protection of the defendant's rights and a careful examination of the record and history of the defendant. It reveals a comprehensive psychiatric and neurological evaluation by an Omaha psychiatrist. The psychiatrist found that no psychosis was

present and indeed the record in this case and the defendant's testimony demonstrate an oriented and articulate human being. Prior to this psychiatric examination the defendant had been taken to the Lincoln State Hospital for approximately 3 weeks observation and then returned to Kearney for trial. The record reveals an unstable and disturbed family background in childhood. It also reveals that he has been in trouble since 1965 when he was 10 years of age; that he was in juvenile court of Douglas County; and has been caught stealing four different automobiles. We characterize this report otherwise by simply stating that the psychiatric examination and his own version to the psychiatrist reveals that he is a youth of precocious experience, an example being that he started having hetero-sexual relations at 12 or 13 years of age. The evidence indicates a continuing condition of bitterness and hostility on the part of the defendant, nonresponsive to the counseling and the training at the school. An example is this statement: "Judge Hart sent my brother to the pen. I'm going to kill him * * *." The record not only fails to reveal proof of an abuse of discretion by the trial judge in imposing the sentence (State v. Chaney, 184 Neb. 734, 171 N. W. 2d 787), but affirmatively supports a finding of a detailed and careful consideration of all the circumstances, indicating a grave need to protect the public and society, and a sentence that would carry the defendant beyond adolescence with the hope of rehabilitation. The crime involved here is one involving great moral turpitude and violence. Significance should be given to these factors. Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689; Peterson v. State, 115 Neb. 302, 212 N. W. 610. We also observe that section 28-408, R. R. S. 1943 (rape), was amended in 1969 to prescribe a wider range of penalty for the crime of forcible rape of not more than 50 nor less than 3 years (previously not more than 20 nor less than 3 years). There is no merit to the contention

that the indeterminate sentence of 6 to 10 years was excessive.

The defendant's new counsel on appeal raises the issue of the incompetency and inadequacy of his trial counsel. The lower court granted him a hearing on this issue. We are in a position to review this issue in this appeal because of the fact the new counsel represented the defendant at the hearing and in this court. We have reviewed the record on this issue and agree with the trial court that this contention is utterly without merit. His basic contention is that he was afforded ineffective counsel in that he did not have a complete defense to the charge of rape because the sexual act was performed without force and with the consent of the prosecutrix, and that his defense counsel failed to interview and obtain witnesses to establish this defense. The defendant utterly failed to establish this allegation. None of the four witnesses identified by him as supporting this defense were called to testify at this hearing nor was their failure to be called as witnesses explained. There was an utter lack of corroboration of the allegation and contention that neither force nor nonconsent were involved in his admitted sexual act with the prosecutrix. Indeed the undisputed testimony, supported by photographs of the prosecutrix taken after the beating, suggests that the defendant's present contention is a pure afterthought. A review of the motion the defendant filed and of the record discloses that at no time did the defendant allege he told his attorney or put him on notice about the defense of consent. Rather, the almost incredible contention is made that notwithstanding the defendant's singular silence to his attorney, the defendant's attorney should have developed facts supporting this defense, which even now is not supported and not corroborated by witnesses or testimony on the hearing. The record reveals that the defendant's attorney was present at the preliminary hearing and represented him; and that he

investigated and was fully familiar with all the evidence of the prosecution which was willingly furnished him by the county attorney's office. It is further established that he sought and obtained a court order to obtain an examination from a psychiatrist in Omaha, previously referred to in this opinion; and that he sought and obtained access to the police investigation.

The defendant contends that character witnesses should have been called to establish his good reputation in the training school. Character witnesses are very seldom called in criminal prosecutions of this nature involving an inmate of an institution. It is difficult to conceive, even if the record established that such witnesses could have been called, how such witnesses' testimony could have constituted an effective marshalling of character evidence. The witnesses would have been employed by the training school or confined therein for delinquent behavior, and the record establishes that although the defendant had only been in the institution for 89 days, he already had been involved in the one instance where he had a 50-year-old woman by the throat with one hand and was reaching for a closet door with the other!

We have examined the other contentions of the defendant in this respect and they are utterly without merit. We have examined the record in this case and can find no support for the allegation of ineffective and inadequate counsel. The evidence contains nothing that can be characterized as "grossly inept" or "shocking the conscience of the court." State v. Putnam, 182 Neb. 185, 183 N. W. 2d 456.

We have carefully examined the record and examined the contentions of the defendant. They are without merit. The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

NORTHLAND MORTGAGE COMPANY, FORMERLY KNOWN AS GENERAL MORTGAGE INVESTMENTS OF ST. PAUL, INC., A MINNESOTA CORPORATION, APPELLEE, V. ROYALWOOD ESTATES, INC., ET AL., APPELLANTS.
206 N. W. 2d 328

Filed April 6, 1973. No. 38529.

1. **Corporations: Interest: Contracts.** A corporation may agree to pay any rate of interest by an agreement in writing which sets out the amount or the rate charged. § 45-101, R. R. S. 1943.
2. **Contracts: Trial.** Instruments made in reference to and as a part of a transaction should be considered and construed together.

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

John W. Delehant, for appellants.

Abrahams, Kaslow & Cassman, for appellee.

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

BOSLAUGH, J.

This is an action to foreclose a real estate mortgage. There is no dispute concerning the plaintiff's right to a decree of foreclosure. The sole issue is the amount due the plaintiff. The trial court found generally in favor of the plaintiff. The defendant Royalwood Estates, Inc., appeals.

The plaintiff is engaged in the mortgage banking business. Its business is the origination and placement of loans as distinguished from the lending of money. The defendant Royalwood Estates, Inc., is a corporation controlled by Millard R. Seldin. Seldin and his associates are real estate developers.

In 1967, Seldin was engaged in a K-Mart project. The financing which had been obtained for the project was inadequate so Seldin proposed to borrow $200,000 on vacant land at 126th and Center Streets.

On June 14, 1967, the plaintiff issued a commitment letter agreeing to loan $200,000 upon terms and conditions specified in the letter. The loan was to bear interest at the rate of 7 percent per annum and provided that upon acceptance of the commitment, "the *borrower* agrees to pay a non-refundable fee in the amount of $6,000.00. This fee shall be earned by us upon the closing of this loan and is in no way contingent upon the closing of the K-Mart loan." (Emphasis supplied.)

The loan was closed on June 22, 1967. A note and mortgage were executed by the defendant corporation and the proceeds of the loan were disbursed to it by the plaintiff. After several extensions, the note was not paid at maturity. This action followed.

The defendant claims it is entitled to a credit of $41,534.64 against the amount due the plaintiff. The amount represents interest paid plus the $6,000 "fee." The defendant contends the loan was in violation of section 45-101, R. R. S. 1943, because the "fee" paid was in fact interest; and in violation of section 45-501, R. S. Supp., 1967, which required full disclosure in a contract of loan of the actual or maximum rate used in computing the charges made for deferred payment. Section 45-501, R. S. Supp., 1967, was repealed in 1969. Laws 1969, c. 45, § 3, p. 258.

Section 45-101, R. R. S. 1943, is the general interest statute and provides for a maximum rate of interest of $9 per year upon $100 subject to a number of exceptions. One exception is that a corporation may agree to pay any rate of interest in excess of the maximum rate "by an agreement in writing which clearly spells out either the amount or the rate of interest charged." See Snyder v. Woxo, Inc., 185 Neb. 545, 177 N. W. 2d 281.

The commitment letter of June 14, 1967, clearly provided that the borrower was to pay 7 percent interest in monthly installments plus the nonrefundable fee of $6,000 which was due upon the closing of the loan. The letter was addressed to Millard R. Seldin et al., and

the acceptance was signed by Millard R. Seldin, Theodore Seldin, Stanley Silverman, and Bernard Raskin. The loan was not made to the individuals who signed the acceptance but was made to the defendant corporation which was controlled by Millard R. Seldin. It is apparent from the commitment letter that the loan was not to be made to the four individuals because the commitment provides for their "personal endorsements and guarantees" of the loan. The defendant is bound by the commitment letter because it was the "borrower" selected by Seldin and accepted the proceeds of the loan. Although it did not sign the commitment letter, it succeeded to the rights and responsibilities of the borrower.

Instruments made in reference to and as a part of a transaction should be considered and construed together. Campbell v. Ohio National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546. The commitment letter satisfied the requirements of the statute. The fact that the note did not contain any reference to the $6,000 fee was of no importance. The defense of usury was not available to the defendant without regard to the nature of the $6,000 fee.

So far as section 45-501, R. S. Supp., 1967, was concerned, the $6,000 fee was not a charge made for the deferred payment of the loan. The fee was nonrefundable and was due upon the closing of the loan. There was no connection of any kind between the fee and the duration of the loan. If the fee is considered as "other charges" exacted of the debtor, the nature of the charge was clearly shown in the commitment letter.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE KENT WACHTEL.
KENT WACHTEL, APPELLANT, V. FREMONT CIVIL SERVICE COMMISSION ET AL., APPELLEES.
206 N. W. 2d 56

Filed April 6, 1973. No. 38534.

1. **Statutes: Administrative Law: Municipal Corporations: Notice: Civil Service.** Section 19-1808, R. R. S. 1943, provides that no person in the classified civil service shall be removed, suspended, demoted, or discharged except for cause and then only upon the written accusation of the appointing power or any citizen or taxpayer. A written statement of such accusation shall be served upon the accused and a duplicate filed with the commission.
2. **Statutes: Administrative Law: Municipal Corporations: Civil Service.** Section 19-1808, R. R. S. 1943, provides that the power of discharge is lodged solely in the Civil Service Commission.

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

Sidner, Svoboda, Schilke & Wiseman, for appellant.

Ray C. Simmons and Lyle B. Gill, for appellees.

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

WHITE, C. J.

This is an error proceeding commenced in the District Court by the petitioner, Kent Wachtel, to determine the validity of his discharge from the Fremont police department. The District Court dismissed the error proceeding, holding that the discharge by the Civil Service Commission was valid, and we affirm the judgment of the District Court.

The petitioner was a regular police officer employed by the police department of the City of Fremont since August 1969. The procedure regulating his discharge is governed by sections 19-1801 to 19-1823, R. R. S. 1943 (the Nebraska Civil Service Act). Pursuant to these statutes, on June 29, 1971, the city council of Fremont

passed a motion to the effect that the petitioner should be discharged from the police force because of "his inattention to duty, for insubordination, and for the commission of acts tending to injure the public service." A copy of this motion, passed by the city council, was served upon the petitioner under the terms of the applicable statutes and a duplicate was filed with the Civil Service Commission of the City of Fremont.

Subsequent to the service of the copy of the motion, the petitioner then filed a written request with the Civil Service Commission of Fremont, asking it to declare that the procedure followed by the city council in discharging him was not in accordance with law and alleging that it failed to serve him with a written accusation prior to the filing of the copy of the motion declaring that he should be discharged, as set out above. In the alternative, the petitioner requested the Civil Service Commission to conduct an investigation and have a public hearing as to the reasons for his discharge. Pursuant to the provisions of the statute, the commission did hold a public hearing and witnesses were called for both sides and both parties appeared. The commission, after a full review of the evidence, determined that the actions of the city council were valid; that the discharge was not made for political or religious reasons; and that it was made in good faith for cause, and discharged the petitioner. It is with some difficulty that we follow the petitioner's argument on appeal in this case. We clarify his contention by stating that the petitioner is, in effect, seeking two hearings on his discharge, one before the city council and another before the Civil Service Commission. In this error proceeding he asserts that the proceedings in the city council were in violation of section 19-1808, R. R. S. 1943, because of failure to serve a written accusation upon him prior to the filing of the motion and the service thereon stating that he should be discharged. The District Court rejected this contention, and we agree. As we see it,

the provisions of section 19-1808, R. R. S. 1943, were literally and completely complied with. The section provides, inter alia, that "no person in the classified civil service * * * shall be removed, suspended, demoted, or discharged except for cause and then only upon the written accusation of the appointing power or any citizen or taxpayer. A written statement of such accusation, in general terms, shall be served upon the accused and a duplicate filed with the commission." Despite the fact that the record shows the passing of a motion by the city council and its service upon the petitioner and its filing with the commission, the petitioner seems to contend that his discharge occurred at the time the city council passed the motion to discharge, and therefore since at that time no written statement of the accusation had been served upon him, its action was a nullity; that the commission's subsequent action was a nullity; and that he therefore should be entitled to reinstatement and reimbursement for lost wages.

Apparently, the petitioner misconceives the terms of the statute and our holding in Simpson v. City of Grand Island, 166 Neb. 393, 89 N. W. 2d 117. The scheme of the statute is plainly stated by its terms. The original determination to discharge is made by the city council with the power to review and make a *final* determination of discharge in the Civil Service Commission. The Simpson case does not hold otherwise. In the Simpson case the city had failed to provide a civil service commission under the terms of the civil service act. Consequently, it was apparent, as the Simpson case held, that the discharge could not be final and effective since, under the terms of the act, the final determination of discharge is lodged solely in the commission. In the Simpson case, we held: "The * * * (final) discharge cannot be exercised because the city has failed to establish the commission to which the power of (final) discharge was delegated by the Legislature." At the risk of belaboring the obvious, the pre-

cise terms of the statute and the Simpson case make it clear that the final determination of discharge, in the event the employee appeals, is in the Civil Service Commission. The statute makes no provision for a hearing before the original determination of discharge is made by the city council. The procedure outlined in the statute makes it clear that the petitioner was entitled to service of the copy of the action or accusation of the city council and a public hearing thereon by the Civil Service Commission before a final adjudication of discharge could be made. It does not provide, either by its express terms or by implication, for two hearings, two notices, and two decisions. By its terms, the statute provides from whom the "written accusation" shall originate. The action by the city council on June 29, 1971, was the formulation and promulgation of the required "written accusation" provided by the statute. The written accusation to initiate the proceedings must originate at some point, and to assert that a notice must be served before an original accusation is made is on its face an absurdity.

Summarizing, the statute itself provides, and our holding in Simpson v. City of Grand Island, *supra,* clearly decides that the final determination of discharge is lodged in the Fremont Civil Service Commission. No contention is made, nor could one be made, that the written accusation prepared by the city council was not served upon the petitioner, and that hearing with full opportunity to be heard was not had before the commission.

We come to the conclusion that the petitioner is not entitled to two hearings or two services of notice; that the procedure followed in the case at bar was in complete and literal compliance with the statute; that a full hearing was had; and that the determination by the Fremont Civil Service Commission effectively and finally discharged the petitioner. The petition in error was properly dismissed.

The judgment of the District Court in dismissing the error proceeding is correct and is hereby affirmed.

AFFIRMED.

GEORGE BRAKHAGE, AS FATHER AND NEXT FRIEND OF CRAIG BRAKHAGE, HIS SON, A MINOR, APPELLANT, V. KATHRYN GRAFF ET AL., APPELLEES.
206 N. W. 2d 45

Filed April 6, 1973. No. 38581.

Insurance: Discovery: Attorney and Client: Privileged Communications. A report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Richard H. Williams, for appellant.

Healey, Healey, Brown & Burchard, for appellees.

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

BOSLAUGH, J.

This was an action for damages arising out of an automobile accident. Craig Brakhage, who was 13 years old and will be referred to as the plaintiff, was riding his bicycle upon State Highway No. 4 in Plymouth, Nebraska, when he was struck by an automobile operated by Kathryn Graff, who will be referred to as the defendant. The action was brought by Craig's father, George Brakhage, as next friend. Larry Graff is the

husband of Kathryn Graff and was the owner of the automobile.

The jury returned a verdict for the defendants. The plaintiff appeals. The assignments of error relate to the ruling on two motions to produce and the instructions to the jury.

The accident happened at about 12:35 p.m., on July 5, 1968. The weather was clear and the highway was dry. Highway No. 4 is a 2-lane highway, approximately 22 feet wide, and is surfaced with blacktop. The highway runs east and west and is straight and level as it goes through Plymouth. The posted speed limit is 40 miles per hour.

The defendant testified that as she entered Plymouth from the west, her speed was below 40 miles per hour. She saw the plaintiff riding his bicycle east on the highway some distance away. As she approached, the plaintiff turned around and looked directly at her. She reduced the speed of her automobile and turned gradually to the left intending to pass the bicycle in the north lane of the highway. The bicycle was then close to the south edge of the south lane. As she started to pass the bicycle, it turned to the left directly in front of her. She applied her brakes but the right front corner of the automobile struck the left side of the bicycle near the rear axle of the bicycle. The point of impact was on or near the centerline of the highway. The plaintiff was thrown from the bicycle and was badly injured.

The defendant's automobile stopped with the right rear wheel on or near the centerline and the left front wheel approximately 6 feet from the north edge of the pavement. The bicycle was from 6 to 9 feet in front of the automobile and the plaintiff was lying on the pavement from 6 to 8 feet in front of the bicycle.

The defendant's automobile left skid marks 24 feet long. The mark made by the right wheels commenced in the right lane and ended near the centerline. The mark

made by the left wheels was entirely in the north lane. The damage to the bicycle indicated that the impact occurred while the automobile was braking. Based upon the skid marks, the speed of the defendant's automobile was estimated to be about 21 miles per hour at the beginning of the skid marks.

The plaintiff has no recollection of how the accident happened. There were no eyewitnesses to the accident other than the defendant.

At the time of the accident the defendant was insured against liability by the State Farm Mutual Automobile Insurance Company. The policy provided that the company would defend suits against the insured with attorneys selected and compensated by the company and make such investigation of claims and suits as it deemed expedient.

On July 8, 1968, Jon Grenseman, a field claims representative of the insurance company, interviewed the defendant and obtained a longhand statement signed by her. On approximately August 5, 1969, defense attorneys were employed by the insurance company in regard to this claim. On September 19, 1968, a second statement was obtained from the defendant.

On or before July 24, 1968, the plaintiff's father employed counsel in regard to the claim. This action was commenced on July 29, 1969. The defendant's deposition was taken by the plaintiff on February 10, 1970. The defendant stated, by affidavit, that she had never been contacted by any representative of the plaintiff.

On March 13, 1970, and again on February 7, 1972, the plaintiff filed motions for an order requiring the defendants to produce for inspection and copying "a statement" taken from the defendant. Both motions were overruled. These rulings are assigned as error.

Upon motion of any party showing good cause therefor the court may order the production of any document "not privileged." § 25-1267.39, R. R. S. 1943. Although the right to a discovery order depends upon a

showing of good cause and to some extent is within the discretion of the trial court, in deciding the issue in this case we consider only the question of privilege.

Although there is authority to the contrary, the weight of authority appears to support the rule that a statement by an insured to his liability insurer is privileged. "According to the weight of authority, a report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him." Annotation, 22 A. L. R. 2d 659. See, also, Heffron v. Los Angeles Transit Lines, 170 Cal. App. 2d 709, 339 P. 2d 567; Travelers Indemnity Co. v. Cochrane, 155 Ohio St. 305, 98 N. E. 2d 840; Gene Compton's Corp. v. Superior Court, 205 Cal. App. 2d 365, 23 Cal. Rptr. 250; Lantex Constr. Co. v. Lejsal (Tex. Civ. App.), 315 S. W. 2d 177; People v. Ryan, 30 Ill. 2d 456, 197 N. E. 2d 15; Vann v. State (Fla.), 85 So. 2d 133.

The fact that the statement was made to a field claims representative of the insurer who was not a lawyer is not controlling. The privilege extends to statements made to agents of an attorney. As stated in VIII Wigmore on Evidence, § 2301, p. 583: "It has never been questioned that the privilege protects communications to the *attorney's clerks* and his other agents (including stenographers) for rendering his services. The assistance of these agents being indispensable to his work and communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents."

The statements involved here were obtained in performance of the insurer's obligation to investigate and

settle or defend claims made against the defendants and were intended for the use of the attorneys selected by the insurer to represent the defendant.

The answer alleged that the plaintiff was negligent in failing to maintain a proper lookout and reasonable control over his bicycle. The plaintiff contends these allegations of contributory negligence should not have been submitted to the jury and the trial court should have given a requested instruction to the effect that the operator of a vehicle being overtaken has no duty to the vehicle to the rear until he has been made aware of it.

The defendant testified the plaintiff turned around and looked directly at her as she was approaching from the west. Then, as she started to pass the bicycle, it turned to the left directly in front of her. In view of this evidence, the instruction given was proper and the requested instruction was properly refused.

The plaintiff also complains of instruction No. 11 in which the trial court advised the jury that "any vehicle proceeding at less than normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right hand lane then available for traffic or as close as practicable to the right hand curb or edge of the roadway except when overtaking and passing another vehicle proceeding in the same direction." The instruction was based upon section 39-746.01, R. S. Supp., 1972. The rule was applicable to the facts in this case and the instruction was a correct statement of the law.

The trial court further instructed the jury that one using the public highways has a duty not to move suddenly from a place of safety into a place of peril or danger "which peril or danger he saw or reasonably could have seen," unless he exercises ordinary care in so doing. The plaintiff contends the instruction was erroneous because the rule is limited to situations in

which the person "sees and is aware" of the peril or danger.

Under the evidence in this case the jury could find the plaintiff, after looking directly at the defendant, turned his bicycle to the left in front of the defendant who was overtaking him. It was the plaintiff's duty to look for traffic approaching from the rear before attempting a left turn across the highway. The defendant's automobile was a peril "he saw or reasonably could have seen." The instruction was not erroneous under the circumstances of this case.

The judgment of the District Court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent for the reason that I would follow the majority rule across the country and require the production of the statement given by Kathryn Graff to her insurance investigator. This statement was in no way a part of the work product of the defendant's attorneys. See, Wilson v. Borchard, 370 Mich. 404, 122 N. W. 2d 57; Alseike v. Miller, 196 Kan. 547, 412 P. 2d 1007; Babcock v. Jackson, 243 N. Y. S. 2d 715, 40 Misc. 2d 757; Jacques v. Cassidy, 28 Conn. Supp. 212, 257 A. 2d 29; Herbst v. Chicago, R. I. & P. R. R. Co. (Iowa), 10 F. R. D. 14.

JOSEPH REIFENRATH, APPELLANT, V. BEATRICE HANSEN ET AL., APPELLEES.
206 N. W. 2d 42

Filed April 6, 1973. No. 38596.

1. **Specific Performance: Contracts.** Specific performance of a contract will not be decreed unless the minds of the parties to the contract have met.
2. ———: ———. To establish a contract capable of specific enforcement, it must be shown that there was a definite offer and an unconditional acceptance.
3. **Courts: Contracts.** It is not the function of a court of equity

to make a contract for the parties or to supply any of the material stipulations thereof.

4. **Frauds, Statute of: Contracts.** The memorandum required by the statute of frauds must contain the essential terms of the contract.

Appeal from the District Court for Dixon County: JOSEPH E. MARSH, Judge. Affirmed.

John V. Addison, for appellant.

Smith, Smith & Boyd, for appellees.

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

MCCOWN, J.

Plaintiff filed this action upon an alleged contract for the sale of real estate. He prayed for an order requiring the defendants to submit the formal real estate contract to him "or to enter an order setting forth such contract in full with the terms thereof and to require defendants to comply therewith." The case was tried to the District Court without a jury. The court found that the evidence was insufficient to establish the issues essential for the formation of a contract or to establish part performance sufficient to remove the transaction from the statute of frauds, and insufficient to sustain a decree for specific performance. The court thereupon sustained defendants' previous motion and dismissed the action.

The plaintiff Reifenrath on April 8, 1970, delivered a check payable to the defendants in the sum of $5,000 as a downpayment upon the purchase of certain described unimproved real estate in Dixon County. The plaintiff for an undisclosed number of years had been and was on April 8, 1970, the tenant in possession of the land. The receipt for the $5,000 check signed by Beatrice Hansen, one of the defendants, read: "Received of Joe Reifenrath the sum of $5000.00 (Five Thousand Dollars) as payment in part for land in Dixon County, to be covered

by contract, which contract shall be drawn up by our attorney, with the approval of his attorney, in the very near future." The check was cashed by the defendants, Beatrice Hansen and Gertrude Brown.

Sometime later in the summer of 1970, a form of proposed real estate contract was delivered by the defendants' attorney to the plaintiff's attorney and discussed by the plaintiff with his attorney. The proposed form of contract provided for a purchase price of $61,020; acknowledged receipt of the $5,000 downpayment; and provided for the payment of the balance by the payment of $5,602 on April 15, 1971, and on April 15 each year thereafter, plus interest at 6 percent per annum. This proposed contract was never signed by either the defendants or the plaintiff, and had no description of the land involved. At approximately the same time in August of 1970, the plaintiff received a letter from each of the two defendants indicating that each assumed the contract would probably be completed and the property sold to the plaintiff.

On October 28, 1970, plaintiff's attorney wrote to the defendants' attorney suggesting a redraft of the proposed agreement to include requirements for a deed in escrow with the right to make payments to the escrow agent in the event of the death of one of the defendants; to provide for the right to assign the contract by the plaintiff, at least for security purposes in borrowing; a provision assigning the rents to the buyer; plus provisions dealing with certain pending litigation and fencing to be paid for by the defendants. On November 14, 1970, a title opinion by plaintiff's attorney directed to the plaintiff stated: "(T)he record title is not absolutely certain and a land survey and a quiet title action would be necessary to completely establish the exact boundaries of this property." The abstract report is the only place any description of the land may be found, and it also indicates that there is substantial accretion land not included in the abstractor's certificate.

In December of 1970, the plaintiff received a letter from the defendants refusing to sell to him on contract and the defendants tendered their check refunding the $5,000 downpayment. Plaintiff then offered to buy the property on a cash basis. Defendants refused the offer.

At the end of the year 1970, the plaintiff delivered to the defendants a paper written by him reporting the amount of corn raised during the year 1970 computed on a two-fifths basis and referring to pasture rent and alfalfa rent and showing a total of $2,052.80. No part of that amount was paid and plaintiff testified that it was not intended as a rental accounting. The record also shows that the plaintiff had signed with the A.S.C.S. program for the year 1970 as a cash renter and had received the entire A.S.C.S. payment for that year. The defendants paid the real estate taxes for 1970.

On April 2, 1971, the plaintiff tendered to the defendants his check for $8,361.20 as payment due on a purchase. The tender was refused and this action was filed on April 16, 1971. In August of 1971, plaintiff received notice from the defendants to terminate his tenancy and deliver possession of the premises to the defendants on March 1, 1972. On January 4, 1972, the plaintiff paid to the county treasurer the first half of the 1971 taxes.

The District Court found that there was not a sufficient meeting of the minds of all parties essential to the formation of a contract; that the evidence was not sufficient to establish part performance to remove the transaction from the statute of frauds; that there was no evidence of agency between defendants; and that the alleged contract is not complete and certain in all essential elements so as to require or allow the court to decree specific performance. The District Court thereupon dismissed plaintiff's petition.

The plaintiff's first contention is that the various written memoranda were sufficient to constitute a contract or writing sufficient to satisfy the requirements of the

statute of frauds if they are all interpreted together.

Section 36-105, R. R. S. 1943, provides: "Every contract * * * for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the * * * sale is to be made." In this case there is no writing or series of writings signed by both the defendants which contain all the essential elements of the alleged contract. Neither is there any proof that either defendant was the agent of the other defendant. The one document which might be said to embody a proposed contract not only was not signed by either defendant but was admittedly never accepted or signed by the plaintiff and contained no description of the land.

Certain legal principles are critical here. One is that specific performance of a contract will not be decreed unless the minds of the parties to the contract have met. To establish a contract capable of specific enforcement, it must be shown that there was a definite offer and an unconditional acceptance. Horn v. Stuckey, 146 Neb. 625, 20 N. W. 2d 692.

It is self-evident here that even if the proposed agreement had been signed by both defendants, it was never unconditionally accepted by the plaintiff. When it was withdrawn by the defendants, it was succeeded by a counter-proposal of the plaintiff for a cash purchase which was, in turn, refused by the defendants.

A court of equity will not enforce a contract unless it is complete and certain in all its essential elements. The parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not a function of a court of equity to make a contract for the parties or to supply any of the material stipulations thereof. Kubicek v. Kubicek, 186 Neb. 802, 186 N. W. 2d 923. The memorandum required by the

statute of frauds must contain the essential terms of the contract. Heine v. Fleischer, 184 Neb. 379, 167 N. W. 2d 572.

The plaintiff also urges that the evidence is sufficient to establish an oral contract in equity and part performance of it. We have consistently required that a party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referrable solely to the contract sought to be enforced, and not such as might be referrable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance. See Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287.

The only part performance that could be relied upon here is the making of the $5,000 downpayment and continued possession of the land by a tenant. Neither is sufficient. See, Heine v. Fleischer, *supra;* Herbstreith v. Walls, 147 Neb. 805, 25 N. W. 2d 409. Even if these acts were deemed to be referrable only to the alleged purchase contract, the terms of such contract here are neither clear, satisfactory, nor unequivocal.

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

AFFIRMED.

HASTINGS BUILDING CO., A CORPORATION, APPELLEE, V. BOARD OF EQUALIZATION OF ADAMS COUNTY ET AL., APPELLEES, CONSOLIDATED WITH JOHN N. MARVEL, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. BOARD OF EQUALIZATION OF ADAMS COUNTY ET AL., APPELLEES.
206 N. W. 2d 338

Filed April 6, 1973. No. 38611.

1. **Taxation: Appeal and Error.** An appeal to the District Court

from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.

2. **Taxation: Trial.** The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
3. **Taxation: Appeal and Error.** The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere.
4. **Taxation: Appeal and Error: Evidence.** In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.
5. ———: ———: ———. Since the appeal of an assessment to this court is triable de novo, this court can make an independent evaluation of the facts. There is a presumption that the assessment made by the board of equalization has a sufficient foundation in the evidence until this presumption is overcome by competent evidence to the contrary.

Appeal from the District Court for Adams County: NORRIS CHADDERDON, Judge. Reversed and remanded.

John N. Marvel, pro se.

James D. Conway and Duane L. Stromer, for appellee Hastings Building Co.

William M. Connolly, for appellees Board of Equalization et al.

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

SPENCER, J.

This appeal involves the valuation for tax purposes of Block 9, Imperial Village Addition to the City of Hastings, Adams County, Nebraska. It is a consolidation of two cases. One, wherein John N. Marvel, in person and for all persons similarly situated, is plaintiff, and the Board of Equalization of Adams County, Nebraska; Adams County, Nebraska; Hastings Mall, Inc.; and Hastings Building Company, are defendants. In the second case, Hastings Building Company is plaintiff, and the Board of Equalization of Adams County, Nebraska, and Adams County, are defendants.

In the first action Marvel contended that the valuation of said land was excessively low and was not fairly and impartially equalized in relation to and proportionately with other property in said county. In the second case the Hastings Building Company alleged that the property was valued excessively high and in excess of the true value of the property. The District Court found in favor of the plaintiff, Hastings Building Company, and reduced the valuation of the property. Marvel prosecutes this appeal. We reverse.

Block 9, Imperial Village Addition, is delineated as consisting of four areas: Parcel A, 14.02 acres; Parcel B, 20.67 acres; Parcel C, 0.92 acres; and Airport Clear Zone Easement, 6.9 acres. Although Parcel C and the Clear Zone are included in the final valuation, those valuations are not disputed. Situated upon Parcels A and B is the Imperial Mall shopping center, containing approximately 23 retail stores and a parking area accommodating 2,072 automobiles. It includes three stores with the largest retail floor space in the city of Hastings: Montgomery-Ward, Woolworth, and J. M. McDonald Company. As of the time of trial, there was also some space still available for rental.

The property is owned by the Hastings Building Company and leased to the Hastings Mall, Inc. The stipulated rental is $8,000, but the Hastings Mall, Inc., has leases with its tenants providing for an override based on a dollar value of sales. Hastings Building Company is to receive 15 percent of all overage rentals.

The land was valued for tax purposes by the Adams County assessor for the year 1971 at $596,502, or approximately 48 cents per square foot for the shopping center and parking site. The valuation found by the District Court was $172,000, or approximately 14 cents per square foot.

The county assessor testified that in connection with section 77-112, R. S. Supp., 1969, he did a comparison with other property of known or accepted value. Each of the properties he considered was generally a shopping center. The type of the business was comparable. The properties he used for comparison were Gibson's, Tempo, and Allen's, retail stores engaged in business comparable with Imperial Mall. Gibson's consists of a single building with different departments. It has an area of 128,967 square feet, valued for tax purposes at $.743 per square foot. Allen's, like Gibson's, is one large store with several departments. The store has 119,816 square feet, valued at $.849 per square foot. Tempo, along with the Jack and Jill store, comprises the Western Mall. Tempo's 317,634 square feet are valued at $.4644 each. The county assessor personally inspected all the properties in question.

The county assessor did not make an exact comparison between Imperial Mall and the downtown area of the city, which is primarily a retail shopping center. The downtown area was more congested and had the benefit of streets, alleys, and parking. Imperial Mall furnished free parking for its customers at its own expense. This, however, was a competitive factor, drawing business to the Mall from the downtown area.

The assessor made no comparison between the rentals

on buildings at the Mall and rentals received from properties in downtown Hastings. In considering value, he did take into account the relative location of Imperial Mall with the relative location of the other shopping centers, two of which are approximately one-half mile distant from Imperial Mall. He was of the opinion that Imperial Mall had a more desirable location than Gibson's, Tempo, or Allen's because of its two entrances, making ingress and egress easier.

The county assessor, in his comparison with other business centers, took the land area and the square feet and then arrived at a per square foot value of the land. On the basis of these figures he valued Imperial Mall at $596,502, or a square foot valuation of $.4773 for each of its 1,249,736 square feet. This was approximately 1 cent more than Western Mall, but was from 27 to 37 cents less than the other two shopping centers.

It was stipulated that the Imperial Mall consisted of some 23 retail businesses and, excluding Allen's, Gibson's, and Tempo, it houses the three stores with the largest retail floor space in the city of Hastings. Plaintiff Marvel testified its first floor retail space is equivalent in size to the retail space existing in the downtown area. He argues a similarity between the downtown area and the shopping center is evident. Both provide a location for retail businesses and parking. There are differences. The shopping center is a completely enclosed one-floor shopping city, whereas the downtown area is broken by streets and alleys, inhibiting customer traffic. Parking at the shopping center is concentrated in a huge parking lot rather than on streets and small lots in the downtown area, and the facilities at the shopping center are valued by its tenants considerably higher than the same space in the downtown area.

Appellee attempted to discredit the assessor's valuation by emphasizing location differences between the Imperial Mall property and the shopping centers form-

ing the foundation for the assessor's comparison. Appellee particularly stressed the nearness of the comparable properties to a four-lane highway through Hastings, described as a main arterial highway, and stressed the fact that the principal route to the Imperial Mall is a two-lane street, although described as an arterial.

Appellee produced two experts to controvert the valuation set by the county assessor. They were Berkley W. Duck, an experienced Indiana real estate appraiser, and Fred A. Herrington, a former State Tax Commissioner. They premised their testimony on the assumption that there were no comparable properties in the Hastings area. Duck testified that the nearest comparable shopping center was one at Fremont, Nebraska, although there was a discount operation, Treasure City, at Grand Island. The Fremont center had a land area less than the land area involved in the Hastings center, and approximately 600 less parking spaces. He did not believe the finish was quite as good as the finish of the shopping center in Hastings, but thought the location was superior. The Fremont center was the only comparable center he viewed with reference to comparing it with the Hastings center, although he had knowledge of other shopping centers which to a greater or lesser degree entered into his judgment. These centers were in various other states and communities. Duck, using a market data approach and an income capitalization approach, fixed the valuation of the Imperial Mall at $172,000.

Herrington familiarized himself with the facts testified to by Duck regarding the Hastings and Fremont areas, and his opinion of the value of the Imperial Mall was $140,000.

Marvel, a Hastings real estate owner, testified to his association with the downtown business area and to his investigation and study of the valuation problem, all of which has been involved in an effort to maintain the downtown area as a viable retail area in the Hast-

ings locality. He produced exhibit 12 as additional examples of similar properties in the downtown area plus examples of vacant residential lots in the residential area in Hastings. The actual land valuations on said exhibit are as follows:

RESIDENTIAL LAND

Block Six (6), except the north ten (10) feet of Alexanders Second Addition, $.22 per square foot.

DOWNTOWN PARKING LOTS

Lots One (1), Two (2), and Three (3), Block Twenty (20), Johnson's Addition, $1.60 per square foot.

Lots Eighteen (18), Nineteen (19), and the West two-thirds (⅔) of Lot Twenty (20), Block Twenty-two (22), Original Town, $1.75 per square foot.

FIRST STREET RETAIL (South Side)

Lot One (1), Block Twenty-seven (27), Original Town, $1 per square foot.

Lots One (1), and Two (2), Block Twenty-six (26), Original Town, $.72 per square foot.

FIRST STREET RETAIL (North Side)

Lots Eleven (11), Twelve (12), and Thirteen (13), Block Twenty-four (24), Original Town, $1.12 per square foot.

SECOND STREET RETAIL

Lot Two (2), Block Twenty-one (21), Original Town, $3.49 per square foot.

Lot Eight (8), Block Twenty-three (23), Original Town, $3.31 per square foot.

Lot Nine (9), Block Twenty-four (24), Original Town, $3.13 per square foot.

Lots One (1), Two (2), and Three (3), Block Twenty-one (21), Johnson's Addition, $1.60 per square foot.

Lots Three (3), Four (4), Five (5), and Six (6), Block Twenty-two (22), Original Town, $3.35 per square foot. This is a property in which Marvel has an interest.

THIRD STREET RETAIL

Lots Fourteen (14), Fifteen (15), Sixteen (16), and Seventeen (17), Block Sixteen (16), Original Town, $1.83 per square foot.

Lot Fifteen (15), Block Sixteen (16), Original Town, $1.83 per square foot.

Appellant Marvel argues in effect that the Imperial Mall should be assessed on an equal basis with the downtown area. It was stipulated that the Imperial Mall and the downtown retail area are in the same taxing district. The appellee argues that the assessment by the Adams county assessor was in excess of the true market value of the property.

Section 77-112, R. S. Supp., 1969, states as follows: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property."

The scope of review from the county board of equalization is set out in section 77-1511, R. S. Supp., 1969. So far as it is material herein it provides: "The district court shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. The court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low."

The judicial definition of the scope of review is found in Weller v. Valley County (1942), 141 Neb. 69, 2 N. W. 2d 606: "* * * there is a presumption that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action. * * *

The presumption obtains only while there is an absence of competent evidence to the contrary. It disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board."

The initial question before this court is whether there is anything indicating that the board's valuation is without a foundation in the evidence. If there is, this court faces the factual issue of whether the board's valuation is reasonable. We said in Grainger Brothers Co. v. Board of Equalization (1966), 180 Neb. 571, 144 N. W. 2d 161: "An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.

"The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment."

In Newman v. County of Dawson (1959), 167 Neb. 666, 94 N. W. 2d 47, we said: "It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious, or so wholly out of line with actual values as to give rise to an inference that the assessor and

county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. The valuation of property is largely a matter of judgment, but mere differences of opinion, honestly entertained, though erroneous, will not warrant the interference of the courts. If uniformity of opinion were required, no assessment could ever be sustained."

In Lexington Building Co., Inc. v. Board of Equalization (1971), 186 Neb. 821, 187 N. W. 2d 94, we said: "In an appeal to the county board of equalization or to the district court, and from the district court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment."

The record would indicate that the assessor attempted to follow section 77-112, R. S. Supp., 1969, but in determining the actual value of property a board of equalization is not restricted to the formulas set out in section 77-112, R. S. Supp., 1969. Many elements enter into a determination of actual value, only some of which are

set out in the statute. Richards v. Board of Equalization (1965), 178 Neb. 537, 134 N. W. 2d 56.

Since the appeal of an assessment to this court is triable de novo, this court can make an independent evaluation of the facts. There is a presumption that the assessment made by the board has a sufficient foundation in the evidence until this presumption is overcome by competent evidence to the contrary. If there is evidence indicating an erroneous assessment, the reasonableness of the board's valuation becomes an issue of fact with the plaintiff bearing the burden of proving that the board has acted arbitrarily.

It is apparent that the assessor who inspected the property was aware of its relative location; its desirability and functional use; the existing zoning of the property; and its comparison with other property of known or recognized value. Inasmuch as we are dealing with only the land value, reproduction cost less depreciation is not a factor.

Appellee's experts restricted themselves to only the market data approach and an income capitalization approach. Appellee's appraisers premise their testimony on the fact that there were no comparable properties in Adams County. Duck did refer to the Tempo shopping area, but made downward adjustments of the Imperial Mall in comparison to Tempo. Duck also made a downward adjustment of this property in comparison to a 15-acre tract housing Treasure City at Grand Island. He concluded that the value of the Imperial Mall land was approximately 60 percent of the value attributed to the Grand Island land.

In the light of the rules set out above, we meet the question as to whether either of the parties has proved that the assessor's valuation as affirmed by the board of equalization is a discriminatory, unjust, or unfair assessment. We find that neither Marvel nor Hastings Building Company has sustained the burden of proving the unreasonableness of the valuation. We therefore

reverse the judgment of the District Court and remand the cause with directions to dismiss the appeal from the board of equalization.

REVERSED AND REMANDED.

NEWTON, J., concurring.

I concur in the majority opinion. We have here a situation in which a firm interested in development of suburban property purchased a large tract, sold a portion of it to another related firm, and through that firm secured the construction of a shopping center. The development of the shopping center would necessarily facilitate development of the rest of the tract purchased. This renders suspect the principal matters urged by the owner as the owner could well afford to give unduly preferential terms to the concern constructing the shopping center. It could afford to rent to the shopping center concern on terms extraordinarily reasonable, and also to enter into an option to sell to such concern on a basis below actual value. The price fixed in the option is not conclusive. No one would pay more for the property than the option price, but if the option were sold with the land it might vastly increase actual value. Actual value is based on land free of encumbrances such as an option.

The owner's expert witnesses based their valuations largely on an income basis. In doing so they considered only the $8,000 annual rental. Ignored were two factors. First, as part of the rent lessee was required to pay taxes. Second, the possibility of rentals increasing by reason of the 15 percent of overage rentals received by the shopping center concern from its tenants.

The use to which land is or can be put has a definite effect upon its value. Usage as a shopping center vastly increases the value of land over what it was in a vacant or unimproved state.

I conclude that the evidence fails to sustain the judgment of the District Court.

McCOWN, J., dissenting.

The majority opinion treats the principal issue in this case as one involving issues of uniformity and proportionate equalization with other property. The actual issue is the much more restricted issue of whether or not the particular property involved here was valued and assessed for taxes at more than its actual value.

Article VIII, section 1, of the Constitution of Nebraska, provides that "taxes shall be levied *by valuation* uniformly and proportionately upon all tangible property * * *." Section 77-201, R. R. S. 1943, requires that all real property subject to taxation "shall be valued at its actual value * * * and shall be assessed at thirty-five percent of such actual value."

A valuation in excess of actual value is clearly in violation of constitutional and statutory provisions. Such an overassessment has always been held to be an erroneous and illegal assessment but not void or unconstitutional except in the case of unlawful discrimination or other fraudulent conduct of the assessing officers. See Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447. Such cases have held only that the exclusive remedy for overvaluation is by direct appeal to the courts, and that an erroneous overvaluation is not subject to collateral attack. See, Scudder v. County of Buffalo, *supra;* S. S. Kresge Co. v. Jensen, 164 Neb. 833, 83 N. W. 2d 569. The case here, however, is not a collateral attack but instead is a direct appeal to the courts, which was sustained by the District Court.

Two qualified expert witnesses for the taxpayer testified that the actual value of the real estate involved here was far less than the valuation fixed by the assessor and the county board of equalization. The county board called no expert witnesses but relied on the testimony of the assessor who, in turn, relied largely on the assessed valuation of other properties without evidence that such values represented "actual value" required by the Constitution and the statutes. The only

issue tried was the "actual value" of the taxpayer's property, an issue which generally demands opinion testimony by qualified expert witnesses. The District Court, who saw and heard the witnesses and who is presumptively far more familiar with local property values in Hastings than is this court, found the "actual value" of the property to be that testified to by the taxpayer's expert witnesses rather than the value placed on it by the county assessor. The assessor's valuation was roughly three times the valuation of the expert witnesses, a variation which can hardly be called "a mere difference of opinion."

Neither the county nor its taxing officials have appealed the judgment of the District Court. An interested taxpayer has appealed on the ground that the downtown business property in Hastings is assessed at a much higher rate per square foot. The contention is that all land used for commercial and business purposes should be assessed and taxed at uniform unit prices per square foot or other measurement unit. Such a classification would obviously be uniform. It would just as obviously not meet the constitutional requirement that taxes shall be levied "by valuation." Neither does such a method constitute an appropriate standard "for the determination of the value" of real estate as authorized by Article VIII, section 1, of the Constitution of Nebraska.

On the record here, and on the basis of such contentions, the majority opinion reverses the factual determination of the District Court, apparently upon the basis that the appeal is triable de novo here and this court can therefore make a completely independent evaluation of the facts. In effect it concludes that the testimony of two qualified expert witnesses was not acceptable or sufficient to support the judgment of the District Court and the judgment was therefore arbitrary

and erroneous. I cannot agree. The judgment of the District Court should be affirmed.

CLINTON, J., joins in this dissent.

ROBERT D. MOUSEL, JR., APPELLEE AND CROSS-APPELLANT, V. ARTHUR A. DARINGER, APPELLANT AND CROSS-APPELLEE, STATE SECURITIES COMPANY, A CORPORATION, INTERVENER-APPELLANT AND CROSS-APPELLEE.
206 N. W. 2d 579

Filed April 6, 1973. No. 38633.

1. **Liens: Animals.** Once it is determined that a person is protected by the statutory lien granted an agister, the statute will be liberally construed so that its object will be effectuated.
2. **Waiver: Words and Phrases.** Waiver generally is the voluntary, intentional, and understanding relinquishment of a known right.
3. **Liens: Security Interest: Statutes.** A person who furnishes materials or services with respect to goods that are already subject to a perfected security interest is not engaged in the ordinary course of his business under section 9-310, U. C. C., with respect to any part of his charges that are unreasonable.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Herman Ginsburg and Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Eisenhart & Eisenhart, for appellee.

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

SMITH, J.

The issues relate to priority of interests between an agister and a secured party and to liability of the agister for damage. The District Court, sitting in equity, found for the agister on his claims but against him on the

damage claim. It accordingly decreased the amount of the judgment for the agister by the amount of damages awarded. The agister's lien was adjudged superior to the security interest which concededly had been perfected. The secured party, State Securities, appeals, and the agister, Robert D. Mousel, Jr., cross-appeals.

SUMMARY OF RECORD

On May 1, 1968, Mousel agreed in writing to sell his registered Hereford cattle to Arthur A. Daringer. The agreement described 5 groups: (1) 100 cows; (2) 32 heifers, age 4, with 15 calves at side; (3) 25 heifers, age 2; (4) 20 bulls; and (5) 79 bull and heifer yearling calves. Darlinger on or before November 1, 1968, was to demand possession of groups 1, 4, and 5, and to pay the price. The price of groups 2 and 3 was paid on the date of the agreement, and those animals, except the 15 calves, were delivered to Daringer. Daringer was to be entitled to possession of the calves upon request. The unpaid balance of the purchase price was $58,000.

Mousel also agreed to take reasonable care of the animals in his possession without charge until June 1, 1968. After that date Daringer was to pay the feed bill monthly to the time he claimed the animals from Mousel.

On March 31, 1969, Daringer in consideration of the loan of the $58,000 executed and delivered a note, financing statement, and security agreement to State Securities. The statement and agreement were filed in Thayer County, where Daringer resided, on April 1, 1969, at 8 a.m.

On April 1, 1969, Daringer notified Mousel that he desired to claim the animals and to pay the balance of the purchase price. That evening they tentatively computed the charges for the feeding of the cattle to date. They intended within a few days to evidence the obligation by a note and security agreement. Daringer then handed Mousel a check for $58,000 drawn by State Securities and payable to Mousel for Daringer. Mousel

retained possession of the animals in Frontier County, where he lived.

In April 1969, Mousel and Daringer (1) recomputed the feed bill to May 1, 1969; and (2) agreed that Mousel would release all the animals except 90 cows in group 1, the 90 cows representing security for payment of the feed bill. The charge, $18,523, was fair and reasonable. Daringer delivered his promissory note payable to Mousel in the sum of $18,523, with interest at the rate of 7% a year to maturity and 9% thereafter. The note was payable in installments of $5,000, $5,000, and $8,523 respectively on July 15 and October 15, 1969, and January 1, 1970. A financing statement was signed and recorded in Frontier County. The only payment made on the note was $5,000 on January 7, 1970. As to Mousel's first cause of action, that rests on the note, in the foreclosure suit Mousel alleged that (1) the credit on principal was $4,136, $864 of the payment representing interest; (2) the principal with interest at 9% a year from maturity to date totaled $15,325; and (3) the total ought to bear interest at 9% a year until paid. The court allowed Mousel's claim on the note in full.

By agreement in the fall of 1969 Mousel had retained possession of the cattle, and he continued to feed them until October 30, 1970. His charges, which formed the basis of his second cause of action, $14,693.10, were fair and reasonable, and the court accordingly rendered judgment for Mousel. It found that both claims took priority over the security interest of State Securities.

On the other claim the District Court found no proof that a 90% breeding standard was "common or ordinary even in the breeding of pure bred livestock . . . ." It also found Mousel liable for damage of $8,320 "to the 1969, 1970 and 1971 calf crops," but it disallowed other items of the damage claim.

The evidence relating to the existence of an industry breeding standard of 90% is in conflict. In addition,

according to the testimony of Mousel, he could not obtain authority from Daringer to sell cows too old to bear calves. In the summer of 1970 he delayed the servicing of the cows because of doubt respecting Daringer's intentions to breed the cows with Mousel's bulls.

Other evidence tended to establish these facts: The old cows were capable of bearing calves. The delay of 1 month in the servicing of all the cows may have adversely affected the birth and condition of calves born in 1971. The calves were handled roughly in the seizure under the replevin. An appraiser testified to the good condition of the cattle at the time of the replevin. A neighbor testified that Mousel, whose herd was the "Cadillac" of Herefords, had taken as good, if not better, care of the herd after the sale to Daringer as he had done before the sale. A veterinarian testified to unsatisfactory care and feeding prior to the time he had seen the animals in late November 1970.

ISSUES RAISED BY STATE SECURITIES

State Securities argues as follows: Its perfected security interest was prior in time and therefore superior to any agister's lien arising after April 30, 1969. Mousel waived his agister's lien existing prior to May 1, 1969, by taking the promissory note, filing the financing statement, and making subsequent feed agreements with Daringer. Rejection of the latter argument would allow a bailor and agister to agree upon terms unfair to a secured party who had already acquired his interest. The allowance of interest at the rates of 7% and 9% agreed upon in the promissory note is a case in point.

The meaning of two statutory provisions and their interaction are important. The provision for an agister's lien reads: "When any person shall procure, contract with, or hire any other person to feed and take care of any kind of livestock, the person so procured, contracted with, or hired, shall have a first, paramount and prior lien upon such property for the feed and care bestowed by him upon the same for the contract price

therefore, and in case no price has been agreed upon, then for the reasonable value of such feed and care, provided the holders of any prior liens shall have agreed in writing to the contract for the feed and care of the livestock involved . . . ." § 54-201, R. R. S. 1943.

The other statutory provision reads: "When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon the goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise." § 9-310, U. C. C.

The provision for an agister's lien is first examined apart from the Uniform Commercial Code. Once it is determined that a person is protected, the provision will be liberally construed so that its object will be effectuated. See, County Board of Platte County v. Breese, 171 Neb. 37, 105 N. W. 2d 478 (1960); Hoerler v. Prey, 125 Neb. 822, 252 N. W. 327 (1934); Becker & Degen v. Brown, 65 Neb. 264, 91 N. W. 178 (1902). The lien is statutory, although its basis is consensual. Becker & Degen v. Brown, *supra*. An agister's lien under a feeding contract in Hoerler v. Prey, *supra*, was superior to a subsequent chattel mortgage, although the bailor and agister extended the feeding period in accordance with the contract.

The lien of an agister may be waived. Hoerler v. Prey, *supra*. Waiver generally is the "intentional, voluntary, and understanding relinquishment of a known right." Dobbs, Law of Remedies, § 2.3, p. 43 (1973). See, also, Kilpatrick v. Kansas City & B. R. R. Co., 38 Neb. 620, 57 N. W. 664 (1894). The policy behind it is stability and conclusiveness. A party who waives his rights tells others in substance that he relinquishes his rights. "It is good policy in many situations to encourage such a reliance rather than to insist that affairs remain in flux. This is a very different matter

from estoppel, where the concern is reparative and ethical rather than politic. In estoppel cases, it is not the policy of encouraging reliance, but the policy of protecting against harmful reliance that has already occurred." Dobbs, *supra*.

" 'The mere taking of security for the amount of a debt for which (such) a lien is claimed does not ordinarily destroy the lien. To have this effect, there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien and destructive of it.

" 'The taking of a mortgage upon the same property upon which the creditor claims a statutory lien, may not displace the lien. The mortgage is regarded as a cumulative security, and the creditor may enforce either the lien or the mortgage . . . .' " Kilpatrick v. Kansas City & B. R. R. Co., *supra*.

If the statute creating a lien in favor of persons who furnish services or materials with respect to goods subject to a security interest is silent on seniority, the lien takes priority over the security interest, although judicial interpretation has subordinated the lien to the security interest. See § 9-310, Comment 2, U. C. C.

A person who furnishes materials or service with respect to goods that are already subject to a perfected security interest is not engaged in the ordinary course of his business under § 9-310, U. C. C., with respect to any part of his charges that are unreasonable. Cf. 4 Anderson, Uniform Commercial Code, § 9-310:10, p. 345 (2d Ed., 1971); II Gilmore, Security Interests in Personal Property, § 33.5, p. 888; Notes and Comments, 76 Yale L. J. 1649 at 1654 (1967).

The argument of State Securities respecting the interest allowed by the District Court is well taken. Mousel and Daringer agreed upon the rates of 7% and 9% a year after perfection of the security interest, and the rates were unreasonable. The amount of the interest on the first cause of action must be recomputed on re-

mand in accordance with section 45-104, R. R. S. 1943, which prescribes the applicable interest rates. The charge of $18,523 for the agistment period to May 1, 1969, being reasonable, Mousel in that respect unquestionably acted in good faith. Inasmuch as he did not waive the lien, enforceability of the note against Daringer in this controversy is a moot question. Equity delights to do justice, and that not by halves.

The argument that Mousel possessed more than one agistment lien and that the first one alone took priority over the security interest is not sound. Mousel's statutory lien attached no later than June 2, 1968, and was prior in right.

LIABILITY OF MOUSEL FOR DAMAGE

No brief answering the cross-appeal of Mousel was filed. Absence of an answer brief and the condition of the record complicates our application of this general rule: On review de novo in equity of issues of fact we consider the opportunity of the trial court to resolve the issues by observing the witnesses.

We consider the opportunity of the trial court to observe the witnesses as much as we can fairly do so. Mousel justifiably delayed the servicing of the cows in 1970, and the duration of his lien under the circumstances did not affect the justification. The evidence does not persuade us that Mousel was negligent in taking care of or feeding the animals during the period in question.

CONCLUSION

The District Court erred in applying interest rates of 7% and 9% in computing the amount of Mousel's lien superior to the interest of State Securities. It also erred in decreasing the amount of Mousel's lien by the amount of the judgment for damages and in failing to dismiss the negligence claim against Mousel. The judgment is reversed and cause remanded with directions to render judgment in accordance with this opinion. Costs on appeal are taxed to State Securities.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD E. SCHOTT, APPELLEE, V. DOROTHY M. SCHOTT, APPELLANT.
206 N. W. 2d 39

Filed April 6, 1973. No. 38676.

Divorce: Parent and Child: Infants. In determining child custody, the controlling consideration is the best interests and welfare of the children.

Appeal from the District Court for Nuckolls County: FRED R. IRONS, Judge. Affirmed.

W. O. Baldwin and Walter C. O'Neal, Jr., for appellant.
Downing & Downing, for appellee.

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

BOSLAUGH, J.

This is a divorce proceeding in which the plaintiff husband was granted a divorce from the defendant and awarded the custody of the minor children. The defendant appeals contending the custody of the children should have been awarded to her and the amount of alimony awarded was inadequate.

The parties were married in 1961. They have two children, Kimberly, now 10 years of age, and Brent, 7 years of age.

The defendant is 30 years of age. During the last 3 or 4 years she developed emotional problems and behaved in a bizarre manner on many occasions. She was treated at the Southeast Psychiatric Clinic in 1969 and was a patient at the Hastings Regional Center in 1970. She is now living and working in Lincoln, Nebraska, and appears to be getting along quite well although still receiving medication.

In determining child custody, the controlling consideration is the best interests and welfare of the children. Nemecek v. Nemecek, 188 Neb. 799, 199 N. W. 2d 409.

The record indicates the defendant's problems were in part related to the care and responsibility which the

children required, and the defendant's conduct was having an adverse effect upon the children. The record fully sustains the award of custody of the children to the plaintiff.

The plaintiff is 31 years of age. He has a high school education. Prior to December 1968, he was employed as an auto parts salesman. In December 1968, he purchased a lumberyard in Nelson, Nebraska, where the parties have lived. In 1969, the yard had a net income of approximately $4,300; in 1970, a net loss of $1,260; and in 1971, a net loss of $50. The plaintiff's withdrawals of approximately $7,750 in 1970 and $5,400 in 1971 have resulted in a deficit of approximately $12,000 in the net worth account. The defendant was earning $350 per month at the time of the trial.

The trial court awarded the residence, household goods, and lumberyard to the plaintiff and ordered the plaintiff to pay $6,000 to the defendant, $300 by July 1, 1972, and the balance in monthly payments of $100. The parties are agreed that this approximates an even division of the property.

As we view the record, the award to the defendant was proper under the circumstances. We find no basis in the record to increase the amount or change the terms of payment.

The judgment of the District Court is affirmed. The defendant is allowed the sum of $250 for services of her attorney in this court.

AFFIRMED.

SMITH, J., participating on briefs.

MARIAN R. HASSLER, APPELLEE, V. EDWIN HASSLER, APPELLANT.
206 N. W. 2d 40

Filed April 6, 1973. No. 38684.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed as modified.

Robert G. Scoville and Ryan & Scoville, for appellant.

Leamer & Galvin and John C. Baker, for appellee.

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

CLINTON, J.

Plaintiff was granted a divorce in the court below on the grounds of extreme cruelty and was awarded lump sum alimony in the amount of $2,150. Defendant appealed on the grounds of the insufficiency of the evidence to support the decree of divorce and the alimony award. The case was tried in the District Court and judgment rendered previous to the effective date of L.B. 820, 1972 Legislature, now sections 42-347 to 42-379, R. S. Supp., 1972, the "no fault" marriage dissolution statute.

At the time of the effective date of that act, the appeal was pending here within the meaning of our recent holding in Lienemann v. Lienemann, 189 Neb. 626, 204 N. W. 2d 170. We accordingly review the record de novo.

The finding of the trial court of extreme cruelty is, under the provisions of the former statutes, supportable neither on the basis of substance nor corroboration. The record, however, does support a finding that the marriage is irretrievably broken under L.B. 820 and we so find.

We further find that the record does not support the alimony award. The parties were married in February 1967 and separated in May 1968. There was a brief period of apparent reconciliation later in 1968. They have lived apart since that time. The divorce action was commenced January 13, 1972.

At the time of the marriage plaintiff was 43, a widow and the mother of six children, four or five of whom resided with the parties. The defendant was 49 at the time of marriage and had not previously been married. The defendant is a tenant farmer and the record is vague as to his worth at the time of marriage and at the time the decree was entered, but the worth is not great and the evidence does not show that the plaintiff contributed to it in any way. The plaintiff was employed at the time of trial and in the year 1971 had earned $4,298.80. She was also the recipient of Social Security and a veteran's pension, the latter of which was reduced upon the marriage. We have already noted that the record does not support a finding of fault on the part of the defendant.

The marriage is dissolved and the judgment of alimony is vacated. In all other respects the judgment is affirmed. The plaintiff is awarded the sum of $250 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

SMITH, J., participating on briefs.

BARBARA C. BENSON, APPELLANT, V. HUGO L. BENSON, APPELLEE.

206 N. W. 2d 51

Filed April 6, 1973. No. 38709.

Divorce: Parent and Child: Infants. When a court, having jurisdiction of children in a divorce action, has placed custody of the children in the court with possession and care in a parent, the court may summarily in the best interests of the children modify the possession of the parent or parents.

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

Philip M. Kneifl of Kneifl, Kneifl, Byrne & Homan, for appellant.

J. William Gallup and Henry C. Rosenthal, Jr., for appellee.

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

CLINTON, J.

This appeal arises out of a hearing on a contempt citation in the course of divorce proceedings. The plaintiff wife was divorced from the defendant husband on August 21, 1968. She was awarded custody of the two minor children, "subject to the defendant's right of reasonable visitation." Almost immediately the parties had difficulty in connection with the visitation rights and the court was required to spell out these rights in detail. Various orders were entered from time to time, but the conflict was not resolved and the two District Judges before whom the matters were heard became much concerned about the effect the power struggle between the parents was having upon the two daughters who were aged 8 and 6 at the time of the divorce.

On June 22, 1971, the court ordered an independent investigation under the provisions of sections 42-307 and 42-808, R. R. S. 1943. The plaintiff had at some point, without permission of the court, removed the children from the jurisdiction and established her home with her second husband in Council Bluffs, Iowa. Following such investigation and upon notice and hearing in which both parties participated personally and through counsel, the court on February 17, 1972, made findings and order including the following: "That the rights of the children to know and to appreciate and to have the filial affection and security of a natural father and to have his love and attention dictate a schedule of visitation so that both the children and the father may have the opportunity to establish and maintain a relationship as much in keeping with the rights of each as are possible under the circumstances. That the conduct of the Plaintiff in willfully removing the children from the State

of Nebraska indicates that no ratification should be made of her willful conduct and that no leave of Court be granted to now do what she has all ready done, that is attempt to remove the children from the jurisdiction of this Court; that, however, since a residence or domicile has been established by the Plaintiff and her now husband, provisions should be made so that the children might reside with her on a temporary basis." The court ordered: ". . . That the custody of the minor children, Elizabeth Lynn Benson and Laurie Ellen Benson, be and hereby is taken in this Court, until further Order of the Court; . . . ." It further granted the plaintiff "responsibility of the care of said children and the right to possession of said children under the conditions and limitations" herein imposed. It granted permission for the children to reside with the plaintiff in Pottawattamie County, Iowa, "conditioned, however, upon it being clearly understood that this authorization shall in no way deprive this Court of jurisdiction of said children." It then spelled out in detail the visitation rights of the defendant, which details included an order directing the plaintiff to deliver the children to the defendant for specified periodic visitations and for the defendant to return the children to the plaintiff's residence at the designated hour at the end of the visitation. It further ordered: ". . . that the Defendant shall have possession of said children during one of the Summer months (June, July or August) of each Summer."

Nonetheless, trouble continued. The defendant filed an application to have possession changed to him and also caused to be issued an order to show cause why the plaintiff should not be cited for contempt. Both matters were noticed for hearing at the same time. At the beginning of the hearing the court announced that only the contempt matter would be heard at that time. The hearing then proceeded on that basis. At the end of the hearing the court found the plaintiff guilty of contempt and modified slightly the provisions of the periodic vis-

itations and also granted the defendant possession of the children from 6 o'clock p.m., Friday, June 9, 1972, to 7 o'clock p.m., August 6, 1972.

The plaintiff on this appeal asserts that the court had no jurisdiction to enter the order enlarging the vacation period possession of the defendant because that was not the matter being heard. The plaintiff relies upon Erpelding v. Erpelding, 176 Neb. 266, 125 N. W. 2d 688; and Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579, and contends that under the circumstances there was the equivalent of lack of notice and opportunity to be heard insofar as the modification of the order of February 17, 1972, is concerned. The plaintiff might also have cited Vasa v. Vasa, 165 Neb. 69, 84 N. W. 2d 185.

The cited cases are not in point. Here the court had, by its order of February 17, 1972, expressly retained custody of the children in the court. This procedure has the sanction of previous practice of the District Court of this state and of this court. Lueders v. Lueders, 187 Neb. 539, 192 N. W. 2d 161; Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647. Its purpose is to "facilitate judicial supervision and summary power to act swiftly in their [the children's] best interests." Lueders v. Lueders, *supra*. The parent having possession where the court has retained custody is in effect an agent of the court. For an analogy see Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839. The record supports the conclusion that the best interests of the children were being served.

AFFIRMED.

C & L COMPANY, DOING BUSINESS AS SILVER TOP, APPELLEE, v. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.
206 N. W. 2d 49

Filed April 6, 1973. No. 38719.

Licenses: Intoxicating Liquors: Words and Phrases. The phrase "not of good character" concerning eligibility for a license under the Nebraska Liquor Control Act imports lack of good faith or honesty of purpose.

Appeal from the District Court for Sarpy County: RUDOLPH TESAR, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellant.

E. Dean Hascall, for appellee.

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

SMITH, J.

The Nebraska Liquor Control Commission denied an application by C & L Company, Inc., for a liquor license. On appeal the District Court found the action of the commission arbitrary, and it ordered issuance of the license. The commission appeals. The parties argue the nature of the proceeding in District Court and the evidence relating to statutory exclusion of a corporate applicant whose agent is not of good character.

There is no conflict of evidence. C & L applied for a Class C retail liquor license held by the Silver Top Bar, a corporation, in the City of Bellevue. A power of attorney attached to the application named Colleen Longo the statutory agent with full authority, control, and responsibility concerning the alcoholic liquor business of C & L. The Bellevue city council recommended issuance of the license, but the chief enforcement officer of the liquor commission protested.

The record of the commission hearing in April 1972 includes the following testimony of Colleen Longo. She

owned the building in which Black Forest, a bottle club licensed to a Mr. McDonald, was doing business. The cost of all liquor purchases was paid by her, and all income was deposited in a checking account with Colleen the only drawee. Colleen was to decide whether she would pay McDonald any money. McDonald was paid nothing by her, for the business was not profitable. Colleen had filed an application for a license in her name on the Black Forest premises. Agents of the commission were fully aware of the manner in which she and McDonald were doing business.

C & L, which Colleen controlled, agreed to purchase the Silver Top Motel and the bar for $150,000 subject to C & L's obtaining a loan. In July 1971, Colleen began to manage the Silver Top Bar for C & L, although Ed Sterba, the seller, continued to be the statutory agent respecting the liquor license. C & L, through Colleen, paid bills upon Sterba's approval, but realization of profits would be unknown until an audit. Sterba eventually became impatient of the delay, consequently, C & L, again through Colleen, disbursed $2,000 to him. The application in suit was filed March 1, 1972, a short time prior to the date of the loan commitment. After subpoena of the books of account by the commission and upon advice of a commission representative that the business practices were unlawful, she and Sterba changed the practices to conform to the advice.

The only other witness at the commission hearing was a Bellevue banker. He testified to the good character and reputation of Colleen. The commisison concededly denied the application because of her character.

The evidence on appeal to District Court consisted of the record of the commission hearing and a stipulation of prejudice to Sterba from the lapse of time in event of denial of the application. The order of the District Court was entered August 18, 1972.

The Nebraska Liquor Control Act reads in part as follows: "No license . . . shall be issued to . . . (2) a

person who is not of good character and reputation in the community in which he resides . . .." § 53-125, R. S. Supp., 1972. "No corporation . . . shall be given any license . . . unless such corporation . . . shall have first appointed . . . its agent, and shall have filed with the commission a . . . power of attorney, . . . authorizing such agent to exercise full authority of such corporation, and full authority, control, and responsibility for the conduct of all business and transactions of the corporation within the state relative to alcoholic liquors. Such agent must be satisfactory to and approved by the commission with respect to his character, and must be one who would be eligible personally for a license . . .." § 53-126, R. R. S. 1943. "This act shall be liberally construed, to the end that the health, safety and welfare of the people . . . shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors." § 53-1,118, R. R. S. 1943.

In light of legislative policy the statutory phrase "not of good character" imports lack of good faith or honesty of purpose.

In the argument C & L emphasizes statutory provisions (1) for a de novo hearing and trial in District Court in the manner provided for the trial of suits in equity, and (2) for introduction of additional testimony. It asserts that arbitrariness or unreasonableness of commission action is not the standard of review on appeal from the commission to District Court, but that the district Court is to exercise an independent judgment on law and fact. The argument has been rejected. See T & N P Co., Inc. v. Nebraska Liquor Control Commission, 189 Neb. 708, 204 N. W. 2d 809 (1973); but cf. Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823 (1949).

We assume arguendo only that (1) C & L's contention relative to the nature of the proceeding in District Court is correct and (2) we are to review the issues of

fact de novo. See §§ 25-1925 and 84-918, R. R. S. 1943. The District Court, however, had only a cold record before it; consequently, the rule pertaining to our consideration of the opportunity of the trial court in equity to observe the witnesses is inapplicable.

The evidence establishes that Colleen was a person of good character apart from the requirement concerning eligibility for a liquor license. To further legislative policy, however, we find that she was not a person of "good character" for present purposes. We would deny the application by C & L. The denial by the commission was therefore neither arbitrary nor unreasonable.

The judgment of the District Court is reversed and the cause remanded with directions to affirm the action by the commission.

REVERSED AND REMANDED WITH DIRECTIONS.

PAULEY LUMBER COMPANY, A CORPORATION, APPELLEE, V. CITY OF NEBRASKA CITY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.
206 N. W. 2d 326

Filed April 6, 1973. No. 38722.

1. **Trial: Evidence.** A party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced.
2. ———: ———. One who fails to object to or move to strike testimony may not predicate error on its admission.
3. **Trial: Evidence: Eminent Domain.** Ordinarily evidence of prices paid for improved properties offered as substantial proof of the value of unimproved property is admissible only where the properties and the circumstances are substantially similar.
4. ———: ———: ———. The trial court is vested with a sound discretion in determining the admissibility of the sale prices of other lands.
5. **Trial: Damages: Eminent Domain: Appeal and Error.** The amount of damages sustained by a landowner in a proceeding in eminent domain is peculiarly of a local nature and is ordinarily to be determined by the jury. Such a verdict will not be set aside unless it is clearly wrong.

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

William F. Davis of Wellensiek & Davis, for appellant.

Guy C. Chambers and Perry, Perry & Witthoff, for appellee.

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

NEWTON, J.

This is an eminent domain proceeding involving four vacant, level, and unimproved city lots. Verdict and judgment were in the sum of $55,000. We affirm the judgment of the District Court.

Defendant asserts that erroneous expert evidence was admitted in that in comparing sales of other properties, the experts were permitted to take into consideration costs of preparing the sites for building, such as clearing existing improvements, filling, constructing a retaining wall, grading or leveling, excavating, etc. Evidence of the cost of this type of work, constituting expense in addition to purchase price, on the sites considered was also admitted. Due to the absence of comparable vacant lots, properties with improvements, or remnants of improvements, were considered. This type of evidence was submitted by both parties without objection and under such circumstances objections to it cannot now be considered. "A party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced." Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887. One who fails to object to or move to strike testimony may not predicate error on its admission. See Meyer v. Moell, 186 Neb. 397, 183 N. W. 2d 480.

Ordinarily evidence of prices paid for improved properties offered as substantial proof of the value of unimproved property is admissible only where the properties and the circumstances are substantially similar.

See Timmons v. School District, 173 Neb. 574, 114 N. W. 2d 386. The trial court is vested with a sound discretion in determining the admissibility of the sale prices of other lands. See Liebers v. State, 183 Neb. 250, 159 N. W. 2d 557.

In the present instance, the properties cited by plaintiff's witnesses had all been purchased by parties to whom the improvements were a detriment and had to be removed. The costs of clearing, filling, etc., represented expense to the purchasers over and above the prices paid for the properties. All these matters were fully explained to the jury. There was no abuse of discretion and the evidence was ample to sustain the verdict.

It is also charged that the verdict was excessive. The owner testified his property was worth $60,000. The testimony of the various expert witnesses valued it within a range of $30,000 to $69,120. The jury viewed the condemned property. "The amount of damages sustained by a landowner in a proceeding in eminent domain is peculiarly of a local nature and is ordinarily to be determined by the jury. Such a verdict will not be set aside unless it is clearly wrong." Bowley v. Airport Authority, 186 Neb. 292, 182 N. W. 2d 911.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN GEORGE BROWN, APPELLANT.

206 N. W. 2d 331

Filed April 13, 1973. No. 38556.

1. **Evidence.** There is no hard and fast rule for demarcation between that which is and that which is not res gestae, but a declaration to be competent evidence as part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremedi-

tated and spontaneous explanation of the matter about which made.

2. **Evidence: Trial.** Determination of admissibility generally rests within the sound discretion of the trial court.
3. **Evidence.** 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.
4. **Evidence: Trial: Criminal Law.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
5. **Evidence: Trial: Criminal Law: Weapons and Firearms.** Evidence of possession of a revolver a short time after it was stolen is admissible as a circumstance in proof that it was stolen by the person in whose possession it was found.
6. **Evidence: Trial: Criminal Law.** It is competent for the prosetion to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
7. ———: ———: ———. Well-established rules have developed concerning the admission of evidence of other criminal conduct. Although this evidence is generally inadmissible since it suggests that the defendant has a propensity to commit crime the trial court can in its discretion admit relevant evidence of other criminal acts and reversal is only commanded when it is clear the questioned evidence has no bearing upon any of the issues involved.
8. ———: ———: ———. The problem concerning the admissibility of evidence of other offenses is a special aspect of the broad general problem of relevancy, and generally the test of admissibility of such evidence is whether the evidence is relevant and material to any issue on the trial, or whether it fairly tends to prove the particular offense charged or an essential element thereof.

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 Ralph H. Gillan, for appellee.

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

SPENCER, J.

Defendant appeals from his conviction on a charge of robbery. The appeal is predicated on two alleged errors in the admission of evidence: (1) The admission of a statement made to a treating doctor, and (2) the admission of testimony of a crime committed in Canada. We affirm.

In view of the issues raised, a detailed discussion of the evidence of defendant's guilt is unnecessary. The robbery occurred at approximately 11:15 a.m. The victim, Wally Smith, who had been hit on the head with a gun, was bleeding profusely from three separate cuts. An ambulance was called and the victim taken to the hospital. There he told Doctor J. E. Mabie that "he had been struck by a gun by two men." Doctor Mabie was permitted to testify to this conversation over defendant's objection.

Police officers from Ontario, Canada, were permitted to testify that defendant and a companion were apprehended by Ontario police 10 days after the robbery in Lincoln, after a chase following a bank robbery. Two guns and a diamond ring, taken in the Lincoln robbery, were recovered from them. One of the guns was found in defendant's pocket. The diamond ring was found in a car registered in defendant's name, together with a ticket showing the purchase of gas in Lincoln the day before the robbery herein.

The victim, Wally Smith, died of heart trouble before the trial. He was taken to the hospital as soon as an ambulance arrived. The statement complained of was made when the doctor asked him what had happened. The State argues the statement, while hearsay, comes well within the res gestae exception to the hearsay rule as heretofore enunciated by this court.

It is often difficult to determine whether or not state-

ments are to be regarded as res gestae. The rule followed in this state is set out in Reizenstein v. State (1958), 165 Neb. 865, 87 N. W. 2d 560, as follows: " 'There is no hard and fast rule for demarcation between that which is and that which is not res gestae, but a declaration to be competent evidence as part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which made.'

"In Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1, this court pointed out some standards which are pertinent in determining whether or not statements may be admitted in evidence as res gestae, as follows: 'To render such assertions admissible it is required that (1) there be some shock to the feelings sufficient to render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i. e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) it must relate to the circumstance causing the shock to the feelings.'

"The evidence in this case brings the statements of the deceased clearly within the rule as delineated by these decisions. It would serve no useful purpose to repeat herein the evidence which makes this clear."

There can be little question the victim, who had bled profusely, was still in some state of shock when he arrived at the hospital. The statement, which was made within 35 minutes of the burglary, related to the condition causing the shock. Under the circumstances the statement bore the stamp of reliability. It was not a statement the victim would be apt to falsify but was a more or less spontaneous utterance. As we said in State v. Juarez (1971), 187 Neb. 354, 190 N. W. 2d 858: "Concepts of res gestae have been indistinct and interpretation has been sometimes confusing. Most of the

present exceptions to the hearsay rule evolved from early explanations in terms of res gestae. The obvious trend of the cases is toward a widening of the admission of spontaneous statements and a narrowing of the operation of the hearsay rule.

"A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is generally admissible as an exception to the hearsay rule, whether it be treated as part of the res gestae or as a spontaneous declaration or excited utterance." In Juarez the statements were made by the victim within 1½ to 2 hours after the assault.

As we said in Juarez, *supra:* "Determination of admissibility generally rests within the sound discretion of the trial court. See, VI Wigmore on Evidence (3d Ed.), § 1757, p. 166; Roberts v. United States, 332 F. 2d 892 (8th Cir., 1964)."

In the recent case of State v. Brown (December 1972), 189 Neb. 319, 202 N. W. 2d 591, we said: "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.'"

Here, the statement was made while the exciting influence of the shock still held sway. It was made in response to the treating doctor's inquiry as to what

had happened. It was a spontaneous response as to the cause of the injury. Under the circumstances, the trial judge did not abuse his discretion in permitting its admission.

Defendant's second assignment of error concerns the testimony of some Canadian officers about a pursuit and gunfight after a bank robbery. This occurred 10 days after the Lincoln robbery. The driver of that getaway car was identified as the defendant. Donald Cotham, who confessed to the Lincoln robbery, was also present in the car. The officers testified that after apprehending the two men they recovered two pistols, one of which the defendant had fired, and that the serial numbers matched those of the guns stolen from Wally Smith. Another Canadian officer testified that after the two men had been apprehended he found a bag of coins, a jeweler's evaluation slip describing a gold ring valued at $1,000, a diamond ring, and another square stone ring in the defendant's car. These were items that had been taken in the robbery of Wally's gunshop.

As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. State v. Hoffmeyer (1972), 187 Neb. 701, 193 N. W. 2d 760. This rule has no application to the situation presented here. There was no effort in the present case to prove the crime charged by evidence of another crime. While the evidence adduced had in it an indication of the commission of another crime, the proof of the other crime was not the purpose of the evidence. The purpose and the direct effect of the evidence was to disclose possession of the revolver and the property stolen from the victim in the Lincoln robbery.

This situation is analogous to Peery v. State (1958), 165 Neb. 752, 87 N. W. 2d 378, where the victims of two subsequent crimes were permitted to testify to identify the possession of property stolen in the robbery for which the defendant was being tried. In that

case we said: "Evidence of possession of a revolver a short time after it was stolen is admissible as a circumstance in proof that it was stolen by the person in whose possession it was found."

In State v. Riley (1967), 182 Neb. 300, 154 N. W. 2d 741, we held: "It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes."

In State v. Sharp (1969), 184 Neb. 411, 168 N. W. 2d 267, defendant appealed on the sole ground that the trial court submitted evidence of independent criminal acts which had no relation to the offense charged. Defendant was referring to the victim's coin purse and billfold which were found in his possession when he was arrested for driving a stolen car. We there said: "Possession of the stolen coin purse and billfold was strong evidence tending to identify defendant as the robber and the evidence regarding the circumstances of his arrest was not only incidental to proof of a major element of the crime, but essential to support reception of the exhibits."

In United States v. Cochran, No. 72-1322, the Eighth Circuit Court of Appeals, in an opinion filed March 9, 1972, said: "Well established rules have developed concerning the admission of evidence of other criminal conduct. Although this evidence is generally inadmissible since it suggests that the defendant has a propensity to commit crime, the trial court can in its discretion admit relevant evidence of other criminal acts and reversal is only commanded when 'it is clear that the questioned evidence has no bearing upon any of the issues involved.' "

In State v. Meadows (1972), 188 Neb. 287, 196 N. W. 2d 171, we said: "The problem concerning the admissibility of evidence of other offenses is a special aspect

of the broad general problem of relevancy, and generally the test of admissibility of such evidence is whether the evidence is relevant and material to any issue on the trial, or whether it fairly tends to prove the particular offense charged or an essential element thereof."

The evidence of the Canadian officers was clearly relevant. Proof of the Canadian crime was purely incidental to the proof of possession and the use of the fruits of the Lincoln robbery. Even if the trial judge could have limited some of the testimony of the Canadian officers, his failure to do so, at most, would be harmless error. Defendant took the stand to testify in his own defense, and on cross-examination testified that he had been convicted of probably 10 or 15 felonies. The jury was properly cautioned that this evidence could only be considered on credibility and not as establishing the truth or falsity of the charges against the defendant.

We find no prejudicial error. The judgment herein is affirmed.

AFFIRMED.

PAUL E. SAILORS, APPELLANT, V. CITY OF FALLS CITY, NEBRASKA, ET AL., APPELLEES.

206 N. W. 2d 566

Filed April 13, 1973. No. 38614.

1. **Civil Service: Statutes: Municipal Corporations.** The Civil Service Act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in section 19-1807, R. R. S. 1943.
2. **Civil Service: Statutes: Administrative Law: Municipal Corporations.** The final determination of discharge of an employee under the Civil Service Act rests in the civil service commission.
3. **Civil Service: Appeal and Error: Administrative Law: Municipal Corporations.** If the evidence in the District Court on appeal is sufficient to show that the order of the commission suspending

or discharging an employee was made in good faith for cause, then the order of the commission must be affirmed.

4. **Civil Service: Evidence: Administrative Law: Trial.** One asserting the disqualification of a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Wiltse & Halbert and McGrath, North, Nelson, Shkolnick & Dwyer, for appellant.

Simon Lantzy, for appellees.

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

McCOWN, J.

Paul E. Sailors has appealed from a judgment of the District Court affirming the action of the Civil Service Commission of the City of Falls City, Nebraska, in discharging Sailors from his employment as a police officer.

The events which led to the discharge occurred on February 9, 1972. Paul E. Sailors, a sergeant of the Falls City police department, and a fellow officer had been in Kansas City that day on police business. Sailors testified that they stopped for a couple of drinks on the return trip to Falls City and after arriving in Falls City at 6 p.m., Sailors had one drink at the Elks Club, and "not over two" drinks at the home of his fellow officer. Sailors went home about 7 p.m. He considered himself off duty at that time, being relieved of his normal night shift.

At approximately 7:30 p.m., George C. Davis, the pastor of a local church, made his first business call as a salesman for the Encyclopedia Britannica. Davis had lived in Falls City only a few months and was undertaking to supplement his income. He was calling on persons whose names and addresses were furnished to

him by the publisher on "lead cards." The printed cards represented requests to the company for information about its encyclopedia. Among the cards furnished to Davis was one containing the typed name and address of officer Sailors' wife. Shortly after 7:30 p.m., Davis arrived at the Sailors' residence and after he had identified himself and his purpose, he was invited in by Mrs. Sailors. Davis was seated in the Sailors' living room. There was some conversation as to whether Mrs. Sailors had signed or sent in any card and whether Davis had a permit. After some discussion, officer Sailors placed Davis under arrest and telephoned the Falls City police department to send an officer to pick him up. When Davis asked what he was under arrest for, Sailors testified that he told him "fraud, you need to be investigated." Another officer then picked up Davis and took him to the police station. When Davis arrived at the police station, he was allowed to call his wife and he also called the chief of police, who came to the police station. Officer Sailors, on his own initiative, also went to the police station. There he made a telephone call to the county attorney and gave him Sailors' version of the incident and charges. The county attorney instructed Sailors to hold Davis until morning. Davis was lodged in jail about 8:30 p.m. Through the evening, Davis continually protested that he was innocent of any wrongdoing and that Sailors was intoxicated. At approximately 11:30 p.m., the county attorney directed that Davis be taken to the county attorney's office and also directed that Sailors attend. Davis was then interrogated for approximately an hour. The interrogation was tape recorded. The civil service commission heard the recording which is transcribed and part of the record here. It establishes rather clearly Sailors' rude and discourteous conduct and his continued refusal to accept or believe Davis' statements. At the conclusion of the interrogation, Davis was allowed to go home and instructed to return the next morning. No

charges of any kind were ever formally filed against Davis.

On February 28, 1972, Davis appeared before the civil service commission and complained of the treatment he had received from Sailors. The commission requested a written statement from Davis which he filed on or about March 2. On March 2, after preliminary investigation, the commission directed that a copy of Davis' written accusation be furnished to Sailors and recommended to the mayor and city council that preliminary disciplinary action be taken suspending Sailors without pay until such time as he could appear before the commission to be heard if he desired to do so. On March 6, 1972, the commission adopted a resolution which stated that it had investigated Davis' complaint and found Sailors was guilty of improper conduct and suspended him from duty indefinitely without pay. The resolution provided for notice to Sailors of his suspension and set out the time allowed to request a public hearing. A copy of the resolution and notice was served on him on March 6, 1972.

Sailors requested an investigation and public hearing as provided by statute. The public hearing was held before the civil service commission on March 27, 28, and 29, 1972. Following the hearing, the civil service commission found that Paul E. Sailors was guilty of intemperance and discourteous treatment of the public and of actively participating in and directing an investigation at a time when he had "consumed a number of alcoholic drinks." The commission found him to be unsuitable to continue in the public service as a member of the police department and recommended to the appointing power that the indefinite suspension of March 6, 1972, be made a permanent suspension. The city council then ordered the proper city officials to enforce the findings and decision of the civil service commission.

Sailors appealed to the District Court. The District

Court, after its review of the record and proceedings before the civil service commission and the filing of written briefs, found that the dismissal of Sailors as a member of the police department was made by the civil service commission of the City of Falls City, Nebraska, in good faith, free of prejudice or bias, and said dismissal was made for cause as provided in sections 19-1807 and 19-1808, R. R. S. 1943. The action of the civil service commission was affirmed and judgment was entered on June 12, 1972. This appeal followed.

Sailors' basic contention is that there was insufficient evidence to establish that his dismissal was made in good faith for cause. The Civil Service Act regulates the hiring, suspension, and discharge of certain employees of the fire and police departments in the cities where it is applicable. It prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons which are listed in section 19-1807, R. R. S. 1943. Intemperance, discourteous treatment of the public, or the use of intoxicating liquors to the extent that the use thereof interferes with the efficiency or fitness of the employee or precludes him from properly performing the functions and duties of any position under the civil service are all reasons for suspension or discharge under section 19-1807, R. R. S. 1943.

An explanation of the statutory civil service scheme is contained in Ackerman v. Civil Service Commission, 177 Neb. 232, 128 N. W. 2d 588. That case holds: "The purpose of the appeal to the district court is to permit the employee to obtain a determination only as to whether the order of the commission was made in good faith for cause. If the evidence in the district court is sufficient to show that the order of the commission was made in good faith for cause, then the order of the commission must be affirmed." The record here fully sustains the finding of the District Court that the

order of the commission was made in good faith for cause.

Sailors levels several objections to the jurisdiction and authority of the civil service commission to act. He asserts that he was entitled to notice and hearing in connection with the preliminary investigation of Davis' accusation before his suspension, as well as the notice and public hearing which he received after his suspension on March 6. He also contends that the commission had no authority to enter a preliminary suspension and that one member of the commission should have been disqualified for prejudice.

The case of Wachtel v. Fremont Civil Service Commission, *ante* p. 49, 206 N. W. 2d 56, makes it clear that the final determination of discharge of an employee under the Civil Service Act rests in the civil service commission, and that two hearings and two services of notice are not required.

Under section 19-1808, R. R. S. 1943, suspension or discharge is initiated by a written statement of accusation by "the appointing power or any citizen or taxpayer." When so initiated before the commission, either the appointing power may temporarily suspend or the commission may direct such temporary suspension.

Sailors' contention that one of the commissioners should disqualify himself was based upon a wholly unsupported allegation that the commissioner, who was previously a police officer, had resigned because of differences with Sailors. Sailors proposed to call the commissioner as a witness and when this was refused, made an offer to prove such allegation by the commissioner's testimony as to any alleged prejudice and failed to introduce any evidence of bias or prejudice of any kind. While there is no provision in the Civil Service Act for disqualification of a commissioner, it is quite apparent that evidence of bias or prejudice might require disqualification in a particular case. That is not this case. One asserting the disqualification of

a civil service commissioner for prejudice must prove facts and circumstances which clearly show such bias or prejudice in order to overcome the presumption of impartiality. See State v. Smith, 77 Neb. 824, 110 N. W. 557. In the absence of even a prima facie showing of prejudice, the commission did not abuse its discretion in refusing to require the disqualification of one of its members.

The District Court specifically found that the procedures followed by the commission in its hearing were as provided by the laws of the State of Nebraska, and were in all respects conducted in a fair and impartial manner. That finding was correct.

Finally, Sailors challenges the entire proceedings because the civil service commission had not adopted suitable rules and regulations for the purpose of carrying into effect the provisions of the Civil Service Act as required by statute.

The District Court specifically found that the civil service commission of the City of Falls City, Nebraska, did not make, print, or disseminate rules and regulations as provided in section 19-1804(1), R. R. S. 1943. Section 19-1820, R. R. S. 1943, also requires such rules and regulations and provides that a failure to comply shall be deemed a violation of the act. A violation is punishable as a misdemeanor. We cannot excuse the commission's failure to make such rules and regulations. Neither do we make any attempt to justify an apparent long-continued violation of the clear requirements of the statutes. Nevertheless, the provisions for suspension and discharge set out in the statutes are extensive and explicit and the record is devoid of any showing of prejudice to Sailors because of the absence of rules and regulations. He was not dismissed for any technical violation of rules or regulations of the commission or the police department. He was discharged for reasons specifically enumerated in section 19-1807, R. R. S. 1943, and in accordance with the procedures

spelled out in the statutes. The procedures followed by the civil service commission here were fair and reasonable and did not violate the statutory provisions.

The evidence at the public hearing before the civil service commission and considered by the District Court was more than sufficient to establish that the order of the commission was made in good faith for cause. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUGENE PRATT, APPELLANT.
206 N. W. 2d 45

Filed April 13, 1973. No. 38708.

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

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

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

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

McCOWN, J.

The sole issue here involves the validity of indeterminate sentences as affected by section 83-170, R. R. S. 1943, and section 83-1,105, R. S. Supp., 1972.

The case is controlled by State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793. The judgment is affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BOBBY JOE WEILAND, APPELLANT.
206 N. W. 2d 336

Filed April 13, 1973. No. 38788.

1. **Post Conviction: Criminal Law.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. **Post Conviction: Appeal and Error: Trial.** Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review.

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

Bobby Joe Weiland, 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.

SPENCER, J.

Defendant appeals from the denial of an evidentiary hearing in this post conviction proceeding. We affirm.

Defendant's motion contained three grounds for release. Defendant concedes that the first two grounds had previously been heard and overruled. Defendant's third allegation was: "That the defendant was tried by surprise for a substantially and materially different criminal charge, than that which he was bound over to the district court for trial on, and which he went to trial prepared to defend against, in clear violation of his right to know the cause and nature of the accusation against him, and his right to due process of law. U. S. C. A. Const. Amends. 6 and 14. This change in the

prosecution theory between bind-over and trial involved the aforesaid change of co-defendants, from Phyllis Croghan to Ronald W. Lefel, and not only violated defendant's right to know the cause and nature of the accusation, but also deprived the district court of jurisdiction to try this cause."

Defendant was convicted in the District Court for Dodge county on a charge of breaking and entering. On March 6, 1970, he was sentenced as an habitual criminal to 12 years in the Nebraska Penal and Correctional Complex. He was represented by competent counsel at his trial, as well as on appeal to this court where the conviction was affirmed in State v. Weiland, 186 Neb. 325, 183 N. W. 2d 244 (1971). Thereafter in August of 1971, he filed a motion to vacate and set aside his conviction and sentence. This was overruled, and the ruling was again appealed to this court which affirmed the action of the trial court in State v. Weiland, 188 Neb. 626, 198 N. W. 2d 327 (1972).

The following from 188 Neb. 626, will amply demonstrate that defendant has had his day in court: "Essentially, defendant asserts that two police officers at a preliminary hearing identified one Phyllis Croghan as defendant's accomplice but at the time of trial, identified one Ronald Leffel instead. Leffel then testified for the State. Two fellow prisoners of Leffel testified that Leffel had told them that if he testified against the defendant, he had been assured that charges against him would be dropped. This testimony was directly contradicted. All of the testimony and the possible inferences to be drawn were fully exploited by competent counsel for the defendant in the original trial. The motion for post conviction relief alleges no facts nor grounds for relief which were not known to defendant and his counsel at the time of trial. The original bill of exceptions reflects the inescapable conclusion that the factual issues were heard and determined by the jury.

"A motion to vacate a judgment and sentence under

the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

"Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review. State v. Lincoln, 186 Neb. 783, 186 N. W. 2d 490."

There must be an end to litigation. A defendant will not be permitted to rephrase issues previously raised or raise new issues which could have been previously raised for the purpose of securing another review on appeal. Defendant raised no issue meriting an evidentiary hearing. The judgment of the District Court is affirmed.

AFFIRMED.

HARRY ALTSULER ET AL., APPELLANTS, V. WILLIAM E. PETERS, STATE TAX COMMISSIONER, APPELLEE.

SHELDON COHEN ET AL., APPELLANTS, V. WILLIAM E. PETERS, STATE TAX COMMISSIONER, APPELLEE.

HAROLD B. BRODKEY ET AL., APPELLANTS, V. WILLIAM E. PETERS, STATE TAX COMMISSIONER, APPELLEE.

RUTH KAY O'HANLON, INDIVIDUALLY, AND RUTH KAY O'HANLON, TRANSFEREE OF PROPERTY OF REED O'HANLON, SR., DECEASED, APPELLANT, V. WILLIAM E. PETERS, STATE TAX COMMISSIONER, APPELLEE.

206 N. W. 2d 570

Filed April 13, 1973. Nos. 38812, 38813, 38816, 38817.

1. **Taxation: Statutes: Partnership.** The Nebraska Revenue Act of 1967 does not authorize the State Tax Commissioner to exclude partners and partnerships from the benefit of the transitional

period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to the filing of returns for taxable periods of less than 12 calendar months.

2. **Taxation: Statutes: Corporations.** The Nebraska Revenue Act of 1967 does not authorize the State Tax Commissioner to exclude corporations having in effect a valid Subchapter S election and its shareholders from the benefit of the transitional period regulation promulgated under section 77-27,124, R. R. S. 1943, pertaining to the filing of returns for taxable periods of less than 12 calendar months.
3. **Taxation: Statutes: Partnership.** Under the Nebraska Revenue Act of 1967, a capital gain or loss realized by a fiscal year partnership prior to January 1, 1968, is not includable in determining the partners' income tax liability for 1968.
4. **Taxation: Statutes: Contracts.** Under the Nebraska Revenue Act of 1967, if any property was sold prior to January 1, 1968, under an installment contract which conforms to the provisions of Section 453 of the Internal Revenue Code, and the taxpayer has elected the option provided for in that section, the capital gain portion of, or the income portion of, any contract payment received on or after January 1, 1968, is to be included in the computation of the taxpayer's adjusted federal income tax liability which is subject to the Nebraska tax rate.
5. **Taxation: Statutes: Profit or Loss.** The Nebraska Revenue Act of 1967 does not contemplate the use of a January 1, 1968, fair market value basis for determining gain or loss of a capital asset acquired or sold on or after that date, and federal law and regulations are to be used in determining basis.

Appeals from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed in part, and in part reversed and remanded.

McGrath, North, Nelson, Shkolnick & Dwyer, for appellants.

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

Lyle E. Strom of Fitzgerald, Brown, Leahy, McGill & Strom, for amicus curiae.

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

CLINTON, J.

The four cases which are before us on this appeal involve primarily the construction of the Nebraska Revenue Act of 1967, and secondarily, depending on the construction adopted, claims of unconstitutionality either in the Act or its application by the State Tax Commissioner who is charged with its administration.

The Commissioner proposed deficiencies against each of the appellants by requiring inclusion in their 1968 individual incomes certain income which they had excluded. All the taxpayers filed protests pursuant to section 77-2778, R. R. S. 1943. The Commissioner sustained the deficiencies in all cases. All the taxpayers then filed appeals to the District Court pursuant to section 77-27,127, R. R. S. 1943. The Commissioner demurred to each petition. The trial court sustained the demurrers and dismissed the petitions on appeal. The appellants each then perfected their appeals to this court where the cases were, by stipulation and order of this court, consolidated for briefing and argument. All the appellants are resident taxpayers.

The Nebraska Revenue Act

The Nebraska Revenue Act of 1967 imposes an income tax which is a flat percentage, determined annually, of the taxpayer's adjusted federal income tax liability for the taxable year. §§ 77-2715, 77-2715.01, R. R. S. 1943. None of the modifications to determine "adjusted" federal income tax liability are relevant to our discussions of the issues. § 77-2716, R. R. S. 1943.

For the most part the terms used in the Act "have the same meaning as when used in a comparable context" in the federal income tax law. References in the Act to the law of the United States means "the provisions of the Internal Revenue Code of 1954, and amendments thereto, . . . and the rules and regulations issued under such laws, as the same may be or become effective, at any time or from time to time, for the taxable year." § 77-2714, R. R. S. 1943.

The determination of the issues which we must decide are related principally to the interpretation of the following section of the Act and the regulations adopted by the Commissioner to effectuate the statute: "Sections 77-2701 to 77-27,135 shall take effect immediately and shall be applicable with respect to items of income, deduction, loss or gain realized in taxable years ending on or after January 1, 1968. For the purpose of facilitating the administration of the tax imposed by the provisions of sections 77-2701 to 77-27,135 during the transitional period, the Tax Commissioner shall provide by regulation for the filing of returns in respect to taxable periods of less than twelve calendar months ending after January 1, 1968, and prior to December 31, 1968." § 77-27,124, R. R. S. 1943.

The Issues

Five issues are presented for determination: (1) Is a taxpayer, who files his individual return on a calendar year basis and who derived all or a part of his income from a partnership which reported its income for federal income tax purposes for a fiscal year which ended in 1968, required to include his entire share of the partnership income for its full fiscal year on his individual state income tax return for 1968, or is he entitled to adjust his reported federal income tax liability by excluding a portion of the partnership income in a manner comparable to that permitted under the regulations of the Commissioner to an individual fiscal year taxpayer who may adjust his reported federal income tax liability by excluding a portion of his income attributable to that part of the fiscal year preceding January 1, 1968? (2) The second issue is the counterpart of that stated as issue (1) above except that the taxpayer is a shareholder of a corporation reporting its income on a fiscal year basis and the corporation and its stockholders have made a valid election under Subchapter S, Internal Revenue Code of 1954, to have its undistributed taxable income taxed to the shareholders. (3) Is a

taxpayer who is a member of a fiscal year partnership which reported the 1967 sale of a capital asset on its 1967-68 federal income tax return required to include that sale in determining his 1968 state income tax, or is he entitled to exclude it under the Act and the regulations issued by the Commissioner? (4) May a taxpayer, who, prior to January 1, 1968, sold real estate at a profit under the terms of an installment contract and elected under federal income tax law to report the gain on an installment basis, exclude for purposes of determining his 1968 state income tax liability the installment received in 1968? (5) May a taxpayer, who in 1968 sells a capital asset acquired prior to 1968, claim as a basis for determining gain the fair market value of the property as of January 1, 1968, and so exclude in determining his gain on the sale the increment of value which accrued prior to January 1, 1968?

Each of the issues presented here are not common to all four cases. We will discuss each issue in the abstract, but will at the end of the opinion set forth the disposition in each case as it is determined by our holding on the specific issues.

Issue No. 1—The Transitional Period and the Partnership Fiscal Year

Pursuant to the provisions of section 77-27,124, R. R. S. 1943, the Commissioner enacted regulations "facilitating the administration of the tax . . . during the transitional period" which pertain to "returns in respect to taxable periods of less than twelve calendar months ending after January 1, 1968, and prior to December 31, 1968." It is evident the Legislature recognized that upon the taking of effect of the Nebraska Revenue Act on January 1, 1968, problems were created with reference to the preparation of state income tax returns and the accounting for income of those taxpayers who would be affected by their prior election to file federal income tax returns on a fiscal year basis. The statute in effect directs the Commissioner to solve the problem by reg-

ulation. To accomplish that purpose the Commissioner adopted the following regulations: "A return for a short period shall also be filed by any fiscal year taxpayer whose fiscal year ended during 1968. Such fiscal year short period income shall be determined as follows:

"Individuals: The short period income shall be determined by first excluding any capital gains or losses and any interest received on U. S. obligations from the total fiscal year income. This amount shall be multiplied by the fraction of the number of days in the short period over the total number of days in 1968. . . .

"Any taxpayer who can determine that the fractional method of reporting income does not closely reflect such short period income, and has records of income, deductions or credits which are sufficient to identify them to the short period so as to accurately state the short period tax liability may request permission to use a separate accounting method of reporting." TC-27-3.

In the same regulation the Commissioner has provided for the filing of short period returns for corporations, estates, and trusts whose fiscal years end in 1968. The Commissioner did not include partnerships in the regulation. Unless a partnership elects to be taxed as a corporation it pays neither a federal nor a state income tax. § 701, I. R. C. 1954; TC-26-2. The partners, in the absence of such an election, must account for and pay tax on the partnership income whether distributed to them or not.

It, of course, is clear that the Legislature intended to tax only income realized after December 31, 1967. The term realized, as we will note later, has come to have in federal tax law a well-recognized meaning. The Commissioner recognized the legislative intent in TC-27-3 and also in regulations TC-23-5 and TC-23-6. In TC-23-5 the Commissioner specifically provides that only capital gains or losses realized from sales or exchanges of property on and after January 1, 1968, are

to be included in computing the taxpayer's adjusted federal income tax liability. In TC-23-6 he prohibits the use of loss carry-overs unless they were realized after January 1, 1968, despite the fact that losses occurring prior to that date can, under federal law, be carried over and affect the liability for the 1968 federal income tax of the taxpayer. These regulations clearly authorize the fiscal taxpayer to exclude gains realized and requires him to exclude losses realized within his 1967-68 fiscal year, but occurring prior to January 1, 1968.

In support of his action giving different treatment to calendar year taxpayers, who, during the "transitional period," derived all or portions of their ordinary income from partnerships reporting on a fiscal year basis, the Commissioner relies upon section 706(a), I.R.C. 1954, and the corresponding treasury regulations. Section 706(a) reads as follows: "In computing the taxable income of a partner for a taxable year, the inclusions required by section 702 and section 707(c) with respect to a partnership shall be based on the income, gain, loss, deduction, or credit of the partnership for any taxable year of the partnership ending within or with the taxable year of the partner."

All this, of course, is very clear, but the question is, has it any application under the provisions of section 77-27,124, R. R. S. 1943, "during the transitional period," or did the Legislature intend that the reporting and accounting of partnership income during that period be provided for by regulation to be adopted by the Commissioner in a manner similar to that provided by the Commissioner for individuals, corporations, and trusts? There is no evidence in the Act itself that the Legislature intended to treat persons who derive all or a portion of their income from partnership sources differently from the manner in which other persons, including corporations and trusts, are treated. It may be worth noting at this point that corporations and trusts may be

members of partnerships and derive part of their income from that source.

The Commissioner argues that partnership income is not realized by the partner until the end of the partnership year because, among other considerations, before that time it cannot be known whether there is a profit or a loss for the partnership fiscal year. This is true, but it is equally true of a sole proprietorship, a corporation, or a trust, all of whom under regulation TC-27-3 may file short period returns during the transitional period. In so doing, they have an option. They can either multiply the fiscal year income (less capital gain), "by the fraction of the number of days in the short period over the total number of days in 1968," or if the accounting records are sufficient "to identify them [income item and deductions] to the short period so as to accurately state the short period tax liability [they] may request permission to use a separate accounting method of reporting." Either of these methods is equally adaptable to a partnership. There is one difference, however, that has significance. The partnership consists of more than one taxpayer. It seems evident that if the total partnership income is to be accurately reflected and the Commissioner is to be able to conveniently reconcile the partnership income with the distributive shares reported on the individual returns, only one of the alternative methods may be used by the partners of a given partnership, i.e., one partner could not use the "fraction[al]" method and the other the "separate accounting method." It therefore appears that an appropriate regulation would have to either (1) limit the methods to one or the other for partners in general, or for the partners of a particular partnership; or (2) require the partnership itself to file a separate informational return for the short period as a condition precedent to the use by the partners of the short period in accounting for partnership income.

The Commissioner in support of his position that the

partner does not "realize" income until the end of the partnership year points to section 77-2728, R. R. S. 1943, which reads as follows: "Each item of partnership income, gain, loss, or deduction shall have the same character for a partner under the provisions of sections 77-2701 to 77-27,135 as it has for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it shall have the same character for a partner as if realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership."

It appears to us that this section, like section 706(a), I.R.C. 1954, has nothing at all to do with the initial year, the "transitional period" or determining when the income tax law becomes effective for particular taxpayers. Section 706(a), I.R.C. 1954, deals with when partnership income must be reported. Section 77-2728, R. R. S. 1943, which is a counterpart of section 702, I.R.C. 1954, the corresponding federal tax law, deals with the retained "character" of income realized from a partnership, i.e., if a partnership has a capital gain or loss, it is still a capital gain or loss when the partner accounts for it. This he does not do as ordinary partnership income, but upon the separate Schedule D of his individual federal return. Likewise, ordinary income of the partnership is treated as ordinary income by the partner where this characterization makes a difference for tax purposes. Likewise, dividends received by a partnership are dividends on the return of the partner for purposes of the dividend exclusion.

The Commissioner has specifically recognized this characterization of income in his regulation pertaining to capital gains and losses realized previous to January 1, 1968. He has not attempted to treat a partner differently in this respect.

What it all boils down to is that neither section 706(a), I.R.C. 1954, nor section 77-2728, R. R. S. 1943, support

the Commissioner's position on the interpretation of the statute.

The net effect of the Commissioner's treatment of the income in these cases is to have the Act take effect sometime in 1967 insofar as it relates to partners who are members of partnerships having a fiscal year ending in 1968. For example, in the case of a partner whose partnership has a fiscal year beginning March 1, 1967, he would be required to report and account for his income from the partnership beginning March 1, 1967. Depending upon the beginning date of other partnership fiscal years, other persons deriving income from the partnerships would be accountable for 1967 income for varying periods of time. For these persons the Act would as a practical matter be effective before January 1, 1968. We see nothing in the Act, whatever, to indicate a legislative intention to discriminate in this way against those doing business in the partnership form.

The Commissioner cites four cases which support the position that the Congress and the states may make changes in income tax law, as by change of rate, which affect adversely partners who must report income for a period which overlaps the changes, i.e., have retroactive effect. These cases are Shonnard v. Price, 49 F. 2d 794; Shunk v. Commissioner of Internal Revenue, 173 F. 2d 747; Andrews v. Franchise Tax Board, 275 Cal. App. 653, 80 Cal. Rptr. 403; Byard v. Commissioner of Taxation, 209 Minn. 215, 296 N. W. 10. We have no quarrel with the cases as they apply after the "transitional period," however, they are no help in determining the question of legislative intent on the issue before us.

Here again the Commissioner returns to the argument that income of a partnership is not realized until the end of the accounting period. This argument, we believe, mistakes the meaning of the word "realized" as used in the statutes and overlooks the somewhat dual nature of the partnership. A partnership for some purposes is an entity and for others a mere conduit. The

Supreme Court of the United States in a recent case, United States v. Bayse, — U. S. —, 93 S. Ct. 1080, 35 L. Ed. 2d 412 (February 27, 1973), had occasion to say this: "Section 703 of the Internal Revenue Code of 1954, insofar as pertinent here, prescribes that '[t]he taxable income of a partnership shall be computed in the same manner as in the case of an individual.' 26 U.S.C. § 703(a). Thus, while the partnership itself pays no taxes, 26 U.S.C. § 701, it must report the income it generates and such income must be calculated in largely the same manner as an individual computes his personal income. For this purpose, then, the partnership is regarded as an independently recognizable entity apart from the aggregate of its partners. Once its income is ascertained and reported, its existence may be disregarded since each partner must pay tax on a portion of the total income as if the partnership were merely an agent or conduit through which the income passed." In a footnote it then adds: "The legislative history indicates, and the commentators agree, that partnerships are entities for purposes of calculating and filing informational returns but that they are conduits through which the taxpaying obligation passes to the individual partners in accord with their distributive shares. See, e.g., H. R. Rep. No. 1337, 83d Cong., 2d Sess., 65-66 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 89-90 (1954), U. S. Code Cong. & Admin. News 1954, p. 4017; 6 J. Mertens, Law of Federal Income Taxation § 35.01 (1968); S. Surrey & W. Warren, Federal Income Taxation 1115-1116 (1960); Jackson, Johnson, Surrey, Tenen & Warren, The Internal Revenue Code of 1954: Partnerships, 54 Col. L. Rev. 1183 (1954)."

Nothing, it seems, could make it clearer that the partner realizes the income or the loss when the partnership does. The Commissioner's regulations make this very clear insofar as a capital gain or loss is concerned, but he has failed to implement the legislative intent with reference to other income items of the partnership. The

term "realized" has for a very long time had a well-established connotation. In general it means received, paid, debited, or incurred, in accordance with the method of accounting authorized for use by the taxpayer. See, MacLaughlin v. Alliance Ins. Co., *post;* City National Bank of Clinton v. Iowa State Tax Commission, *post;* Norman v. Bradley, 173 Ga. 482, 160 S. E. 413; Fullerton Oil Co. v. Johnson, 2 Cal. 2d 162, 39 P. 2d 796.

It seems obvious to us that this is what the Legislature meant and that the very reason why it directed the Commissioner to make the regulations for the transitional period was to take into account the complexities which would arise because some taxpayers had long before elected the fiscal years under the federal law or would be affected by fiscal year returns such as in a partnership. For the reasons we have set forth we are convinced that the Legislature did not intend to discriminate against partners insofar as the effective date of the Nebraska Revenue Act of 1967 was concerned.

The cases before us must be decided as though the Commissioner had adopted an appropriate regulation. The affected appellants ask us to determine that they correctly determined their 1968 income tax insofar as partnership income is concerned. This we cannot do for the case was determined on demurrer and the evidence is not before us. We have, however, laid down the rules. The affected cases must be remanded. No doubt the parties can now settle the matter.

The foregoing disposition of the issue makes it unnecessary to consider the claims of unconstitutionality.

Issue No. 2—Income of Shareholder From Subchapter S Corporation

It is agreed by the parties that with some differences which are not material in these cases, the undistributed income of the corporation having in effect a valid Subchapter S election is treated in the same manner as partnership income. § 1372, I.R.C.; § 77-2734(3), R. R. S. 1943; TC-24-4. What we have said on issue No. 1

requires disposition of this issue in the same manner. A transitional regulation should be applied.

Issue No. 3—Accounting by Partner for Sale by Partnership of Capital Asset Prior to January 1, 1968, But Within the Partnership 1967-68 Fiscal Year

What we have already said in connection with our decision on issue No. 1 also determines this question. Under both state and federal income tax law, sections 77-2727 and 77-2728, R. R. S. 1943, and section 703, I.R.C. 1954, only the partners pay income tax and the character of income of the partnership retains the same character when accounted for by the partners. Section 77-27,124, R. R. S. 1943, makes the Act applicable "to items of income, deduction, loss or gain realized in taxable years ending on or after January 1, 1968." It follows that a capital gain or loss realized by a partnership prior to January 1, 1968, is not includable in determining partners income tax liability for 1968. This is implicit in TC-23-5 and TC-23-6 adopted by the Commissioner under the Act.

Issue No. 4—Installment Sale Prior to January 1, 1968—Installment Received After January 1, 1968

The Act, except as otherwise provided therein, adopts generally as a basis for determining state income tax liability on income derived from Nebraska sources, the federal income tax law, rules, and regulations. See especially sections 77-2714, 77-2715, 77-2716, and 77-27,124, R. R. S. 1943. That purpose has been implemented by the regulations adopted by the Commissioner. Among these regulations is the following: "Taxation of Capital Gains and Income Received on or After January 1, 1968, but Pursuant to an Installment Sale Contract Executed Prior to January 1, 1968.—If any property was sold prior to January 1, 1968, under an installment contract which conforms to the provisions of Section 453 of the Internal Revenue Code, the capital

gain portion of, or the income portion of, any contract payment received on or after January 1, 1968, is to be included in the computation of the taxpayer's adjusted federal income tax liability which is subject to the Nebraska tax rate. The federal rules and regulations regarding cost basis, capital gains status, ordinary income status, and holding period determination are controlling for the purposes of the Nebraska income tax." TC-23-7.

The taxpayer, in a sense, realizes a gain on an appreciated asset when he sells it, even though he has contracted to take the proceeds over a period of time. Under the provisions of section 453, I.R.C. 1954, if the requirements of that section are met, he may report the gain in installments. The statute and the regulation give him the option of postponing the recognition of a portion of the gain. In effect, he has the option of treating the gain as completely realized at the time of sale, or he may postpone partially the tax consequences until he has actual realization by receiving the installment. It makes little difference whether we say the gain is realized but recognition is postponed, or say that there is no realization until receipt of the installment. In the absence of some contrary indication in the Nebraska Revenue Act of 1967 it appears to us, as we have already indicated, that the Legislature used the term realized, in the context we are now using it, primarily in the sense of received. The following cases cited by the Commissioner support his position. Snell v. Commissioner of Internal Revenue, 97 F. 2d 891; Katzenberg v. Comptroller of Treasury, 263 Md. 189, 282 A. 2d 465; Marco Associates, Inc. v. Comptroller of the Treasury, 265 Md. 669, 291 A. 2d 489. Appellants cite no contrary cases. Regulation TC-23-7 is valid and effectuates the legislative intent.

Issue No. 5—Basis of Capital Assets Acquired Before January 1, 1968

The appellant contends that a statute which au-

thorizes the taxation of that portion of the gain on the sale of a capital asset represented by appreciated value accruing prior to the effective date of the income tax act, violates Article I, section 3, of the Nebraska Constitution, and Article 14, section 1, of the United States Constitution, and that he is entitled to deduct in computing gain all appreciation in value accruing prior to January 1, 1968.

The Commissioner adopted TC-23-5 which incorporates the federal rules of law and regulations for determining basis.

Both parties cite MacLaughlin v. Alliance Ins. Co., 286 U. S. 244, 52 S. Ct. 538, 76 L. Ed. 1083; and City National Bank of Clinton v. Iowa State Tax Commission, 251 Iowa 603, 102 N. W. 2d 381. We have carefully read these cases and conclude that they support the position of the Commissioner and not that of the appellant. It is true that in both cases the taxing acts themselves allowed a basis of fair market value as of the date of the taxing act. The courts did not, however, say that the taxing of gain accrued prior to the effective date of the Act was unconstitutional. Quite to the contrary, the Supreme Court of the United States in MacLaughlin v. Alliance Ins. Co., *supra,* said: "The tax being upon realized gain, it may constitutionally be imposed upon the entire amount of the gain realized within the taxable period, even though some of it represents enhanced value in an earlier period before the adoption of the taxing act." We have carefully read the cases supporting the appellant's contention as well as the other cases cited by the Commissioner. Most of these are discussed by the Iowa court in City National Bank of Clinton v. Iowa State Tax Commission, *supra.* Further discussion is not merited. Regulation TC-23-5 effectuates the purpose of the Act and is valid.

Disposition

In Altsuler, No. 38812, issues Nos. 1 and 4 are involved. The position of the appellants is sustained on

issue No. 1 and that of the Commissioner on issue No. 4.

In Cohen, No. 38813, issues Nos. 1, 2, and 3 are involved. The position of appellants is sustained on all issues.

In Brodkey, No. 38816, issue No. 5 is involved. The position of the Commissioner is sustained.

In O'Hanlon, No. 38817, issue No. 1 is involved. The position of the appellant is sustained.

The order of the lower court is sustained in No. 38816. The other cases are reversed and the causes remanded.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

KRUEGER-IHLE ELECTRIC COMPANY, A CORPORATION, APPELLANT, V. PETRING MOTOR COMPANY, A CORPORATION, ET AL., APPELLEES.
206 N. W. 2d 564

Filed April 17, 1973. No. 38735.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Appeal dismissed.

Moyer & Moyer, for appellant.

Daniel D. Jewell and Deutsch & Hagen, for appellees.

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

PER CURIAM.

Oral argument on motion of the appellee Petring Motor Company to dismiss the appellant's appeal for failure to timely file briefs as required by rules of this court was heard on March 5, 1973.

The record discloses original brief day was December 14, 1972; the bill of exceptions was filed in the District Court on November 3, 1972; and a supplement thereto was filed on December 27, 1972.

On December 4, 1972, the appellant had filed a motion for a 15-day extension of brief day. This motion was not acted on because on December 14, 1972, it filed an application for a 30-day extension. This was allowed. On January 15, 1973, the appellant moved for a second 30-day extension. This was allowed. February 13, 1973, it moved for a third 30-day extension. On February 14, 1973, the motion to dismiss was filed. The appellant's brief was filed March 1, 1973.

As grounds for the last-requested extension the appellant avers that a portion of the bill of exceptions pertaining to a motion heard by the trial court on August 4, 1972, was omitted therefrom. The praecipe for the bill of exceptions was as follows: "Please include therein a complete bill of exceptions, all evidence offered at the hearing on the motion for summary judgment on June 16, 1972 and on the 23rd day of January, 1970."

The affidavit in support of the motion indicates that the sole omitted portion was an exhibit offered, but not received by the trial court, at a hearing on August 4, 1972. We interpret the praecipe as not including a request for that inclusion. In any event, the omission was known, or could have been known by the exercise of reasonable diligence, before the second extension was requested. It further appears that the brief could have been prepared timely and the bill of exceptions later supplemented. The record does not show that good cause existed for the requested extension.

APPEAL DISMISSED.

BOSLAUGH and MCCOWN, JJ., dissenting.

The appellant's brief has been on file since March 1, 1973. We dissent.

SMITH, J., concurring with majority.

I concur on authority of Asmus v. Nebraska Public Power Dist., 186 Neb. 760, 186 N. W. 2d 480 (1971). In extending the time for preparation of a bill of exceptions, we there said: "In many cases . . . on motion

almost as a matter of course we have been extending due dates for filing of briefs . . . . (E)ffective September 1, 1971, we will strictly enforce our rules relating to such extensions except under unusual circumstances. For example, the press of any other business upon counsel . . . will be no ground for extension."

STATE OF NEBRASKA, APPELLEE, V. WILLIAM RUSS, APPELLANT.
206 N. W. 2d 561

Filed April 20, 1973. No. 38623.

Criminal Law: Intent: Words and Phrases. 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.

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

Welsh & Savin, 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 appeals from a conviction for second degree murder. The assignments of error relate to the sufficiency of the evidence; a motion for a psychiatric examination; a motion for a mistrial; and whether the sentence was excessive.

The record shows that the defendant shot and killed Benny Thomas on September 29, 1971. The killing took place in front of the residence of Cheril Thomas in Omaha, Nebraska.

Cheril Thomas was divorced from Edward Thomas sometime around 1965. She lived with the defendant

from 1965 to 1968 and from December 1969 to July 1971. The defendant is the father of her child, Tracey Thomas, born January 29, 1966.

Cheril Thomas became acquainted with Benny Thomas in March 1971, when he was one of her students at O.I.C. She had been on one date with him and he had visited her home twice. He was a student at the University of Omaha and had delivered a textbook to Cheril just before he was killed.

The record contains evidence that on a number of occasions the defendant threatened others with violence and had engaged in violent conduct. On April 3, 1969, the defendant threatened to kill Cheril if she left her house. Later when she left with a male friend, the defendant stabbed both Cheril and her friend. In July 1971, the defendant threatened to kill Cheril. In September 1971, the defendant told Benny Thomas that Thomas had better keep Cheril out of his car or else something would happen to Thomas. On several occasions the defendant warned Cheril to avoid other men or they could be hurt. On the day of the murder the defendant had threatened to kill Cheril.

On September 29, 1971, after Cheril returned from work, she went to a nursery near her home to pick up Tracey. The defendant came into the nursery, talked with Cheril, and then left. The proprietor of the nursery sent two of her employees to walk home with Cheril and Tracey. When they were about halfway to Cheril's house, the defendant stopped Cheril and tried to talk to her but Cheril refused to talk to the defendant.

When Cheril had reached her house, Benny Thomas drove up and stopped in front of the house. Cheril walked over to the car to talk to Thomas and received a textbook he was loaning to her. The defendant then drove up behind the automobile Thomas was driving, got out of his car, and ran over and shot Thomas in the head as he was starting to drive away. The defendant then turned and shot Cheril. The employees

from the nursery who had walked home with Cheril were eyewitnesses to the murder.

The defendant testified that he shot Thomas in self-defense. The jury did not accept this testimony and was not required to believe it.

The defendant complains that the evidence did not show malice, an essential element of second degree murder. § 28-402, R. R. S. 1943. 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. State v. Schumacher, 189 Neb. 138, 201 N. W. 2d 249. The evidence was clearly sufficient to sustain a verdict of second degree murder.

Five days before the trial commenced, the defendant filed a motion for an order requiring the defendant to be examined by a psychiatrist. There was no showing filed in support of the motion and there was no formal hearing or ruling on the motion before the trial commenced.

On the second day of the trial the court inquired of the defendant as to whether he was willing to be examined. The defendent stated he had previously refused to be examined; and he was now willing to submit to an examination if his counsel felt it was necessary but that he did not feel it was necessary and had told his counsel that day that they would proceed with the trial without an examination.

There is nothing in the record to indicate the court should have required that the defendant be examined. Under these circumstances there was no error of which the defendant could complain.

After the jury had returned a verdict but before the jury had been polled, the defendant advised the court that he recognized one of the jurors to be a person he had known 24 or 25 years before. When the jury was polled, the court asked the juror in question if she knew the defendant and she replied in the negative. The defendant later moved for a mistrial which was denied.

There was no basis for any claim of error in this ruling.

The defendant was sentenced to imprisonment for a period of 24 to 29 years. He contends the sentence is excessive and in violation of section 83-1,105, R. S. Supp., 1972.

The maximum sentence for second degree murder is life imprisonment. § 28-402, R. R. S. 1943. Section 83-1,105, R. S. Supp., 1972, is not applicable to such an offense. State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793.

The record does not indicate that the sentence imposed was excessive. The defendant had made threats of violence on numerous occasions and had carried out his threats several times. The sentence was well within the discretion of the District Court.

The judgment is affirmed.

AFFIRMED.

FRITZ E. STRUEMPLER, JR., ET AL., APPELLANTS, V. JOSEPH E. PETERSON ET AL., APPELLEES.
206 N. W. 2d 629

Filed April 20, 1973. No. 38643.

1. **Homestead: Contracts: Statutes: Acknowledgments.** An option to purchase land constituting a homestead is void when not executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943.
2. **Homestead.** Once acquired, the homestead continues as long as the residence is maintained on the premises.
3. ———. Once established, a homestead is not abandoned until there is both an intent to abandon and actual abandonment.
4. **Homestead: Contracts: Statutes: Acqnowledgments: Specific Performance.** Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property.

5. **Homestead: Contracts: Specific Performance.** Where such a contract is not severable as between homestead and nonhomestead property, this court will not ordinarily attempt to make a new contract for the parties; nor impose new conditions; nor will it require specific performance of a contract which does not contain the substance of the agreement made.

Appeal from the District Court for Custer County: WILLIAM F. MANASIL, Judge. Affirmed.

Tedd C. Huston and C. S. Marchek, for appellants.

Schaper & Schaper, for appellees.

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

MCCOWN, J.

This is an action for specific performance of an option to purchase real estate. The District Court denied specific performance and dismissed the action. We affirm the judgment.

On June 2, 1971, the defendants and the plaintiffs executed a written agreement in which the defendants granted to the plaintiffs an option to purchase the East Half of Section 7, Township 15 North, Range 25 West of the 6th P.M., Custer County, Nebraska, for $50,000. The option was irrevocable for 6 months. Although the option was signed by all the parties, it was not acknowledged. The house and other improvements were located on the southeast quarter of the section. The defendants have lived on this land continuously since their marriage in 1934 and have owned the land since 1944.

On August 4, 1971, a written acceptance of the option executed by the plaintiffs was delivered to the defendants. In July of 1971, the defendants purchased some lots in Arnold, Nebraska, with the announced intention of building a house there and moving into town. In September or early October the defendants commenced construction of a house on the property in Arnold. Con-

struction continued until January or February of 1972, when work on the house was stopped at defendants' request. At that time the house was approximately 75 percent completed. Meanwhile, the defendants continued to reside in their house on the farm and were still living there at the time of trial.

In July 1971, the defendant Peterson offered plaintiffs $1,000 not to go through with the transaction. The defendants did not sign or execute any documents other than the original option agreement. On December 30, 1971, the defendants notified the plaintiffs that defendants would not perform the agreement, returned the $1 downpayment on the option, and this action followed.

Section 40-104, R. R. S. 1943, provides in part: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife, except as otherwise hereinafter provided." The plaintiffs contend that this section does not apply because the farm home of the defendants was not their homestead but had been replaced by the partially constructed house in the Village of Arnold. The plaintiffs also contend that the section does not apply because an option contract is neither a conveyance nor an encumbrance.

Plaintiffs' argument rests on the theory that a homestead interest in the lots in Arnold vested at the time defendants acquired title with the intention of later occupying the premises as a residence. That contention ignores the critical fact that the defendants never abandoned their established homestead on the farm and that they can have only one homestead at any given time. There is no question that the defendants' homestead had been established on the farm since 1944. Once acquired, the homestead character continues as long as the residence is maintained on the premises. Palmer v. Sawyer, 74 Neb. 108, 103 N. W. 1088. Once established, a homestead is not abandoned until there is both

an intent to abandon and actual abandonment. See Quigley v. McEvony, 41 Neb. 73, 59 N. W. 767.

Plaintiffs' contention that section 40-104, R. R. S. 1943, does not apply because an option is neither a conveyance nor an encumbrance is ingenious but erroneous. While it may be said that an option to purchase does not in itself create an interest or estate in real estate, there is no question but that upon exercise it becomes a contract for the purchase and sale of the property. This court has consistently held that a contract to sell land constituting a homestead is void when not executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. See Trowbridge v. Bisson, 153 Neb. 389, 44 N. W. 2d 810. The option contract here, insofar as it involved the homestead of the defendants, was clearly within the purview of the statute and was therefore void as to the homestead property.

The plaintiffs impliedly contend that even though the option as to the quarter section constituting the homestead may be unenforceable, the contract should be enforceable as against the remaining quarter section not constituting the homestead. Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property. See Watkins v. Youll, 70 Neb. 81, 96 N. W. 1042.

That is not the case here. In this option the contract describes the land only as one full half section. It does not indicate any basis for allocation of the consideration to anything except the entire tract. To require specific performance as to the nonhomestead property here with an abatement of the purchase price for the value of the homestead land would require us to

make a contract which the parties did not make and which the evidence does not disclose that they even contemplated. In such a situation, this court will not ordinarily attempt to make a new contract for the parties which they did not make themselves; nor impose new conditions not contemplated or discussed by the parties; nor will it require specific performance of a contract which does not contain the substance of the agreement made. Anderson v. Schertz, 94 Neb. 390, 143 N. W. 238.

Plaintiffs could, of course, require conveyance of the nonhomestead land if they were willing to accept it in full performance of the agreement and pay the full contract consideration, without abatement for the absence of the homestead. See Davis v. Merson, 103 Neb. 397, 172 N. W. 50. Such a remedy is obviously inequitable here. No issues as to damages at law have been considered by the District Court nor by this court.

The option contract here included the homestead of the defendants. It was not acknowledged as required by section 40-104, R. R. S. 1943. The contract provisions apply equally to homestead and nonhomestead property, and are not severable. The District Court properly denied the equitable remedy of specific performance.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KATHY SHIMP, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. DANIEL CLARK, APPELLANT.
206 N. W. 2d 627

Filed April 20, 1973. Nos. 38681, 38682.

1. **Controlled Substances: Criminal Law: Evidence.** Proof of physi-

cal or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession.

2. **Trial: Criminal Law.** Cases may be consolidated for trial if the offenses charged are based on the same act or transaction. § 29-2002, R. R. S. 1943.
3. **Trial: Appeal and Error: Criminal Law.** A ruling on a motion for consolidation will not be disturbed in the absence of an abuse of discretion.
4. **Controlled Substances: Criminal Law: Sentences: Infants.** A female 15 years of age or older convicted of unlawful possession of a controlled substance, except marijuana, may be sentenced to the Division of Corrections for a term of 2 to 4 months. § 28-4,125, R. S. Supp., 1972; § 83-482, R. R. S. 1943.

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

Charles A. Fisher, for appellants.

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.

BOSLAUGH, J.

The defendants appeal from convictions for unlawful possession of a controlled substance. The cases were consolidated for trial in the District Court. Since the appeals involve similar issues, they will be disposed of in this court by one opinion.

The assignments of error relate to the sufficiency of the evidence; the consolidation for trial in the District Court; the instructions to the jury; and the sentence imposed on the defendant Shimp.

The record shows that the defendants were living together in Chadron, Nebraska. A witness for the State testified he was at the residence of the defendants on February 20, 1972, and purchased two tablets containing LSD from Spike Myers. Both defendants were present when the transaction occurred. After making the sale,

Myers handed two bags of the tablets to Clark and asked Clark to keep them there. Clark then placed the bags in the freezer compartment of the refrigerator. Although there was no direct evidence that Shimp actually handled the tablets, the circumstantial evidence was sufficient to permit the jury to find her guilty of possession.

Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187. The language in the informations that charged the defendants had "physical control" was surplusage since the statute prohibits possession. § 28-4,125, R. S. Supp., 1972. The evidence in this case was sufficient to sustain a finding of physical possession by Clark and constructive possession by Shimp.

The trial court instructed the jury that knowledge that the substance in question was LSD and consciousness of possession were essential elements which the State was required to prove. The instruction given was sufficient, and refusal to give the requested instruction was not error. The instruction given on circumstantial evidence conformed to NJI No. 14.50 and was proper.

A trial court may consolidate cases for trial if the offenses charged are based on the same act or transaction. § 29-2002, R. R. S. 1943. The proof in these cases related to the transaction at the residence of the defendants on February 20, 1972, when both were present. Substantially all the evidence was admissible against both defendants. There was no showing of any substantial prejudice to either defendant as a result of the consolidation. See State v. Clark, 189 Neb. 109, 201 N. W. 2d 205. In the absence of an abuse of discretion, a ruling on a motion for consolidation will not be disturbed. State v. Bazer, 189 Neb. 711, 204 N. W. 2d 799.

The trial court sentenced Shimp to the Division of Corrections of the Department of Public Institutions of the State of Nebraska for a period of not less than 2 nor more than 4 months. The sentence was authorized by section 83-482, R. R. S. 1943.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOE SHAY, APPELLANT.
206 N. W. 2d 330

Filed April 20, 1973. No. 38747.

Criminal Law: Sentences. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, the sentence imposed within those limits will not be disturbed unless there appears to be an abuse of discretion.

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

Joseph D. Martin, 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.

The defendant has been convicted of breaking and entering. His only assignment of error is that his sentence of 15 months to 2 years is excessive. We affirm the judgment of the District Court.

Defendant was charged with two counts of burglary. Due to a plea bargain, one was dismissed. He had previously been an inmate of the Boy's Training School in 1968 and was subsequently, in 1971, convicted of breaking and entering for which he received a 1 to 3-year sentence. He served 9 months of this sentence

and was still on parole when the present offense was committed.

Although defendant was only 19 years of age, it would appear, in view of his previous record, that he was dealt with in a lenient manner. The court further ordered that he receive credit on the sentence imposed for time spent in custody prior to sentencing. The appeal is frivolous.

"Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, the sentence imposed within those limits will not be disturbed unless there appears to be an abuse of discretion." State v. Kelly, *ante* p. 41, 205 N. W. 2d 646.

The judgment of the District Court is affirmed.

AFFIRMED.

LYLE NELSON, APPELLANT, V. CHARLES L. WOLFF, JR., WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.

206 N. W. 2d 563

Filed April 20, 1973. No. 38775.

Criminal Law: Sentences. When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise.

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 Betsy G. Berger, for appellee.

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

SPENCER, J.

Appellant, Lyle Nelson, prosecutes this appeal from the denial of a petition for a writ of habeas corpus. He predicates his claim to relief on his assumption that his State-imposed sentence ran concurrently with a prior-imposed federal sentence. We affirm.

Petitioner was convicted in the United States District Court for the District of South Dakota on October 7, 1966, for the offenses of interstate transportation of stolen cattle and conspiracy. He was sentenced to two 3-year terms which were to run concurrently. While these convictions were being appealed he was free on bond.

On October 31, 1966, the petitioner was sentenced to a term of 5 years in the District Court for Sheridan County, Nebraska, on a charge of cattle stealing. He was admitted to bail pending appeal. The judgment was affirmed. State v. Nelson (1967), 182 Neb. 31, 152 N. W. 2d 10. Petitioner did not enter the Nebraska Penal and Correctional Complex to serve his 5-year sentence until October 4, 1971.

From April 19, 1967, to approximately July 24, 1969, petitioner was serving a South Dakota sentence for breaking and entering and burglary. During August 1969, the petitioner was returned to the custody of the federal authorities to serve the federal sentences heretofore referred to. He was surrendered to the Nebraska authorities and began serving his Nebraska sentence on October 4, 1971.

Petitioner argues that because the Nebraska trial judge knew he had a federal sentence to serve and did not specify that the sentence was to be consecutive to the federal sentence, it must be construed to be concurrent with it. There is no merit to this contention unless we wish to ignore or overrule rules which have been well-established in this jurisdiction.

In State ex rel. Allen v. Ryder (1930), 119 Neb. 704, 230 N. W. 586, this court held: "When sentence is pronounced upon one already serving a sentence from

another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise." See, also, Brott v. Fenton (1931), 120 Neb. 792, 235 N. W. 449.

We see no reason to overrule these cases herein, and affirm the judgment of the trial court.

AFFIRMED.

LOREN A. KOEHLER, APPELLEE, V. CARRIE M. BOYLE ET AL., APPELLANTS.

206 N. W. 2d 646

Filed April 27, 1973. No. 38634.

Contracts: Evidence: Damages. In a quantum meruit action the price agreed upon by the parties is competent evidence of the reasonable value, and when this is the only evidence on the subject it presents the proper measure of damages.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Richard C. Mueting, for appellants.

Vincent J. Kirby and Eugene C. McFadden, for appellee.

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

WHITE, C. J.

This is an appeal from a judgment of the District Court foreclosing a mechanic's lien based upon an oral contract for repair services and work performed, entered into by the defendant Dorothy I. Duke as the agent of the owner-defendant Carrie M. Boyle. The defendants contend generally that the plaintiff has not met the burden of proof and that the evidence is insufficient to sustain the judgment on the basis of a quantum meruit recovery

for the services and repairs rendered. We affirm the judgment of the District Court.

The defendants assert 13 overlapping assignments of error. Boiled down, the defendants' contention seems to be that there was a fatal variance between the cause of action pled and the proof adduced, because the plaintiff pled an action for quantum meruit recovery for the services and the materials rendered and failed to prove the reasonable value of the materials and labor furnished. They further contend that the contract was limited to the sum of $300 and that the court erred in entering a judgment foreclosing the lien in the sum of $713.50. The petition in this case alleges that the defendants employed the plaintiff "under an oral contract of employment" to do certain repair work and clean-up work on the property. It further alleges that the defendants agreed to pay the plaintiff the reasonable value of his services and material and that said reasonable value of his services was in the sum of $713.50.

The evidence shows that the house upon which the services and labor were to be performed had been severely abused by the previous tenants and consequently was unsaleable. The plaintiff was employed by the defendant Dorothy I. Duke to fix-up and clean-up this property belonging to the defendant Carrie M. Boyle at the rate of $5 per hour. The evidence shows that the plaintiff was employed to do the fix-up and clean-up work for the defendants at the rate of $5 per hour and that such agreement is uncontradicted, as is the testimony of the plaintiff with respect to the time required for the completion of the work. The defendant Dorothy I. Duke herself testified as follows: "Q. Did you want only Mr. Koehler to work on your house? A. Yes. I didn't care, just so that he had gotten it done. He said he would do it all, it didn't bother me how he got it done at $5.00 an hour, I said 'You are to see that it's all done at — for $5.00 an hour.'" After hearing and observing the witnesses, the trial court found that the "evidence

is abundant that the agreement was $5.00 an hour for what work was done, * * *." The defendants nevertheless contend that there was no independent evidence establishing that $5 an hour was a reasonable charge for the plaintiff's work. In effect, the defendants ask this court to reverse the judgment in this case and order a new trial to resolve the issue of whether the $5 charge in the oral contract was a reasonable cost to charge for the services actually rendered.

The contention of the defendants is answered by the case of Hibbard v. Wilson, 51 Neb. 436, 71 N. W. 65, which held that the price agreed upon by the parties is competent evidence of the reasonable value of services rendered, and that when this is the only evidence on the subject it presents the proper measure of damages. We have reviewed the evidence of the plaintiff in this case and we observe that although no precise words were used with relation to the reasonable value of the plaintiff's services, such an inference is implicit from the whole of his testimony. We observe that the testimony of the plaintiff that he performed all the fix-up and clean-up work agreed to is contradicted; however his testimony with respect to the time required for the completion of the work is uncontradicted. We come to the conclusion that there is ample evidence to support the finding of the trial court and that there was an oral agreement at the rate of $5 an hour for what work was done; that the work was done; that it was done in a workmanlike manner; and that the reasonable value of the services under the contract was in the sum of $713.50. There is no merit to this contention of the defendants.

The defendants assert that there was a limitation of $300 on the amount to be charged. As the defendants themselves concede the evidence was in sharp conflict on this point. The resolution of this issue amounted to a swearing contest between the plaintiff and the defendants, and the trial court saw and heard the wit-

nesses and the evidence supports its finding. We find no error therein. We observe further circumstantially that the nature and extent of the work performed and contracted for, under the defendant Dorothy I. Duke's own testimony, supports the conclusion that an arbitrary limitation of $300 for the amount of the contract would have been improbable and unreasonable.

The defendants' last contention is that a new trial should be ordered on the grounds of newly discovered evidence. They say that after the trial the defendants discovered that the plaintiff had done repair work for one Virgil D. Hiatt and that such work was not done in a workmanlike manner and that the work was overcharged for. Such evidence with relation to a completely independent contract is obviously incompetent and irrelevant. There is no merit to this contention.

Summing up, the evidence in this case shows that the plaintiff was employed to do fix-up and clean-up work for the defendants at the rate of $5 per hour; and that the testimony of the plaintiff with respect to the time required for the completion of the work is uncontradicted. It further shows that the District Court, after hearing the evidence, determined that the work had been done in a workmanlike manner and that the plaintiff was entitled to recover the full amount of his bill.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE (SPIKE) MYERS, APPELLANT.

206 N. W. 2d 851

Filed April 27, 1973. No. 38683.

1. **Evidence: Trial.** Tape recordings of relevant and material conversations are admissible as evidence of such conversations and

in corroboration of oral testimony of the conversations, provided proper foundation is laid.

2. ———: ———. A rerecording of an original tape recording is admissible where proper foundation is laid and such rerecording from the original was necessary because of the poor quality of the original. The admission does not constitute a violation of the best evidence rule.
3. **Criminal Law: Evidence: Trial: Discovery: Undercover Agents.** A defendant may not complain of the use of lawful tape recordings of conversations between himself and an undercover agent made when he was not yet accused or under indictment when he has taken no steps to discover such evidence under section 29-1912, R. S. Supp., 1972, and has himself on cross-examination elicited from the witness oral testimony of the conversation.
4. **Criminal Law: Undercover Agents.** An undercover agent who associates himself with the police before association with the wrongdoer or before the actual perpetration of the offense is not an accomplice.
5. **Criminal Law: Witnesses: Trial: Instructions.** Nebraska Jury Instruction 14.81 pertaining to the credibility of witnesses is applicable to the testimony of a defendant and it is not usually necessary to give at defendant's request a special instruction highlighting his testimony.
6. **Criminal Law: Evidence: Admissions.** Admissions generally pertain to a past offense or transaction and do not include statements which are part of the res gestae.
7. **Criminal Law: Evidence: Controlled Substances: Words and Phrases.** Where the only evidence in a prosecution involving possession of a controlled substance tends to establish actual physical possession, no special definition of the term possession is required to be given to the jury.

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

Charles A. Fisher, 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 was found guilty by a jury of two

separate charges of distributing and delivering a controlled substance, namely, lysergic acid diethylamide, and was sentenced to a term of 16 months on each count, the sentences to run concurrently.

The errors assigned on appeal are: (1) Denial of motion for a continuance during trial; (2) admission of a tape recording of a conversation between the defendant and an undercover agent who was the State's principal witness; (3) the giving or the refusing to give certain jury instructions; and (4) insufficiency of the evidence to sustain the convictions.

The first two assignments are related and we will discuss them together.

One of the transactions which gave rise to the prosecution occurred while the witness, an undercover agent, and the defendant were in an automobile. The witness had at that time on his person a tape recorder and on it had made a recording of the conversation which occurred when the sale and delivery took place. This recording was not of good quality and the volume was poor, and later a rerecording was made from the original. After the jury was impaneled, it was released for the day and a hearing on the admissibility of the evidence of the conversation in the automobile was held before the trial judge. At the end of the hearing the court ruled that the tape recordings were admissible but that the oral testimony of the witness as to the conversation would not be admitted. The witness would, however, be permitted to testify as to the physical acts of the delivery of the substance and the payment of the money. The defendant moved for a continuance on the ground of surprise, claiming he had not previously known of the existence of the tapes.

At the end of the admissibility hearing after the court had announced its ruling and again during trial before the tapes were to be played to the jury, the defendant objected to the playing of the rerecording on the grounds that it was secondary evidence and the admission would

violate the best evidence rule. He also objected that the foundation for the admissibility of the tapes was insufficient.

At trial foundation for introduction of the tapes was laid in the following manner. The witness related the time, place, and with whom the conversation occurred; that he had been furnished the recorder by the Nebraska State Patrol; that he turned on the recorder before the conversation began and that it was on during the entire conversation; that later he listened to the tape and to the rerecording of it and that both accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were his and that of the defendant. Before the tapes were played the defendant's counsel was permitted to cross-examine further as to foundation and in so doing he had the witness himself testify as to the entire conversation with the defendant. Later both tapes were played to the jury and the witness then testified to the delivery and the sale, i.e., the physical transactions which the tape did not record, but which it corroborated.

The foundation was clearly sufficient. See cases cited in 58 A. L. R. 2d 1032. Such recordings are also admissible as corroboration of the oral testimony. 58 A. L. R. 2d 1045. The objection that the rerecording was not admissible because it is not the best evidence is not well taken. State v. Lyskoski, 47 Wash. 2d 102, 287 P. 2d 114; Monroe v. United States, 234 F. 2d 49, cert. den. 352 U. S. 873, 77 S. Ct. 94, 1 L. Ed. 2d 76; 58 A. L. R. 2d 1044; United States v. Hall, 342 F. 2d 849 (4th Cir.). The facts in this case do not raise any question of deprivation of rights under either the Fourth or Fifth Amendments to the Constitution of the United States. United States v. King, 472 F. 2d 1.

Neither did the court err in denying the motion for a continuance. The defendant had taken no steps to discover the existence of the tapes and this he could have

done under the provisions of section 29-1912, R. S. Supp., 1972. Furthermore, the defendant himself had the witness testify to the same conversations as were recorded on the tapes, even though the trial court in the exercise of great caution had ruled only one form of the conversation would be admissible. Both forms corresponded in substance. There was no prejudice in any event.

The defendant requested that the jury be given a cautionary instruction as to the weight and credibility of the testimony of an accomplice. The requested instruction was directed to the testimony of the undercover agent. An undercover agent who associates himself with the police before association with the wrongdoer or the actual perpetration of the offense is not an accomplice. 7 Wigmore on Evidence (3d Ed.), § 2060, pp. 340, 341; State v. Arriola, 99 Ariz. 332, 409 P. 2d 37.

The defendant requested and the court refused the following instruction: "Dale Myers, the person on trial in this case, has taken the witness stand and given testimony in his own behalf and in this connection you are instructed that the law of this State is that a person charged with a criminal offense has a right to testify in his own behalf and the jury have no right to disregard such testimony simply on the grounds that he is the defendant and stands charged with the commission of a crime and the jury should consider the evidence given by the defendant together with all of the evidence in this case in determining whether or not he is guilty or innocent of the crime charged." The court gave NJI 14.81, the general instruction on the credibility of witnesses and, of course, the instruction on the presumption of innocence. The testimony of the defendant is not judged by a standard different from that of other witnesses. In State v. Swiney, 179 Neb. 230, 137 N. W. 2d 808, we approved an instruction which said: ". . . the testimony of a defendant is to be considered as that of any other witness, taking into con-

sideration his interest in the result of the trial, his manner, the probability of the testimony, and giving it such weight as it is entitled to receive under the circumstances." This makes it clear that an instruction highlighting the testimony of the defendant is not required. The refusal of the instruction was not prejudicial. The requested instruction is not one approved by rule of this court. See Neb. Pattern Jury Instr., p. IX.

The defendant requested, and the court refused to give, a special cautionary instruction relative to consideration by the jury of testimony of admissions by the defendant. Such an instruction, even though it may be sometimes appropriate, had no application in this case. The defendant made no admissions. There was no testimony that he did. Statements which are part of the transaction which constitute the offense charged are not admissions in the sense in which the term is used in such a cautionary instruction. An admission is an acknowledgment of some fact or circumstance, short of an acknowledgment of guilt, which tends towards proof of the ultimate fact of guilt. Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627; 22A C. J. S., Criminal Law, § 730, p. 1024. It generally refers to a past event or transaction and does not include statements which are part of the res gestae. State v. Clark, 102 Mont. 432, 58 P. 2d 276. Evidently the defendant was under the impression that the evidence contained in the tapes constituted evidence of admissions.

The defendant complains of the following instruction: "Knowledge and consciousness of possession are essential elements of proof of possession of controlled substances," because it did not define the term possession. The only evidence of possession in this case tended to prove actual physical possession by the defendant prior to delivery. Under the state of the evidence here no further special definition was required.

The contention of the defendant that the evidence is

insufficient to support the jury verdict is without merit. Samples of the substances which the witness testified he obtained from the defendant in the two transactions were stipulated by the parties to be lysergic acid diethylamide. The remainder of the evidence supporting the conviction was the testimony of the undercover agent as to both transactions and the tape recordings as to one. The testimony was contradicted by other witnesses. The jury believed the undercover agent. The defendant also presented alibi witnesses. These too were also apparently disbelieved by the jury. It is not the province of this court to resolve conflicts in the evidence in this case.

Other assignments made by the defendant are wholly without merit.

AFFIRMED.

CITY OF KIMBALL, A MUNICIPAL CORPORATION, APPELLEE, V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, APPELLANT.

206 N. W. 2d 632

Filed April 27, 1973. No. 38704.

1. **Insurance: Words and Phrases.** The word "accident" as used in liability insurance is a more comprehensive term than "negligence" and in its common signification the word means an unexpected happening without intention.
2. ———: ———. The word "accident" has many meanings, and when used in a contract of liability insurance, unless otherwise stipulated, it should be given the construction most favorable to the insured.
3. **Insurance: Words and Phrases: Damages.** Elements of unforeseen or unexpected damage or consequence as distinguished from normal or probable consequence from negligent act is important in describing causation by accident within a policy.
4. **Insurance: Time.** In the absence of any express policy provision in such respect, the inability to fix the exact time when and where an accident occurred does not preclude recovery under the policy.

5. **Insurance: Time: Words and Phrases.** The accident covered by the policy may be a process. Where the accident is a process how long then is not significant. It is the nature of the process which is important.
6. **Insurance: Damages: Words and Phrases.** In general, the element of an unforeseen or unexpected damage as distinguished from a normal and probable consequence from a negligent act is dominant in describing a causation by accident.

Appeal from the District Court for Kimball County: JOHN H. KUNS, Judge. Affirmed.

O'Brien & Everson and Darrel J. Huenergardt, for appellants.

John D. Knapp, for appellee.

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

SPENCER, J.

St. Paul Fire and Marine Insurance Company, appellant, appeals from a judgment determining that it had wrongfully denied coverage under a liability policy issued to the city of Kimball. The city paid a judgment rendered against it in favor of Walter Strauch for $5,500. The city brought this action against the company and recovered a judgment for the amount paid, with interest and costs, including an attorney's fee. Appellant perfected this appeal. We affirm.

In 1958, the city of Kimball contracted to have a sewage lagoon system constructed on the Southeast Quarter of the Northwest Quarter of Section 28, Township 15 North, Range 55 West of the 6th P. M., Kimball County, Nebraska. This is the adjoining quarter to land owned by Walter Strauch. The system was completed on April 10, 1959.

In 1963, Strauch made a claim against the city alleging damages arising from seepage. Specifically, he alleged that for three growing seasons prior to 1964 the city continued to use its lagoon, and the discharge therefrom polluted and contaminated the underground

water from which he obtained his irrigation water.

During this time, the city had an insurance policy with appellant which provided in part: " 'To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.' " In addition, the policy provided that the insurance company would defend the city against actions alleging covered injury, sickness, disease, or destruction.

The city made demand on the appellant to assume coverage of the Strauch claim, as well as to defend the action itself. The appellant denied coverage and refused to defend the action.

In the Strauch action against the city the court specifically found: "* * * that the Defendant was negligent in not discovering and then filling the seismograph holes lying beneath the floor of the Defendant's sewage lagoon cells at the time the sewage lagoon was constructed by the Defendant thereby allowing sewage to flow and seep through the seismograph holes into the underground waters from which Plaintiff obtains his irrigation water and thereby polluting and contaminating the Plaintiff's irrigation well."

The parties in this action stipulated that the city's agents and employees inspected the premises upon which said sewage lagoon was constructed prior to the construction thereof, but failed to discover the existence thereon of the seismograph holes referred to in the judgment of the District Court for Kimball County, Nebraska. The question presented is whether this contamination was an accident within the coverage of the policy.

The word "accident" as used in liability insurance is a more comprehensive term than "negligence" and in its common signification the word means an unexpected happening without intention. 1 Long, The Law of Liability Insurance, § 1.15, p. 1-33.

The word "accident" has many meanings, and when used in a contract of liability insurance, unless otherwise stipulated, it should be given the construction most favorable to the insured. Updike Investment Co. v. Employers Liability Assurance Corp. (1936), 131 Neb. 745, 270 N. W. 107. There is in the policy in question no attempt to define the term "accident." Consequently, the meaning of the word most favorable to the insured should be accepted.

The following language from Bennett v. Travelers Protective Assn. (1932), 123 Neb. 31, 241 N. W. 781, is very pertinent herein: "In the case of Lewis v. Ocean Accident & Guarantee Corporation, 224 N. Y. 18, 7 A. L. R. 1129, we find a very interesting opinion by Judge Cardozo. In this case the insured had a pimple on his lip, which, when pricked, carried a germ known as staphylococcus aureus into the underlying tissues of his face, and, in spite of remedies applied by the physician, it spread toward the eye, and 12 days later his death ensued. The question arose whether the infection was the result of an accident, making the insurance company liable. Judge Cardozo says: 'Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. To the scientist who traces the origin of disease there may seem to be no accident in all this. * * * But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. * * * Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test — the one that is applied in the common speech of men — is also the test to be applied by courts.' "

In Cutrell v. John Hancock Mutual Life Ins. Co.

(1945), 145 Neb. 550, 17 N. W. 2d 465, we held: "An accident within the meaning of contracts of insurance against accidents includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby."

While the Updike case, 131 Neb. 745, 270 N. W. 107, involved an accident within the terms of a standard workmen's compensation and employer's liability policy, the facts indicate the range of interpretation herein. The plaintiff alleged that she was required to work in a place which subjected her to cold drafts of air that impaired her health and caused the injuries of which she complained. The insurance carrier denied liability on the theory that the claim made by the claimant did not arise out of an accident. Updike then brought an action under the provisions of the Uniform Declaratory Judgments Act for construction of the policy. This court said: "We think the decision in the instant case must be controlled to a great extent by well-settled principles of insurance law. One of these is that, where the language employed in a policy of insurance is susceptible of more than one construction, that most favorable to the insured will be adopted. * * * 'As used in an indemnity policy such as this, we are of the opinion that the word "accident" means an undesigned and unforeseen occurrence of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured.' Since this is the ordinary meaning of the word and is more favorable to the insured, under the principles above quoted such definition must be accepted as the meaning of the term, as used in paragraph seven of the policy in question."

In Railway Officials & Employees Accident Assn. v. Drummond (1898), 56 Neb. 235, 76 N. W. 562, this court adopted the following language from American Accident Co. v. Carson, 99 Ky. 441, 59 Am. S. R. 473: " 'While our preconceived notions of the term "accident" would hardly lead us to speak of the intentional killing of a

person as an "accidental" killing, yet no doubt can now remain, in view of the precedents established by all the courts, that the word "intentional" refers alone to the person inflicting the injury, and if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means within the meaning of such policies.' "

The case of Taylor v. Imperial Casualty & Indemnity Co. (1966), 82 S. D. 298, 144 N. W. 2d 856, involved the seepage of gasoline from a gasoline storage tank. That action was against the liability insurers for damages sustained in their refusal to defend an action for injunctive relief and damages. Plaintiff sought damages for amounts expended in protecting adjoining property from seepage on the grounds that the property injury was caused by accident within the terms of the policy. The South Dakota Supreme Court said: "We affirm the trial court's judgment of coverage based upon the findings that the leaks in the underground tank and the escape and seepage of gasoline were the result of negligence and the unintended consequences were caused by accident. Injuries are caused by accident according to the quality of the causes."

A case of similar import is The Travelers v. Humming Bird Coal Co. (Ky. App.), 371 S. W. 2d 35. In October 1956, the company began surface or strip mining on a mountainside in Leslie County, Kentucky. It bulldozed the surface until a bench or shelf was established 30 or 40 feet wide and about 600 feet above the highway at the base of the steep mountain slope. The earth and debris removed was pushed over upon the slope of the mountain with a depth of about 10 feet, and with a width of 30 or 40 feet. Prior to December 1956, the earth mass on the slope began to move or slip, not all at once but gradually and slowly, until it

reached the borderline of a farm below, overrunning the water supply and damaging the farm. The exact time this earth mass passed over the boundary of the farm is not known. When a claim was asserted against Humming Bird, it contacted The Travelers, who refused the defense on the theory that it was not an accident within the terms of the policy. That court said: "The leading defense of defendant Travelers is that the injury to the Melton property was not an accident within the meaning of the policy. Here lies a misconception. The accident mentioned in the policy need not be a blow but may be a process. It is not required that the injury be the result of some contact with the bulldozer or the shelf or a rock hurled over from the shelf. It is not required to be sudden like an Alpine avalanche that upon a shout roars down with an overwhelming rapidity. A glacier moves slowly but inevitably. Where the accident is a process, how long is then not significant whether it takes three hours, three weeks, or months.

"It was unforeseen that the earth removed from the shelf would not secure a firm foothold. Heavy rock and earth do not flow like water. * * *

"This policy should not be interpreted so narrowly or rigidly as to destroy a recovery for a loss clearly traceable to the operation of plaintiff's Coal Company's business. * * *

" 'No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure.' "

Of interest is a Court of Appeals of Louisiana case, Knight v. L. H. Bossier, Inc. (1960), 118 So. 2d 700. That was an action to recover from a contractor for the loss of cattle and for the cost of replacing and repairing

a fence, which contractor's employees had taken and left down, permitting the owner's cattle to escape. The court held that while it may have been perfectly foreseeable to contractor's employees that removal of the pasture fence without notifying the owner of the cattle would permit escape and possible loss or destruction of the cattle, the cause of the loss of the cattle was unforeseen, unexpected, and extraordinary from the standpoint of the owner of the cattle and that the loss was thus caused by accident for purposes of the policy, insuring the contractor against liability for loss caused by accident.

In Hauenstein v. St. Paul-Mercury Indemnity Co. (1954), 242 Minn. 354, 65 N. W. 2d 122, the Supreme Court of Minnesota held: "Accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause," and it embraced property damage to a building caused by the application of defective plaster sold by insured to consumers.

In Moffat v. Metropolitan Casualty Ins. Co. of New York (1964, Pa.), 238 F. Supp. 165, the federal court, applying Pennsylvania law, held that emanation of destructive gasses caused by oxidation of coal refuse piles called culm banks, were the result of an accident within a comprehensive liability policy.

In City of Myrtle Point v. Pacific Indemnity Co. (1963, Ore.), 233 F. Supp. 193, the city was sued by a householder alleging the city had for a period of 2 years negligently operated a sewage disposal plant causing property damage. The city's carrier denied coverage on the basis of no accident. That court, in allowing recovery, said: "In absence of intent by insured city to cause harm resulting in damage, its alleged negligence in using malfunctioning or inadequate apparatus in sewage disposal plant, with result that a home was damaged and depreciated, did not negate a causation by

'accident' within policy obligating insurer to pay on behalf of insured for injury or destruction of property as result of accident." Also, from the same case: "Element of unforeseen or unexpected damage or consequence, as distinguished from normal and probable consequence, from negligent act is important in describing causation by 'accident' within a policy."

Appellant calls our attention to Town of Tieton v. General Insurance Co. of America (1963), 61 Wash. 2d 716, 380 P. 2d 127, in which the Washington Supreme Court held that contamination of a property owner's well caused by seepage from a sewage lagoon which was located approximately 300 feet from the well, and which had been constructed by the town with knowledge of the potential hazard of pollution was not caused by accident within the town's liability policy covering injury to property caused by accident. We have no question about that case. It is readily distinguishable from the instant one. The Town of Tieton had several reports in writing that there was a possibility of contamination of the adjoining property owner's well because of the nature of the soil. Disregarding this possibility, it went ahead with construction without making a prior arrangement with the well owner. The court held when, under the facts of the case, the possibility of contamination which had been foreseen became a reality it could not be said that the result was unusual, unexpected, and unforeseen.

In Vappi & Co., Inc. v. Aetna Casualty & Surety Co. (1965), 348 Mass. 427, 204 N. E. 2d 273, the allegations, among other things, referred to injuries to land, buildings, and property caused by a contractor's negligence in failing to take precautions to prevent the diversion of surface water and harmful results from vibrations. The Superior Court of Massachusetts considered these allegations sufficient under its decisions to permit recovery under a clause " 'damages because of injury to * * * property * * * caused by accident.' " The Mas-

sachusetts court held unintended or unforeseen consequences of reckless or negligent acts, if not undertaken with malice or intent to injure the person or property hurt, may be within the definition of "accident."

Appellant argues because the date of the seepage could not be fixed with certainty it lacked a distinguishing characteristic feature of an accident. The general rule is expressed by 2 Richards on Insurance (5th Ed.), § 219, p. 747: "In the absence of any express policy provision in such respect, the inability to fix the exact time when and where an accident occurred does not preclude recovery under the policy." We agree with the Kentucky court in The Travelers v. Humming Bird Coal Co. (Ky. App.), 371 S. W. 2d 35. The accident covered by the policy may be a process. When the accident is a process, how long then is not significant. It is the nature of the process which is important.

A rather extensive research indicates that the courts have not found it possible to give the word "accident" a precise legal definition. In general, the element of an unforeseen or unexpected damage, as distinguished from a normal and probable consequence from a negligent act, is dominant in describing a causation by accident. In most all jurisdictions the courts hold the word has no technical meaning in law, but should be interpreted in its ordinary and popular sense.

We reaffirm what we said in Updike Investment Co. v. Employers Liability Assurance Corp., 131 Neb. 745, 270 N. W. 107: "The term 'accident' has many meanings, and when used in a contract of indemnity insurance, unless otherwise stipulated, it should be given the construction most favorable to the insured." This the trial court did. The parties stipulated that the site had been inspected before the construction of the sewage lagoon, but the seismograph holes were not discovered. On this record, the damage to the Strauch property was something unforeseen, unexpected, extraordinary,

an unlooked-for mishap, and so an accident. The judgment rendered by the trial court is correct.

The judgment is affirmed.

AFFIRMED.

NEWTON, J., dissenting.

I respectfully dissent.

This case involves the construction of a sewage lagoon. Its use resulted in the contamination of underground waters to the damage of a neighboring farmer who recovered from the city of Kimball. The city now seeks to recover from its insurer against property damage "caused by accident."

Seismograph holes had been bored in the area covered by the lagoon and were not discovered until the difficulties mentioned had developed and the city undertook to seal the sides and bottom of the lagoon.

Construction of the lagoon was a deliberate, calculated, and willful act on the part of the city and it was clearly negligent in failing to seal the lagoon and in failing to discover the seismograph holes. Irrespective of the seismograph holes, the propensity of water, or water-bearing substances, to percolate through the ground is a well-known and elemental factor. Everyone is familiar with the way rain or other surface water is absorbed into the earth. It is commonplace in this day and age to find examples of underground water contamination resulting from the use of fertilizers and chemicals in farm operations. It is a matter of common knowledge that such items when used on the surface of the ground will eventually percolate or seep into underground water-bearing strata. It is therefore apparent that the city knew, or certainly should have known, that sooner or later its lagoon would bring about the very type of water contamination that resulted. This was neither a sudden nor an unexpected occurrence, but on the contrary, something that should have been expected and foreseen. This is not an instance

of a break or leak developing unexpectedly in an underground pipe or tank.

The majority opinion is based entirely on the theory mentioned in case after case cited therein, that an accident is an undesigned, unexpected, and unforeseen event. I have no quarrel with that legal proposition or definition. Here the damage inflicted was the result of an intentional act of the city. It was almost certain to occur and certainly should have been anticipated. It was no accident.

The term "caused by accident" has been subject to multiple definitions. It is conceded that it should be construed according to its "commonly accepted meaning." It is generally deemed to refer to a fortuitous circumstance, event, or happening, an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens, an unforeseen or unlooked for event, an unusual or unexpected result, a sudden happening rather than one which continues, progresses or develops, or something extraordinary, out of the usual course of events. See, Black's Law Dictionary (4th Ed.), pp. 30, 31; 44 Am. Jur. 2d, Insurance, § 1219, p. 64.

The only one of these definitions which can, by any stretch of the imagination, be considered applicable to the present case is the one referring to an event which is unusual and is unexpected by the person to whom it happens. That also is clearly inapplicable. Seepage through the ground, as mentioned, is a natural everyday phenomenon familiar to all. When it rains, the water seeps into the ground. With constant replenishment of this surface water, it seeps or sinks deeper and deeper into the ground. It winds up as "underground" water. This is the source of *all* underground water strata. We know that nitrogen fertilizer applied on a farmer's field winds up in, and contaminates, under-

ground water strata. Canals, ponds, and lakes commonly raise underground water levels in adjacent areas and frequently result in "water boils" surfacing in adjoining lands. The use of an unsealed lagoon is similar and is certain to have similar results with or without seismographic holes. The only difference is that the holes let the raw sewage, completely unfiltered, enter directly into underground water strata.

In the case of Town of Tieton v. General Insurance Co. of America, 61 Wash. 2d 716, 380 P. 2d 127, an identical sewage lagoon was constructed. The town officials were well aware of the natural phenomenon of seepage and fully expected it to occur just as the city officials of Kimball and the injured farmer should have, and possibly did, expect it in the present instance. This is not a fortuitous occurrence, nor is it an "unusual or unexpected" event from the standpoint of the damaged landowner. In the identical Tieton case, the court held that contamination of property owners' well caused by seepage from sewage lagoon, which was located approximately 300 feet from well and which had been constructed by town with knowledge of potential hazard of pollution, was not caused by accident within town's liability policy covering injury to property caused by accident. In the present case it is not admitted that the parties involved anticipated contamination of the underlying water strata but they must be held to have recognized a natural law of nature and to have anticipated the result.

In the field of accident insurance, "The generally accepted rule is that death or injury does not result from accident or accidental means within the terms of an accident policy where it is the natural result of the insured's voluntary act, unaccompanied by anything unforeseen except the death or injury. In other words, an accident is never present when a deliberate act is performed, unless some additional, unexpected, independent, and unforeseen happening occurs which pro-

duces or brings about the result of injury or death." 44 Am. Jur. 2d, Insurance, § 1222, p. 70.

The case of Vappi & Co. Inc. v. Aetna Casualty & Surety Co., 348 Mass. 427, 204 N. E. 2d 273, is not in point. In that case the insured had successfully defended the suit brought against him. The insurer had agreed to defend any suit against Vappi alleging an injury caused by accident even though the suit was groundless. The insured sought recovery of attorney's fees and engineering expense incurred in defending the suit when the insurer declined to defend it. Recovery was permitted under the guarantee to defend.

In Albuquerque Gravel Prod. Co. v. American Emp. Ins. Co., 282 F. 2d 218 (10th Cir., 1960), recovery was sought for flooding. The court stated: "Although the rains were heavier and more frequent than usual during the summer of 1955, and the flooding was more extensive, we cannot say as a matter of law that the floods were accidental rather than the normal consequence of heavy rains which were foreseeable by a prudent person. Consequently, assuming negligence in the construction of the ramp, the results of the floods were not accidental."

The case of Gassaway v. Travelers Insurance Co., 222 Tenn. 649, 439 S. W. 2d 605, involved damage to a house due to seepage from a storm sewer. Negligence was involved. The court stated: "The point here is that while negligent acts can and in fact often do support a claim of accident as this word is used in insurance policies, yet it does not follow that all negligent acts so support such claim. Accident and negligence are not synonymous terms. * * *

"In regard to the legal definition of the word 'accident' as used in insurance policies we have conducted a rather extensive research. The courts have not found it possible to give the word so used a precise legal definition. In most all jurisdictions it is held this word so used has no technical meaning in law and should be in-

terpreted in its ordinary and popular sense. It does appear to us that the courts now either give this word a broader meaning or at least apply it to factual situations which the courts not many years ago would not have accepted. * * *

"It is argued here, and we think correctly, that the damage occurring was not intended by any of the parties, and was, in fact, the result of ordinary negligence on the part of V & M Homes. Accepting this argument does not compel the conclusion the damage was caused by accident. The element of foreseeability cannot be ignored. The Circuit Court determined V & M Homes knew these drainage facilities created a risk and under these facts we think V & M Homes could reasonably foresee that what did occur could occur. When a reasonably foreseeable event does occur, it cannot be said to be a result that was unforeseen and unexpected or fortuitous."

In Harleysville Mutual Cas. Co. v. Harris & Brooks, Inc., 248 Md. 148, 235 A. 2d 556 (1966), it was held that the fact that an injury is caused by an intentional act does not preclude it from being caused by accident within liability policy if in that act, something unforeseen, unusual and unexpected occurs which produces the result. Contractor who piled trees and underbrush in 10 to 12-foot piles, added fuel oil and rubber tires, and permitted the fires to burn for 36 hours before they were extinguished was charged with responsibility of foreseeing that a pall of smoke and soot would result, which might damage adjacent properties, and hence resulting damage for which the contractor was held liable was not caused by accident within liability policy covering property damage liability caused by accident.

The case of Farmers Elevator Mutual Ins. Co. v. Burch, 38 Ill. App. 2d 249, 187 N. E. 2d 12 (1962), involved damage caused by dust, noise, and vibration from the operation of a grain elevator. Recovery from the insurer was denied. The court stated: "'Accident' nor-

mally designates an unforeseen occurrence, usually of an untoward or disastrous character, or an undesigned sudden or unexpected event of an inflictive or unfortunate character * * *. The natural and ordinary consequences of an act do not constitute an 'accident.' "

Hayden v. Insurance Co. of North America, 5 Wash. App. 710, 490 P. 2d 454 (1971), involved an accidental death policy and there was evidence the death resulted from the insured's excessive indulgence in intoxicating liquors. The court held: "When death occurs as result of unusual, unexpected or unforeseen event or events following intentional act or acts, the death is 'accident' within the terms of accident policy but when death occurs as natural result of voluntary act or acts and there is nothing unusual, unexpected or unforeseen which occurs, except the death, the death is not 'accident' and an event or events is not unforeseen, unexpected or unusual if the event or events would normally result from the intentional act or acts. * * *

" 'Accident' within terms of accident policy is never present when deliberate act is performed, unless some additional, unexpected, independent and unforeseen happening occurs which produces or brings about the results of injury or death." See, also, Wright v. Western & Southern Life Ins. Co., (Tex. Civ. App.), 443 S. W. 2d 790 (1969).

The case of City of Aurora v. Trinity Universal Ins. Co., 326 F. 2d 905 (10th Cir., 1964), held: "Damage caused by sewage backing up from insured city's sewage system into residences as result of heavy, but not unprecedented, rainfall and negligent operation of pump by city to prevent flooding of a lift station was not 'caused by accident' within coverage of comprehensive liability policy."

In Clark v. London & Lancashire Indemnity Co. of America, 21 Wis. 2d 268, 124 N. W. 2d 29, 98 A. L. R. 2d 1037, it was held that an insurance policy for premises used in the operation of a gravel pit covering lia-

bility of the insured for personal injury or property damage caused by accident does not extend to liability for the operation of the premises for a considerable period as a nuisance in permitting the gravel pit to be used for dumping purposes for the disposal of refuse, garbage, and other putrid and combustible material. See, also, American Casualty Co. v. Minnesota Farm Bureau Service Co., 270 F. 2d 686 (1959); United States Fidelity & Guaranty Co. v. Briscoe, 205 Okla. 618, 239 P. 2d 754.

The principles enunciated herein have been followed in Nebraska. In Cutrell v. John Hancock Mutual Life Ins. Co., 145 Neb. 550, 17 N. W. 2d 465, it was held: "Death resulting from an accident is not effected by accidental means where insured brings the assault upon himself by his own wrongful acts, or voluntarily incurs an obvious hazard thereof under such circumstances that he would naturally be presumed to know that the injury is likely to be inflicted, or places himself in a position that may be reasonably expected to bring such an assault upon him."

In Rapp v. Metropolitan Accident & Health Ins. Co., 143 Neb. 144, 8 N. W. 2d 692, it was held: "Where the insured voluntarily submitted to a major surgical operation, to determine the cause of an obstruction of the common bile duct and, as a result of his poor physical condition, died on the operating table during the progress of such operation from surgical shock incident to the operation, and the operating surgeon and his assistants skilfully performed the operation, insured's death was not the result of accident."

When damage results from a willful and deliberate act and such damage is practically certain to occur under the immutable laws of nature, it must be considered to have been intended or recklessly disregarded and it certainly is not "caused by accident."

We should not lose sight of the fact that we are dealing with a contractual agreement, the terms of which

we have no right or authority to alter or rewrite. Unquestionably the damaged landowner had a right of recovery against the city for its tortious act. It does not follow that the city can recover from its insurer *unless the loss is covered under the policy.* "In the absence of a statute to the contrary, the risks insured against under a policy of liability insurance are determined by the terms of the policy and not by the liability of the insured. And, if plainly expressed, insurers are entitled to have such limitations construed and enforced as expressed." Marx v. Hartford Acc. & Ind. Co., 183 Neb. 12, 157 N. W. 2d 870.

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

RALPH DOVER ET AL., APPELLEES, V. GRAND LODGE OF NEBRASKA INDEPENDENT ORDER OF ODD FELLOWS, APPELLANT.

206 N. W. 2d 845

Filed April 27, 1973. No. 38725.

Wills. The cardinal intention of testamentary construction is to ascertain and effectuate the intention of the testator when it can be done consistent with the rules of law.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Hutton & Garden, for appellant.

George H. Moyer, Sr., and Moyer & Moyer, for appellees.

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

NEWTON, J.

The matter presented involves the construction of the last will and testament of Nettie M. Dover, deceased. The District Court held that defendant had not ac-

quired any interest in the property of the estate. We affirm that judgment.

The duly probated last will and testament of decedent provided: "Third.-I give and devise my real estate, to-wit, the West Half of the Southwest Quarter of Section Four, Township Twenty-two North, Range One West of the 6th P.M., Lots Six and Seven in Block Seventy-nine of Northwest Addition to the City of Madison and Lots Seven and Eight of Dickerson's Addition to the Village of Enola, all in Madison County, Nebraska, and all other real estate that I may own at the time of my death, to my said daughter Edna M. Arehart, to have and to hold the same for and during her lifetime, and at her death to her issue in equal shares, or if she shall leave no issue, then to the Odd Fellows Home at York, Nebraska, or to the trustees or body corporate which shall be qualified to take title thereto and apply the same to the exclusive use and benefit of said Odd Fellows Home, being a home maintained at York, Nebraska, for aged and indigent odd fellows, their widows and orphans. Provided, if my said daughter Edna M. Arehart shall be left a widow, then upon her becoming a widow, I give and devise all my said real estate to her, my said daughter, by absolute title, believing she may need the same for her maintenance."

Testatrix died January 1, 1942. She was the mother of Edna Dover Miller, formerly Edna M. Arehart. The husband of Edna Dover Miller died January 1, 1969. She never remarried but died a widow on December 5, 1970, without issue.

The intent of the testatrix appears to be clear. The real estate described in the third paragraph of the will is devised to the testatrix' daughter for life, with a provision that if the daughter should become a widow, the remainder interest should immediately vest in the daughter. This is an executory interest which abridged and terminated the life estate and vested the fee simple

title in the daughter Edna Dover Miller. The contingent interest of defendant, which could take effect only in the event the daughter failed to become a widow and failed to leave issue, was thereby terminated.

The cardinal intention of testamentary construction is to ascertain and effectuate the intention of the testator when it can be done consistent with the rules of law. See First Nat. Bank & Trust Co. v. Oeltjen, 175 Neb. 345, 121 N. W. 2d 816.

The judgment of the District Court is affirmed.

AFFIRMED.

DONALD W. BROWN, DOING BUSINESS AS DON AIR SERVICE, APPELLANT, V. VIRGINIA SHAMBERG, APPELLEE.
206 N. W. 2d 846

Filed April 27, 1973. No. 38733.

1. **Appeal and Error: Evidence: Records.** Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.
2. **Appeal and Error: Evidence: Records: Depositions.** Depositions offered in evidence on a motion for summary judgment must be included in a bill of exceptions to be reviewed in this court on appeal.

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

Laurice M. Margheim of Bump & Bump, for appellant.

Jack H. Myers of Van Steenberg, Myers & Burke, for appellee.

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

SPENCER, J.

Plaintiff prosecutes this appeal from an adverse ruling on his motion for judgment notwithstanding the verdict, or alternatively for a new trial. Plaintiff, in

two separate causes of action, sought recovery from the defendant for damages to a helicopter. The first cause of action is predicated on alleged negligence. The second cause of action involved a check, allegedly given as a complete and final settlement of plaintiff's account, including the damages to the helicopter. The trial court entered a summary judgment for the defendant on the second cause of action. Subsequently, plaintiff's first cause of action was submitted to the jury, which returned a verdict for the defendant. We affirm.

The helicopter, which was equipped with dual controls, crashed while the defendant was receiving instruction from an instructor employed by the plaintiff. Plaintiff contends that defendant gave him a check for $14,054, $14,000 of which was to pay for the damage to the helicopter, and $54 to pay for flight instruction, but payment was stopped on the check before it was cashed. Defendant contends the check was given without consideration, within an hour after the crash, while she was under great emotional stress; that she broke down immediately after the check was given; and that she stopped payment on the check as soon as she reached home.

The only assignment of error argued in the brief pertains to the sustaining of the motion for summary judgment as to plaintiff's second cause of action. At the time the motion for summary judgment was filed, there were six depositions with exhibits on file. No bill of exceptions has been filed herein. Plaintiff, however, filed a supplemental transcript to which the depositions were attached. Plaintiff argues the depositions were duly offered into evidence for the purpose of the motion for summary judgment, and were considered by the trial court in rendering his decision to grant the summary judgment on the second cause of action. This raises the question as to whether or not their inclusion in the transcript is sufficient to permit their review in this court in the absence of a bill of exceptions.

We have repeatedly said that in the absence of a bill of exceptions no question will be considered, a determination of which requires an examination of the evidence produced in the District Court. Lange v. Kansas Hide & Wool Co. (1959), 168 Neb. 601, 97 N. W. 2d 246.

In Palmer v. Capitol Life Ins. Co. (1953), 157 Neb. 760, 61 N. W. 2d 396, defendant, to sustain its motion for summary judgment, offered an affidavit and a deposition in evidence. The motion was sustained. Plaintiff appealed, but did not file a bill of exceptions. In that case we said: "Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions."

Plaintiff concedes that affidavits used as evidence on a hearing on a motion for summary judgment must be identified, offered in evidence, and embodied in a bill of exceptions as a prerequisite to their review on appeal. He argues, however, that section 25-1332, R. R. S. 1943, differentiates between affidavits and depositions. It is his contention that depositions are in the same category as pleadings and may be examined by the court, whether they are offered at a hearing or not, so they become for the purposes of the summary judgment statute a part of the record when filed. We do not agree. Depositions offered in evidence on a motion for summary judgment must be included in a bill of exceptions to be reviewed in this court on appeal.

While the defendant has argued other points which appear to have merit, the reasons given above are sufficient to dispose of the case. The judgment is affirmed.

AFFIRMED.

MOYER & MOYER, A PARTNERSHIP, ET AL., APPELLEES, V. STATE FARM MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.
206 N. W. 2d 644

Filed April 27, 1973. No. 38742.

Insurance: Attorney and Client: Fees. A collision carrier which obtains payment in full of its subrogation claim directly from the liability carrier is not liable in any amount for the services of attorneys employed by its insured unless it has received some benefit from the services for which the insurer in fairness should pay.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Reversed and remanded with directions.

Deutsch & Hagen and Thomas H. DeLay, for appellant.

George H. Moyer, Jr., and Moyer & Moyer, pro se.

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

BOSLAUGH, J.

This was an action to recover attorneys' fees alleged to be due the plaintiffs for their services in creating a trust fund from which a subrogation claim of the defendant was paid. The plaintiffs recovered $147.63 in the District Court. The defendant appeals.

Arnold L. Gruchow was injured in an automobile accident on July 19, 1965, when an automobile operated by Charles A. Reikofski collided with the rear of the Gruchow automobile. Gruchow was insured by the defendant, and his claim under his collision coverage was adjusted on the basis of a total loss. The defendant paid Gruchow $642.90 which represented the value of his automobile less a $50 deductible. The defendant realized $200 from the salvage so its loss was $442.90.

Reikofski was insured by Protective Fire and Casualty Company. On July 28, 1965, Protective assigned its claim to Crocker Claims Service for handling.

On or about August 1, 1965, Gruchow employed J. R. Mapes to represent him. Moyer & Moyer became associated with Mapes in the case on October 18, 1965.

On August 28, 1965, the defendant presented its subrogation claim directly to Protective. Protective replied that the personal injury claim of Gruchow would have to be disposed of before a decision could be made with respect to the subrogation claim.

On August 23, 1966, Mapes wrote to the defendant inquiring whether the defendant wanted Mapes to represent the defendant in settlement negotiations with Crocker Claims Service. The defendant replied that it was unable to advise Mapes at that time concerning the handling of the property damage claim.

The defendant then wrote to Protective inquiring whether Protective intended to pay the subrogation claim in full. On September 7, 1966, Protective sent a release to the defendant stating that upon receipt of the release properly executed, the claim would be paid in full. The release was returned to Protective on September 12, 1966. On the same day the defendant wrote to Mapes stating that the defendant was handling its claim directly with Protective and that Protective was paying the defendant's claim in full. A draft was sent to the defendant on September 14, 1966.

On October 26, 1966, Moyer & Moyer wrote to the defendant inquiring whether the property damage claim should be included in a petition that was to be filed. A petition was filed on November 7, 1966, against Reikofski in which it was alleged that Gruchow's automobile had been totally destroyed in the accident.

A pretrial order filed March 11, 1968, contained a stipulation that any issue as to damage to Gruchow's automobile would be reserved until after trial; and that if Gruchow recovered any amount from Reikofski, $50 would be added to the recovery and accepted as the full amount of automobile damages claimed by Gruchow.

Trial was had on April 23, 1968. The jury returned

a verdict in the amount of $4,097.77 for Gruchow and the trial court added $50 to this amount in accordance with the pretrial order.

This action was commenced on June 30, 1970, to recover the fair and reasonable value of plaintiffs' services in creating a trust fund from which the defendant's subrogation claim was paid. The plaintiffs rely on United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N. W. 2d 174, 2 A. L. R. 3d 1422, and Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 169 N. W. 2d 601.

In the Hills case an action was filed which included both the personal injury and the automobile damage. After the action had been commenced, the insurer requested the subrogation claim be deleted from the action. Hills refused to do so and proceeded to collect the insurer's subrogation claim as well as his client's damages. This court held Hills could recover a fee from the insurer on the theory that the insurer accepted the avails of the litigation and was obligated to pay a proportionate share of the expenses. The Krause case was decided upon demurrer. Krause alleged the insurer was aware of his efforts and had acquiesced in the negotiations which resulted in the settlement. Neither case is applicable to the facts in this case.

The plaintiffs have no right to compensation from the defendant unless they have benefited the defendant. The record in this case shows the plaintiffs' services to Gruchow conferred no benefit upon the defendant.

The accident in question was a rear-end collision in broad daylight. In a letter to Crocker Claims Service on August 26, 1965, Protective stated: "After reviewing the file, we would agree that this should be considered a case of liability, and an effort made to make settlement of the personal injury and property damage claims of Arnold L. Gruchow."

The property damage claim was, for all practical pur-

poses, a liquidated amount. The bodily injury claim was an unliquidated amount. Consequently, Protective was willing to pay the subrogation claim in full directly to the defendant which it did on September 14, 1966. The record will not support a finding that the defendant received any substantial benefit from the services of the plaintiffs in their representation of Gruchow. The defendant had been paid in full long before any fund was created by the efforts of the plaintiffs.

The statement in the opinion in the Krause case to the effect that the rule in Hills cannot be avoided by direct payment to the collision carrier is limited by the facts in the Krause case.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

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

206 N. W. 2d 642

Filed April 27, 1973. No. 38808.

Criminal Law: Evidence: Instructions: Trial. If the evidence in a criminal case is such as to warrant only a verdict of the greater offense, or one of not guilty, then it is not proper to give an instruction on a lesser included offense.

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

Frank B. Morrison, Sr., and Stanley A. Krieger, 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 was charged and jury convicted of shooting with intent to kill, wound, or maim. § 28-410, R. R. S. 1943. The defendant was sentenced to an indeterminate term of 3 to 5 years in the Nebraska Penal and Correctional Complex. His contentions on appeal are that the court refused to instruct the jury of the lesser included offense of assault and battery and that his indeterminate sentence was erroneous. We affirm the judgment and sentence of the District Court.

The defendant's first contention is that the court should have instructed upon the lesser included offense of assault and battery. The giving of an instruction on a lesser included offense, even if requested, is proper only when applicable to the evidence and where the evidence would justify a verdict of guilty of the lesser offense of assault and battery. If the evidence is such as to warrant only a verdict of the greater offense, or one of not guilty, then it is not proper to give such an instruction. State v. Randall, 187 Neb. 743, 193 N. W. 2d 766; Olney v. State, 169 Neb. 717, 100 N. W. 2d 838.

We go to the evidence. The defendant and his wife had been divorced. They had lived together for a short time thereafter in April of 1972 in an attempt to patch up their marriage. Yvonne DeBerry, the wife, testified that when she returned home from work at approximately 6 p.m. the defendant was there. An argument ensued over whether she was turning the kids against her husband and whether she had told one of the daughters to call DeBerry names. DeBerry had a gun in his hip pocket. They were sitting on chairs. As the argument proceeded, DeBerry got up first, reached into his back pocket, and pulled out the gun. The defendant threatened her. She tried to calm him down. She walked up to him and touched him. Then she was knocked to the floor, dazed, and at the same time she heard the explosion of the gun firing and felt throbbing in her upper left chest. While she was down

she heard several shots and felt burning and pressure. She was coughing, got up, and ran out the kitchen door, down the block, to a neighbor's house. She was bleeding and coughing blood. Actually she was shot in the left arm and as a result has three scars on her left arm. She also testified that her husband stated at least once that he was going to kill her and was cursing during this period of time. She had no weapons on her.

An expert from the Omaha police department arrived and gathered three spent shell casings from the apartment. Two of the shell casings were about 5 or 6 feet inside the door and approximately 8 or 9 inches apart, and the third one was lying on the floor of the apartment approximately 10 feet from the others, and to the left. He identified and examined the .25 caliber pistol involved in the shooting. The evidence is undisputed that this gun was in good order, with no defects, and that it would not fire without the pulling of the trigger each time a shot was to be fired. Each time the trigger is pulled a shell is ejected. There was a pool of blood approximately 8 to 10 feet east of the doorway, and one of the slugs was lying near this pool of blood.

The defendant testified that he was carrying the gun because he was afraid of his father-in-law. He testified himself that when he got out of his chair he picked up his gun. His testimony negatives any evidence of a simple assault upon his wife Yvonne. His explanatory testimony, almost incredible, is that he simply pushed her back and that she came and ran into him again, that he was the one who was assaulted, and that he was knocked over a chair and the gun accidentally fired several times as he was falling down over the chair. His evidence was that the gun was just continuously going off. He testified that after being knocked down in this fashion, he got up and the gun jammed, and then his wife jumped up and ran out through the kitchen.

The shooting is not denied by the defendant, and the

force and purport of the defendant's testimony is clearly that he did not have any intent to shoot and wound Yvonne.

It is clear from the evidence we have recited that the sole and only question open for the jury to decide under the evidence was whether the defendant shot Yvonne purposely or accidentally. If the shooting was purposely done, then the defendant was guilty as charged; if it was accidental, the defendant had no criminal intent and he was innocent of the crime as charged and also of any lesser crime such as simple assault and battery. Even under the defendant's recital of the evidence, which we have substantially given in this opinion, his explanation of the shooting is almost incredible. But more importantly, there is no evidence in this case that would sustain a finding of a simple assault on the prosecutrix. The shooting is not denied. The only question involved is whether it was done intentionally or accidentally. As in some of our previous cases involving this subject, if the trial court had given such an instruction in this case and the jury had returned a verdict of guilt of simple assault and battery, it would have required a reversal and a discharge of the defendant. As we have said as far back as Davis v. State, 116 Neb. 90, 215 N. W. 785, if the evidence in a criminal case is such as to warrant only a verdict of the greater offense, or one of not guilty, then it is not proper to give an instruction on a lesser included offense. There is no merit to this contention.

The other contention of the defendant as to the erroneousness of his indeterminate sentence of 3 to 5 years is answered by our recent holding in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793. There was no error in the sentence imposed and it is not otherwise attacked.

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

AFFIRMED.

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

206 N. W. 2d 848

Filed April 27, 1973. No. 38843.

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

John F. Steinheider, for appellant.

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

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

CLINTON, J.

Defendant pled guilty to a charge of forgery and was sentenced to a term of 5 to 10 years in the Nebraska Penal and Correctional Complex. The sole issue on appeal is the claim that the sentence is excessive. The sentence indeed is a severe one, but we cannot say the trial court abused its discretion.

We have carefully examined the record, including the presentence report. The defendant has spent a major part of his adult life in penal institutions with rather brief periods of freedom between terms. He adapts well to prison life but is indifferent to programs of rehabilitation and has found it difficult to cope with the problems which confront the person released or paroled from prison. Imprisonment as means of rehabilitation has failed, but the trial court could apparently see no reasonable alternative. The comments of the trial court at sentencing indicate the sentence was intended to afford the defendant maximum motivation and opportunity for participation in rehabilitative programs.

AFFIRMED.

McCOWN, J., dissenting.

I dissent. A sentence of 5 to 10 years in prison for

forging a $58.70 check is excessive. Obviously the defendant's past criminal record was bad but he was not charged with being an habitual criminal. Instead he was convicted of the crime of forging a $58.70 check. The punishment does not fit the crime even though it may fit the defendant.

ALICE D. MITCHELL, ADMINISTRATRIX OF THE ESTATE OF FERGUSON S. MITCHELL, DECEASED, APPELLANT, V. JUDITH M. EYRE, EXECUTRIX OF THE ESTATE OF MICHAEL J. EYRE, DECEASED, APPELLEE.

206 N. W. 2d 839

Filed May 4, 1973. No. 38561.

1. **Airplanes: Pilots: Aviation: Collisions.** Where an aircraft is equipped with dual controls and both occupants are pilots, proof as to who may have been piloting the craft at the time of take-off is not conclusive where a crash occurs more than an hour later.
2. **Negligence: Evidence: Trial.** The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.
3. **Negligence: Pilots: Aviation.** The finding of negligence is immaterial until we can determine the identity of the person to be charged with responsibility for the negligence.
4. **Judgments: Evidence.** An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment. Consequently, a judgment solely based upon speculation, surmise, or conjecture must be set aside.

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

Joseph K. Meusey of Fraser, Stryker, Marshall & Veach and Robert E. O'Connor of Ross & O'Connor, for appellant.

Fredric H. Kauffman of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

SPENCER, J.

This is a wrongful death action arising out of a crash October 4, 1964, during an effectiveness test of the search and rescue capabilities of the Nebraska Wing of the Civil Air Patrol. Both occupants of the aircraft were killed. The parties to the action are the widows and personal representatives of the decedents. The case was tried to a jury which returned a verdict for the defendant. Plaintiff appeals. We affirm.

Both decedents Mitchell and Eyre were members of the Nebraska Wing of the Civil Air Patrol. Mitchell had held a pilot's license since September 10, 1958. Because his log book was unavailable, the extent of his actual experience could not be ascertained. However, he had been an active member of the Civil Air Patrol from 1959. At the time of his death he occupied the position of a training officer. Eyre began flying in 1963. He qualified for a private pilot's license in October of that year. His log book indicates that he had 87 hours and 55 minutes of flying experience. He became a member of the Civil Air Patrol in September 1963.

For the purpose of the test, a simulated wreck had been placed upon the Leonard Sisel farm ½ mile east and 2 miles north from Bee, Nebraska. Participation was entirely voluntary. The aircraft, an Aeronca L-16, was a tandem-seated plane with dual controls, that is to say the plane could be operated from either of the two seat positions. In the investigation which followed the crash, it was determined that both controls were installed and operating.

The Civil Air Patrol form shows Eyre as the pilot in command and Mitchell as the observer. While Eyre was the pilot at take-off, one of plaintiff's witnesses, a lieutenant colonel in the Civil Air Patrol, testified that

insofar as the Civil Air Patrol is concerned, it is possible for the observer, if he is a licensed pilot, to be flying the aircraft at any given time. He has done so as an observer.

The crash occurred at the edge of a milo field in terrain which was described as level, rolling, and farm ground. The site was an open or noncongested area. The weather was clear, with unlimited ceiling and visibility of more than 15 miles. The wind at the time of the crash was from 340 degrees, with a velocity of 14 knots and gusts to 22 knots. The temperature was 57 degrees Fahrenheit. The estimated time of departure on the mission was approximately 9:45 a.m. The time of the crash is estimated at approximately 11 o'clock a.m. The site of the crash was approximately 30 miles from Wahoo, the point of take-off.

There were four eyewitnesses to the crash. The first, Mrs. Leonard Sisel, testified she first saw the plane sometime around 10:30 a.m. It made two turns over her farm and then flew to Dwight, Nebraska. It then returned and started circling the milo field which is just north of a tree windbreak on the Sisel farm. The windbreak is just north of the house which faces east. She stood on the north edge of the windbreak with her children and watched the plane circle two or three times. She then testified: "A. On the last circle it seemed to have speeded up, and started going down quite rapidly; and it turned out over the road, and — Q. The road in front of your house? A. That's right. Right in front of our house. It turned out over the road, and cleared the electric wires, and was heading west, and then it was quite low over the field. Then it kind of straightened up like it was going to land, and right then its wings tipped straight up and down like this (indicating), and it went down. * * * Q. Then it went out over that road, and then came back in? A. Yes. It swung out over the road, cleared the wires, and headed back west. Q. Then it went up? A. Then

suddenly his wings flipped up like this (indicating), and he went down. Q. If you would, when you say the wings flipped up, would you show us what you had in mind when you say the wings flipped up? A. The wings flipped up like this (indicating). Q. How? A. He was coming around this way (indicating), and came out over the road this way (indicating), and then his wings went like this (indicating), and he went clear down. Q. Almost perpendicular? A. That's all I saw. There is a very slight — the land isn't completely level. There is a very slight incline right there. I didn't exactly see it hit the ground, but it looked like it was absolutely straight up and down like this (indicating), and the kids figures he was going to land, and they couldn't figure out how it could land in that position. Q. You didn't see it hit the ground? A. No."

Vic Semin, a farmer living ½ mile north of the Sisel farm was watching the plane from his yard. He saw the plane flying toward the north, saw it turn west, and it leaned over and went out of sight. Mrs. Semin, who was with her husband, saw only one circle of the flight and had no opinion as to the height of the plane.

Robert Washington, a major in the Civil Air Patrol at the time of the trial, was in command of a ground mobile unit equipped with a radio participating in the test. He watched the plane circle twice, watched it come back out over the road starting a third circle, and then it disappeared as it flew west of a building which he described as a barn which blocked his view.

No purpose will be served by reviewing the expert testimony or the technical data received in evidence. None of the eyewitnesses could testify as to who was piloting the aircraft at the time of the crash.

At the close of the plaintiff's case, the defendant moved for a directed verdict. Included among the reasons assigned was the fact that the evidence failed to show Michael Eyre was piloting the aircraft at the time of

the accident. It was a dual control aircraft which could be operated from either seat, and there is no proof in the record as to which one of the decedents was actually flying it at the time of the crash. This motion should have been sustained unless there is some legal presumption that Eyre, who was the pilot at take-off, was the pilot at the time of the crash.

Plaintiff's case is bottomed on the premise that the pilot in command of an aircraft is legally presumed to have been in control of it at the time of the accident if there is no direct evidence as to who was actually in control. There is an Annotation discussing this question in 36 A. L. R. 2d 1290.

At the outset, we suggest that in any action for injuries sustained in an airplane accident the issues of negligence, proximate cause, and contributory negligence invariably turn upon the question of who was piloting the plane at the time of the crash. It is necessary, therefore, for one seeking to recover in such action to establish the identity of the operator of the plane at the time of the accident. Where the aircraft is equipped with dual controls and both occupants are pilots, proof as to who may have been piloting the craft at the time of take-off, in our judgment, should not be conclusive where, as here, the crash occurs more than an hour later.

There are a number of decisions dealing with the question of presumption in these situations. Those cited by plaintiff which hold that a presumption exists can be readily distinguished from the facts in the instant case.

In Bird v. Louer (1933), 272 Ill. App. 522, where the court found the presumption to exist, Meyer, operator of the plane, was an experienced pilot. The other occupant was a passenger who had no experience piloting an airplane.

In Drahmann's Administratrix v. Brink's Administratrix (1956, Ky. App.), 290 S. W. 2d 449, the Kentucky

court held the facts sufficient to create a rebuttable presumption that Brink was the pilot of the plane at the time of the crash. In that case, however, Brink, the owner of the plane, was an experienced pilot, whereas Drahmann had no flying experience at all.

Lange v. Nelson-Ryan Flight Service, Inc. (1961), 259 Minn. 460, 108 N. W. 2d 428, involved a crash killing both occupants, one of whom was an instructor and the other a trainee. The Minnesota court there determined the instructor was the pilot in command.

Bruce v. O'Neal Flying Service, Inc. (1949), 231 N. C. 181, 56 S. E. 2d 560, 12 A. L. R. 2d 647, involved a public demonstration of airplane maneuvers. For the occasion, the plane was piloted by an employee of the owner. The plaintiff's decedent was aloft strictly as a passenger.

Boise Payette Lumber Co. v. Larsen (9th Cir., 1954), 214 F. 2d 373, has no relevance herein. It involved an action on behalf of a business-invitee where the aircraft was piloted by the company's salesman.

Insurance Co. of North America v. Butte Aero Sales & Service (1965), 243 F. Supp. 276, is an opinion of the United States District Court of Montana. The owner of the plane was the pilot at take-off. The other decedent had never flown the plane. The plane had been observed going through various maneuvers and was flying quite low.

Whittemore v. Lockheed Aircraft Corp. (1944), 65 Cal. App. 2d 737, 151 P. 2d 670, tends to support plaintiff's general position. It is not pertinent herein in view of the testimony of one of plaintiff's witnesses that insofar as the Civil Air Patrol is concerned, it is possible for an observer, if he is a licensed pilot, to pilot the aircraft at any given time.

The other case cited by plaintiff, In re Estate of Hayden (1953), 174 Kan. 140, 254 P. 2d 813, supports defendant's rather than plaintiff's position. It was an action by a widow against the personal representative

of the deceased owner of the airplane for the wrongful death of her husband. The husband, the owner, and a third party, all of whom had flying experience, were flying together at the time of the crash. The owner and third party had access to the airplane's dual controls. The court reversed a jury verdict for the plaintiff against the owner, holding that a demurrer to plaintiff's evidence should have been sustained. There, the owner of the plane was at the controls at the time of take-off, and the plane could not have been taken off from the right-hand position occupied by the third party. The position of the two parties did not change during the course of the flight. There was also evidence that the owner had flown the plane in a reckless manner on other occasions. The court held, giving the plaintiff's evidence the benefit of every inference to which it may be entitled, still any answer to the question as to who was actually at the controls of the plane at the moment of the tragedy must be predicated upon speculation, surmise, or conjecture.

From a review of the decisions pro and con, we are convinced those upholding the contrary view are entitled to the greater weight. They are more analogous to the present situation and more in conformity with our holdings in tort actions.

Madyck v. Shelley (1938), 283 Mich. 396, 278 N. W. 110, was a case where both occupants of the airplane, which had dual controls permitting operation from either cockpit, were experienced flyers. The dual controls were connected after the crash in which both occupants were killed. The court held evidence that the occupant of the front cockpit had the sole right to fly the plane, of which he was a part owner, was insufficient to establish that he was the pilot at the time of the crash.

Towle v. Phillips (1943), 180 Tenn. 121, 172 S. W. 2d 806, was an action for the death of a passenger who had access to one of the dual controls of an airplane which climbed vertically from a low altitude before

crashing, killing the pilot and the passenger. The court held the evidence insufficient to take the question of the pilot's negligence to the jury. The following from the opinion is pertinent herein: "No doubt the vertical climb was the proximate cause of the crash. On the record before us it may have been caused by Webb's handling of the controls available to him, or by Towle's handling of the controls available to him, or it may have been caused by something not explained, for which neither man was responsible. It would be a guess to say that Webb's negligence was the responsible agency."

In Budgett v. Soo Sky Ways, Inc. (1936), 64 S. D. 243, 266 N. W. 253, the trial court sustained a motion for judgment notwithstanding the verdict, after permitting the case to go to the jury. The Supreme Court affirmed the judgment, holding the plaintiff had failed to sustain the burden of proof. It speculated either of the parties may have taken hold of the control stick and moved it in such a way as to have nosed the plane toward the ground, or the pilot may have made a false move and pulled the stick the wrong way, or he may have made too short a turn or too steep a bank and lost flying speed of the ship for which reason it fell to the ground.

In Hall v. Payne (1949), 189 Va. 140, 52 S. E. 2d 76, the trial court permitted the case to go to the jury. Thereafter, on motion, the verdict for the plaintiff was set aside. The Supreme Court affirmed the judgment. It held that to prove possibility only, or to leave the issue to surmise or conjecture, is never sufficient to sustain a verdict. While the main question in that case was whether there was sufficient evidence of negligence on the part of the pilot rather than his identity, the rule announced applies with equal force to a situation where the question of who was operating a plane is the decisive issue.

In Morrison v. Le Tourneau Co. of Georgia (5th Cir., 1943), 138 F. 2d 339, a crash of a two-seated dual control plane killed the pilot and the passenger. The court

said that no one could answer a number of stated questions as to what or who caused the crash, including: "Did Morrison get excited and grab the controls?" It is also observed that theories could doubtless be multiplied as to how the accident occurred, but each must have as its basis speculation and conjecture.

In re Estate of Rivers (1954), 175 Kan. 809, 267 P. 2d 506, involved a crash of two planes in midair. The owner of the planes sought to recover the value of the planes from the estate of one of the pilots. That plane was equipped with dual controls. Two men were riding in it. Each of them had equal access to the controls. The Supreme Court, affirming the sustaining of defendant's demurrer to the evidence, said that on the facts presented, any finding of the jury that defendant's decedent was piloting the plane at the time of the crash would be based upon mere surmise and conjecture.

Plaintiff may be right in urging that the crash occurred because the plane was flying too low to recover from a stall. Granting this fact and granting also that it was the result of the negligence of one of the parties, still leaves many unanswered questions. The dual controls were connected. Regardless of which one of the decedents may have been operating the plane the other could have taken some action which precipitated the difficulty. Any conclusion we draw must be based upon surmise and conjecture.

In Mills v. Bauer (1966), 180 Neb. 411, 143 N. W. 2d 270, we held: "The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured." To recover herein the plaintiff was required to prove who was piloting the plane at the time of the crash. Until she has done so she has not met her burden of proof. The finding of negligence is immaterial until we can determine the identity of the person to be charged with responsibility for the negligence. An issue depending entirely upon

speculation, surmise, or conjecture is never sufficient to sustain a judgment. Consequently, a judgment solely based upon speculation, surmise, or conjecture must be set aside.

Defendant's motion for a directed verdict at the close of the plaintiff's evidence should have been sustained. While the trial court submitted the case to the jury, the verdict returned was for the defendant. As we determine on the record herein that the plaintiff did not carry her burden of proof, we would have been required to have set aside any other verdict than one for the defendant. In the light of this conclusion, there is no need to discuss the errors assigned by the plaintiff. We therefore affirm the judgment for the defendant.

AFFIRMED.

MARVIN HAND, APPELLANT, V. RORICK CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.
206 N. W. 2d 835

Filed May 4, 1973. No. 38701.

1. **Contracts: Property: Invitee.** A general contractor, in control of the premises where work performance under a contract with the owner is to be carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance.
2. **Contracts: Property: Employer and Employee: Scaffolds.** The duty of a general contractor to employees of a subcontractor extends only to providing a reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by the subcontractor for the use of his own employees.
3. **Contracts: Employer and Employee: Scaffolds.** A general contractor's mere failure to inspect a scaffold owned, erected, and controlled by the subcontractor and furnished by the subcontractor for the use of his own employees does not make the general contractor liable to the subcontractor's employees for injuries caused by defects in the scaffold.
4. **Contracts: Property: Employer and Employee: Scaffolds.** A provision in a contract between the general contractor and

the owner providing: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed," does not enlarge the common law duty of the general contractor to employees of the subcontractor so as to require inspection by the general contractor of tools and equipment furnished by the subcontractor for the exclusive use of his own employees.

5. **Contracts: Employer and Employee: Scaffolds.** The contractual provision does not have the effect of giving to the employee of the subcontractor a cause of action under the Nebraska statutes pertaining to scaffold safety, because those statutes place liability upon the person who erects, constructs, maintains, or supplies the unsafe scaffold.

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

August Ross of Ross & O'Connor and Robert Heithoff, for appellant.

John R. Douglas of Cassem, Tierney, Adams & Henatsh, for appellee Rorick Constr. Co.

Boland, Mullin, Walsh & Cooney, for appellee Kehm Constr. Co.

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

CLINTON, J.

This is an action in negligence against a general contractor by an employee of a masonry subcontractor for injuries sustained in a fall from a scaffold at the site of remodeling and construction of a school in Omaha, Nebraska. At the close of plaintiff's case-in-chief before a jury, the amended petition of plaintiff was dismissed and this appeal was taken.

On October 25, 1965, plaintiff was on a scaffold 20 feet above the ground, laying block and brick. The scaffold planking gave way and plaintiff fell, receiving

bodily injuries. The scaffold platform had been constructed by resting two 2 x 10 planks side by side and placing them across arm brackets, part of the metal scaffold which supported both the brackets and the materials platform. The evidence showed that safe construction practice as well as safety codes adopted by the Department of Labor of the State of Nebraska pursuant to statutory authority required that the planks be kept in place by cleats and bars which are braces nailed or fastened across the planks on the underside at each end to prevent the planks from slipping off the arm brackets or separating. There were no cleats or bars on the planks that fell.

The scaffold had been erected by employees of plaintiff's employer which owned the scaffold, but plaintiff had not been one of those employees.

The contract between the owner and the general contractor provided: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed."

Although its superintendent was at the site, the general contractor had never inspected the scaffolding.

Plaintiff, a bricklayer for 17 years, was thoroughly familiar with scaffolds. He had experienced difficulty with scaffolding earlier at the same site, and someone had corrected the condition without anyone notifying the general contractor.

The plaintiff appears to recognize the rule that a general contractor is not liable to an employee of a subcontractor for the acts and omissions of the employer-subcontractor. Munson v. Vane-Stecker Co., 347 Mich. 377, 79 N. W. 2d 855; Miller v. Weinberg, 56 Del. 87, 190 A. 2d 27; Johnson v. Cal-West Constr. Co., 204 Cal. App. 2d 610, 22 Cal. Rptr. 492; Davis v. Caristo Constr.

Corp., 13 App. Div. 2d 382, 216 N. Y. S. 2d 765; Gambella v. John A. Johnson & Sons, Inc., 285 App. Div. 580, 140 N. Y. S. 2d 208; Chesin Constr. Co., Inc. v. Epstein, 8 Ariz. App. 312, 446 P. 2d 11. However, he takes the position the contractual provision we have earlier quoted enlarges both the common law duty of the contractor and its obligation under pertinent statutes pertaining to scaffolding and gives rise to a cause of action on the theory of a third party beneficiary. This position clearly appears to be the import of the amended petition on which the case was tried.

It appears to be conceded that the plaintiff's employer was, under the terms of the contract with the defendant, required to furnish all the material, tools, and equipment required for performance of the subcontract, but it is the plaintiff's theory that the contractual provision in this case imposed on the defendant the duty to furnish safe scaffolds, nonetheless. We do not agree.

Such contractual provisions are frequently held not to create a third party beneficiary relationship unless it clearly appears it was so intended. Rausch v. Julius B. Nelson & Sons, Inc., 276 Minn. 12, 149 N. W. 2d 1; Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P. 2d 733; Walker v. Wittenberg, Delony & Davidson, Inc., 242 Ark. 97, 412 S. W. 2d 621. In the first-cited case, the negligence was that of the general contractor. The contractual provision in the contract was similar to that involved here and was held to be admissible merely as evidence of the duty.

The plaintiff relies upon, among other cases, our holding in Simon v. Omaha P. P. Dist., 189 Neb. 183, 202 N. W. 2d 157, which was decided after the trial of this case. Our holding there is clearly distinguishable. In that case the instrumentality which caused the injury was a condition of the premises and the failure of the owner, who was its own general contractor and was in absolute control of the premises through its retained engineer (to whom it had entrusted implementation

of safety measures), to cover or barricade an opening as required by the safety code. The condition had existed for many months. The owner and its agent, who had complete control of all safety on the premises, had the right, opportunity, and duty to cover or barricade the opening. This was not the subcontractor's obligation. In the present case the instrumentality which caused the injury was not the premises, but equipment owned, controlled, and erected by the plaintiff's employer, the subcontractor. The evidence does not establish that the general contractor had any right to control the instrumentalities used by the subcontractor. It is not clear that the contractual provision gives it that right and nothing in Simon supports such a conclusion. It is clear it did not undertake to exercise control over the machines and equipment of the subcontractor. In Simon we held a general contractor, in control of the premises where work performance under a contract with the owner is to be carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. The reach of that holding does not cover the situation we have here.

Plaintiff cites a number of other cases. We believe they are all clearly distinguishable. In Blount Brothers Constr. Co. v. Rose, 274 Ala. 429, 149 S. 2d 821, the general contractor did, in fact, erect and furnish the scaffolding which was found to be inadequate and which caused the injury. In Presser v. Siesel Constr. Co., 19 Wis. 2d 54, 119 N. W. 2d 405, the situation was similar to that in Simon. The general contractor failed to erect a barricade in front of an opening in the structure which was under the control of the general contractor.

In McDonnell v. Wasenmiller, 74 F. 2d 320, the court upheld a jury verdict against the engineer in charge of and who directly supervised the installation of an expansion joint in the steam line which failed because it was not installed in conformity with the contract.

The faulty joint was the instrumentality which caused the injury.

In Dinschel v. United States Gypsum Co., 83 Ill. App. 2d 466, 228 N. E. 2d 106, the basis of liability was the Scaffold Act of Illinois which the court interpreted to be applicable to the person "in charge of" the work and held that under the provisions of the contract in question the general contractor was "in charge of" the work within the meaning of the contract and the statute.

The Nebraska statutes pertaining to scaffold safety, sections 48-425 and 48-428, R. R. S. 1943, have been applied by this court to persons who erect, construct, or supply the scaffold. Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65. The penalty section of the act originally imposed joint and several liability on the owner, contractor, and subcontractor. This provision was eliminated in 1919 and has never been restored. The language of section 48-425, R. R. S. 1943, appears to place responsibility thereunder upon the one who erects or constructs. Section 48-428, R. R. S. 1943, is a related section that requires when the inspectors of the Department of Labor find such devices deficient they shall "notify the person responsible for its erection or maintenance . . . and warn him against the use, maintenance or operation thereof and prohibit the use thereof." That section further provides: ". . . the person responsible therefor shall . . . immediately remove . . . and alter or strengthen it in such manner as to render it safe."

Skezas v. Safway Steel Products, Inc., 85 Ill. App. 2d 295, 229 N. E. 2d 781, involved a third party complaint against the injured person's employer and is in no way applicable to the situation here.

In Giarratano v. Weitz Co., Inc., 259 Iowa 1292, 147 N. W. 2d 824, the contract provision was identical to that here but, insofar as can be gained from the opinion, the cause of injury was the premises. The court did state that the plaintiff could recover against the general contractor either on theory of tort or third party

benefit. If this case supports plaintiff's position, we choose not to follow it.

We hold that the duty of a general contractor to employees of a subcontractor extends only to providing a reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by the subcontractor for the use of his own employees. Miller v. Weinberg, *supra;* Johnson v. Cal-West Constr. Co., *supra;* Gambella v. John A. Johnson & Sons, Inc., *supra.*

We also hold that a general contractor's mere failure to inspect a scaffold owned, erected, and controlled by the subcontractor and furnished by the subcontractor for the use of his own employees does not make the general contractor liable to the subcontractor's employees for injuries caused by defects in the scaffold. Munson v. Vane-Stecker Co., *supra;* Chesin Constr. Co., Inc. v. Epstein, *supra;* Gambella v. John A. Johnson & Sons, Inc., *supra;* Miller v. Weinberg, *supra.*

We further hold that a provision in a contract between the general contractor and the owner providing: "The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed," does not enlarge the common law duty of the general contractor to employees of the subcontractor so as to require inspection by the general contractor of tools, equipment, and apparatus furnished by the subcontractor for the exclusive use of his own employees. Rausch v. Julius B. Nelson & Sons, Inc., *supra;* Walker v. Wittenberg, Delony & Davidson, Inc., *supra;* Davis v. Nelson-Deppe, Inc., *supra.*

It is true that in Rausch v. Julius B. Nelson & Sons, Inc., *supra,* the injured person was an employee of a cocontractor rather than a subcontractor, but we do not regard that as a distinction that makes a difference

as to the possible applicability of the third party beneficiary theory insofar as it affects this case. It does not seem to us reasonable to say that the owner intended the provision, not only for his own protection and that of employees of the subcontractor, but for some unstated reason intended to exclude from the benefits the employees of a cocontractor. Yet this is what one would have to say for the differences to have significance.

We also hold that the contractual provision does not have the effect of giving to the employee of the subcontractor a cause of action under the Nebraska statutes pertaining to scaffold safety, because those statutes place liability upon the person who erects, constructs, maintains, or supplies the unsafe scaffold. Johnson v. Weborg, *supra*. Insofar as any of the cases cited by the plaintiff seem to support a contrary position, they depend upon statutes which place such duty upon the general contractor or upon a court interpretation which places the statutory duty upon the general contractor irrespective of whether he furnished the instrumentality.

AFFIRMED.

SMITH, J., dissents.

IN RE VALUATION AND EQUALIZATION OF REAL ESTATE IN SIOUX COUNTY, NEBRASKA, FOR 1972.
COUNTY OF SIOUX, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
207 N. W. 2d 219

Filed May 4, 1973. No. 38706.

1. **Taxation: Evidence: Administrative Law.** Proceedings at a hearing before the State Board of Equalization and Assessment are not bound by the strict technical rules of evidence demanded in a court of law.
2. **Taxation: Evidence: Administrative Law: Records.** Determinations of the State Board of Equalization and Assessment are clothed with a presumption of validity and the burden of proof

is on the appellant to establish that the record of proceedings does not support the action of the board.

3. **Taxation: Evidence: Administrative Law:** Where the evidence discloses the consistent use of reasonably current reappraisals done under uniform conditions and regulations and approved by the State Tax Commissioner, such procedures meet the constitutional test of uniformity.

4. ———: ———: ———. Professional reappraisals conducted in accordance with statutory requirements and the applicable rules and regulations of the State Tax Commissioner, and approved by him, constitute an adequate basis upon which the State Board of Equalization and Assessment may rely in the absence of clear evidence that such appraisals or reappraisals are erroneous or that they fail to establish the equality and uniformity required by law.

Appeal from the State Board of Equalization and Assessment. Affirmed.

John H. Skavdahl, for appellant.

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

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

MCCOWN, J.

This is an appeal from an order of the State Board of Equalization and Assessment increasing the 1972 assessed value of all real estate in Sioux County for local property tax purposes by restoring values established by a professional appraisal. Sioux County has appealed.

In January 1970, Sioux County contracted with Justin H. Haynes and Company, a professional appraisal firm, to make a scientific reappraisal of all real property in the county for property tax purposes. The appraisal was completed in January of 1972 and the board of county commissioners, by formal resolution, accepted and approved the completed appraisal on February 7, 1972. After publication of notice as required, the State Tax Commissioner held a public hearing in Sioux County on March 3, 1972, relative to his approval of the ap-

praisal. On March 22, 1972, the State Tax Commissioner notified Sioux County of his approval of the appraisal. On May 24, 1972, the Sioux County board of equalization, by formal resolution, decreased by 20 percent the actual value of all real estate in Sioux County from the values ascertained and shown by the Haynes appraisal.

On July 13, 1972, the Sioux County assessor forwarded the 1972 abstract of assessment to the State Board of Equalization and Assessment. That abstract reflected the 20 percent reduction from the Haynes appraisal valuations. On July 28, 1972, the state board gave Sioux County written notice of a hearing to be held on August 4, 1972, before the State Board of Equalization and Assessment to consider raising the actual value of all real estate in Sioux County by 25 percent. The hearing before the state board was held as scheduled. On August 15, 1972, the State Board of Equalization and Assessment entered its order that all real estate in Sioux County be raised in valuation by 25 percent over the valuation as reflected in the 1972 abstract of assessment filed by the county. The order contained findings of fact and conclusions of law in support of the order and specifically recited that it was the intent and purpose of the order to restore the valuations to the level established by the Haynes appraisal.

Sioux County's assignments of error are generally directed to two areas. One area involves issues of due process and procedure and the other the substantive issue of whether the order of the state board is supported by the record or was erroneous, arbitrary, or capricious.

The fundamental threshold issue raised by the county involves the sufficiency of the notice of the hearing of August 4, 1972, before the State Board of Equalization and Assessment. The county asserts that the notice was misleading and ambiguous and failed to state the proposed percentage of increase by reference to the abstract of assessment. Sioux County contends that

due notice is a condition precedent to any valid order by the state board and that in the absence of valid notice, the board has no jurisdiction to order an increase in value.

Sioux County did interpose its objections as to sufficiency of notice at the commencement of the hearing before the state board, but made no request for continuance or for a specification of proposed adjustments. The county participated fully in the proceedings before the board without further objection as to notice, and with no apparent confusion as to the exact purpose of the hearing. The contention is that the notice of hearing was ambiguous in that the first paragraph might arguably be construed to propose a 25 percent increase to the Haynes appraisal values rather than a 25 percent increase in the 1972 abstract of assessment of Sioux County. Even if it be assumed that the first paragraph of the notice might be ambiguous as to what original valuations were to be increased by 25 percent, any such ambiguity was completely removed by the latter portions of the notice. The notice specified that the proposed 25 percent raise was the amount necessary to restore the full value resulting from the Haynes reappraisal. The notice met all essential requirements of the statutes and the decisions of this court. See, County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N. W. 2d 880; County of Lancaster v. State Board of Equalization & Assessment, 180 Neb. 497, 143 N. W. 2d 885. An inadvertent ambiguity in one portion of a notice of hearing clarified or removed by other portions of the same notice ought not to form the basis for a due process challenge of the notice. Participation in the hearing under these circumstances removes the foundation for asserting prejudicial insufficiency of notice. The notice here was fully sufficient and the State Board of Equalization and Assessment had full jurisdiction and authority to act.

On other procedural issues the county asserts that

hearsay evidence was received and some documents received in evidence without proper foundation, and other documents received or considered without formal admission and inclusion in the record. In many instances no objection was made to sworn testimony. In other instances the county's objections are based upon the assumption that the state board fully adopted and relied upon facts indicated by documentary evidence. In other instances witnesses' testimony referred to documents filed with the State Tax Commissioner. We think it necessary only to note that proceedings at a hearing before the State Board of Equalization and Assessment are not bound by the strict technical rules of evidence demanded in a court of law. The multiple procedural contentions raised by the county cannot be sustained.

We turn now to the substantive issues as to whether the record supports the order of the State Board of Equalization and Assessment or instead demonstrates that the action of the board was erroneous, arbitrary, and capricious. A fundamental rule consistently followed by this court is that the determinations of both county and state boards of equalization are clothed with a presumption of validity. We have consistently affirmed the rule that the burden of proof is on the appellant to establish that the action of the State Board of Equalization and Assessment was erroneous, arbitrary, and capricious. While the record of the proceedings must sustain the action of the board, it is only when the record does not support such action that it will be held to be unreasonable and arbitrary. See, Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N. W. 2d 878; City of Omaha v. State Board of Equalization & Assessment, 181 Neb. 734, 150 N. W. 2d 888; County of Sioux v. State Board of Equalization & Assessment, 185 Neb. 741, 178 N. W. 2d 754.

The critical issue in this case involves the validity of the Haynes appraisal and whether or not a professional appraisal made pursuant to statutory requirements rea-

sonably reflects equalization between counties and uniformity of assessment. Essentially, Sioux County concedes that the Haynes appraisal does not exceed actual value and that it is acceptable as to internal equalization within the county. The position of Sioux County is simply that the Haynes valuations are too high in relationship to adjoining counties. The evidentiary support for that position is based almost entirely on an appraisal study by R. C. Walters Company, Inc., dated July 1, 1969, and comparisons in that study based on 1969 tax valuations. That study concerned three counties and was done over a 2½ month period in 1969. The Walters study also used as partial basis for valuation, sales occurring in the years 1967 and 1968. The Haynes appraisal was completed 2½ years after the Walters study, involved a more intensive study of Sioux County, and considered and used sales for the years 1969 through 1971. The chief appraiser of the real estate division of the Nebraska Department of Revenue also testified and fully supported the Haynes appraisal on issues of valuation as well as on equalization between counties. Representatives of adjoining counties also testified that the valuations of the Haynes appraisal had achieved reasonable equalization as between counties and that the action of the Sioux County board in reducing the Haynes valuations by 20 percent had destroyed that equalization and placed the Sioux County values at a level below that of surrounding counties.

Professional appraisals have consistently been approved as a reasonable and proper basis of valuation of real estate for tax purposes. Such appraisals have been the traditional method of valuation in this state. The statutes now provide extensive direction for such reappraisals; require them for all counties at periodic intervals; require the State Tax Commissioner, by rule, to establish standards for such appraisals to assure the determination of actual value on a consistent basis and the equalization of values; and require him to

supervise and approve reappraisal contracts and to approve the reappraisals themselves. See §§ 77-1301 to 77-1301.11, R. R. S. 1943. The rules and regulations promulgated by the State Tax Commissioner are detailed and extensive. See Appraisal Rules and Regulations, State of Nebraska, Department of Revenue.

Section 77-1301.06, R. R. S.. 1943, provides in part: "Upon completion and final approval of any reappraisal conducted pursuant to the provisions of sections 77-1301.07 and 77-1301.08, the valuations established by such reappraisal shall be used for purposes of property taxation of all property so appraised." We have previously held that where the evidence discloses the consistent use of reasonably current reappraisals done under uniform conditions and regulations and approved by the State Tax Commissioner, such procedures meet the constitutional test of uniformity. County of Gage v. State Board of Equalization & Assessment, 185 Neb. 749, 178 N. W. 2d 759. We now hold that professional reappraisals conducted in accordance with statutory requirements and the applicable rules and regulations of the State Tax Commissioner, and approved by him, constitute an adequate basis upon which the State Board of Equalization and Assessment may rely in the absence of clear evidence that such appraisals or reappraisals are erroneous or that they fail to establish the equality and uniformity required by law.

The order of the State Board of Equalization and Assessment ordering the valuation of all real estate in Sioux County to be raised by 25 percent over the valuation reflected in the 1972 abstract of assessment filed by the county was correct and is affirmed.

AFFIRMED.

IN RE INTEREST OF KAREN VOGT, A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. OTTO E. VOGT, JR., ET AL., APPELLANTS.

206 N. W. 2d 849

Filed May 4, 1973. No. 38743.

1. **Infants: Parent and Child: Statutes.** Child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purpose of serving the best interests of the child involved.
2. **Infants: Parent and Child: Trial: Appeal and Error.** In cases involving child custody the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

David M. Geier, for appellants.

Paul L. Douglas and Janice L. Gradwohl, for appellee.

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

SPENCER, J.

In this action the Separate Juvenile Court of Lancaster County terminated all parental rights between Frances and Otto Vogt and their child, Karen Vogt. We affirm.

Karen, who was born April 19, 1969, was removed from the custody of her parents September 16, 1970, and placed in an approved foster home under the supervision of the Lancaster County department of public welfare. Both parents consented to this award of temporary custody.

On June 11, 1971, a hearing was held on an amended petition alleging Karen to be neglected due to the fault and habits of her parents. We summarize the allega-

tions. The mother of said child threatened to beat and kill said child. The father had assaulted and beaten the mother on various occasions. During the time the child was in the home of her parents she was dirty and unkempt. The family home was burned in a fire started when the father was welding in an area where fuel was kept. The city housing consultant had found that in its present condition the dwelling of the parents was unsafe for additional occupants. The parents have been involved in domestic problems and are unable to provide a stable home for said child.

The court found the allegations of the amended petition to be generally true and Karen Vogt to be neglected due to the fault and habits of her parents, and in a situation dangerous to life and limb and injurious to health. Her temporary custody was given to the Lancaster County department of public welfare for placement in an approved foster home. The order further provided that the department of public welfare was to work with Otto and Frances Vogt in an attempt to correct the condition of neglect, in order that the child could be returned to her parents.

On June 29, 1972, a hearing was held upon an amended supplemental petition alleging that Karen Vogt was a neglected child, and requesting termination of parental rights. The court specifically found that reasonable efforts had been made under the direction of the court to correct the conditions of neglect, without success. Appellants complain because the court did not direct efforts of the parents to correct the conditions which existed at the time of the original finding of neglect. There is no merit to this contention. As the court found, the primary conditions of neglect were conditions that needed to be corrected by the parents and correction by outsiders could not alleviate the problems.

The record evidences deplorable conditions in the residence of the parties subsequent to the original finding of neglect. It also evidences the failure of the parents

to take any concerted action to correct those conditions. We note a lack of interest of the parents in the welfare of the child from the time the child was taken from the home to the time of the trial. A 9-year-old brother of Karen, who has not been in the parents' home since shortly after birth, is being raised in the home of his maternal grandmother in another county.

The court specifically found the parties permitted an unmarried man and woman to live together on the premises with them. It also found the mother of the child was herself involved in an improper relationship. It further found the conduct of the parents and the conditions in the home would be seriously detrimental to the health, morals, and wellbeing of the child were the child to be returned to the parents.

The law is well settled that child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purpose of serving the best interests of the child involved. State v. Randall (1971), 187 Neb. 64, 187 N. W. 2d 586.

We have said, in cases involving child custody, the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. State v. Randall, *supra*.

We are convinced from a reading of the record herein there has been no abuse of discretion. The best interests of the child requires a termination of all parental rights in the Vogts. Believing as we do that the judgment rendered herein is the only one possible on the record, to delay further in the termination of the parental rights between the Vogts and their child would be detrimental to the best interests of the child. In view of that conclusion, the trial court rendered the only judgment permissible herein. The judgment is affirmed.

AFFIRMED.

PROGRESSIVE DESIGN, INC., APPELLEE, V. OLSON BROTHERS MANUFACTURING COMPANY, APPELLEE, SECURITY STATE BANK OF OXFORD, NEBRASKA, INTERVENER-APPELLANT.
206 N. W. 2d 832

Filed May 4, 1973. No. 38746.

1. **New Trial: Appeal and Error: Records.** If the consideration of a record of the District Court does not require the examination of any issue of fact or error of law occurring at the trial, which could only be preserved by a bill of exceptions, a motion for a new trial is not a condition precedent to a review of that record in this court.
2. **Dismissal and Nonsuit: Parties.** The dismissal of a plaintiff's petition or cause of action does not affect an intervening petitioner's right to proceed and obtain a determination of his claim to affirmative relief.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded for further proceedings.

Richard A. Knudsen of Knudsen, Berkheimer, Endacott & Beam, William A. Sherwood of Sherwood & Poff, and Beech & Webster, for intervener-appellant.

J. Patrick Green of Eisenstatt, Higgins, Miller & Kinnamon and Walt Azaroff, for appellee Progressive Design, Inc.

William W. Griffin, for appellee Olson Bros. Manuf. Co.

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

NEWTON, J.

This is an action brought by Progressive Design, Inc., to recover from defendant Olson Brothers Manufacturing Company for breach of contract. Plaintiff had entered into a security agreement and assigned the contract to intervener Security State Bank of Oxford, Nebraska. Plaintiff entered into a settlement with defendant and dismissed its petition with prejudice. The court

thereupon dismissed the intervener's petition. We reverse the judgment of the District Court.

On March 31, 1970, plaintiff, by written contract, agreed to manufacture and sell to defendant certain quantities of hydraulic valves. On April 29, 1970, plaintiff assigned to intervener all claims for money falling due it under the contract as security for a loan and executed a security agreement thereon. Financing statements were duly filed. Oral notice of the assignment was given defendant on May 14, 1970, and written notice on August 14, 1970. Plaintiff was in default under the security agreement.

Plaintiff's petition was filed November 27, 1970. Defendant appeared by motion and an amended and substituted petition was filed. Intervener's petition in intervention setting up its interest in the matter was filed June 1, 1971. No answer appears to have been made by defendant. On August 23, 1971, plaintiff filed a dismissal with prejudice. Defendant then moved for dismissal of the petition in intervention on the ground that a settlement had been effected between plaintiff and defendant and plaintiff's petition dismissed. Dismissal of the petition in intervention was entered by the court on August 16, 1972.

Questions presented are the propriety of the order dismissing the petition in intervention, the necessity of a motion for new trial, and the filing of a bill of exceptions to a determination on appeal.

As to a bill of exceptions, it appears that no evidence was taken and the transcript is sufficient to present all issues before the court. The case is one for determination solely on the pleadings and the order of the court.

In regard to the requirement of a motion for new trial, it was held in Walker v. Burtless, on rehearing, 82 Neb. 214, 118 N. W. 113, that: "If the consideration of a record of the district court does not require the examination of any issue of fact or error of law occurring at the trial, which could only be preserved by a

bill of exceptions, a motion for a new trial is not a condition precedent to a review of that record in this court."

In Weideman v. Estate of Peterson, 129 Neb. 74, 261 N. W. 150, it is stated: "An examination of our statute relating to new trials and the constructions heretofore placed thereon in numerous cases establishes beyond any doubt the rule that orders of the district court which do not pertain to the trial of the case, such as rulings upon demurrer, motions addressed to the pleadings, and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial to make them available on appeal taken to this court."

A more serious question is presented regarding dismissal of the petition in intervention following the dismissal of plaintiff's petition. It is evident that intervener has a direct interest in the subject of the action and the settlement made by plaintiff and defendant is an attempt to circumvent and defeat the intervener's claim. As assignee of the contract, any settlement made by plaintiff is necessarily ineffective unless the assignee is a party to it. The matter is handled in several different ways in the various jurisdictions. Some hold that the plaintiff cannot dismiss its own petition if it adversely affects an intervener entitled to affirmative relief. Some, by statute, preserve the intervener's cause of action. Others hold that dismissal of the principal action dismisses the petition in intervention. Still others hold, even in the absence of statute, that an intervener's petition showing it to be entitled to affirmative relief will be preserved and heard regardless of the disposition of the principal action.

Nebraska follows the latter rule. It was held in Montgomery v. Dresher, 97 Neb. 112, 149 N. W. 314, that: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, may become a party to such action, and when he has become a party thereto

it is error for the court to dismiss his petition of intervention prior to the final determination of the action on the merits."

In Scott v. Van Sant, 193 Minn. 465, 258 N. W. 817, it was held that where complaint in intervention asked for affirmative relief, plaintiff's attempted dismissal of her action by means of notice of dismissal did not affect intervener's right to maintain complaint in intervention.

In Patterson v. Pollock, 84 Ohio App. 489, 84 N. E. 2d 606, plaintiff dismissed her action and the court stated: "However, the case has been presented to this court as though the entry that the court set aside effected the dismissal of the entire action including the intervening petition. We hold that if the order of the court had that effect it was erroneous in the absence of consent by the intervenor."

In Boyd v. McConnell, 186 Tenn. 520, 212 S. W. 2d 365, it was held: "Dismissal of original bill for complainant's failure to execute cost bond does not affect intervening petitioner's right to proceed with litigation and determination of his rights."

In In re Estate of Hazeldine, 225 Iowa 369, 280 N. W. 568, the court stated: "That claimant's dismissal as to a part of his amendment to his claim did not deprive the court of its jurisdiction to adjudicate the rights claimed by the cross-petitioner and intervenor is, we think, sustained by our decisions * * *."

In Muirhead v. Johnson, 232 Minn. 408, 46 N. W. 2d 502, the court held that in an action by taxpayer to set aside conveyance by city on grounds that conveyance had been obtained through false representations and for grossly inadequate consideration, where city filed complaint in intervention before plaintiff's action had been expressly dismissed, but subsequent to expiration of time granted plaintiff to file amended complaint by order sustaining demurrer to plaintiff's original petition, city's complaint was not subject to dismissal on ground that no action was pending, since dismissal of

plaintiff's action did not affect rights of intervener or effect dismissal of intervener's complaint. See, also, Seil v. Board of Supervisors of Will County, 93 Ill. App. 2d 1, 234 N. E. 2d 826; Minkin v. City of New York, 198 N. Y. S. 2d 744, 24 Misc. 2d 818.

The judgment of the District Court is reversed and the cause remanded for further proceedings on the petition in intervention.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. MELVIN MARTIN, APPELLANT.
206 N. W. 2d 856

Filed May 4, 1973. No. 38785.

1. **Criminal Law: Receiving Stolen Goods: Words and Phrases.** The word "receiving" in the offense of receiving stolen property, essentially means acquisition of control in the sense of physical dominion or of apparent legal power to dispose.
2. **Criminal Law: Constitutional Law: Statutes.** The habitual criminal statute does not contravene the constitutional prohibition against cruel and unusual punishment.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Affirmed.

Lester R. Seiler, 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.

SMITH, J.

Melvin Martin was charged with the offense of receiving stolen copper of the value of more than $100 and with being a habitual criminal. A jury found him guilty of the offense, and the court sentenced him as a habitual criminal. He appeals.

Martin assigns for error (1) the denial of his motion to strike all the testimony of a prosecution witness, Ned Nelson, who admitted larceny of the copper, (2) insufficiency of the evidence to sustain the verdict, and (3) unconstitutionality of the habitual criminal statute under the federal prohibition against cruel and unusual punishment.

The testimony of Ned Nelson is as follows. In January 1972 he and Martin salvaged and sold copper taken from the Glenville dump near Hastings. The larceny occurred February 13 under these circumstances. The two men early in the morning of February 12 found 3 or 4 tons of copper with large quantities of iron pipe and cinder block. The materials were located in a gutted building at the Navy Ammunition Depot and were the property of the Hadco Company. Martin suggested stealing the copper. They then "set some copper away from the wall" and departed empty-handed because of daylight and factories nearby. About 10:45 p.m. they returned with axes, hammers, and chisels, in a 1963 Ford station wagon owned by Nelson. Until 4 a.m. frames, each of which weighed at least 600 pounds, were stripped of 1,100 pounds of copper. The men then transported the copper and unloaded it at the Glenville dump which they chose because no watchman was present.

Having arisen at 7 a.m. on February 14, Nelson and Martin in the station wagon proceeded to the dump. They loaded only part of the copper because of rough roads and returned to Hastings where Nelson parked in a parking lot. Martin then drove his Buick automobile to the dump, and the men loaded the remainder of the copper. Upon their return to the parking lot they transferred the copper in the Buick to the station wagon. The copper was covered with tarpaulin and transported to Alter's Iron Works in Council Bluffs, Iowa. Nelson and Martin helped unload the cargo. Alter's paid for the copper by issuing a check for $375.26 payable to

Nelson alone. The check was cashed at a Council Bluffs bank and the proceeds were divided evenly between Nelson and Martin. The method of payment resulted from Martin's desire to conceal his connection with the transaction.

The testimony of Nelson exhibits ill will on his part against Martin, some self-contradiction, and some contradiction of testimony by a disinterested witness. Nelson denied a bargain for immunity. Although the county judge at a preliminary hearing had bound Nelson over to District Court, the county attorney prior to the trial of Martin did not prosecute Nelson in District Court.

The testimony of Martin is as follows: Prior to February 14 he and Nelson on two occasions sold salvage to Alters. On February 14 at 7 a.m. Nelson visited the room of Martin. In the presence of Mike Broadbent, an overnight guest, Nelson asked Martin to drive him to the Glenville dump to salvage copper. The two men proceeded there in Martin's Buick, loaded the automobile, and drove to the parking lot. There they transferred the Buick load to the station wagon, and Martin helped to cover the copper with a blanket. His testimony to other events that day coincided with Nelson's version. On February 28 Martin first learned that someone had stolen copper from Hadco.

Mary Nelson, former wife of Nelson, testified that shortly after February 14 Martin had said: "A. He told me that him and Ned took copper, and took it to Council Bluffs and sold it, and when he come back, he showed me stubs on how much they got out of it, and then destroyed them. Q. Did he tell you why he destroyed them . . .? A. He wanted no connection to this where the stubs might be taken to anybody and shown. . . . He didn't want anybody to know anything about it. . . . He told me he got it from the Navy Depot. That's what he told me that they had gotten it from there."

Martin argues that the denial of his motion to strike the testimony of Nelson was erroneous under this rule: "The fact an accomplice has been guilty of willful false swearing on a material matter does not automatically discredit his testimony as a matter of law in all cases. Ordinarily, his credibility is a question for the jury under a proper cautionary instruction." State v. Oglesby, 188 Neb. 211, 195 N. W. 2d 754 (1972). We conclude that the ruling of the District Court on Martin's motion was correct.

On insufficiency of the evidence Martin argues that a participant in the larceny cannot receive the property. See, II Anderson, Wharton's Criminal Law and Procedure, § 576, p. 296 (1957); Clark & Marshall, Law of Crimes (Wingersky, 6th Rev. Ed., 1952), § 12.37, p. 856 at 858; LaFave & Scott, Handbook on Criminal Law, § 93, p. 681 at 689 (1972).

The word "receiving" in the offense of receiving stolen property, essentially means acquisition of control in the sense of physical dominion or of apparent legal power to dispose. State v. Alcorn, 187 Neb. 854, 194 N. W. 2d 798 (1972). The evidence was sufficient for a jury properly to find that Martin did not participate in the larceny but that he was guilty of the offense of receiving stolen property.

Martin asserts unconstitutionality of the habitual criminal statutes on two grounds: The prosecutor possesses a discretion whether to charge the facts referable to habitual criminality, State v. Reed, 187 Neb. 792, 194 N. W. 2d 179 (1972), and the statute provides for punishment of a status. It concededly commands an increase in the sentence of a defendant with two prior convictions, the statute embodying exceptions immaterial here. It does not prescribe a separate offense. See, § 29-2221, R. S. Supp., 1972; State v. Losieau, 184 Neb. 178, 166 N. W. 2d 406 (1969).

Habitual criminal statutes have repeatedly withstood attacks on their constitutionality under the Fourteenth

Amendment. See, Oyler v. Boles, 368 U. S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962); State v. Losieau, *supra*. New Mexico with a statute similar to the one under attack rejected the contention of cruel and unusual punishment. Its Court of Appeals said, however, that the prosecutor had no discretion. See, State v. Gonzales, 84 N. M. 275, 502 P. 2d 300 (1972); State v. Sedillo, 82 N. M. 287, 480 P. 2d 401 (1971).

Any distinction or difference between duty and discretion of the prosecutor in this context is unimportant. Discretion on the part of state representatives is inherent at many stages in administration of criminal law. To adopt Martin's argument would uproot the system, and that the Supreme Court of the United States has not countenanced. Cases striking down the death penalty, such as Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), are distinguishable. Application of the statute does not impose cruel and unusual punishment. See, State v. Losieau, 182 Neb. 367, 154 N. W. 2d 762 (1967); State v. Custer, 240 Ore. 350, 401 P. 2d 402 (1965).

The statute does not provide for punishment of a status in contravention of the Fourteenth Amendment. See State v. Gonzales, 84 N. M. 275, 502 P. 2d 300 (1972).

Other assignments of error are without merit.

AFFIRMED.

ROBERTA KENASTON, ADMINISTRATRIX OF THE ESTATE OF TIMOTHY J. KENASTON, DECEASED, APPELLANT, V. BIXBY TEETERS, APPELLEE.

207 N. W. 2d 388

Filed May 11, 1973. No. 38664.

Trial: Evidence. Unless it is directly in issue, the character or reputation of a party to a civil action is generally regarded as legally irrelevant in the determination of the controversy; consequently, evidence relating thereto is not admissible.

Appeal from the District Court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded.

John McArthur, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Richard P. Nelson, for appellee.

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

SPENCER, J.

Plaintiff, administratrix, appeals from a verdict for the defendant. The issues tried were the gross negligence of the defendant and the alleged contributory negligence of plaintiff's decedent. We reverse.

Decedent was the husband of the plaintiff and the father of three small children. Decedent and his family rode with the defendant to a sandpit lake north of Ashland, Nebraska. Defendant and the decedent had been drinking beer earlier in the day. On the way to the sandpit they purchased more beer. At the sandpit they engaged in recreational activities with friends and relatives. This included the drinking of more beer. An autopsy performed on the decedent shortly after his death revealed 0.14 grams percent of alcohol in his blood.

Defendant's vehicle, a convertible with the top down, was parked in an area provided for that purpose on the premises. Defendant's party, which was the last to leave, prepared to depart about 8 p. m., while it was still light. There was a dropoff between the parking area and the sandpit where the people had been swimming. The vehicle upset over this bank, pinning the decedent underneath and killing him instantly. There is a sharp dispute as to how the accident happened. In view of the conclusion we reach, no purpose will be served by enumerating the respective versions of the accident.

As the case will be retried, we discuss only two assignments of error, the fifth and the eighth. The fifth

refers to instruction No. 8 by which the jury was advised that it is the duty of a guest riding in an automobile to use due care in keeping a lookout and also to warn the driver of a danger known to the guest. The instruction, if applicable, is a proper one. See Pankonin v. Borowski (1958), 167 Neb. 382, 93 N. W. 2d 41. The answer of the defendant does not plead this defense. Nor is there anything in the evidence which would sustain a finding that the decedent could have done anything in the way of warning the defendant. So far as lookout was concerned, defendant expressly admitted that he knew at all times of the presence of the bank that he went over. Under the circumstances, the instruction was erroneously given.

Plaintiff's eighth assignment is to the effect that the court erred in receiving over objection general evidence of marital unfaithfulness of decedent. A number of questions were asked of the plaintiff concerning the state of her marriage prior to the date of the decedent's death. At that time the parties were living together and decedent was supporting his family.

Plaintiff was asked if she had ever commenced an action for divorce against decedent. An objection to this question was sustained. She was then asked: "Q During the entire time of your marriage to Timothy Tenaston (sic) did you always live together? A No, sir." There was no objection to the question, but counsel did approach the bench. Subsequently, the following testimony appears: "Q Did your husband make a habit of going out by himself or with the other guys? A He did go out, yes. Q I mean with other people. A Yes, sir. Q Did he during your marriage go out with other women? MR. McARTHUR: I'm going to object to this as improper and immaterial. THE COURT: Overruled. BY MR. COBB: Q You may answer. A Yes, sir. Q In fact, during your marriage did he have a child by another woman? MR. McARTHUR: I ob-

ject to this as being improper and prejudicial. THE COURT: Sustained."

Plaintiff and the decedent were living together at the time of his death, and the decedent was supporting his family. Previous misconduct was not a relevant issue. The character of a third person may not as a general rule be shown in a civil action any more than the character of a party. Unless it is directly in issue, the character or reputation of a party to a civil action is generally regarded as legally irrelevant in the determination of the controversy; consequently, evidence relating thereto is not admissible. Defendant argues the evidence here was admissible under Metcalf v. Chicago, R. I. & P. Ry. Co. (1919), 103 Neb. 431, 172 N. W. 246. We disagree. That case involved liability under an employer's liability act. The defendant sought a new trial on the grounds of newly discovered evidence that the parties had been living apart. The court denied the motion because decedent was contributing to the support of the family, and held the wife sustained a pecuniary loss for which she could recover.

Judgment reversed and cause remanded for a new trial.

REVERSED AND REMANDED.

ELNA M. FLEISCHER, APPELLANT, V. LAVERN ROSENTRATER, APPELLEE.

207 N. W. 2d 372

Filed May 11, 1973. No. 38674.

1. **Trial: Instructions.** It is the duty of the trial court to submit to the jury all issues which are properly pleaded and which find support in the evidence.
2. **Trial: Evidence: Motor Vehicles: Statutes.** Under section 39-757, R. R. S. 1943, where the evidence shows that a vehicle was left standing on the paved, improved, or main-traveled portion of a highway, a prima facie violation of the statute is established and it is incumbent upon the person charged to

show the existence of facts which take him out of the scope of the application of the statute.

3. ———: ———: ———: ———. Where a prima facie violation of section 39-757, R. R. S. 1943, is shown under the evidence, the questions of whether a reasonable excuse for the stopping existed, or whether reasonable effort was made to remove the vehicle from the traveled portion of the highway, and whether reasonable precautions were taken for the protection of highway traffic, are ordinarily for the jury.

Appeal from the District Court for Custer County: WILLIAM F. MANASIL, Judge. Affirmed.

Padley & Dudden, for appellant.

Stewart & Stewart and Roy E. Blixt, for appellee.

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

WHITE, C. J.

The basic issue in this case is whether the trial court erred in submitting the issue of contributory negligence to the jury, which returned a verdict for the defendant in this action for personal injuries and property damage arising out of an automobile collision on a gravel road in Custer County, Nebraska. The trial court entered a judgment for the defendant and the plaintiff prosecutes this appeal from the overruling of a motion for a new trial. We affirm the judgment of the District Court.

This is a rear-end collision case, between a parked car on a gravel country road and the defendant's automobile approaching from the rear. As usual, in this continually recurring type of rear-end collision - parked car case - the question involved is whether the court should submit the issue of negligence or contributory negligence for violation of section 39-757, R. R. S. 1943, which provides first that no person shall park or leave standing any vehicle on the main-traveled portion of any highway when it is practicable to park or leave such vehicle standing off the paved, improved, or main-traveled portion of such highway. And secondly the

statute also provides that in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than 15 feet upon the main-traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in each direction upon such highway. Since the contention is that there is no evidence to justify the trial court in submitting the issue of contributory negligence on the part of the driver of the parked car, Mrs. Elna M. Fleischer, we review the evidence in some detail.

It shows that on January 17, 1963, the plaintiff, Mrs. Elna M. Fleischer, was following a truck occupied by her son, William Fleischer, and daughter-in-law, Marlene Fleischer, on State Highway No. 47 about 14 miles north of Gothenburg, Nebraska, in Custer County. They were proceeding south. They reached a point on the highway opposite the lane on the east side of the highway which led to the Fleischer home. William Fleischer turned into this lane, drove about 30 feet into it, and stopped. The plaintiff continued down the highway for about 10 feet or so beyond this lane to the south and stopped on the west side of the road. The plaintiff intended to pick up Marlene Fleischer, who had gotten out of the truck driven by her husband, William, and she and Mrs. Fleischer were to proceed on to church further south in Mrs. Fleischer's vehicle. Marlene Fleischer testified that she had gotten out of the truck and was going over to the plaintiff's car when she realized that she had forgotten her purse and so went back to the truck to get it. She got her purse and had just reached the back of the truck when she saw the defendant Rosentrater's car approach and strike the plaintiff's car. The right front of the Rosentrater vehicle came in contact with the left rear of the Fleischer vehicel and pushed it south and west into the borrow

ditch or pit on the west side of the road. The Rosentrater vehicle also came to rest in the west borrow ditch, 11 feet north of the Fleischer car.

State Highway No. 47 is a gravel-surfaced road. There was evidence that there had been a slight bit of snow early that morning, but by 1:45 p.m., the time of the accident, this was gone, and the evidence is that the day was dry and clear, with a wind out of the northeast at about 5 or 6 miles per hour. The defendant testified that the road was dusty and that his vision was obscured at times by clouds of dust stirred up by the vehicles preceding him. The plaintiff contended that the road and the atmosphere were clear at all times.

No issue was presented as to the evidence of the defendant's negligence. The quite strong preponderant evidence of his negligence as shown by the record in this case only serves to obscure the precise issue and that is whether there was evidence of the plaintiff's contributory negligence. The roadway in question was 24 or 25 feet in width. The state patrolman who investigated the accident testified without dispute that there was debris on the highway consisting of bits of glass and mud that appeared to have been jarred loose from the impact of the automobiles. In conjunction with the debris, the patrolman testified there was a trail of antifreeze that was left by the defendant Rosentrater's car as a result of damage to the radiator. It is undisputed that the right front of the Rosentrater vehicle came into contact with the left rear of the Fleischer vehicle. The beginning of the antifreeze trail was 13 feet from the east side and 11 feet from the west side of the road (24 or 25 foot width). The patrolman marked the presence of the debris and the antifreeze on exhibit 8. It demonstrates that the debris and the antifreeze were about in the exact center of the highway. The patrolman testified *that there were shoulders on the sides of the road.* There is also evidence that the radiator hose was pulled from its mounting by the collision and that

the antifreeze leak came from the right side of the radiator.

It becomes abundantly clear from the above evidence, and almost all of which was testified to by the state patrolman, and almost all of which is without dispute, that the defendant's automobile was stopped and standing in the main-traveled portion of the road. The evidence clearly supports, and almost conclusively, that the Fleischer vehicle was standing and stopped in the main-traveled portion of the roadway. Our court has consistently held that such facts constitute a prima facie violation of the statute sufficient to make a jury question and that it is incumbent upon the person charged to show the existence of facts which take him out of the scope of the statute. In Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885, a case closely in point with the present one, this court held: "Where the evidence shows that a vehicle was left standing on a paved, improved or main traveled portion of a highway, *a prima facie violation of the statute is established and it is incumbent upon the person charged to show the existence of facts which take him out of the scope of the act.* In the instant case, therefore, *the evidence that the defendant's car was standing on the pavement is evidence of a violation of statute relative to the use of motor vehicles on a highway which, if found to be true, is evidence of negligence which the jury may consider* in connection with all the other facts and circumstances in determining whether or not the driver of defendant's car was negligent. * * * consequently, the evidence is sufficient to show that there was a noncompliance with the statute. This is *evidence of negligence, which the jury* may properly consider." (Emphasis supplied.)

We come to the conclusion, therefore, that the evidence clearly establishes a properly submissible issue of contributory negligence.

Giving maximum import to the plaintiff's argument, she seems to contend that she has, as a matter of law,

met the burden of proof on the issue of coming within the exceptions contained in the statute as to disability, excuse, or necessity. Although we have demonstrated that the proof of a violation of the statute is sufficient to carry this issue to the jury, we examine the evidence on this point. As we have pointed out it is incumbent upon her and not the defendant to sustain the burden of showing disability, excuse, or necessity. We point out that no necessity or emergency is shown to exist as a reason for stopping, other than her desire to pick up her daughter-in-law. Her car was not disabled or in any type of an emergency condition or situation that was present in the cases cited by the plaintiff. Her own evidence shows that the width of the roadway and the shoulder was sufficient for her to have pulled her car off the main-traveled portion of the road which she testified that she did, but the undisputed evidence of the patrolman leads to a strong inference that she did not. Further, the evidence is undisputed that she could have pulled clear off the highway and into the lane leading into her residence, the same lane that her son did pull the truck off into.

On the second portion of the statute relating to permitting 15 feet of clear and unobstructed roadway the evidence of the patrolman that the debris and the antifreeze trail was 11 feet from the west side of the road and 13 feet from the east side, together with the evidence as to the leak coming from the right side of the radiator, and the evidence that the right front of the defendant's vehicle struck the left rear of the plaintiff's vehicle are sufficient to warrant a finding by the jury that this provision in the statute was also violated and consequently resulted in a jury question as to the determination of her contributory negligence. We have examined the cases cited by the plaintiff and they are all clearly distinguishable from the present case and the applicable authorities.

Many of this type of rear-end cases have been before

our court and the law is well-settled that whether reasonable excuse for stopping existed, whether reasonable effort was made to remove the vehicle from the traveled portion of the highway, whether the reason for the stopping was the disability of the car, and whether reasonable precautions were taken for the protection of highway traffic are ordinarily questions for the jury. Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628. It is abundantly clear that there was a direct conflict in the evidence on this issue in the case between the plaintiff's testimony, the defendant's testimony, and the state patrolman's evidence. The trial court did not, and we can not, find as a matter of law either that the statute was not violated or that an emergency or suitable excuse was indisputedly demonstrated relieving the plaintiff from the prima facie application of the statute.

The District Court properly submitted the issue of the violation of the statute to the jury, recited the applicable sections of the statute to the jury, and properly warned the jurors that a violation of the statute, by itself, was not negligence, but was evidence of negligence that could be considered with all the other circumstances in the case. An examination of the other instructions covering the issue of contributory negligence reveals no error. They follow, in substance, the accepted standards set out in the Nebraska Jury Instructions covering these areas.

The submission of the issue of the plaintiff's contributory negligence by the trial court is correct. The judgment of the District Court is correct and is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the result. I do not agree that a temporary stop on a level highway where there are no closely following vehicles and there is good visibility for vehicles approaching from the rear for a considerable distance makes a submissible issue on violation of the statute. Here there is evidence of restricted visibility

for vehicles following the plaintiff caused not only by the plaintiff's vehicle, but by the truck which it was following which turned off just before the accident. The jury could find that the plaintiff should have been aware of this and that possible finding plus the fact there was evidence that it was practicable for the plaintiff to have parked on the shoulder of the road and entirely off the main-traveled portion were circumstances which created a jury question as to the plaintiff's contributory negligence.

NEWTON, J., dissenting.

There were two critical issues in the trial of this case. First, was the defendant negligent and, if so, to what extent? Second, was the plaintiff contributorily negligent in stopping on the road?

The court instructed on the range-of-vision rule as follows: "A motorist ordinarily has a duty to drive an automobile on a public street or highway in such a manner that he can stop in time to avoid a collision with an object within the range of his vision, and he is negligent if he fails to do so.

"A motorist is not, however, negligent where the object *cannot be observed* by the exercise of ordinary care in time to avoid a collision." (Emphasis supplied.)

On the basis of this instruction, the jury may well have concluded that the existence of a dust cloud excused a violation of the rule. The rule, NJI No. 7.03 B, to the effect that the existence of dust required a reduction of speed and a commensurate degree of care on the part of defendant was directly in issue but not given.

The court instructed on the statute forbidding stopping on a highway but failed to instruct on the qualifying rule that the statute does not prohibit a momentary stoppage on the traveled portion of the highway under proper circumstances for a normal and reasonable purpose. See Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. Under

the instruction given, a school bus driver stopping to drop or pick up a school child on a narrow 18-foot country road would be guilty of negligence. A similar finding necessarily followed in the present case.

The failure to give these two qualifying instructions was tantamount to directing a verdict for the defendant and was extremely prejudicial. In my judgment, this judgment should be reversed and the cause remanded for a new trial.

SPENCER and MCCOWN, JJ., join in this dissent.

MCCOWN, J., dissenting.

The majority opinion construes section 39-757, R. R. S. 1943, as applying to stopping on a highway to pick up passengers. In this case there is simply no dispute that the stopping was for the purpose of picking up a passenger who was in the process of coming across the road at the moment of impact. The language of this court in Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669, is entirely appropriate. In speaking of the identical statute, this court said: "We think this statute was not intended to prohibit a momentary stoppage on the paved portion of the highway under proper circumstances for a normal and reasonable purpose. A like statute was fully, and we think correctly, analyzed in Peoples v. Fulk, 220 N. C. 635, 18 S. E. 2d 147. Therein the court said: 'The temporary stop of the bus on the hard surface portion of the highway to take on a passenger did not constitute a violation of sec. 123(a), ch. 407, Public Laws 1937, which provides that "no person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway."

" 'The clause "whether attended or unattended" limits the meaning of the word "park" as well as of "leave

standing." The two terms, as thus limited are synonymous. A vehicle which is left standing is parked and a vehicle which is parked is left standing. Neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the "travel."

"'"Park" or "leave standing" means something more than a mere temporary or momentary stop on the road for a necessary purpose. * * * Starting and stopping are as much an essential part of travel in a motor vehicle as is "motion." Stopping for different causes, and according to the exigencies of the occasion, is a natural part of the "travel." The right to stop when the occasion demands is incident to the right to travel.'"

The majority opinion holds in effect that stopping on the right half of a level stretch of graveled country road to pick up a passenger on a clear, dry, winter day, with no traffic ahead and only the defendant some distance behind, is a violation of section 39-757, R. R. S. 1943, and is negligence more than slight in comparison with the negligence of a defendant who fails to see the stopped vehicle in time and strikes it from the rear. There should have been a directed verdict for the plaintiff on the issue of liability with special instructions on the comparative negligence rule if the statute was to be applied at all.

SPENCER, J., joins in this dissent.

DOMINICK L. GIANGRASSO, APPELLANT, V. JULIA K. SCHIMMEL ET AL., APPELLEES.
207 N. W. 2d 517

Filed May 11, 1973. No. 38730.

1. **Negligence: Admissions: Evidence.** Standing alone, a declaration by defendant that he is sorry he hit plaintiff is not an admission of negligence.
2. **Trial: Judgments.** A judgment dismissing plaintiff's petition

in accordance with a proper motion for judgment after mistrial and discharge of a jury but containing the phrase "notwithstanding verdict," is harmless error.

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

Thomas Kelley and Michael Kelley, for appellant.

Fitzgerald, Brown, Leahy, McGill & Strom, William J. Brennan, Jr., and C. L. Robinson, for appellees.

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

SMITH, J.

The jury in a personal injury action was unable to reach a verdict; consequently, the court declared a mistrial. After a proper motion for judgment in favor of defendant Julia K. Schimmel, the court in response entered a judgment notwithstanding the verdict. Plaintiff appeals. His assignments of error relate to sufficiency of the evidence and to the entry of judgment notwithstanding the verdict.

The evidence is meager. Plaintiff walked out of the Blackstone Hotel in Omaha on October 30, 1964, at noon. To reach his automobile parked in the hotel lot, he proceeded on a sidewalk to a place near the parking attendant's booth. The booth was located in the middle of the hotel driveway. While plaintiff was crossing the driveway, as it was necessary for him to do, an automobile moving in the direction of the lot struck him from behind. Plaintiff was knocked to the ground in a dazed condition. The plaintiff testified that Julia approached him, said she was sorry she had hit him, and asked whether he desired to see Mr. Schimmel. Plaintiff answered, "Forget about it." He had seen no car approaching the parking lot. No other evidence tends to raise an issue of fact of negligence on the part of Julia.

The question is whether Julia's statement was an ad-

mission, plaintiff arguing that Julia apologized. The word "sorry" was once a verb meaning "(t)o grieve, to sorrow; to provide for." The adjective "sorryish" meant "(s)omewhat sorry." II Oxford English Dictionary, p. 2925 (Comp. Ed., 1971). Today it is an adjective defined as follows: "1. Feeling or expressing sympathy, pity, or regret; sorrowful. Often used to express apology . . . 3. Causing sorrow, grief, or misfortune; grievous; sad . . . ." American Heritage Dictionary, p. 1233 (1969). "1: grieved or grieving over the loss of some good . . . : feeling sorrow, regret, or penitence . . . - often used interjectionally to express polite regret . . . ." Webster's Third New International Dictionary, p. 2175 (Unabr. Ed., 1961). "1. Feeling pity, regret, sympathy, etc; sad . . . 2. wretched; poor; pitiful . . . 3. painful; distressing . . . . Syn. 1. distressed, sorrowful." 2 World Book Dictionary, p. 1975 (1972). See, also, Random House Dictionary, p. 1358 (Unabr. Ed., 1966). "6. (used interjectionally as a conventional apology or expression of regret)." id.

Admissions of a party are received as substantive evidence of the facts admitted. McCormick on Evidence, 629 (2d Ed., 1972). See, also, Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182 (1950). The word "sorry" in conjunction with other language or circumstances may constitute an admission, denoting apology. Standing alone, it is not an admission of negligence; it may mean regret, not apology. The statement was not an admission of negligence, and the evidence would have been insufficient to support a verdict for plaintiff.

Julia at the conclusion of all the evidence had moved for a directed verdict on the ground of absence of negligence. After the mistrial and discharge of the jury she timely moved for judgment or in the alternative for dismissal of plaintiff's petition in accordance with her motions made at the close of all the evidence. The court sustained the motion of Julia for "judgment not-

withstanding the verdict" and dismissed plaintiff's action with prejudice.

The motions of Julia were proper. See § 25-1315.02, R. R. S. 1943. It is true that all orders must specify clearly the relief granted or order made in the action, but harmless error is not reversible. See §§ 25-853 and 25-1318, R. R. S. 1943. The phrase "notwithstanding the verdict" in the judgment was harmless error.

The judgment is affirmed.

AFFIRMED.

DENVER MIDWEST MOTOR FREIGHT, INC., APPELLANT, V. BUSBOOM TRUCKING, INC., APPELLEE.
207 N. W. 2d 368

Filed May 11, 1973. No. 38745.

Carriers: Contracts: Indemnity. An indemnification clause in a trip lease of operating equipment by a licensed motor carrier, subject to ICC regulations, which obligates the lessor to reimburse the lessee for any payment made on account of any accident, claim, or suit arising out of the operation of the equipment during the term of the lease is unenforceable as against public policy.

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

Bernard L. Packett, for appellant.

Knudsen, Berkheimer, Endacott & Beam, Kenneth L. Noha, Crosby, Pansing, Guenzel & Binning, and Theodore L. Kessner, for appellee.

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

MCCOWN, J.

This is an action against the lessor of a truck tractor to obtain indemnification for amounts paid by the motor carrier lessee for damages to cargo and other property

resulting from an accident. The District Court sustained a demurrer to the amended petition and dismissed the action.

On February 7, 1971, the plaintiff, Denver Midwest Motor Freight, Inc., and the defendant, Busboom Trucking, Inc., entered into a lease agreement in which the plaintiff leased a truck tractor from the defendant. It was to be used for a one-way shipment of a printing press from Omaha to Denver. The lease provided that the lessor "shall surrender full control, possession and management of said equipment to the Lessee during the term of this lease * * * and the (Lessor further agrees to operate said equipment as directed by Lessee) and the Lessor shall furnish the driver, and shall pay the driver for his services * * *. Provided, however, that during the time this lease shall be in force * * * such driver shall be subject to the control and supervision of the Lessee." The lease also provided that the lessor would maintain the equipment and furnish and pay all expenses incident to its operation. The critical provision of the trip lease agreement around which this litigation centers provided: "The Lessor agrees to reimburse the Lessee for any payment made on account of any accident, claim, or suit arising out of the operation of said equipment during the term of this lease."

The leased equipment picked up the printing press on February 7, 1971, in Omaha. On February 8, 1971, the truck went off the road and the printing press was damaged in the accident. The lessee settled the claim for damage for $40,989.37 and in this action sought recovery of that amount under the indemnity provisions of the lease.

The lease agreement and the operation of the equipment here were subject to the rules and regulations of the Interstate Commerce Commission and applicable federal statutes. 49 U. S. C. A., § 304, authorized the Interstate Commerce Commission to prescribe regulations for the leasing and use of motor vehicles by authorized

motor carriers. The statute authorized "regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier * * *," and "such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used, the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

The purpose of the ICC regulations adopted under this statutory authority was "to protect the industry from practices detrimental to the maintenance of sound transportation services * * * and to effect safety of operation for vehicles and drivers." See American Trucking Associations, Inc. v. United States, 344 U. S. 298, 73 S. Ct. 307, 97 L. Ed. 337.

The regulations as adopted required that the lease of equipment by authorized carriers must be in writing. Title 49 C. F. R., § 1057.4(a)(2). Most significantly here, the regulations required that the lease "Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, * * *." Title 49 C. F. R., § 1057.4(a)(4).

The nonowned equipment was required to be inspected by the lessee carrier when possession was transferred to it and the lessee was also required to make certain that the driver of the leased vehicle was familiar with

the motor carrier safety regulations. Title 49 C. F. R., § 1057.4(c) and (e).

The background for the statutes and rules and regulations governing truck leasing practices by authorized carriers is set forth in American Trucking Associations, Inc. v. United States, *supra*. Prior to 1953, the effective date of the ICC regulations, interchange or trip leases were frequently oral and created difficulty in fixing the lessee's responsibility for accidents. Sanctions for the violation of ICC regulations were difficult to impose in the case of exempted equipment and commission safety requirements were commonly overlooked. "Since most of these leases extended for the period of one trip only, the leasing carriers often failed to inspect the equipment used or to extend the supervision of rest periods, doctor's certificates, brakes, lights, tires, steering equipment and loading, normally accorded its own drivers and equipment." See Alford v. Major, 470 F. 2d 132. We approach the case before us against that historical backdrop.

The lessee, who drew the lease here, contends that its indemnification clause may be properly enforced because the lesssee, consistent with ICC regulations, assumed full control, management, and supervision of the equipment and driver, and the lessor and lessee should be free to contract between themselves as to which one of them shall ultimately bear the cost of damages to a third party. The defendant lessor contends that the intent of the regulations and the statutes was to make sure that licensed carriers would be responsible in fact as well as in law for the maintenance of leased equipment and the supervision of borrowed drivers, as well as for damages to third parties. Defendant contends that the indemnity clause abrogates the regulations, contravenes public policy, and is unenforceable.

There are two lines of authority on the specific issue with which we are confronted. They are represented by two federal cases, both decided in 1972. The

two cases reach almost diametrically opposite results.

Alford v. Major, 470 F. 2d 132 (7th Cir., Nov. 1972), held that an indemnification clause in a trip lease obligating the lessor to indemnify the lessee for damage to cargo or injuries suffered by third persons as a result of negligence of the lessor or lessor's driver was unenforceable as against public policy since the clause would permit the lessee to circumvent the requirement of ICC regulations that leased carriers exert actual control over the leased equipment and the borrowed drivers. The case also determined that highway safety was one of the paramount goals of the statutes and regulations, and that strict enforcement of those regulations would assist in the prevention of accidents from interstate truck leasing operations.

Allstate Insurance Co. v. Alterman Transport Lines, Inc., 465 F. 2d 710 (5th Cir., Aug. 1972), involved a trip lease which provided not only that the equipment should be solely and exclusively under the direction and control of the lessee but also provided that the lessee "shall assume full common carrier responsibility * * * for the operation of such vehicle." The court there held that a provision for indemnity by the lessor did not abrogate the ICC regulations and did not prohibit two free contracting parties from determining as between themselves which party will ultimately bear the cost of damages to a third party and did not prevent indemnification between trucking companies.

There are obvious factual differences between the Alford and the Allstate cases upon which they might be distinguished. An analysis of the overlapping and sometimes conflicting policy considerations convinces us that the Alford case provides the better solution.

In the case before us, the lease form was drawn by the lessee. It did not contain any provision requiring the lessee to assume full common carrier responsibility for the operation of the vehicle. It did not "specify the compensation to be paid by the lessee for the rental

of the leased equipment" as required by the ICC regulations.

The approval of indemnity provisions under the circumstances here might well adversely affect the safety of operation of vehicles and drivers as suggested in Alford. It would also inject into trip lease negotiations an added element of uncertainty and permit carriers to circumvent the clearly spelled out requirements that a lessee exert actual control over leased equipment and borrowed drivers. Varying conditions and provisions of indemnity clauses when applied to varying factual situations introduce added elements of uncertainty and tend to blur lines of responsibility to the public between lessor and lessee and increase the prospect of litigation between carriers or their insurers without any corresponding benefit to the public. Insurance coverage of carriers might be adversely affected where tort liability of others is assumed by contract if such indemnification clauses were enforceable. If indemnity clauses in these circumstances are unenforceable, uncertainty is removed, statutory and regulatory provisions are fully enforced, and public policy is best served. We therefore hold that an indemnification clause in a trip lease of operating equipment by a licensed motor carrier, subject to ICC regulations, which obligates the lessor to reimburse the lessee for any payment made on account of any accident, claim, or suit arising out of the operation of the equipment during the term of the lease is unenforceable as against public policy. Such a clause would permit the lessee to circumvent the requirements of the Interstate Commerce Commission that authorized carrier lessees to exert actual control over the leased equipment and the borrowed drivers. Alford v. Major, 470 F. 2d 132.

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

AFFIRMED.

MARGHERITA C. KNAPP, APPELLEE, V. SCHOOL DISTRICT NO. 109R, A BODY CORPORATE, ET AL., APPELLANTS.
207 N. W. 2d 223

Filed May 11, 1973. No. 38759.

Schools and School Districts: Contracts. When one school district by statute succeeds to all property and assets, and is responsible for all unbonded indebtedness of former dissolved districts, it is liable for all breaches of teachers' contracts by the former districts if the latter would have been liable.

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

L. Bruce Wright of Cline, Williams, Wright, Johnson & Oldfather and Sara Jane Cunningham, for appellants.

Russell, Colfer, Lyons, Wood & Carroll, for appellee.

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

SMITH, J.

Plaintiff claimed damage from breach of a contract by a school district to employ her as a teacher. After trial to the District Court judgment was entered for plaintiff and against defendant district, the successor of the allegedly contracting district. Defendant school district appeals. It contends that (1) plaintiff failed to notify the school board of her acceptance of the renewal offer and (2) it was not subject to liability for breach of contract by its predecessor.

The alleged renewal contract provided for employment of plaintiff by School District No. 107 of Red Willow County and Frontier County, a Class II district, during the school year 1968-69. At the commencement of the year 1968-69 district No. 107 refused performance tendered by plaintiff. In 1969 defendant district, by petition for merger, was created from all territory of district No. 107 and School District No. 2 of Red Willow County. The statutory requirement of notification by

plaintiff of renewal of her contract for 1968-69 is no longer in force. See, Laws 1965, c. 528, § 1, p. 1660; § 79-1254, R. R. S. 1943. A statement of facts and reasons for our conclusion on the issue of notification of acceptance of renewal raised by the district would therefore gain nothing. The evidence was sufficient to support the finding by the District Court.

Under statutory provisions for the merger defendant district succeeded to all property and other assets of the former districts. It also became responsible for all their unbonded indebtedness. See § 79-414, R. R. S. 1943. It argues that only former district No. 107, by analogy to the law of private business corporations, is liable on plaintiff's claim, notwithstanding the dissolution.

The argument of defendant is not persuasive. Under the foregoing statutory provisions and without a legislative declaration to the contrary, the new district becomes liable for all breaches of contract by the former districts, if the latter would have been liable. See, Antieau, Independent Local Government Entities, § 30C.04, p. 30C.11 (1970); cf. 2 McQuillin, Municipal Corporations, §§ 8.14 to 8.17, pp. 576 to 587 (3d Ed., Rev., 1966); but cf. Millsap v. San Pasqual Union School Dist., 232 Cal. App. 2d 333, 42 Cal. Rptr. 778 (1965).

The judgment of the District Court against the school district is affirmed.

AFFIRMED.

WOODROW MEGEL ET AL., APPELLANTS, V. CITY OF PAPILLION ET AL., APPELLEES.
207 N. W. 2d 377

Filed May 11, 1973. No. 38776.

1. **Contempt: Parties.** A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private parties.

2. ——: ———. The failure to obey an order of the court made for the benefit of the opposing party is ordinarily a civil contempt, but the disobedience must be willful before it may be punished as a contempt.
3. **Contempt.** If it is impossible to comply with the order of the court, the failure to comply is not willful.

Appeal from the District Court for Sarpy County: WALTER H. SMITH, Judge. Reversed and remanded.

Bernard E. Vinardi and Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellants.

Eugene T. Atkinson of Atkinson & Kelly, for appellees.

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

BOSLAUGH, J.

This is a civil contempt proceeding. The trial court found the evidence failed to show a willful disobedience or failure to comply with the judgment of the District Court and dismissed the action. The plaintiffs appeal.

The plaintiffs are the owners of Tax Lots 7 and 8 which are adjacent to the City of Papillion, Nebraska. The lots lie to the north of Lincoln Street which runs along the north boundary of Papillion at that place. The old bed of Papillion Creek forms the north boundary of Lot 7 and a part of the north boundary of Lot 8. The Papillion Drainage Ditch is located farther to the north.

In 1962, the plaintiffs commenced an action against the City of Papillion and its mayor and councilmen to enjoin the defendants from diverting "drainage water" into and upon the property of the plaintiffs. This action resulted in a decree on January 7, 1971, enjoining the defendants "from in any way causing or permitting surface water from its streets, alleys and sewers * * * to flow in, upon, through or against any of the property of the plaintiffs * * * in a greater quantity than what would have reached the property by natural

drainage." The decree also ordered the defendants to commence engineering studies forthwith and to construct facilities within 6 months to cause the surface waters to be disposed of other than through the property of the plaintiffs and "in a manner so that no damage be caused to the property of said plaintiffs and to said plaintiffs."

Motions for a new trial were overruled on July 29, 1971. There was no appeal from the decree and it became final.

The application for an order to show cause was filed on October 14, 1971. The plaintiffs alleged the defendants had failed to comply with the decree and had authorized additional construction in the City of Papillion which had materially increased the flow of surface water across the plaintiffs' property.

The evidence in the original action is not before us but the record in this proceeding indicates that the natural drainage was to the east of the plaintiffs' property. The construction of street improvements and other structures by the City of Papillion now diverts surface waters upon and through the plaintiffs' property that would normally have drained across other property lying to the east.

A supplemental application to obtain a temporary order restraining the defendants from proceeding in eminent domain to obtain an easement across the plaintiffs' property was filed on December 20, 1971. A temporary restraining order was granted on that day.

The record shows without dispute that the defendants did not comply with the terms of the decree. The defendants had engineering studies made and preliminary plans prepared which contemplated construction of an improved drainageway across a part of Lot 7. The defendants made some attempt to acquire an easement across Lot 7 by negotiation but were not successful. No facilities were constructed as required by the decree.

A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private parties. McFarland v. State, 165 Neb. 487, 86 N. W. 2d 182. The failure to obey an order of the court made for the benefit of the opposing party is ordinarily a civil contempt, but the disobedience must be willful before it may be punished as a contempt. Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512. If it is impossible to comply with the order of the court, the failure to comply is not willful. Hawthorne v. State, 45 Neb. 871, 64 N. W. 359.

The defendants do not attempt to justify their failure to comply with the decree of January 7, 1971, on the ground that compliance was impossible. The temporary restraining order obtained by the plaintiffs on December 20, 1971, prevented the defendants from proceeding after that date to condemn an easement across the property of the plaintiffs. There is no satisfactory explanation in the record as to their failure to comply with the decree before December 20, 1971. The defendants seem to have been more concerned with the expense involved in remedying the wrongful diversion of surface waters than in complying with the decree and affording the plaintiffs the relief to which they are entitled.

In Kasparek v. May, *supra*, a party who had employed consulting engineers and a contractor in an attempt to comply with a decree was held to be in contempt when the resulting construction failed to conform to the terms of the decree. As in the Kasparek case, the decree here required specific acts which have not been performed. We conclude that the record in this case supports a finding of willful contempt.

There are mitigating circumstances in this case which make it inappropriate to impose any penalty upon the defendants at this time other than the costs and expenses of this proceeding in both courts, including a reasonable fee for the services of the attorney for the plaintiffs.

There is an additional matter which requires consideration. The plaintiffs contend the decree of January 7, 1971, prevents the City of Papillion from acquiring an easement across the property of the plaintiffs for drainage purposes. Although there is language in the decree which lends support to such an interpretation, the pleadings show there was no issue before the District Court in the original action concerning the right of the city to acquire an easement. The District Court did not construe the decree as preventing the city from acquiring an easement. We conclude the city is not estopped by the decree of January 7, 1971, from proceeding in eminent domain to acquire an easement across the plaintiffs' property for drainage purposes.

The finding of the District Court that the defendants are not guilty of willful contempt is reversed and the cause remanded for further proceedings in conformity with this opinion. All costs and expenses in both courts, including a reasonable fee for the services of the plaintiffs' attorney, are taxed to the City of Papillion. The plaintiffs are allowed the sum of $1,000 for the services of their attorney in this court.

REVERSED AND REMANDED.

HUSTON CO., APPELLANT, V. FRANK F. MOONEY, APPELLEE.
207 N. W. 2d 525

Filed May 11, 1973. No. 38778.

1. **Property: Brokers: Contracts: Sales: Fees.** Where a real estate broker is employed to procure a purchaser of real property, he is entitled to compensation when he has secured a proposed purchaser ready, able, and willing to buy the property on the terms and conditions upon which the broker is authorized to procure such purchaser.
2. ———: ———: ———: ———: ———. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser

within the time limited who is ready, able, and willing to buy upon the terms prescribed.

3. ———: ———: ———: ———: ———. Where a real estate broker obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is thereafter made by the owner to the person produced by the agent but not on substantially the terms that had been offered through the agent's efforts, the broker is not entitled to a commission for making the sale.

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

William G. Blackburn of Cunningham, Blackburn & Von Seggern, for appellant.

William P. Mullen and Byron J. Brogan, for appellee.

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

CLINTON, J.

This is an action by a licensed real estate broker to recover a commission alleged to have been earned for procuring a purchaser of real estate pursuant to the terms of the listing agreement. The case was tried by the court without a jury and on conflicting evidence the trial judge found for the defendant Mooney. The plaintiff appealed. We affirm.

The listing agreement was as follows: "In consideration of your agreement to use your efforts to find a purchaser, I, or we, hereby give you the exclusive right to November 1, 1969 to offer for sale to sell the following property towit: 711 & 715 West 5th Street, Grand Island, Nebr. For the sum of $20,000.00 and upon the following terms: CASH Or such other price or terms that are acceptable to me, or us. If sale is made or a purchaser found by HUSTON CO. to whom a sale is made, I, or we, hereby agree to pay HUSTON CO. upon the following commission schedule: 6% of the gross sale."

On November 4, 1969, the plaintiff communicated with

the defendant by letter, making reference to a telephone conversation of October 31, 1969, and said: "My party, in my opinion, is being very cooperative with us and has made me the following proposition and is willing to put it in writing. . . . He will enter into a contract effective January 1, 1970, paying $1,000 down. This would be paid down somewhat as an option, holding the property to July 1, at which time interest of 8 per cent would commence and he would also pay an additional $4,000. He would pay an additional $5,000 on December 31 and the balance of $10,000 payable the following July 1 or in two semi-annual payments of $5,000 each if you prefer. . . . This looks like a choice opportunity for you to sell the property and collect some top interest, and in terms nearly which you specified yourself." The defendant testified that he was at all times unwilling to sell except for $20,000 in cash. The plaintiff testified to the contrary.

On January 28, 1970, approximately 3 months after the expiration of the listing agreement, the defendant himself sold the property for $20,000 cash plus abstract costs to Harold Green, Jr., the party with whom the plaintiff had been negotiating. There is no evidence in the record to indicate that the plaintiff was at any time able to obtain from Green an offer to purchase for $20,000 cash. The record supports the conclusion that the consummation of the sale upon terms acceptable to the defendant was the result of the efforts of the defendant himself after the listing had expired. The record does show that previous to the listing with the plaintiff there had been direct negotiations between Green and the defendant and between Green and other real estate agents with whom the property had been listed previously. These earlier contacts were as far back as 1964 or 1965, but the parties had never been able to come together on an agreement.

The trial court specifically found: "That the Contract between the parties provides that the described real

estate was to be sold for $20,000 cash; the Plaintiff at no time secured a buyer for $20,000 cash; and that the Defendant at no time agreed to accept anything other than the full amount of $20,000 cash; that after the expiration of Contract the Plaintiff personally sold the described real estate for $20,000 cash. . . . The Court further finds that the Plaintiff failed to procure a purchaser within the terms of the listing agreement; that there was no breach of contract or fraud on the part of the Defendant. . . ."

The applicable rules are: The findings of the court in a law action in which a jury has been waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711. Where a real estate broker is employed to procure a purchaser of real property, he is entitled to compensation when he has secured a proposed purchaser ready, able, and willing to buy the property on the terms and conditions upon which the broker is authorized to procure such purchaser. Jones v. Stevens, 36 Neb. 849, 55 N. W. 251; Stewart v. Smith, 50 Neb. 631, 70 N. W. 235. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed. Langhorst v. Coon, 53 Neb. 765, 74 N. W. 257. Where a real estate broker obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is thereafter made by the owner to the person produced by the agent but not on substantially the terms that had been offered through the agent's efforts, the broker is not entitled to a commission for making the sale. Peters v. Dreger, 146 Neb. 670, 21 N. W. 2d 436.

AFFIRMED.

O'HARA PLUMBING COMPANY, INC., APPELLANT, V. LARRY ROSCHYNIALSKI ET AL., APPELLEES.
207 N. W. 2d 380

Filed May 11, 1973. No. 38781.

Liens: Contracts: Vendor and Purchaser. The lien of one who furnishes material for the repairs and alteration of a building upon land in the possession of the vendee under an executory contract of purchase is subordinate to the lien of the vendor who retains the legal title to secure deferred installments of the purchase price except in cases where the vendor himself promotes the improvement or causes it to be made.

Appeal from the District Court for Merrick County: C. THOMAS WHITE, Judge. Affirmed.

Sam Grimminger, for appellant.

Sampson & Armatys, for appellees.

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

McCOWN, J.

This is an action to foreclose a contractor's lien for improvements installed in a residence. The District Court sustained a motion for summary judgment on behalf of the defendants Reeves and dismissed plaintiff's action.

The defendants, Lawrence C. and Donna J. Reeves, were the owners of the real estate involved here. On March 31, 1970, the Reeveses entered into an installment sales contract to sell the property to the defendants Roschynialski. After downpayments, the contract required 180 monthly installment payments of $150 each commencing on May 1, 1970, with a final payment of $10,925.78. The contract authorized the sellers to declare the contract null and void upon default and payments to be forfeited as rent and liquidated damages. The Roschynialskis took possession, made three monthly payments on the contract, and were thereafter in default.

On September 5, 1970, the Roschynialskis employed

the plaintiff to make the plumbing and heating improvements involved here. The labor and materials were furnished and delivered between September 29, 1970, and October 6, 1970, and their reasonable value was $1,315.67. There is no allegation or evidence that the defendants Reeves had consented to or had any knowledge of the improvements prior to the filing of plaintiff's lien claim.

On January 22, 1971, Reeveses notified the Roschynialskis that Reeveses had elected to declare the real estate installment sales contract null and void and demanded immediate possession of the premises. On January 25, 1971, Reeveses filed a petition in the District Court for immediate possession of the premises and on April 5, 1971, obtained a default judgment against the Roschynialskis. The judgment determined that the Reeveses were the legal owners in fee simple; that the Roschynialskis had no right, title, or interest therein; and that the Reeveses were entitled to immediate possession of the premises.

Meanwhile, on February 4, 1971, the plaintiff filed a contractor's lien against the Roschynialskis and the property. On February 1, 1972, the plaintiff filed this action against the Roschynialskis and the Reeveses to foreclose the claimed lien. The District Court sustained a motion for summary judgment by the Reeveses and dismissed the petition. Plaintiff has appealed.

Plaintiff contends that the lien attached to the equitable interest in the real estate and that dependent upon facts and circumstances which might be disclosed, retained its validity upon termination of the sale contract because the equitable and legal titles then merged. Cases relied upon by the plaintiff either involve factual situations in which the real estate vendor consented to or caused the improvement to be made, or involve facts as to the coalescing of legal and equitable titles which constitute a merger and estoppel. Here the Reeveses never consented to the improvements and there is no

evidence that they had any knowledge or notice of them even at the time they declared the real estate contract null and void and began their action to regain possession. The Reeveses filed the action in ejectment against the Roschynialskis 10 days before plaintiff's lien was filed of record. The judgment of the District Court against the Roschynialskis did not constitute a merger of the legal and equitable interests but extinguished the equitable interest of the Roschynialskis. No elements of estoppel against the Reeveses are pleaded. The facts establish that the improvements did not involve any emergency in which the improvement was for the protection or preservation of the property.

This case is governed by Larson Real Property Co. v. Norris-Lyddon Produce Co., 127 Neb. 357, 255 N. W. 50. That case held that the lien of one who furnishes material for the repairs and alteration of a building upon land in the possession of the vendee under an executory contract of purchase is subordinate to the lien of the vendor who retains the legal title to secure deferred installments of the purchase price except in cases where the vendor himself promotes the improvement or causes it to be made. See, also, West v. Reeves, 53 Neb. 472, 73 N. W. 935.

The record here establishes that there was no genuine issue as to any material fact. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE FARM FIRE & CASUALTY COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. WILLIAM J. MUTH ET AL., APPELLEES AND CROSS-APPELLANTS.
207 N. W. 2d 364

Filed May 11, 1973. No. 38783.

1. **Trial: Judgments: Appeal and Error.** The findings of the trial court in an action where a jury has been waived have the effect

of a verdict of a jury and will not be set aside unless clearly wrong.

2. **Insurance: Contracts: Words and Phrases.** An injury is either expected or intended within the meaning of an exclusion in a policy of liability insurance reading as follows: "This policy does not apply to bodily injury or property damage which is either expected or intended from the standpoint of the insured," if the insured acted with specific intent to cause harm to a third party.
3. **Insurance: Contracts: Judgments: Fees: Statutes.** A judgment creditor of an insured under a policy of liability insurance is entitled to an award of attorney's fee under section 44-359, R. S. Supp., 1972, where the insurer brings an action for declaratory judgment to determine coverage under the policy and the judgment creditor prevails.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Fraser, Stryker, Marshall & Veach, for appellant.

Matthews, Kelley, Cannon & Carpenter and Burbridge, Burbridge & Parsonage, for appellees.

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

CLINTON, J.

This action is one for a declaratory judgment between the insurer, the insured, and the judgment creditor of the insured. It presents the question of the construction of an exclusion in a policy of liability insurance and the applicability of the exclusion to the facts as found by the trial court.

The language of the exclusion is as follows: "This policy does not apply . . . to bodily injury or property damage which is either expected or intended from the standpoint of the insured." The pertinent insuring clause in the homeowner's policy involved in this case is as follows: ". . . to pay on behalf of the insured, all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property

damage, to which this insurance applies, caused by an occurrence."

We now set forth the pertinent facts. The defendant Allen Muth, a minor, was an insured under the homeowner's policy of his parents, William J. Muth and Naomi R. Muth, by virtue of being a resident of their household. On September 2, 1970, Allen fired a B-B gun from a slowly moving automobile and the pellet struck James B. Brailey, Jr., in an eye, causing loss of sight in that eye. James recovered a judgment in a tort action against Allen. The State Farm Fire & Casualty Company, plaintiff and appellant herein, defended the tort action under a reservation of rights agreement. The ground of the reservation was that there was no coverage under the policy because under the facts the exclusion which we have previously set forth applied.

The trial judge in this case found that when Allen caused the gun to discharge in the direction of James he did not intend nor expect to do bodily injury to James, that Allen was negligent, and that the exclusion was not applicable.

Allen testified he pointed the gun "at his feet" without taking careful aim and that his intention was to "scare somebody." He was not a close acquaintance of James. He knew who James was because they had been in one class session together after the start of the school term. There had been no conflict between them. The evidence discloses that the act of Allen was a spontaneous one. There was conflicting evidence from which the court could have found Allen aimed at James and intended to hit him. We interpret the court's finding to mean it accepted Allen's version of the facts.

The appellant argues that if Allen "should have expected that his act . . . involved the risk of injury to Brailey, then it follows that the incident was not one within the coverage of the policy." On this point, during cross-examination of Allen counsel drew from him the concession that if one points a gun in the general

direction of a person, even though aim is not taken, there is a risk of hitting somebody. The cross-examination continued as follows: "Q. And that's what we mean by taking the risk of hitting somebody if you don't aim; right? A. Yes. Q. You understand that, don't you? A. Yeah. Q. And you understood that when you pointed the gun out that car window at that young boy, didn't you? A. I didn't think it would hit him or hurt him, because— Q. I am not asking you that; I am asking you, if you don't aim, and you aim a gun out a window, and there's a person over there, you could possibly hit him? A. You could possibly hit him. Q. And that's the risk that you were willing to take, wasn't it? . . . Isn't that right? A. I suppose." On redirect examination Allen testified that he did not think he was taking a chance of hitting James.

Language in liability policies excluding from coverage injury intentionally caused by the insured are common, but we have been cited no case, nor have we found any, interpreting the precise policy language we have here. The language usually found is: "injury . . . caused intentionally by or at the direction of the insured."

In accordance with the usual rule that the judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong, we feel ourselves bound by the findings of the trial judge that Allen did not intend to injure James. Belek v. Travelers Ind. Co., 187 Neb. 470, 191 N. W. 2d 819. While we might ourselves have come to a different conclusion than did the trial judge, we cannot say his findings were clearly wrong.

Accordingly, we believe the pertinent inquiry is whether the language "bodily injury . . . which is either expected or intended from the standpoint of the insured," means something other than "injury intention-

ally caused," and thus is there substance to the appellant's argument that coverage is excluded if Allen "should have expected that his act . . . involved the risk of injury"?

The term "expected" when used in association with "intended" carries the connotation of a high degree of certainty or probability and seems to be used to practically equate with "intended," because one expects the consequences of what one intends. See Webster's Third New International Dictionary (Unabr. Ed., 1968), pp. 799, 1175. It does not seem to us designed to substantially enlarge the exclusion.

We hold on the basis of the authorities which we hereinafter cite that, under the language of the exclusion in question, an injury is either expected or intended if the insured acted with the specific intent to cause harm to a third party. It seems to us to be immaterial whether the injury which results was specifically intended, i.e., the exclusion would apply even though the injury is different from that intended or anticipated. We find it difficult to precisely delineate the scope of the rule and recognize that there will be difficulties in applying the rule in concrete cases. For that reason we cite and discuss the following cases which we believe illustrate the intendment of the rule.

In State Farm Mutual Auto. Ins. Co. v. Worthington, 405 F. 2d 683, the Eighth Circuit had occasion to consider a factual situation similar to what we have here and a policy exclusion which read: "This policy does not apply: * * * to bodily injury * * * caused intentionally by or at the direction of the insured;". The court held that the language did not exclude coverage where the gun was fired intentionally with the purpose of frightening, but where there was no intention to shoot a person. We do not, however, intend to adopt the holding in that case insofar as it may lend support to the proposition that the exclusion does not apply where one person is shot at with the intent to harm,

but a bystander is injured. That question is not before us here.

A somewhat similar case on the facts is Lumbermen's Mut. Ins. Co. v. Blackburn (Okla.), 477 P. 2d 62. The language of the exclusion there was the same as in the case just cited. The trial court found that the insured intentionally threw the rock which caused the plaintiff's injury, but did so without the intent of causing injury. The court on appeal held the exclusion did not apply. We do not, however, adopt the holding in that case insofar as it appears to hold that the exclusion does not apply unless the intention is to inflict the injury actually inflicted and unless the act is directed specifically against the party injured. Again that question is not before us.

A case which seems to illustrate a situation which would come within the language of the exclusion we have in this case is found in Rankin v. Farmers Elevator Mut. Ins. Co., 393 F. 2d 718. There the insured deliberately sideswiped a motorcycle, causing personal injuries to the rider. The exclusion which was identical to that of the two previously cited cases was held to be applicable. The court said: "The serious injury of the rider of the motorcycle was a consequence of the deliberate collision and should have been expected and hence intended." This case, in our view, illustrates the type of situation to which the language we have before us here would be properly applicable. If, in the situation before us, the trial court had found that Allen had intended to hit James, even though he might have intended no serious injury, the language of the exclusion would have eliminated coverage.

Another case which illustrates the type of situation in which the exclusion in the policy under consideration would apply is Kraus v. Allstate Insurance Co., 379 F. 2d 443, in which the Third Circuit was applying Pennsylvania law. In that case the insured murdered his wife and killed himself by setting off a dynamite

blast while the two were seated in an automobile. The plaintiff's decedent, a passerby, was killed and other bystanders were injured. The language of the exclusion was the same as in the other cases we have cited. It was held that the exclusion was applicable and precluded coverage. In that case the insured intended harm to his wife and the means which he used were such that he could clearly expect to harm others who might be within the range of the explosion. The court in that case laid some stress upon the fact that the insured was an expert with explosives and could readily anticipate the probable results thereof.

Another case which illustrates the rule we adopt is Peterson v. Western Casualty & Surety Co., 5 Wis. 2d 535, 93 N. W. 2d 433. In that case the insured was fleeing in an automobile to escape arrest on a traffic charge. He was cornered by several police cars. In attempting to back his automobile from its cornered position he knocked over and injured the plaintiff, a police officer, who had opened the door of the insured's auto to effect his arrest. The exclusion was held not to be applicable because the insured did not specifically intend to harm the plaintiff or anyone. The appellate court described the conduct as grossly negligent, but pointed out that while gross negligence might be considered as intentional wrongdoing for some purposes, it was not to be so considered for purposes of exclusion in the policy where there was not a specific intention to harm or injure.

The case of Morrill v. Gallagher, 370 Mich. 578, 122 N. W. 2d 687, also illustrates the rule we adopt. There the insured as a practical joke threw a lighted firecracker, referred to as a cherry bomb, into a room where the plaintiff, a fellow employee, was working. The insured's purpose was to startle him. The results turned out to be far more serious than anticipated and caused impairment of the plaintiff's hearing and psychic disorder. The exclusion for intentional injury was held

not applicable. The court said: "Some emphasis is placed on exclusion (c) on the ground that in the instant case the firecracker was thrown intentionally. Unquestionably such was the case, but it will be noted that under the language of the excluding clause the *injury* must be caused 'intentionally.' There is nothing in this case to justify a conclusion that either Gallagher or Canfield intended to cause any physical harm to plaintiff."

On the basis of the foregoing analysis and authorities, we conclude that the rule we have earlier formulated is the proper one and tends to promote the fulfillment of the reasonable expectations of the insured and the injured, and at the same time will tend to promote the public policy of excluding coverage where there is a deliberate intention to cause physical harm or where, as in Rankin v. Farmers Elevator Mut. Ins. Co., *supra,* such intention must be attributed as a matter of law because the acts are of such a nature that the injury must necessarily be expected.

The appellee, James Brailey, assigns as error the refusal of the trial court to allow him an attorney's fee to be taxed as costs for the services of his attorney in the court below in this action. He relies upon section 44-359, R. S. Supp., 1972, and our recent holdings in Workman v. Great Plains Ins. Co., Inc., 189 Neb. 22, 200 N. W. 2d 8; and State Farm Mut. Auto. Ins. Co. v. Selders, 189 Neb. 334, 202 N. W. 2d 625; and upon Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N. W. 2d 471.

In Workman v. Great Plains Ins. Co., Inc., *supra,* this court held that the 1971 amendment to section 44-359, R. R. S. 1943, made it applicable to declaratory judgment actions brought by the insured against the insurer. In State Farm Mut. Auto. Ins. Co. v. Selders, *supra,* we said the right to attorney's fees did not depend upon who brought the action and awarded attorney's fees to the insured in an action brought by the insurer.

In the earlier case of Metcalf v. Hartford Acc. & Ind. Co., *supra,* we held that a judgment creditor was entitled to attorney's fees when he had to bring an action against the liability insurer to collect his judgment against the insured. This action is brought by the insurer against both the insured and the judgment creditor and its result is tantamount to an action by the judgment creditor on the policy. The court below erred in not awarding an attorney's fee to James Brailey in this action.

The appellant urges that we overrule Selders and argues that before we can reach the result we now do, we must overrule Lundt v. Insurance Co. of North America, 184 Neb. 208, 166 N. W. 2d 404. Our holdings in State Farm Mut. Auto. Ins. Co. v. Selders, *supra,* and in Lundt v. Insurance Co. of North America, *supra,* are clearly distinguishable. In Lundt v. Insurance Co. of North America, *supra,* the facts were that the plaintiff had earlier obtained a judgment against the insured which the defendant liability carrier paid. The plaintiff then sought in the cited case to obtain an attorney's fee from the insurer for its services to the plaintiff in the action in which it obtained the judgment against the insured. There never was any action on the policy because the insurer had paid. The situation in Lundt v. Insurance Co. of North America, *supra,* is the same as if the court below or this court were being asked to award Brailey an attorney's fee for the services of his attorney in obtaining the judgment against Muth. Lundt has no application to this case. Appellee James Brailey is awarded an attorney's fee of $750 for services of his attorney in this court.

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

Note: See *post* p. 272, for Supplemental and Amendatory Opinion.

JERRY SCHMIDT, APPELLEE, V. KENNETH ORTON ET AL., APPELLANTS.
207 N. W. 2d 390

Filed May 18, 1973. No. 38645.

1. **Trial: Evidence: Judgments.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party.
2. **Trial: Evidence: Negligence.** Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury.
3. **Negligence: Games.** A person hitting a golf ball must exercise ordinary care under the circumstances for the safety of others. He must give adequate and timely notice to persons who appear to be unaware of his intention to hit the ball when he knows, or by the exercise of ordinary care should know, that such persons are so close to the intended flight of the ball that danger to them might reasonably be anticipated.

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

Healey, Healey, Brown & Burchard and Douglas L. Kluender, for appellants.

Con M. Keating of Marti, Dalton, Bruckner, O'Gara & Keating, for appellee.

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

BOSLAUGH, J.

The plaintiff, Jerry Schmidt, was injured when struck by a golf ball at Holmes Park Public Golf Course in Lincoln, Nebraska, on June 26, 1970. The jury returned a verdict in the amount of $8,500 against both defendants. They appeal. The issue is whether the evidence is sufficient to sustain the judgment against one or both defendants.

The plaintiff and the defendant Kenneth Orton were

playing with a foursome which had commenced play at around 12:30 p.m. The defendant Udo Jansen was playing with a foursome immediately behind the plaintiff's foursome. The accident happened on the 13th hole which is a par 4 hole, 378 yards in length. The fairway runs generally south from the tee box but curves to the west near the green.

The plaintiff's drive from the 13th tee landed in the rough near some pine trees approximately 180 yards south of the tee. The plaintiff was searching for his ball when the Jansen foursome reached the 13th tee. Orton was nearby helping the plaintiff look for his ball. The other two players in the plaintiff's foursome were farther south toward the green. After Orton had spent 2 or 3 minutes looking for the plaintiff's ball he signaled the Jansen foursome to play through.

The first player in the Jansen foursome to drive from the 13th tee was Carroll Londoner. Londoner's ball landed in the fairway opposite a tree in the area where the plaintiff was searching for his ball. The second player to drive from the 13th tee was Jansen. Before driving the ball, Jansen looked toward the green and saw the plaintiff who appeared to be searching for a ball in the rough. Jansen gave no warning before driving the ball. His drive appeared to be a good hit, at first, but then veered to the right toward the area where the plaintiff was looking for his ball. When Jansen saw his drive veer to the right he shouted "Fore."

The plaintiff testified he was not aware that a ball was coming toward him until he heard the warning from Jansen. The plaintiff turned around, "got a blance (glance)" of the ball when it was in the air about 100 yards away, and ran behind a fir tree nearby. The ball came through the tree and struck the plaintiff near his left eye injuring him seriously.

Orton testified that after signaling the Jansen foursome to play through, he walked to within 5 yards of

the plaintiff and "told" him the foursome behind them would play through. About a minute later Orton looked up and saw the plaintiff walking toward the fairway. Orton then yelled: "Wait, Jerry, they are hitting." The plaintiff testified he received no indication, warning, or notification from Orton that the Jansen foursome had been waved through.

The case was submitted to the jury upon the plaintiff's allegations that Orton was negligent in failing to warn the plaintiff he was signaling the Jansen foursome to play through; and that Jansen was negligent in failing to warn the plaintiff of his intention to drive the ball. The defendants' allegations of assumption of risk and contributory negligence were also submitted to the jury.

In determining whether the evidence presented questions for the jury as against the defendants, the evidence must be considered in the light most favorable to the plaintiff. Every controverted fact must be resolved in his favor and he must have the benefit of every inference that may reasonably be drawn from the evidence.

The general rule adopted in most jurisdictions is that a person hitting a golf ball must exercise ordinary care under the circumstances for the safety of others. He must give adequate and timely notice to persons who appear to be unaware of his intention to hit the ball when he knows, or by the exercise of ordinary care should know, that such persons are so close to the intended flight of the ball that danger to them might reasonably be anticipated. McWilliams v. Parham, 273 N. C. 592, 160 S. E. 2d 692. See, also, Robinson v. Meding, 52 Del. 578, 163 A. 2d 272, 82 A. L. R. 2d 1176; Alexander v. Wrenn, 158 Va. 486, 164 S. E. 715. Miller v. Rollings (Fla.), 56 So. 2d 137.

The evidence was such that the jury could find Jansen was negligent in failing to give an adequate and timely warning to the plaintiff of his intention to drive the ball. When the evidence is viewed in the light most

favorable to the plaintiff, it is sufficient to sustain the judgment as against Jansen.

As to Orton, the jury could find he was negligent in failing to warn the plaintiff that he had signaled the Jansen foursome to play through. The circumstances were such that reasonable minds might draw different conclusions and inferences from the evidence as to the negligence of Orton and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other. In such a case the issues must be submitted to the jury. Maxwell v. Lewis, 186 Neb. 722, 186 N. W. 2d 119.

We conclude the evidence presented questions for the jury as against both defendants and the judgment must be affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent. When golf players, waiting on a tee, are signaled to play through by a member of the preceding group and do so, they can reasonably expect that the players in the preceding group are conscious of their approach and will protect themselves from their drives. The players playing through have every right to believe that the signaling member of the previous group has warned all members of his group of their approach.

Orton testified that he twice told the plaintiff he had signaled the following group through. A failure on the part of the injured person to hear or pay attention to warning under such circumstances should not impose liability on the players coming through. On this record I cannot understand the finding of negligence on the part of defendant Jansen.

STATE OF NEBRASKA, APPELLEE, V. THOMAS TERRY TURNER, APPELLANT.

207 N. W. 2d 382

Filed May 18, 1973. No. 38799.

1. **Criminal Law: Trial: Evidence.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
2. **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.
3. **Criminal Law: Trial: Evidence: Appeal and Error.** When evidence of an in-court identification alleged to be tainted by a prior illegal line-up is first challenged on appeal, such challenge, in the absence of clear showing of prejudicial error, will not be considered. Failure to object will be attributed to defense counsel's choice of trial tactics.

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

William J. Riedmann, 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.

Defendant, Thomas Terry Turner, prosecutes this appeal from a conviction of robbery. He alleges five assignments of error: (1) Insufficiency of the evidence; (2) admission into evidence of a $10 bill found on defendant; (3) identification of defendant from certain photographs in a manner prejudicial to defendant's constitutional right of due process; (4) lack of probable cause to arrest defendant and to search his vehicle; and (5) the sustaining of the State's motion for a con-

solidation of defendant's trial with that of defendant Bazer. We affirm.

The facts are essentially as follows: One Bahm stopped at the home of his companion, Kurbis, to let him out about 2:15 a.m., February 15, 1972. An automobile, which had been following the Bahm car, stopped and a man with a rifle got out of that car. He demanded that Bahm roll down his window. He then directed Bahm and Kurbis to hand over their wallets. Both parties identified the defendant Turner as the individual who held the rifle. Bahm handed his wallet to Turner. It contained $2. Kurbis surrendered his wallet to the man with the rifle. It contained a $10 bill.

After the robbers drove away, Bahm and Kurbis sought a police officer. They reported the incident to the officer about 2:20 a.m. They described the robber's vehicle as being light colored, probably a Pontiac, with the right side toward the back damaged or bashed in. One headlight was on high beam, the other on low beam. The car had no taillights. The possible license number was given as 1-L400.

The police broadcast a description of the individuals and the automobile, which they described as a silver-blue or a silver-grey Pontiac. Between 2:40 and 3 a.m., officer Hansen stopped a turquoise-colored Plymouth, with license No. 1-L488. The suspect vehicle had one low beam headlight out, and there was moderate damage to the rear of the vehicle. The occupants, Turner and Bazer, were apprehended. Bazer was driving. A .22-caliber rifle was in the front seat of the car, as well as a police-type billy club and a flashlight. Bahm and Kurbis identified the vehicle as the one involved. They were taken to see it while they were on the way to the police station.

Turner was searched during the booking procedure, and the officer found a $10 bill in his front pocket. This $10 bill was received into evidence over objection. There was no showing that the money was not the personal

property of Turner. Turner's mother testified that he was at home from 1:10 a.m. until 2:30 a.m. on the morning of the robbery. The time of the robbery was approximately 2:15 a.m.

The appeal of defendant's codefendant, Raymond E. Bazer, was decided March 2, 1973. State v. Bazer, 189 Neb. 711, 204 N. W. 2d 799. Defendant's first and fifth assignments of error were covered in the Bazer opinion. In Bazer we held the consolidation was proper, and that the evidence was sufficient to find Bazer guilty beyond a reasonable doubt.

At the close of the evidence, defendant moved for a directed verdict. It was properly overruled. The evidence adduced was sufficient to require the submission of the case to the jury. As we said in Sherrick v. State (1953), 157 Neb. 623, 61 N. W. 2d 358: "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty."

We held in State v. Clark (1972), 189 Neb. 109, 201 N. W. 2d 205: "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." Defendants were represented by separate counsel. Much of the evidence in the case related to Turner alone. Our holding in State v. Bazer, *supra*, determined that there was no abuse of discretion in sustaining the State's motion for consolidation.

Turner, in his second assignment, contends it was error for the court to admit into evidence a $10 bill found on him at the time of his arrest. The bill was not identified as being the specific one taken in the robbery. However, the defendant was identified as the individual who had taken a $10 bill. A $10 bill was found loose in his pocket when he was apprehended

soon after the robbery. Also, the weapon used in the robbery was found beside him when he was apprehended. The bill was a link in the chain of evidence, but not a necessary one. While its admissibility is a close question, on the record herein we do not believe the trial judge abused his discretion in its admittance.

Turner argues that the identification by the two victims should have been excluded because the methods of such identification were violative of and a denial of his right to due process of law. Kurbis, on redirect examination, testified that he had been shown five photographs at the police station for identification purposes. He readily recognized one of them, which was of a tall individual with a beard. None of the other photographs were of bearded individuals. Bahm testified that the photograph he saw showed three individuals, only one of whom had long hair and a beard. He identified the bearded individual as the one who held the gun on them.

The record indicates that on at least two occasions, once at a hearing on a motion to suppress evidence, and once during the trial, Kurbis identified Turner as one of the persons who robbed him. On neither occasion did defendant object to the identification. His motion to strike was not made until the conclusion of Kurbis' testimony. On three occasions, once during the hearing on motion to suppress evidence, and twice during the trial, Bahm identified Turner as being the person who approached their car with the rifle. None of Bahm's identifications were objected to, and there was no motion to strike them.

In State v. Cannon (1970), 185 Neb. 149, 174 N. W. 2d 181, we held: "When evidence of an in-court identification alleged to be tainted by a prior illegal line-up is first challenged on appeal, such challenge, in the absence of a clear showing of prejudicial error, will not be considered. Failure to object will be attributed to defense counsel's choice of trial tactics."

Even if we were to find the identification of defendant by Kurbis to be erroneous, it could hardly be said that it would be prejudicial. Bahm's identification was admitted without question. There was no motion to suppress, no objection at the time of identification at the trial, no motion to strike. Further, Kurbis' identification was not brought to the court's attention in defendant's motion for a new trial. On the record herein, Kurbis' identification could not be held to be prejudicial.

Defendant's fourth assignment of error is premised on his contention that the arresting officer had no probable cause to make an arrest, and consequently the subsequent search violated his constitutional rights. The State neglected to argue this assignment. However, it is without merit.

A description of the robbers and their vehicle was broadcast over the police radio within 5 minutes after the occurrence. Officer Hansen stopped a car, containing two occupants, which substantially fit the description. It is true the vehicle was a turquoise 1965 Plymouth rather than a silver-blue or silver-grey Pontiac, and the license number was 1-L488 rather than 1-L400. We note, however, that the robbery occurred after 2 o'clock in the morning. At that hour, it is not too difficult to mistake two figure "8s" for two zeros. The stopped vehicle had one low beam headlight out, and there was moderate damage to the rear of the vehicle. Officer Hansen testified that one of the descriptions definitely included a man with a beard, and that the two individuals were in their late teens or early twenties. Defendant was bearded and 22 years of age. There were sufficient similarities to suggest to a reasonably prudent officer that an investigation was in order.

Officer Hansen called for assistance. The occupants were not ordered out of the car until assistance arrived. At that time, a butt of a rifle was observed protruding between the seats on the driver's side, the butt up.

There was probable cause to stop the automobile and probable cause for the arrest of the occupants. See State v. Huffman (1967), 181 Neb. 356, 148 N. W. 2d 321.

For the reasons stated, we find no merit in any of defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

TUB-MASTER CORPORATION, APPELLANT, V. STATE SURETY CO. ET AL., APPELLEES.
207 N. W. 2d 520

Filed May 18, 1973. No. 38841.

Liens: Statutes: Time. Section 52-102, R. R. S. 1943, requires the filing of the lien within 3 months from the furnishing of the material.

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

Shrout, Caporale, Krieger, Christian & Nestle, for appellant.

Swarr, May, Smith & Andersen, Richard H. Hoch, and John W. Delehant, for appellees.

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

SPENCER, J.

This appeal is from the sustaining of defendants' motion to dismiss plaintiff's petition for the foreclosure of a mechanic's lien. Plaintiff is the supplier of a supplier to a subcontractor. We affirm.

The defendant property owners contracted with Seldin Construction Company for the erection of an apartment complex. Seldin subcontracted with Swanson-Gentleman, Inc., for the installation of certain bathroom fixtures in said complex. Swanson-Gentleman, Inc., purchased materials for its contract, including folding

shower doors, from Snyder Fiberglass Company of Lincoln, Nebraska. Snyder ordered these shower doors from the plaintiff and directed that they be delivered to the construction site in Bellevue, Nebraska. The doors were sold by the plaintiff to Snyder Fiberglass Company, and were billed to it. They were delivered at the construction site on July 12 and July 21, 1971.

Tub-Master Corporation's contract was with Snyder. It had no contract or contact with either Swanson-Gentleman, Inc., Seldin Construction Company, or the owners of the property. Snyder was paid for the doors by receiving credit on another obligation. Plaintiff has never received payment.

Plaintiff's attorney filed a mechanic's lien on its behalf October 26, 1971. Plaintiff's brief gives the date as October 20, but the lien was not acknowledged until October 26, 1971. The register of deeds of Sarpy county testified it was filed October 26, 1971.

Swanson-Gentleman, Inc., filed a surety bond with State Surety Company as surety, with the register of deeds as substituted security, in accordance with section 52-121, R. R. S. 1943.

The only issue presented is whether plaintiff has a valid lien herein. Section 52-101, R. R. S. 1943, provides in part: "Any person who shall perform any labor or furnish any material, * * * (1) for the construction, erection, improvement, repair, or removal of any house, * * * building, * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same * * *."

Section 52-102, R. R. S. 1943, provides in part: "Any person or subcontractor who shall perform any labor for, or furnish any material * * * for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him

from such contractor for such * * * material * * * within three months from the performing of such labor or furnishing such material * * * with the register of deeds of the county wherein said land is situated."

We do not deem it necessary to consider herein whether the supplier of a supplier to a subcontractor can bring himself within the statute by the delivery of materials to the job site. The lien was filed out of time. Even if Snyder had filed it, it involved material furnished to a subcontractor by a materialman. There was no contract between the owners of the property or their agents and Snyder for the material in question. Section 52-102, R. R. S. 1943, provides for liens for materials furnished to contractors or subcontractors.

Section 52-102, R. R. S. 1943, requires the filing of the lien within 3 months from the furnishing of the material. Plaintiff's last delivery was July 21, 1971. The 3 months would therefore expire on October 21, 1971. Plaintiff's lien was not filed until October 26, 1971, or 5 days after the time permitted by statute had expired. The judgment of dismissal was therefore proper, and it is affirmed.

AFFIRMED.

MICHAEL PAYNE ET AL., APPELLEES, V. OTIS GLEBE, APPELLANT.

GEORGE W. CHANDLER ET AL., APPELLEES, V. OTIS GLEBE, APPELLANT.

207 N. W. 2d 386

Filed May 18, 1973. Nos. 38858, 38859.

Contempt: Obstructing Justice: Trial. By statute, courts of record have power to punish as for criminal contempt persons guilty of willful disobedience of or resistance willfully offered to any lawful process or order of the court, or any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit or proceeding pending before the court.

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

John McArthur, for appellant.

Hamilton, Greenwalt & Geier and Stephen R. McCaughey, for appellees.

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

SPENCER, J.

This appeal involves civil contempt proceedings originating in the municipal court of Lincoln, Lancaster County, Nebraska. Defendant-appellant, Glebe, was found guilty of contempt in two separate actions, sentenced to 10 days in jail, and fined $50 in each of said actions. Both actions involved the same transaction and were identical in every respect except for the names of the parties' plaintiff. Defendant appealed to the District Court. After a trial de novo, the District Court affirmed the findings, order, fine, and sentence of the municipal court. Defendant prosecutes his appeals to this court. We affirm as modified.

Until appeal to the District Court, defendant was not represented by counsel but appeared pro se. He was sued in the municipal court by the legal aid society on behalf of three plaintiffs, in separate landlord-tenant cases, claiming damages and recovery of deposits. The cases involved the same dwelling unit where the respective plaintiffs had lived at different times. The cases were consolidated for trial in District Court.

During the course of the municipal court proceedings the plaintiffs filed motions to inspect the premises. One inspection was requested for both cases. The municipal judge issued an order of inspection in each case, which defendant refused to honor. Defendant was then cited for contempt for willfully, contumaciously, and contemptuously refusing to obey the order for inspection.

Defendant was found guilty in both cases, and appealed to the District Court.

"By statute courts of record have power to punish as for criminal contempt persons guilty of wilful disobedience of or resistance wilfully offered to any lawful process or order of the court, or any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit or proceeding pending before the court." Niklaus v. Holloway (1944), 144 Neb. 503, 13 N. W. 2d 655.

Defendant sets out two assignments of error, as follows: "1. The court erred in failing to decide the case de novo. 2. The court erred in refusing to sustain appellant's motion to dismiss at the conclusion of plaintiff's case for failure of proof."

The hearing held in the District Court was in fact a trial de novo. The case was decided by the District Court on the merits. Preliminary proceedings were had in the District Court questioning whether the proper procedure was an appeal or a petition-in-error. It was determined that defendant was entitled to proceed by appeal. In discussing trial procedure with counsel, the trial judge held the parties were in the same position as though the contempt had never been determined. He placed the burden on the plaintiffs to show that defendant contumaciously and contemptuously violated a valid court order. Plaintiffs produced such evidence and rested. Defendant produced no evidence.

After argument, the trial court determined that the evidence sustained a finding that the defendant was guilty of willful civil contempt on or about the 3rd day of August 1971. While the choice of language in the decretal portion of the judgment entry would be that ordinarily used for a petition-in-error, there can be no question the trial judge was reimposing the municipal court sentences on the defendant.

There is no merit to defendant's second assignment of error. The record amply supports a finding of will-

ful civil contempt on the part of the defendant. We believe, however, that the jail sentences in the two cases should run concurrently.

The judgment herein is affirmed, except that the jail sentences of 10 days in each case shall be concurrent.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. LYNN M. MOORE, APPELLANT.
207 N. W. 2d 518

Filed May 18, 1973. No. 38882.

1. **Post Conviction.** The Post Conviction Act extends relief only to persons "in custody."
2. **Indigents: Right to Counsel: Time.** Prior to June 22, 1970, it was not required that an indigent defendant be supplied with counsel at a preliminary hearing.

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

Ross D. Druliner, Jr., 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.

NEWTON, J.

This is a post conviction proceeding. Defendant was convicted on March 1, 1963, of breaking and entering. The present motion to vacate the judgment and sentence asserts that defendant's sentence has been served. The sole ground alleged is that defendant, an indigent, was not represented by counsel at the time of his preliminary hearing. The judgment is affirmed.

In the case of State v. Myles, 187 Neb. 105, 187 N. W. 2d 584, this court gave recognition to the ruling in Sibron v. New York, 392 U. S. 40, 88 S. Ct. 1889, 20

L. Ed. 2d 917, that an appeal was not necessarily moot because the sentence had been served. In the Myles case, the appeal was treated not as a post conviction proceeding, which it purported to be, but as a direct appeal. The present case is purely a post conviction proceeding and, as such, is moot. The Post Conviction Act extends relief only to persons "in custody." See § 29-3001, R. S. Supp., 1972. The same is true in the case of federal habeas corpus proceedings. See, United States ex rel. Myers v. Smith (2d Cir., 1971), 444 F. 2d 75; 28 U. S. C. A., § 2241 (c) (3).

The requirement that an indigent be supplied with counsel at his preliminary hearing was promulgated in Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970). In Adams v. Illinois, 405 U. S. 278, 92 S. Ct. 916, 31 L. Ed. 2d 202 (1972), it was held that Coleman v. Alabama, *supra*, does not apply retroactively. Since defendant was convicted in 1963, the rule of Coleman v. Alabama, *supra*, is inapplicable.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE FARM FIRE & CASUALTY COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. WILLIAM J. MUTH ET AL., APPELLEES AND CROSS-APPELLANTS.

207 N. W. 2d 364

Filed May 21, 1973. No. 38783.

SUPPLEMENTAL AND AMENDATORY OPINION

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. See *ante* p. 248, 207 N. W. 2d 364, for original opinion. Original opinion modified. Affirmed in part, and in part reversed and remanded for further proceedings.

Fraser, Stryker, Marshall & Veach, for appellant.

Matthews, Kelley, Cannon & Carpenter and Burbridge, Burbridge & Parsonage, for appellees.

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

CLINTON, J.

In order to correct an oversight in our opinion, State Farm Fire & Cas. Co. v. Muth, *ante* p. 248, 207 N. W. 2d 364, filed May 11, 1973, the following paragraphs are substituted for the last three paragraphs of that opinion.

The appellee, James Brailey, and the appellee, Allen Muth, assign as error the refusal of the trial court to allow them attorneys' fees to be taxed as costs for the services of their respective attorneys in the court below in this action. They rely upon section 44-359, R. S. Supp., 1972, and our recent holdings in Workman v. Great Plains Ins. Co., Inc., 189 Neb. 22, 200 N. W. 2d 8; and State Farm Mut. Auto. Ins. Co. v. Selders, 189 Neb. 334, 202 N. W. 2d 625; and upon Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N. W. 2d 471.

In Workman v. Great Plains Ins. Co., Inc., *supra,* this court held that the 1971 amendment to section 44-359, R. R. S. 1943, made it applicable to declaratory judgment actions brought by the insured against the insurer. In State Farm Mut. Auto. Ins. Co. v. Selders, *supra,* we said the right to attorney's fees did not depend upon who brought the action and awarded attorney's fees to the insured in an action brought by the insurer. In the earlier case of Metcalf v. Hartford Acc. & Ind. Co., *supra,* we held that a judgment creditor was entitled to attorney's fees when he had to bring an action against the liability insurer to collect his judgment against the insured. This action is brought by the insurer against both the insured and the judgment creditor and its result is tantamount to an action by the judgment creditor on the policy. The court below erred

in not awarding an attorney's fee to Brailey and Muth in this action.

The appellant urges that we overrule Selders and argues that before we can reach the result we now do, we must overrule Lundt v. Insurance Co. of North America, 184 Neb. 208, 166 N. W. 2d 404. Our holdings in State Farm Mut. Auto. Ins. Co. v. Selders, *supra,* and in Lundt v. Insurance Co. of North America, *supra,* are clearly distinguishable. In Lundt v. Insurance Co. of North America, *supra,* the facts were that the plaintiff had earlier obtained a judgment against the insured which the defendant liability carrier paid. The plaintiff then sought in the cited case to obtain an attorney's fee from the insurer for its services to the plaintiff in the action in which it obtained the judgment against the insured. There never was any action on the policy because the insurer had paid. The situation in Lundt v. Insurance Co. of North America, *supra,* is the same as if the court below or this court were being asked to award Brailey an attorney's fee for the services of his attorney in obtaining the judgment against Muth. Lundt has no application to this case. Appellees James Brailey and Allen Muth are awarded an attorney's fee of $750 for services of their attorneys in this court. If the parties cannot agree upon the division of said fee, the court below may hear evidence and make an appropriate division.

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

EARL SELDERS AND ILA SELDERS, ADMINISTRATOR AND ADMINISTRATRIX OF THE ESTATES OF MARCELLA SELDERS, DOUREEN SELDERS, AND GARY SELDERS, DECEASED, APPELLANTS, V. CHARLES DALE ARMENTROUT ET AL., APPELLEES.

207 N. W. 2d 686

Filed May 25, 1973. No. 38564.

Death: Damages: Parent and Child. The measure of damages for the wrongful death of a minor child should be extended to include the loss of the society, comfort, and companionship of the child.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Moyer & Moyer, for appellants.

Hutton & Garden, Deutsch & Hagen, Kirby & Spittler, and Thomas H. DeLay, for appellees.

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

MCCOWN, J.

This is an action by Earl and Ila Selders to recover damages for the wrongful deaths of three of their minor children. The children were killed in an automobile accident. The jury found the defendants Charles and William Armentrout negligent and returned a verdict against them for the exact amount of the medical and funeral expenses of the three children. The parents have appealed.

The sole issue on this appeal involves the proper elements and measure of damages in a tort action in Nebraska for the wrongful death of a minor child. The court essentially instructed the jury that except for medical and funeral expenses, the damages should be the monetary value of the contributions and services which the parents could reasonably have expected to receive

from the children less the reasonable cost to the parents of supporting the children.

The defendants contend that the measure of damages is limited to pecuniary loss and that the instructions to the jury correctly reflect the measure and elements of damage. The plaintiffs assert that the loss of the society, comfort, and companionship of the children are proper and compensable elements of damage, and that evidence of amounts invested or expended for the nurture, education, and maintenance of the children before death is proper.

An analysis of the history of our wrongful death statutes is appropriate. The statutory provision creating a cause of action for wrongful death has never contained the word "pecuniary" but only referred to an action for "damages." That statute was section 1428, Rev. St. 1913, and is now section 30-809, R. R. S. 1943. The statute is still identical, word for word. What might be referred to as the procedural and limitation provisions were originally contained in section 1429, Rev. St. 1913, now section 30-810, R. S. Supp., 1972. In 1913, that section provided in part: "* * * the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death * * *." In 1919, that provision was changed to read: "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained." Laws 1919, c. 92, § 1, p. 235. This language and the preceding portions of the statute still remain unchanged today. In 1919, that particular language was followed by the words "and the avails thereof shall be paid to and distributed among such persons in the same proportions as the personal property of an intestate under the inheritance laws." From 1919 to 1945, the word "pecuniary" did not appear in section 30-810, R. S. 1943, nor any amendments to it.

In 1945, the language of section 30-810, R. S. 1943,

providing that "the avails" of a wrongful death action should be distributed as personal property of an estate under inheritance laws was changed to the present language that: "The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons." The statutory reference to "damages * * * sustained" remains unqualified and unrestricted.

It would seem clear that the word "pecuniary" as it now appears in the statute does not refer to the "damages" recoverable but only to the method of apportioning "the avails" or the amount recovered as damages in a wrongful death action.

Although the defendants assert that the measure and elements of damages recoverable in a wrongful death action are by statute limited to pecuniary loss, and this state has sometimes been placed in the category of states having statutes of that kind, the historical background demonstrates the erroneousness of that concept. The case of Ensor v. Compton, 110 Neb. 522, 194 N. W. 458, decided in 1923, after the 1919 amendment above referred to, said: "This amendment was made by the legislature after this court had, by a long line of decisions, held that damages in this class of cases were limited under the statute to money loss or its equivalent. This change, while significant, does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss." That same case, however, allowed a recovery by a surviving husband for loss of services and companionship of his wife and said: "In states having a statute similar to our own, it has generally been construed as permitting recovery of damages for loss of service and companionship under special circumstances where the evidence shows they have a money value."

It is quite apparent from an examination of the judicial decisions and the legal literature in the field, that

a broadening concept of the measure and elements of damages for the wrongful death of a minor child has been in the development stage for many years. See, Annotation, 14 A. L. R. 2d 486; Speiser, Recovery for Wrongful Death, § 3:1, p. 54, et seq.; and § 4:16 to § 4:28, p. 323, et seq. Following a discussion of the rigid common law rules limiting recovery for wrongful death to the loss of pecuniary benefits, Prosser states: "Recent years, however, have brought considerable modification of the rigid common law rules. It has been recognized that even pecuniary loss may extend beyond mere contributions of food, shelter, money or property; and there is now a decided tendency to find that the society, care and attention of the deceased are 'services' to the survivor with a financial value, which may be compensated. This has been true, for example, not only where a child has been deprived of a parent, * * * but also where the parent has lost a child * * *." Prosser, Law of Torts (4th Ed.), § 127, p. 908.

The original pecuniary loss concept and its restrictive application arose in a day when children during minority were generally regarded as an economic asset to parents. Children went to work on farms and in factories at age 10 and even earlier. This was before the day of child labor laws and long before the day of extended higher education for the general population. A child's earnings and services could be generally established and the financial or pecuniary loss which could be proved became the measure of damages for the wrongful death of a child. Virtually all other damages were disallowed as speculative or as sentimental.

The damages involved in a wrongful death case even today must of necessity deal primarily with a fictitious or speculative future life, as it might have been had the wrongful death not occurred. For that reason, virtually all evidence of future damage is necessarily speculative to a degree. The measure and elements of damage involved in a wrongful death case, however,

have been excessively restrictive as applied to a minor child in contrast to an adult. Modern economic reality emphasizes the gulf between the old concepts of a child's economic value and the new facts of modern family life. To limit damages for the death of a child to the monetary value of the services which the next of kin could reasonably have expected to receive during his minority less the reasonable expense of maintaining and educating him stamps almost all modern children as worthless in the eyes of the law. In fact, if the rule was literally followed, the average child would have a negative worth. This court has already held that contributions reasonably to be expected from a minor, not only during his minority but afterwards, may be allowed on evidence justifying a reasonable expectation of pecuniary benefit. Draper v. Tucker, 69 Neb. 434, 95 N. W. 1026; Fisher v. Trester, 119 Neb. 529, 229 N. W. 901. Even with that modification, the wrongful death of a child results in no monetary loss, except in the rare case, and the assumption that the traditional measure of damages is compensatory is a pure legal fiction.

Particularly in the last decade, a growing number of courts have extended the measure of damages to include the loss of society and companionship of the minor child, even under statutes limiting recovery to pecuniary loss or pecuniary value of services less the cost of support and maintainance, or similar limitations. See, Fussner v. Andert, 261 Minn. 347, 113 N. W. 2d 355; Wycko v. Gnodtke, 361 Mich. 331, 105 N. W. 2d 118; Lockhart v. Besel, 71 Wash. 2d 112, 426 P. 2d 605; Wardlow v. City of Keokuk, 190 N. W. 2d 439 (Iowa, 1971).

In this state, the statute has not limited damages for wrongful death to pecuniary loss but this court has imposed that restriction. For an injury to the marital relationship, the law allows recovery for the loss of the society, comfort, and companionship of a spouse. This court has allowed such a recovery for the wrongful

death of a wife. See Ensor v. Compton, 110 Neb. 522, 194 N. W. 458. There is no logical reason for treating an injury to the family relationship resulting from the wrongful death of a child more restrictively. It is no more difficult for juries and courts to measure damages for the loss of the life of a child than many other abstract concepts with which they are required to deal. We hold that the measure of damages for the wrongful death of a minor child should be extended to include the loss of the society, comfort, and companionship of the child. To the extent this holding is in conflict with prior decisions of this court, they are overruled.

The trial court gave NJI No. 4.60 as to wrongful death but entirely omitted paragraph 2i dealing with companionship, counseling, and advice. That omission was probably sanctioned under our previous decisions. The plaintiffs having raised the issue of the measure of damages for the wrongful death of a minor child both in the trial court and on this appeal are entitled to the benefit of the new rule announced in this case and should be afforded a new trial on the issue of damages only.

For the guidance of the court on retrial, we believe that evidence of expenses of birth, food, clothing, instruction, nurture, and shelter which have been incurred or were reasonably necessary to rear the child to the age he or she had attained on the date of death are not properly admissible. We conclude that the investment theory of measuring damages by the amounts expended in raising the child is inappropriate and improper.

The judgment of the trial court as to liability is affirmed, the judgment as to damages is reversed and the cause remanded for trial on the issue of damages only, consistent with our holding in this opinion.

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

WHITE, C. J., dissenting.

I dissent strongly to both the conclusion and the

rationale of the majority opinion in this case. The opinion, in one arbitrary action, now states that: "The measure of damages for the wrongful death of a minor child should be extended to include the loss of the society, comfort, and companionship of the child."

There is nothing "limited" about the range of the new measure of damages adopted by the majority opinion.

Admittedly the new rule has an emotional appeal, and from the beginning of the basic concepts of the law, legislatures and the courts have had to deal with the emotional appeals and demands that *money* be awarded as compensation for a purely emotional loss. A wrongful death action does not arise out of the common law and out of the principles of stare decisis. Our wrongful death statute is purely a legislative creation, and this court, for over a period of 50 years of decisions, has followed its judicial duty in setting out precisely how the measure of damages is to be compensated. After a long line of judicial decisions, without legislative interference, and without dissent, the Legislature enacted the 1945 statute which provides: "The avails thereof (from a wrongful death action) shall be paid * * * in the proportion that the pecuniary loss suffered by each (heir) bears *to the total pecuniary loss suffered by all such persons.*" (Emphasis supplied.) § 30-810, R. S. Supp., 1972. I submit that the majority opinion adopted by this court, in one arbitary action, despite its previous pronouncement of the measure of damages in this case itself, and despite the 1945 statute and the 50 years of settled and precise determinations and decisions of this court, both before the 1945 statute and afterwards, and despite any interference by the Legislature or without action by the Legislature since the 1945 statute, by judicial fiat is creating a class action on behalf of the next of kin or heirs to recover monetary damages for "society, comfort, and companionship," and permit a jury to translate emotional, conjectural, and speculative

sentimental values incapable of having any objective standards applied to them, into an award of money.

With the common assumption by the public and jurors of the presence of liability insurance in damage cases, and with the natural and human elements of sympathy present in the courtroom, it takes no imagination to see the amounts of verdicts that will be returned. In the hands of an imaginative lawyer, marshaling family albums and the testimony of sympathetic friends, and demonstratively organized and staged by a histrionic-minded lawyer, this court will undoubtedly be faced in the future with the almost impossible job of attempting to apply the generalized principles of excessiveness of a verdict to these judgments, which by their nature are an attempt to award money for a purely emotional loss conjectural, speculative in nature, and incapable of measurement or proof by any objective standard or related criteria.

I call attention to the following specific problems:

(1) The outright repeal by judicial fiat of the 1945 statute, which confirmed the court's continued, consistent, and unrepealed interpretation of the measure of damages in a wrongful death case. I allude to the statute again and particularly to the language "to the total pecuniary loss suffered by all such persons." The majority opinion skips with a light fantastic toe over this language and this statute. We must remember that we are dealing with a legislative creation here, and not a right that is sourced in judicial decision flowing from the common law. It is absolutely indisputable that this was a corrective statute, enacted in 1945, the purpose of which was to conform the distribution of the avails in a wrongful death action to the established law as to the nature of the damages. The previous 1919 statute was absurdly inconsistent and unjust with reference to the method of distribution, providing for distribution under the intestate laws. This conforming statute accomplished symmetry between the measure of damages

and their method of distribution. It is inconceivable to me that any other conclusion could be drawn except that the 1945 statute affirmed and enforced the statutory interpretation that the court had placed upon the wrongful death statute for a period of 25 years. The query arises: What authority is there in the court for repealing by judicial fiat section 30-810, R. S. Supp., 1972? And what now, may I ask, is the method or the rule devised to determine the proper distribution of the loss or award?

I submit further that under any application of the rules of statutory interpretation, the statutes must be construed pari materia, that it is assumed that the Legislature was familiar with the law when it enacted the statute, and it is the duty of the court to harmonize the statutes enacted on the same subject, thus this 1945 conforming statute reaffirmed and declared the legislative intent to approve and to follow what had been the settled law in Nebraska for over 25 years at the time of the 1945 statute. I suggest further that it is now 50 years since the court's original interpretation in 1923, and that the 1945 statute, and the applicable case law, has been followed continuously over the period of the last 28 years, and has existed without dissent or a discoverable attempt to legislate, repeal, or amend the two statutes.

(2) The measure of damages. In the majority opinion, in the last few paragraphs, it is now forbidden to introduce any evidence or to instruct upon the pecuniary nature of the child's services, parent's expenses, etc. The majority opinion states: "For the guidance of the court on retrial, we believe that evidence of expenses of birth, food, clothing, instruction, nurture, and shelter which have been incurred or were reasonably necessary to rear the child to the age he or she had attained on the date of death *are not properly admissible.* We conclude that the investment theory of measuring damages by the amounts expended in raising

the child is *inappropriate and improper.*" (Emphasis supplied.) Thus the majority opinion seizes upon these pecuniary-related items and says that they shall not be considered. What, then, may I ask is the measure of damages? What is the jury going to be told, *under our statute, and the 1945 amendment* as to how it will measure the elements of comfort, society, and companionship? The majority opinion seizes upon the decision in Ensor v. Compton, 110 Neb. 522, 194 N. W. 458, in 1923, and states that it itself allows damages for loss of companionship between the husband and the wife. Overlooked and not mentioned in the majority opinion is the qualifying language in the Ensor case that states all damages of whatever nature must be supported by evidence that they have a money value. And the Ensor case says "of such a character that would give advantage to such survivor, and that a disallowance thereof would cause a pecuniary loss to him or her." And this court in Ensor further stated: "Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death."

(3) The magnitude of the impact of the majority opinion and its reversal and overruling of both case and statutory law can be grasped by reading the following succinct summary of Nebraska law in the case of Wright v. Hoover, 329 F. 2d 72, in which it was stated: "(1) Generally, in a wrongful death action, the measure of damages is limited to the *pecuniary* loss sustained by the statutory beneficiaries. Darnell v. Panhandle Cooperative, 175 Neb. 40, 120 N. W. 2d 278, 286 (1963); Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831, 840-841 (1955); see also, Thevenot v. Sieber, S.D.N.Y., 204 F. Supp. 15, 16 (1962) (involving Nebraska law); (2) Where the deceased is an unemancipated child, such pecuniary loss is that which - measured by the present value of a dollar - will be sustained by the parent by reason of being deprived of the child's services during his minority, *and the loss of contributions,*

if any, having monetary value that might reasonably be expected to be made by the child after reaching his majority. Bailey v. Spindler, 161 Neb. 563, 74 N. W. 2d 344, 351 (1956); Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701, 714-715 (1955); Forrest v. Masters, 158 Neb. 506, 63 N. W. 2d 777, 780 (1954); Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544 (1949); Fisher v. Trester, 119 Neb. 529, 229 N. W. 901 (1930); Draper v. Tucker, 69 Neb. 434, 95 N. W. 1026, 1028 (1903); (3) In calculating the pecuniary loss to the parent, the amounts which would have been expended for the child's maintenance and support are deducted from the monetary value of the child's services and contributions. Shields v. County of Buffalo, supra, 71 N. W. 2d at 714; Forrest v. Masters, supra, 63 N. W. 2d at 780; Dorsey v. Yost, supra, 36 N. W. 2d at 575-576; (4) *Pain, anguish, loss of society and companionship are not ordinarily proper elements of pecuniary loss.* In re Lucht's Estate, 139 Neb. 139, 296 N. W. 749, 752 (1941); Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 748-749, 74 A. L. R. 5 (1930); Elliott v. City of University Place, 102 Neb. 273, 166 N. W. 621, 622 (1918)." (Emphasis supplied.)

(4) The rights created under Lord Campbell's Act in our death statute are statutory in creation and are governed solely by statute. There is a non sequitur inference in the majority opinion that because the 1919 statute simply mentioned damages, that therefore the statute itself is authority for a non pecuniary measure of damages such as loss of comfort, society, and companionship. Quite the contrary is true. I do not think I need to recite the elementary fact that in the event a general statute is enacted giving the right to recover damages. it then becomes a part of the judicial power and the duty of the court to lay down the measure of the damages, to be followed by a jury or a court in making its award. I point out that this court has consistently and clearly followed its duty in this respect, and more

importantly, its interpretation and application of the measure of damages has been affirmed and enacted into law by the Legislature itself in the 1945 statute. Courts, generally, and this court, have universally condemned, in all contexts, attempts by trial courts to submit the issue of damages generally to a jury and have spoken quite firmly that it is the duty of the court to set out for the guidance of the jury the measuring standards for its evaluation of the *money* damages that are awarded in a tort action. The majority opinion dodges this issue completely without any indication of any nature whatsoever as to how the damages are measured except that a jury may award any and all damages that it wants to as long as they are related to comfort, society, and companionship. I submit that such a position is nothing more than a permission to take money out of one man's pocket and put it into another's on the basis of sympathy and sentimental reasons. And in this connection, I call attention to the very material distinction that this court has made, and courts generally, between awards for pain and suffering accompanied by physical injury and loss, as distinguished from speculative awards for sentimental value, such as bereavement, comfort, society, and companionship.

(5) The majority opinon is not consistent with and is a denial of the general principles that this court and other courts have stated with reference to the allowance of compensatory damages. We have stated many times that compensatory damages are the only ones recoverable under our law (with certain exceptions not pertinent here). In general terms, we have stated many times that the law awards damages to a party injured from the negligence of another, not as a punishment of the negligent party, but as compensation for the pecuniary loss sustained by the injured party. And correlated to this we have denied and continually and consistently stated that damages which are uncertain, contingent, sentimental, conjectural, or speculative can-

not be made the basis of a recovery in an action for damages. We have also stated that proof of damages must be made with a reasonable degree of certainty and even though the damages may be real, they are not recoverable if they are too remote or are speculative in nature. I call attention to these basic principles in light of the super charged emotional atmosphere that a competent and zealous trial attorney can create in the trial of a death-damage action for the loss of a minor child.

In conclusion I reiterate what seems to me must be perfectly obvious. This is a statutorily created class action, completely under the control and jurisdiciton of the Legislature. It enacted the statute and over a period of 50 years has adopted and categorically confirmed our determination of the measure of damages, which measure of damages consistently follows the basic principles of damage law under Anglo-Saxon jurisprudence. I submit that whatever the majority's desire may be to change and reform the law of damages to accommodate to the emotional loss of a death of a minor child, that it is our duty as a court to abide by the legislative policy and action in this area. Besides all the other considerations mentioned the effect of such a change on insurance premiums, the matter of the distribution of the avails which question has not been answered in the majority opinion, the acceptance of any principle that the amount of the loss may be extended because the distribution of loss is covered by insurance, and many other considerations are purely for legislative policy consideration. I submit that the majority opinion, which arbitrarily and in one stroke, after 50 years of settled law and without public hearing or consideration of the different interests and policies involved, and in violation of the 1945 legislative policy clearly announced in the statute, and unrepealed, simply throws open a death claim for a minor child to a sympa-

thy and sentiment contest in the award of money, and is a serious mistake for us to make.

NEWTON, J., joins in this dissent.

CLINTON, J., dissenting.

I have concurred in the dissent of Judge White on the merits, but another aspect of this case deserves comment. That aspect may be defined by the answer to the following conundrum. When is "the law of the case" not "the law of the case?"

This is the third appearance of this plaintiff before us. On the first appeal the plaintiff sought a declaration that he, Earl Selders, was an insured under an automobile liability policy for the purpose of the uninsured motorist coverage thereunder. If he were, then State Farm Mutual Automobile Insurance Company would be required to respond in damages to him if he should obtain a judgment against the present defendants who were the uninsured motorists found by the jury in the present case to be responsible for the death of his minor children.

Because the children were not members of the plaintiff's household, the answer to the issue in the original case turned upon the measure of damages applicable to any possible recovery by the plaintiff under the wrongful death statute. We held that the plaintiff qualified as an insured under subdivision (3) of the policy definition of insured as that definition applied to uninsured motorist coverage. Subdivision (3) thereof read as follows: "(3) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this coverage applies." We then reiterated the long-standing rule as to the measure of damages for death of a minor child as follows: " 'The measure of damages in an action such as we have before us is the pecuniary loss which the parent sustains by reason of being deprived of the child's services during his minority and the loss of contributions that might reasonably be expected to be made after reaching

his majority.'" State Farm Mut. Auto. Ins. Co. v. Selders, 187 Neb. 342, 190 N. W. 2d 789. It seems clear to me that the foregoing holdings established the law of the case and that under the former holdings of this court not only was the trial court bound, but so are we on this appeal. Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571; Ripp v. Riesland, 180 Neb. 205, 141 N. W. 2d 840.

It is true, of course, that the present defendants were not parties to the first action, but nonetheless the effect of our holding in the first case was that State Farm Mutual would, to the limits of liability afforded by the policy, be required to pay any judgment the plaintiff might be awarded against these defendants. Given that result, the consequences for purposes of application of the rule of the law of the case are the same as if the original action was between the defendants and their own liability insurer, had they one.

The answer is that the law of the case is not the law of the case when this court on the second appeal by a raw exercise of judicial fiat says it is not.

The trial court properly instructed the jury on the measure of damages in accordance with the applicable rules under all the previous decisions of this court and under the law of the case as laid down in State Farm Mut. Auto. Ins. Co. v. Selders, *supra*. The judgment should be affirmed.

NEWTON, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. LITTLE ART CORPORATION, A FOREIGN CORPORATION DOING BUSINESS AS ART 16 THEATER, APPELLANT.
207 N. W. 2d 527

Filed May 25, 1973. No. 38672.

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

Walter J. Matejka, Frank B. Daninger, and Arthur Schwartz, for appellant.

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

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

CLINTON, J.

The result in this case is governed by our opinion in State v. Little Art. Corp., 189 Neb. 681, 204 N. W. 2d 574. The issues are identical with those in the cited case and there is no material difference in the evidence. The judgment is affirmed. See Rule 20.

AFFIRMED.

MARILYN C. EWOLDT, APPELLANT, V. AMERICAN NATIONAL INSURANCE COMPANY, A CORPORATION, APPELLEE.

207 N. W. 2d 521

Filed May 25, 1973. No. 38777.

1. **Insurance: Contracts.** The provision in the policy for reinstatement represents a valuable contract right which survives a lapse of the policy and which an insurer cannot arbitrarily condition or deny.
2. **Insurance.** In acting upon an application for reinstatement an insurer may not act capriciously or unreasonably.
3. **Insurance: Contracts.** The purpose and effect of statutory and policy provisions requiring an application for the reinstatement of a lapsed policy is to permit the insurer to reexamine the risk it is considering reinsuring.
4. ———: ———. A requirement, for reinstatement of a life policy, that satisfactory evidence of insurability be presented is a part of the contract of which insurer is entitled to performance.
5. **Insurance: Contracts: Time.** Upon receipt of a reinstatement application, an insurer has the right to require further evidence of insurability or to agree to reinstate the policy on the basis of the information in the application itself, but in either event,

reinstatement is never effectuated until the insurer acts on the application.

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

Walter C. O'Neal, Jr., for appellant.

Luebs, Tracy, Huebner, Dowding & Beltzer and D. Steven Leininger, for appellee.

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

NEWTON, J.

This is an action on a life insurance policy issued by defendant on the life of Gary L. Ewoldt, husband of plaintiff, under which plaintiff is the beneficiary. Summary judgment was entered for defendant. We affirm.

Premiums on the policy were payable monthly and the policy lapsed due to failure to pay premiums. The policy provided: "8. REINSTATEMENT. If this policy has not been surrendered for its cash value, application for reinstatement may be made to the Company at any time within five years after lapse, upon (a) presentation of evidence of insurability, satisfactory to the Company (b) payment of all overdue premiums with interest at the rate of 5% per annum and (c) payment or reinstatement of any indebtedness to the Company which existed at the time of lapse, with interest at the rate of 5% per annum."

After the policy had lapsed, the insured decided to reinstate the policy. He forwarded delinquent premiums and a signed application blank for reinstatement to defendant's agent. The application was not filled out and no evidence of insurability was supplied. The application was signed and mailed to defendant's agent in Denver, Colorado, on February 23, 1968. Insured was killed in an automobile accident on February 25, 1968. Defendant's agent was absent from his office for several days but on his return on February 29, 1968,

he found the premium check and the signed application for reinstatement. Whether or not it had been delivered prior to insured's death cannot be determined. It was later filled out and forwarded by the agent to defendant which refused to reinstate the policy and refused payment.

Under the terms of the contract of insurance, when a premium remained unpaid at the end of the 31-day grace period, the policy became void but remained subject to reinstatement as above noted. Insured's right to reinstatement was not absolute. In addition to complying with the other provisions contained in the reinstatement clause, insured was required to present evidence of insurability which was "satisfactory to the company." This provision conforms to the requirements of section 44-502 (11), R. R. S. 1943.

The provision in the policy for reinstatement represents a valuable contract right which survives a lapse of the policy and which an insurer cannot arbitrarily condition or deny. See Schiel v. New York Life Ins. Co., 178 F. 2d 729 (9th Cir., 1949).

In acting upon an application for reinstatement an insurer may not act capriciously or unreasonably. See Sunset Life Ins. Co. of America v. Crosby, 85 Idaho 407, 380 P. 2d 9.

The purpose and effect of statutory and policy provisions requiring an application for the reinstatement of a lapsed policy is to permit the insurer to reexamine the risk it is considering reinsuring. See Siegel v. Continental Cas. Co., 27 Ill. App. 2d 290, 169 N. E. 2d 587.

A requirement, for reinstatement of a life policy, that satisfactory evidence of insurability be presented is a part of the contract of which insurer is entitled to performance. Reed v. Washington Nat. Ins. Co., 6 Ill. App. 2d 49, 126 N. E. 2d 517.

Upon receipt of a reinstatement application, an insurer has the right to require further evidence of insurability or to agree to reinstate the policy on the basis

of the information in the application itself, but in either event, reinstatement is never effectuated until the insurer acts on the application. See, Siegel v. Continental Cas. Co., *supra;* Hogan v. John Hancock Mut. Life Ins. Co., 195 F. 2d 834 (3d Cir., 1952); Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 78 N. W. 936.

In the present instance the insured failed to supply any evidence of insurability whatsoever to the defendant's agent. In fact, he did not furnish even an application for reinstatement but simply signed a blank form of reinstatement application which was filled out after the insured's death by the agent. Insurer had no opportunity, prior to insured's death, to determine the question of insurability or to accept or reject the application. It is obvious there would be no reinstatement of a policy on a man already deceased as there was then a complete lack of the element of insurability. It is not contended that defendant at any time consented to a reinstatement of the policy.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LOUIE KLINKACEK, APPELLANT.

207 N. W. 2d 524

Filed May 25, 1973. No. 38836.

Criminal Law: Sentences: Intoxicating Liquors: Motor Vehicles. A sentence to 3 years' imprisonment for driving while intoxicated was not excessive where the defendant had six previous convictions for the same offense, had violated his probation order, and had failed to continue with treatment for alcoholism.

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

Joseph D. Martin, 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.

BOSLAUGH, J.

The defendant pleaded guilty to third offense operating a motor vehicle while under the influence of alcoholic liquor. On June 1, 1972, the District Court placed the defendant on probation for 3 years. The order provided that the defendant should abstain from the use of alcoholic beverages and not drive an automobile during the period of probation.

Thereafter an application to revoke the order of probation was filed alleging the defendant had not abstained from the use of alcoholic liquor and had driven a car. At the hearing on the application on September 25, 1972, the defendant admitted he had violated the probation order as alleged. The order of probation was revoked and the defendant was sentenced to imprisonment for 3 years. The defendant contends the sentence was excessive.

The defendant is 50 years of age, divorced, and has no children. He has been employed as a farm and ranch laborer. He has been found guilty of driving while intoxicated six times before the offense charged in this case. He has been sentenced to jail on three occasions. He has no prior felony convictions.

When the defendant was placed on probation he was receiving treatment for alcoholism. The trial court directed the defendant to continue with the treatment. The defendant stopped taking antibuse about 60 days after he had been placed on probation and commenced drinking about 30 days later.

The sentence imposed is the maximum permitted by the statute. § 39-727, R. S. Supp., 1971. Although an indeterminate sentence would have been appropriate

in this case, the sentence imposed was not excessive under the facts and circumstances.

The judgment of the District Court is affirmed.

AFFIRMED.

STEVE W. STEVENSON, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

207 N. W. 2d 680

Filed May 25, 1973. No. 38839.

1. **Intoxicating Liquors: Implied Consent Law.** The refusal of a request of an arrested person to contact an attorney before consenting to an alcoholic test under the Implied Consent Law affords no reasonable ground for refusing to submit to the test.
2. **Intoxicating Liquors: Implied Consent Law: Statutes.** Section 39-727.03, R. S. Supp., 1972, must be construed in conjunction with sections 39-727, 39-727.15, and 39-727.16, R. S. Supp., 1972, all of which are clearly pari materia to each other.

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

Hutton & Garden, 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.

Appellant, Steve W. Stevenson, appealed from a judgment of the District Court sustaining the revocation of his Nebraska operator's license by the Director of the Department of Motor Vehicles of the State of Nebraska. We affirm.

About 1 a. m., on July 20, 1972, appellant was observed speeding and driving recklessly through the city of Norfolk. When he stopped he was asked for his license,

and then was told: " 'Mr. Stevenson, I am placing you under arrest for driving while intoxicated.' " He was taken to the police captain's office at the police station, where the arresting officer proceeded to fill out the standard "driving while intoxicated" forms, which included questions, answers, and implied consent information. While this was going on, appellant asked for an attorney, and was told that he could call one when the reports had been completed. The arresting officer read him the Implied Consent Law verbatim from the standard report form.

The officer then testified as follows: "Q And is that document before you, an exact copy of that which you read to him verbatim? A Yes, it is. Q All right, and did you read that to him more than once? A Yes, I did. Q All right, approximately how many times did you read it? A I read it and explained it to him on four occasions. Q And again refreshing your memory with Exhibit No. 1, read for the record just exactly what it was that you read to Mr. Stevenson? A Yes. 'Under Nebraska Law you have given your consent to submit to a chemical test of your blood, urine or breath for the purpose of determining the amount of alcohol content in your body fluid. If you refuse to submit to a chemical test you will be required to show cause for your refusal to the Director of Motor Vehicles. If you cannot show cause, your motor vehicle operator's license will be revoked. Do you understand that?' And his reply was, 'Yes, I do understand but won't admit to it.' Q All right. A Further went on and stated, 'No breath testing equipment is available but you do have a choice whether to give a sample of your blood or urine for a chemical test. Will you give a sample of your blood or urine? And he replied 'No, I won't.' Then he was asked, 'Has this statement been given freely and voluntarily without any threats or promises?' He stated, 'You bet.' 'Is it true to the best of your

knowledge?' He stated, 'Yes.' He was asked, 'Will you sign this statement?' and he said, 'No.' "

Appellant testified that immediately upon arrival at the police station he asked to call his attorney, and the request was refused. He was told "That we had to fill out a report first or had to be questioned." He testified during the questioning he made three or four more requests to call his attorney, and was told by the police officer that they had to do the questioning and fill out the report first. He denies he was advised at any time that if he failed to submit to a chemical test of his blood or urine his driver's license and operating privileges would be revoked for 1 year. He refused to submit to the test becase he did not know the consequences of such refusal.

The officer testified the questioning took 10 minutes, and that as soon as the report was finished appellant was permitted to make a long distance call to his attorney at Stanton, Nebraska. The attorney, who is appellant's brother-in-law, is the county attorney of Stanton county. The attorney talked with a police officer, who told the attorney appellant was charged with driving while intoxicated.

The issues raised by the petition on appeal to the District Court were as follows: (1) Whether appellant did show cause at the hearing before the examiner for the Department of Motor Vehicles why his driving privileges should not be suspended; (2) whether appellant was unreasonably denied the right to counsel with his attorney; and (3) whether the affidavit on which this proceeding was founded was contrary to law.

Appellant contends that he should have been permitted to consult with his attorney when requested. He argues that the brief delay occasioned by a call to his lawyer would not jeopardize the effectiveness of the test. He argues, therefore, that his refusal to take a test when he could not visit with his attorney about the implications, under the circumstances was reason-

able. Appellant's argument has been sufficiently answered in Rusho v. Johns (1970), 186 Neb. 131, 181 N. W. 2d 448. The only issue in that case was whether or not the defendant was entitled to consult his lawyer before deciding about the test. We there said: "A refusal of a request of an arrested person to contact an attorney before consenting to an alcoholic test under the implied consent law affords no reasonable ground for refusing to submit to the test."

Appellant then demands a strict construction of the Implied Consent Law as it relates to the officer's sworn report, prepared pursuant to section 39-727.16, R. S. Supp., 1972. He also attacks section 39-727.03, R. S. Supp., 1972, as it pertains to the arrest.

If we understand appellant's argument, he is contending the only thing an individual can be arrested for in section 39-727.03, R. S. Supp., 1972, is failure to take a preliminary breath test, which is covered by subsection (3). Appellant takes too restricted a view of section 39-727.03, R. S. Supp., 1972. There are four other subsections of that section in addition to subsection (3). Subsection (3) does make specific provision for arrest for failure to give a breath test, which is not covered in any other section of the statute. Even a cursory reading of the statute indicates that section 39-727.03 must be construed in conjunction with sections 39-727, 39-727.15, and 39-727.16, R. S. Supp., 1972, all of which are clearly pari materia to each other. See State v. Manley (1972), 189 Neb. 415, 202 N. W. 2d 831. The law is clear, anyone arrested for driving while intoxicated can be asked for a test. If he refuses, then he is subjected to the administrative revocation procedures provided by the statutes, which is the procedure followed in this case.

Appellant's last argument relates to his contention that he was never advised of the consequences of refusing to submit to a fluid test. The officer testified that on four different occasions he explained the law to

appellant. The trial court believed the testimony of the officer rather than that of appellant. On this record, it would strain credulity to accept appellant's version.

Appellant's assignments of error are wholly without merit. The judgment is affirmed.

AFFIRMED.

CONNIE KAY BROADSTONE, APPELLEE, V. GEHLING WILLIAM BROADSTONE, APPELLANT.
207 N. W. 2d 682

Filed June 1, 1973. No. 38734.

1. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Appeal and Error.** In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion.
3. ———: ———: ———. 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 Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Peter D. Beekman, for appellant.

Wiltse & Halbert, for appellee.

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

WHITE, C. J.

The principal issue involved in this case is the determination of the custody of two minor adopted children, aged 6 and 7 years. The District Court, under the "no fault" marriage dissolution statute, sections 42-347 to 42-379, R. S. Supp., 1972, found the marriage irretriev-

ably broken, entered a decree accordingly, placed the legal custody of the two children in the county welfare director, and the physical custody of the two children to the petitioner Connie Kay Broadstone, subject to the supervision of the county welfare director, entered child support judgment against the respondent in the sum of $85 per month per child, divided the property of the two parties, and awarded costs and attorney's fees. We affirm the judgment and order of the District Court.

No issue is presented as to the dissolution of the marriage and we go to the issue of the custody of the children. The parties were married on February 24, 1962, aged 18 and 23 years, and adopted the two children. The respondent works for the railroad. The record reveals that until October of 1969 the couple had a normal happy marriage. Broadstone received a severe head injury in October of 1969 which resulted in a continuing medical problem and treatment. Mutual difficulties and problems have arisen since that time.

The evidence shows that the respondent is employed as a brakeman and conductor for the Missouri Pacific Railroad. His working hours are irregular and at odd times of the day. His work also takes him out of town quite a bit, and although he testified he was willing to make arrangements for the care of the children during his absence, it is clear a major factor in the trial court's determination was that this type of life would not be conducive to a stable home life for the children. There is also evidence as to the effect of Broadstone's injury and medication upon his conduct. At times his talk was slurred and he acts like he was drugged. At times he has had trouble keeping his car on the road. On the other hand, there is conduct on the part of the petitioner, such as attempting to commit suicide, and irregular habits of life, which give rise to an inference that the care of these children should be carefully supervised. The record contains considerable evidence of emotional problems of both the parties. Both have un-

dergone psychiatric treatment quite recently and the respondent is still under a doctor's care and taking quite extensive medication. It is clear that these difficulties arose subsequent to the disruption and problems involved in Broadstone's serious head injury in October of 1969. In evidence is a letter from Broadstone's own doctor which states that, in his opinion, although both parties have received psychiatric care for emotional problems, both were physically and emotionally capable of continuing to care for the children. The trial court's findings in this respect are amply supported by the evidence.

In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Lanz v. Lanz, 189 Neb. 578, 203 N. W. 2d 761; Phillips v. Phillips, 188 Neb. 89, 195 N. W. 2d 160. The statutes also wisely provide for a continuing power of the trial court to control the custody, and change it if necessary, in the best interests of children. Sections 42-351 and 42-364, R. S. Supp., 1972, specifically provide that in a proper case the court may place the minor children in the court's custody if their supervision and continuing welfare shall so require. We observe that we are dealing with two children of tender years here, aged 6 and 7 years. While there is no presumption that either parent is entitled to custody of their children, the natural relationship of mother and child, and the needs of children of tender years, usually indicates or compels that the physical care of such children be awarded to their mother unless she is unfit. Bolles v. Bolles, 182 Neb. 798, 157 N. W. 2d 410; Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217.

Viewing the record as a whole, the trial court, recognizing the factors that existed, which indicated that full and unlimited custody to either party would be unwise, wisely determined that the mother of the children, espe-

cially with the respondent's medical problem and the nature of his work, would be better able to provide the children with a suitable home environment. To properly implement the power of the court and to insure this result by a continuing review and supervision, it fixed the legal custody of the children in the director of welfare of Richardson County. In cases involving determinations of child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion. Lanz v. Lanz, *supra;* Phillips v. Phillips, *supra.* The evidence in this case not only amply supports the decision of the trial court but it affirmatively appears that the decision of the trial court was directed towards and insures that the decision as to custody can be supervised and will produce the final result in the best interests of the children.

The respondent contends that the trial court was in error in refusing to appoint a guardian ad litem for the two children. The statute, section 42-358, R. S. Supp., 1972, provides that the court may appoint an attorney to protect the interests of any minor children of the parties. The appointment is discretionary. The record reveals a complete exploration by the parties and the trial court of all the facts that relate to the proper care of the two children. The transcript reflects that there was pretrial discovery, and the bill of exceptions reflects several days of testimony of a marked adversarial nature. It reveals a full exploration of the psychiatric and emotional problems of the two parents, and a full exploration of the day-to-day living conditions of the children. The contention of the respondent is barren of any suggestion or argument that the appointment of a guardian ad litem would have rendered any service to the court beyond that which is clearly demonstrated in the record. It is fundamental in our interpretations of the divorce and custody statutes, that the Dis-

trict Court has broad powers of investigation and exploration when small children are involved, and we have held many times that the children become wards of the court in a divorce proceeding. It is particularly appropriate in the present case, in light of the nature of the physical and emotional problems involved, that the trial court saw and observed the witnesses, and had the opportunity to make that necessarily subjective judgment and personal evaluation which inheres in a child custody determination.

The respondent's last contention is that the child support award and division of property was inequitable. The court awarded $85 per month per child for child support, and the petitioner was awarded the residence property, household goods, an automobile, and various other items of personal property. The petitioner is unemployed and untrained in any specific skill. She was married when she was 18 and has been a housewife since. 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. Person v. Person, 189 Neb. 329, 202 N. W. 2d 629. It is clear that the trial court's fixing of the property rights was equitable and fell far short of an abuse of discretion. This is true particularly in light of the respondent's own testimony that if he had custody of the children he would hire a housekeeper. It also appears that *if* the respondent's demands and contentions with reference to the detailed care and custody of the children were fulfilled that the award of the trial court is the minimum to meet an adequate standard of food, clothing, schooling, and physical care in their best interests. We can find no abuse of discretion in this respect.

The judgment of the District Court is correct and is affirmed, and the petitioner is awarded the sum of $300 for the services of her attorneys in this court plus costs.

AFFIRMED.

SMITH, J., dissents.

BILL FORD, APPELLANT, V. COUNTY OF PERKINS ET AL., APPELLEES.
207 N. W. 2d 694

Filed June 1, 1973. No. 38811.

1. **Appeal and Error.** Questions not presented to or passed on by the trial court will not be considered on appeal.
2. ———. An appeal to the Supreme Court will be treated and disposed of upon the theory presented by the parties upon the trial if a liberal construction of the pleadings as construed by them will permit the same to be done.

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

Padley & Dudden, for appellant.

Frederick E. Wanek, for appellees.

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

SPENCER, J.

This is an action for an injunction. Plaintiff-appellant obtained a temporary restraining order concerning a letting on July 17, 1972, of a contract for the construction of 2 miles of paved road near Elsie, Nebraska. The county conceded the invalidity of its notice and published a new one, calling for a letting on August 11, 1972. Appellant was then permitted to amend his petition to cover the new letting. The injunction as to the July 17th letting was made permanent, but the petition was denied as to the subsequent letting of August 11th. We affirm.

In February 1972, the board of commissioners of Perkins county, after due notice and hearing, adopted a 6-year county highway program and an annual county highway program. The plan included 2 miles of asphalt road to be constructed with federal aid. The county was advised that time did not permit a sufficient review by state and federal authorities to bring the construction within the 1972 road program. The board then

requested permission of the State Board of Public Roads Classifications and Standards to amend the plan. Permission was granted and the board proceeded to publish notice, soliciting bids. This action resulted.

The 2 miles of substituted road covered by the amendment granted by the State Board of Public Roads Classifications and Standards and included in the July 17 and August 11, 1972, notices were not included in the annual road plan, and had lesser priorities than other roads included in the 6-year plan. Appellant complains that no notice was ever given concerning the meeting which modified the original priorities with reference to construction, so that the people in the community had no opportunity to voice their opinions as to the advisability as to the change.

Appellant sets out four assignments of error, as follows: "1. The judgment of the Court is contrary to law. 2. The judgment of the Court is contrary to the evidence. 3. The Court erred in refusing to enjoin the Defendants from entering into a contract for road improvement without having given public notice of their action modifying the classification and the priorities as to road building and without giving notice as to their action with reference to advertising for a letting on the construction. 4. The Court erred in refusing to enjoin the County and the County Commissioners, Appellees herein, with reference to road construction, the contract for which violates the rule with reference to abuse of discretion."

The only propositions of law set out by appellant are sections 84-1401, 84-1402, and 84-1405, R. R. S. 1943. Appellant's amended petition, however, restricted his allegations to violations of sections 73-101 to 73-105, R. R. S. 1943; section 23-916, R. R. S. 1943; section 39-1503, R. S. Supp., 1972; and sections 39-2105 to 39-2124, R. S. Supp., 1972.

As is apparent from appellant's propositions of law, the thrust of his appeal concerns violations of the public

meeting law. §§ 84-1401, 84-1402, and 84-1405, R. S. Supp., 1972. Unfortunately for appellant's appeal, these sections of the statute were not included in the amendment to his petition in the trial court. They are mentioned for the first time in his motion for a new trial. This issue was not raised in the pleadings or by the evidence, and was not determined by the District Court. Questions not presented to or passed on by the trial court will not be considered on appeal. State v. Merritt Brothers Sand & Gravel Co. (1966), 180 Neb. 660, 144 N. W. 2d 180. The time to have raised this issue was at the trial, not on a motion for a new trial nor in this court. An appeal to the Supreme Court will be treated and disposed of upon the theory presented by the parties upon the trial if a liberal construction of the pleadings, as construed by them, will permit the same to be done. Andrews v. Wilkie (1967), 181 Neb. 398, 148 N. W. 2d 924.

For the reasons given, the judgment herein is affirmed.

AFFIRMED.

PASCHAL R. MCPHILLIPS, APPELLANT, V. KNOX CONSTRUCTION COMPANY, INC., A CORPORATION, APPELLEE.
208 N. W. 2d 261

Filed June 1, 1973. No. 38827.

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. ———: ———: ———. 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.
3. ———: ———: ———. The District Court shall set aside a judgment of the Workmen's Compensation Court on rehearing only upon the grounds provided by statute which include "(3) the findings of fact by the court are not supported by the record."

4. **Workmen's Compensation: Appeal and Error: Evidence.** The Supreme Court, on an appeal from the District Court in a workmen's compensation case, may set aside the judgment of the District Court only upon the grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record."
5. ———: ———: ———. If the Supreme Court, on an appeal from the District Court in a workmen's compensation case, finds that the findings of fact are not supported by the evidence as disclosed by the record, it then considers the matter de novo.
6. **Workmen's Compensation: Trial: Evidence.** A finding of fact by the Workmen's Compensation Court on rehearing against the party having the burden of proof will be set aside only if the evidence compels a finding for that party.

Appeal from the District Court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

Robert E. Paulick, for appellant.

Conway, Connolly & Stromer, for appellee.

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

CLINTON, J.

This is a workmen's compensation case. The one judge Workmen's Compensation Court found that the evidence was "insufficient to sustain a finding that the plaintiff suffered an accident and received an injury which arose out of and in the course of his employment." On rehearing before the Workmen's Compensation Court en banc the court made an identical finding and dismissed the petition. The District Court on appeal affirmed the judgment of the Workmen's Compensation Court. The plaintiff appeals and we affirm.

The plaintiff claimed to have suffered an injury to his back in May 1970 when in the employ of the defendant while he was engaged in guiding a utility pole which was being lifted by a crane or boom from a pile of such poles.

The pertinent portion of his testimony is as follows:

"Q. Then what happened? A. Well, when it broke loose, well, all the heavier end was the one I was on and it came down and just pulled something in my back. I didn't feel it. It wasn't a real sharp pain. Q. Well, describe the pain that you had in your back at that time? A. Well, at first it didn't hardly — I didn't even know it was — well, I had had aches and pains before and they had always gone away, but this here, it would start as a little small dull ache in my back and after about a week it started a little sharp pain in my back and in my left leg, upper left leg and kept going. Q. Did you continue to work that day after having that pain in your back? A. Yes. It didn't — well, it didn't bother me much. I had had aches before."

The record discloses he made no complaints to anyone at the time, nor at any time while he was in the employ of the defendant. He voluntarily left his employment with the defendant about 2 weeks after the alleged injury because he had to drive too far to work on his own time. He took employment with a roofing company doing heavy work, and he testified that his pain grew worse and that he was fired because he could not keep up with his work. He thereafter worked for a mobile home manufacturer on an assembly line making sidewalls, and he testified that he hurt so badly he had to sit down on the job and that he had to quit work. This was about July 3, 1970. He had not yet notified the defendant of any claim of injury. About July 4, 1970, he sought medical attention. Bed rest was recommended. He saw other doctors and later had back surgery. Medical testimony as to the cause of his back ailment was conflicting.

The following rules are applicable. 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. Hartwig v. Educational Service Unit No. 13,

189 Neb. 339, 202 N. W. 2d 618. 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. Hartwig v. Educational Service Unit No. 13, *supra*. The District Court shall set aside a judgment of the Workmen's Compensation Court on rehearing only upon the grounds provided by statute which include "(3) the findings of fact by the court are not supported by the record." § 48-184, R. R. S. 1943; Adler v. Jerryco Motors, Inc., 187 Neb. 757, 193 N. W. 2d 757. The Supreme Court on an appeal from the District Court in a workmen's compensation case may set aside the judgment of the District Court only upon the grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record." § 48-185, R. R. S. 1943. If this court so finds, it then considers the matter de novo. Adler v. Jerryco Motors, Inc., *supra*. A finding of fact by the Workmen's Compensation Court on rehearing against the party having the burden of proof will be set aside only if the evidence compels a finding for that party. Adler v. Jerryco Motors, Inc., *supra*.

The evidence in this case does not compel a finding for the plaintiff.

The judgment of the District Court affirming the findings of the Workmen's Compensation Court en banc is affirmed.

AFFIRMED.

CAROL J. (WHITTED) BRISBY, APPELLANT, V. DANIEL B. WHITTED, APPELLEE.
207 N. W. 2d 697

Filed June 1, 1973. No. 38845.

1. **Divorce: Parent and Child.** In determining reasonable visita-

tion rights, the best interests and welfare of the child are the primary considerations. His age, health, and need for stability and continuity in his home environment must be considered.

2. ———: ———. Only in exceptional circumstances should the parent deprived of custody be totally denied any right of visitation.

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

Daniel D. Koukol and L. W. "Jim" Weber, for appellant.

John S. Samson, for appellee.

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

BOSLAUGH, J.

The parties were divorced on July 18, 1967. The plaintiff was awarded custody of the minor child of the parties, Daniel B. Whitted, Jr., referred to as Danny, and the defendant was granted reasonable visitation rights. Child support was fixed at $80 per month.

On February 23, 1972, the defendant filed a motion alleging that the plaintiff had denied him the right to visit Danny and requesting the trial court to fix definite times for visitation. The plaintiff filed an answer and petition to modify alleging the defendant was delinquent in his child support payments; there had been a change in circumstances; and requesting the defendant's visitation rights and child support payments be eliminated.

The trial court found both parties were in contempt; the defendant should not be denied visitation rights; and the defendant should be required to continue to support Danny and pay all delinquent installments of child support. The plaintiff appeals.

The evidence shows difficulty in regard to visitation developed in December 1971. The defendant had made very little effort to visit Danny, but the defendant's parents visited Danny frequently and sometimes took

Danny to visit his father. The plaintiff became concerned on several occasions when Danny's paternal grandparents failed to return Danny in accordance with the plaintiff's understanding of the arrangements. There is evidence that Danny was emotionally upset on several occasions after visiting with the grandparents.

The evidence does not support a finding that the plaintiff had denied the defendant reasonable rights of visitation with Danny. On several occasions the plaintiff did refuse last-minute requests to see Danny and on several occasions the defendant called late in the evening or when he was intoxicated.

In determining reasonable visitation rights, the best interests and welfare of the child are the primary consideration. His age, health, and need for stability and continuity in his home environment must be considered. Trautman v. Trautman, 184 Neb. 202, 166 N. W. 2d 415; Passmore v. Passmore, 144 Neb. 775, 14 N. W. 2d 670. Only in exceptional circumstances should the parent deprived of custody be totally denied any right of visitation. Syas v. Syas, 150 Neb. 533, 34 N. W. 2d 884.

The trial court ordered that the defendant have the right to visit Danny from noon to 6 p.m. on the first and third Sundays of each month; from 9 a.m. to 6 p.m. on the second and fourth Saturdays of each month; from 9 a.m. to 8 p.m. on Christmas and January 29 of each even-numbered year; from 9 a.m. to 8 p.m. on Easter and Thanksgiving of each odd-numbered year; and for a 30-day consecutive period in June, July, or August of each year. The trial court further ordered the plaintiff to deliver Danny to the home of the defendant's parents during the first 6 months of the year, and defendant's parents were ordered to pick up Danny during the last 6 months of the year on each occasion when the defendant had the right of visitation.

We think the trial court was correct in finding the defendant should not be deprived of all rights of visitation and should be required to comply with the terms

of the judgment concerning the support and maintenance of Danny. The order fixing times of visitation, however, is erroneous in several respects. The grandparents are not parties to the action and are not subject to the jurisdiction of the court. That part of the order requiring the grandparents to pick up Danny and requiring the plaintiff to deliver Danny to the home of the grandparents should be deleted.

The judgment should be modified to provide that until the further order of the court the defendant's time for visitation shall be from noon to 6 p.m. on the first and third Sundays of each month. It is the defendant's responsibility to call for Danny at the home of the plaintiff and to return Danny to the home of the plaintiff on each occasion. Additional times for visitation shall be by agreement of the parties.

The judgment of the District Court is affirmed except as modified in this opinion. All costs are taxed to the defendant. The plaintiff is allowed the sum of $500 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JOE R. MAESTAS, APPELLANT.

207 N. W. 2d 699

Filed June 1, 1973. No. 38853.

Rape: Witnesses: Discovery. If the District Court has inherent power to require the complaining witness in a prosecution for a sex crime to submit to a psychiatric examination prior to trial, it is not an abuse of discretion to deny such examination in the absence of a showing of good cause.

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 Chauncey C. Sheldon, for appellee.

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

CLINTON, J.

Defendant was found guilty by a jury of statutory rape and was sentenced to a term of 3 to 5 years in the Nebraska Penal and Correctional Complex. At the time of the offense the prosecutrix was 14 years old, the defendant 24. The evidence indicates the act was accomplished by force. He appeals. We affirm.

The sole assignment of error is that the trial court erred in denying the motion of the defendant to have the court "appoint a qualified psychiatrist to examine * * * the prosecuting witness at the expense of the State of Nebraska in order to determine her mental competency. Defendant submits that conviction by a mentally unbalanced witness would violate his right to due process of law under the state and federal constitution." No factual support in affidavit form or otherwise was submitted in support of the motion. The motion was overruled on July 28, 1972, and trial began on August 8, 1972.

We are asked in this case to adopt a rule advocated by Wigmore to the effect that in every case charging a sexual offense the complaining witness should be examined before trial as to the witness' probable credibility. Such a rule is said to be advocated by psychiatrists generally and certain eminent ones in particular. See, Overholser, The Psychiatrist and the Law, p. 54; 3A Wigmore on Evidence (Chadburn Rev. Ed., 1970), § 924, p. 734. The suggested rule is claimed to be advisable because false accusations of such offenses are made not only because of mistake in identification, but also for purposes of blackmail and revenge, or as a result of fantasy, or as symptoms of psychosis. *Op. cit.*, Overholser, p. 53. The importance of the issue of the

complaining witness' credibility increases in proportion as independent corroboration of the charge decreases.

Only a few jurisdictions have considered the question of requiring the complaining witness in a prosecution for a sex crime to submit to a psychiatric examination. 18 A. L. R. 3d, Sex Crime—Psychiatric Examination, § 4, p. 1439. Some have taken the view that the court has no power to compel such an examination. Others that the court has discretionary power to compel the examination. None has adopted the rule of the scope here advocated as urged by Wigmore.

It seems clear that such a rule would be a form of discovery, but it does not come within the statutory rules pertaining to the physical and mental examination of persons because the witness is not a party to the proceedings. § 25-1267.40, R. R. S. 1943. Even under the statute a showing of good cause must be made. No good cause is shown here.

That sexual intercourse did occur is verified by medical tests made immediately after the event which showed human male sperm in a sample of vaginal fluid taken from the prosecutrix. Consent or nonconsent were immaterial. There was immediate complaint by the prosecutrix. There was strong circumstantial evidence corroborating the identification of the defendant. The testimony of the prosecutrix does not bear any obvious indications of unreliability or mental aberration. We hold that if the court has inherent power to require the complaining witness in a prosecution for a sex crime to submit to psychiatric examination, nonetheless it did not under the showing here abuse its discretion in denying the examination.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD HIATT, APPELLANT.
207 N. W. 2d 678

Filed June 1, 1973. No. 38854.

1. **Criminal Law: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Trial: Attorneys at Law: Waiver.** The right of defendant's counsel to be present at the time the verdict is received may be waived.
3. **Criminal Law: Trial: Jury.** The trial court is not required to poll the jury unless requested to do so.
4. **Criminal Law: Trial: Jury: Waiver.** A defendant may waive his right to have the jury polled. When upon inquiry by the court he replies in the negative, the right is waived.

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

Paul E. Watts, Stephen Greenberg, and J. Joseph McQuillan, 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 assault and battery and sentenced to 180 days' imprisonment. He appeals contending the evidence was insufficient to sustain the conviction and the trial court erred in receiving the verdict in the absence of counsel for the defendant.

The charges arose out of a fight on December 12, 1971, in a parking lot near a shopping center in Sarpy County, Nebraska. The defendant and his brother, Richard Hiatt, had gone to the Convenient Food Mart to purchase beer, groceries, and candy. When they entered the checkout line, Barry Lee accused the de-

fendant of stepping in front of him. The defendant made some remark to Lee and then went to the end of the line. After Lee and a companion, John Gearhart, had checked out they went to the parking lot and entered Lee's automobile. The evidence is in sharp conflict as to what happened after the defendant and his brother left the store.

The jury could find the defendant and his brother assaulted Lee as Lee and Gearhart were starting to drive away from the parking lot. In the fight that ensued, Lee received knife wounds in the chest, back, neck, arm, and along his beltline. Both Lee and Gearhart testified positively the defendant had a knife in his hand during the fight. The defendant received a stab wound in his leg which could have been accidentally self-inflicted during the fight.

The jury was not required to accept the testimony of the defendant and his brother. Both had been previously convicted of felonies and were impeached to some extent by circumstantial evidence and the testimony of disinterested witnesses. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Martinez, 181 Neb. 392, 148 N. W. 2d 841. These are questions for the jury in a criminal case. State v. Myers, 182 Neb. 117, 153 N. W. 2d 360. The evidence in this case was clearly sufficient to sustain the verdict of guilty.

After the instructions had been read to the jury, the county attorney stated he would waive his presence when the verdict was returned. According to the trial court, the defendant's counsel upon inquiry by the court stated: "'I will, too.'" Defendant's counsel denies he made such a statement. No record was made at the time but at the hearing on the motion for new trial the trial court and defendant's counsel stated their recollection as to what had been said.

Defendant's counsel had asked the clerk to call him

when the jury came in. Although the clerk did not testify, this could have been understood as a request to advise defendant's counsel as to the nature of the verdict.

Apparently defendant's counsel was not notified when the verdict was returned and was not present in court when it was received. The defendant was present. After the verdict had been read, the trial court asked the defendant if he wanted the jury polled, explaining that meant questioning each juror individually. The defendant replied in the negative.

The defendant's right to have the jury polled depended upon a request being made. § 29-2024, R. R. S. 1943; Feddern v. State, 79 Neb. 651, 113 N. W. 127. In the absence of defendant's counsel the trial court extended this right to the defendant and explained what it meant. The defendant did not request that the jury be polled. Under the circumstances we conclude the right was waived and the trial court was not required to poll the jury.

The judgment of the District Court is affirmed.

AFFIRMED.

RUTH D. SCRIPTER, APPELLANT, V. JOSEPH M. SCRIPTER, APPELLEE.
208 N. W. 2d 85

Filed June 1, 1973. No. 38867.

Divorce: Parent and Child. An original decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action.

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

Robert E. Paulick, for appellant.

Luebs, Tracy, Huebner, Dowding & Beltzer and D. Steven Leininger, for appellee.

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

NEWTON, J.

This is an appeal from the denial of an application for a change of custody of a minor child. We affirm the judgment entered.

Following the entry of a decree of divorce and the granting of custody of the child to defendant, plaintiff appealed to this court. See Scripter v. Scripter, 188 Neb. 576, 198 N. W. 2d 201. At that time this court found: "The evidence showed that the plaintiff suffers from rheumatism and arthritis in her left knee and spine, and calcium deposits in her lower back. She was hospitalized for an undisclosed reason for a period of 10 days shortly before the trial. She had previously done baby sitting, but testified that she was physically unable to perform baby sitting or to take care of children, and that she had been advised by her doctor not to perform any work and to stay off her feet as much as possible. In addition, the evidence showed a continuous state of untidiness in plaintiff's home, either through plaintiff's physical incapacity or for other reasons. In contrast defendant is healthy, is regularly employed, and appears energetic and resourceful."

Plaintiff maintains that her health is now satisfactory and her home adequate. There is no evidence to support a finding of defendant's unfitness to retain custody. We do not believe it is in the best interests of a child to unnecessarily change custody and bandy the child back and forth between parents. Stability is desirable. There has not been such a change of circumstances here as would justify a finding that the best interests of the child again require a change in custody.

"An original decree fixing custody of minor children will not be modified unless there has been a change

in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action." Packett v. Packett, 184 Neb. 769, 172 N. W. 2d 86.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD HUFFMAN, APPELLANT.

207 N. W. 2d 696

Filed June 1, 1973. No. 38904.

Post Conviction: Res Judicata. The trial court is not required to entertain successive motions under the Post Conviction Act for similar relief from the same prisoner.

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

Harold Huffman, pro se.

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

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

BOSLAUGH, J.

The defendant's conviction of forgery was affirmed in State v. Huffman, 185 Neb. 417, 176 N. W. 2d 506. In a prior post conviction proceeding, sentences on two counts were vacated but relief was otherwise denied. State v. Huffman, 186 Neb. 809, 186 N. W. 2d 715.

In this second proceeding under section 29-3001, R. S. Supp., 1972, the defendant has alleged no basis for further relief. The trial court is not required to entertain successive motions for similar relief from the same prisoner. State v. Pilgrim, 188 Neb. 213, 196 N. W. 2d 162.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

SONJA CRAIG, BY ARTHUR CRAIG, FATHER AND NATURAL GUARDIAN AND NEXT FRIEND, APPELLANT, V. GAGE COUNTY, NEBRASKA, APPELLEE.

SONJA CRAIG, BY ARTHUR CRAIG, FATHER AND NATURAL GUARDIAN AND NEXT FRIEND, APPELLANT, V. GAGE COUNTY, NEBRASKA, ET AL., APPELLEES.

208 N. W. 2d 82

Filed June 8, 1973. Nos. 38618, 38619.

1. **Appeal and Error: Torts: Political Subdivisions: Counties.** Findings of the District Court under the Political Subdivision Tort Claims Act will not be disturbed on appeal unless they are clearly wrong.
2. **Appeal and Error: Constitutional Law: Statutes.** Attack upon the constitutionality of a statute cannot ordinarily originate on appeal from District Court.

Appeals from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed in part, and in part reversed and remanded.

Perry, Perry & Witthoff, for appellant.

Ronald Sutter, Dalke, Carlson & Thompson, Keith Howard, and Pilcher, Howard & Dustin, for appellees.

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

SMITH, J.

In a personal injury action the District Court awarded damages to Sonja Craig and against the County of Gage in the sum of $27,500. Sonja appeals. Her main assignments of error relate to type of review, adequacy of award, constitutionality of the Political Subdivision Tort Claims Act which prohibits trial by jury, and dis-

missal of a claim against an employee of Gage County.

Sonja, age 8, sustained the injury in a bicycle-truck collision at 2:30 p.m. on June 18, 1970, in Holmesville. At 4 p.m. she was admitted to a hospital in Lincoln for surgery by Dr. L. J. Gogela, a neurosurgeon.

On the left side of Sonja's head were swelling and a puncture wound over the temporal bridle area. Brain tissue extruded from the opening. A fracture extended two-thirds the length of the skull from the left frontal area to the bridle area. Three or four fragments of depressed bone had penetrated into the substance of the brain, and one may have entered three-fourths of an inch. The underlying dura was extensively torn.

As the depressed fragments were elevated, brain tissue extruded with blood. After removal of bone fragments and opening of the dura, Dr. Gogela aspirated brain tissue that the collision had torn and devitalized, removing several cubic centimeters. Precise measurement was impossible because of the tissue aspirated through the suction apparatus. Dr. Gogela also wired together several larger fragments of bone, sacrificing bone fragments in front to do so. In the skull area a sizeable pulsating defect, one by one and one-half inches in front, remained. The advisability of further surgery is in doubt, although a cranial defect is ordinarily covered to protect the brain from a penetrating wound and to conceal it.

The injury occurred in an area where part of the intellect lies. Although Dr. Gogela could view only the opening, he logically assumed that major injury to the visible area of the brain implied lesser injury to parts of the brain not visible to him. After closing the scalp, he applied a dressing. Duration of the surgery was one hour. Medical and hospital expenses incurred by Sonja's father totaled $3,194.25.

Upon dismissal from the hospital July 7, 1970, Sonja was unable to talk or to move without assistance, but her vital signs were good. She was subsequently seen

by Dr. Gogela on six occasions, the last visit occurring in November 1971. In a neurological examination on the latter date he noted permanent impairment of the right fields of vision with both eyes. Sonja, whom a speech therapist had treated until April 1971, still experienced some difficulty of expression, but improvement had been decidedly steady and should continue. Dr. Gogela did not attempt to evaluate her intellect, but he did not think that in most cases another part of the brain assumed the function of the damaged part.

Sonja, an average student, had completed the third grade prior to the injury. Prior to the trial in May 1972 she had been demoted to the third grade, but in the opinion of her teacher she was incapable of doing the work.

In March 1972, Professor David Levine, Chairman of the Department of Psychology at the University of Nebraska at Lincoln, tested the intelligence quotient of Sonja. On the nonlanguage test of the Wechsler Intelligence Scale for Children her score was somewhat below average. On the language test it was 57, a score lower than the scores of 99 per cent of the people tested. The results were subsequently corroborated by Sonja's scores on the following tests: Gray Standardized Oral Reading Paragraphs, California Achievement Tests, portions of the Stanford-Binet Intelligence Scale, the Peabody Picture Vocabulary Test, and parts of the Wechsler Pre-School and Primary Scale of Intelligence.

The scores of Sonja on the tests administered by Professor Levine accorded in his opinion with her medical history. Generally in right-handed people the left side of the brain controls language and the right side tends to control ability to deal with spatial relations.

According to Professor Levine, Sonja had possessed average ability prior to the injury, but afterwards she might fit into a classroom of educable students only with some difficulty. Her ability lay at the line that separated the educable and trainable student from the trainable

but noneducable student. Respecting language Sonja functioned at a moderately retarded level. Without the language factor she functioned almost within average range in all but some instances.

Professor Levine was pessimistic about improvement of Sonja's language ability, distinguishing language from speech. He testified: ". . . (S)he will have difficulty in school continually and . . . will not be able to handle at any time high school level work." Without the injury she would have been capable of satisfactory work in some kind of college. Occupations requiring ability to perceive spatial relations will be suitable for her, but our society has limited them mostly to men.

The foregoing evidence and judgment are part of the record in case No. 38618, which was brought under the Political Subdivision Tort Claims Act. In case No. 38619 a petition containing the claim of Sonja against the truck operator, a county employee, as well as Gage County, was dismissed on motion and without a trial after judgment in case No. 38618.

We are told that our review ought to be de novo, the same as is our review of an equity case. See § 25-1925, R. R. S. 1943. Counsel cite City of Grand Island v. American Fed. of State, County, & Municipal Emp., 186 Neb. 711, 185 N. W. 2d 860 (1971); Satterfield v. Dunne, 180 Neb. 274, 142 N. W. 2d 345 (1966); Roberts Constr. Co. v. State, 172 Neb. 819, 111 N. W. 2d 767 (1961). In the first case the statute provided for the type of review counsel for Sonja seek. The opinion in the second case at best implied a statutory action in the nature of a suit in equity. In the third case this court reviewed an action at law in which counsel had waived a jury trial, saying: "Under such circumstances the findings of the trial court are equivalent to the verdict of a jury and will not be disturbed unless clearly wrong."

The Political Subdivision Tort Claims Act reads: ". . . (T)he procedures provided by this act shall be used to the exclusion of all others." § 23-2401, R. R. S. 1943.

". . . (R)ights of appeal in all suits . . . under this act shall be determined in the same manner as if the suits involved private individuals . . . ." § 23-2406, R. R. S. 1943. The findings of a District Court under the act will not be disturbed on appeal unless they are clearly wrong. The award of damages to Sonja was below the minimum amount that the District Court could have awarded without committing reversible error.

The Political Subdivision Tort Claims Act expressly prohibits trial by jury. § 23-2406, R. R. S. 1943. Objection in the present cases to constitutionality of the act is for the first time raised on appeal. Attack upon the constitutionality of a statute cannot ordinarily originate on appeal from District Court. Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415 (1966), rehearing denied, 180 Neb. 794, 146 N. W. 2d 66 (1966); Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N. W. 133 (1895). The general rule controls, and we decline to review the objection.

Final judgment in a suit under the act constitutes a bar to any action by the claimant, by reason of the subject matter, against an employee of the political subdivision whose act or omission gave rise to the claim. The section is inapplicable if the court rules that the act does not permit the claim. § 23-2408, R. R. S. 1943. Dismissal of the petition against the employee of Gage County in light of our conclusions was correct.

The judgment in case No. 38619 is affirmed. The judgment in case No. 38618 is reversed and the cause remanded for a new trial on the single issue of the amount of damages that Sonja is to recover from Gage County. Costs on appeal are taxed to Gage County.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RONALD E. YOUNG, APPELLANT.
208 N. W. 2d 267

Filed June 8, 1973. No. 38679.

1. **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.
2. **Evidence: Criminal Law: Trial.** Ordinarily the hearsay rule does not operate to exclude evidence of a statement, request, or message offered for the mere purpose of proving the fact that the statement, request, or message was made or delivered where such occurrence establishes a fact in issue or circumstantially bears on such a fact.
3. **Evidence: Criminal Law: Intent: Trial.** Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.

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

Donald R. Hays, 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, Ronald E. Young, was found guilty by a jury on two counts, one of delivery and the other of possession of cocaine, a controlled substance. The defendant received a 5-year sentence on the delivery count and a 1-year sentence on the possession count, the sentences to run concurrently. We affirm the judgment and sentences.

In the early evening of January 29, 1972, an undercover agent of the drug control division of the Nebraska State Patrol entered a house on North 60th Street in Lincoln, Nebraska. The agent had a body transmitter taped to his chest. Police officers in a nearby patrol car were monitoring and tape recording the transmissions. They were also maintaining surveillance of the rear of the house. The front of the house and part of one side were under the surveillance of another police officer.

The undercover agent, upon entering the house, asked to purchase some "coke" or cocaine. The police officers monitoring the transmitted conversation could identify only the voice of the undercover agent, although they identified both voices as being male voices. For $40 the agent received a small cellophane bag containing a white powder. After 5 minutes in the house, the agent came out and went directly to the car of the state patrol investigator and turned the bag over to him. Three police officers then approached the rear of the house and two police officers went to the front door and gained entrance to the house. Upon entering, the officers found three people present in the house, the defendant, Ronald E. Young, his wife, and a small child.

Inspector Larsen placed the defendant under arrest, searched his person, and seized the belongings found in his pockets. Among these items were three $20 bills. One of them bore the serial number of a $20 bill furnished to the undercover agent on the morning of the purchase. The main floor of the house was checked at that time for the presence of other persons and permission to search the premises was requested of the defendant. When he refused, a search warrant was obtained from the Lancaster county court. A search of the premises was then made including the upstairs, basement, and garage.

One of the items seized in the search of the house was a thermos bottle which was in the refrigerator. The

thermos bottle contained cocaine and formed the basis for the possession count. The cellophane bag purchased by the undercover agent also contained cocaine.

The defendant's primary contentions center upon the claim that the evidence was circumstantial and insufficient to sustain the guilty verdict. To some degree, defendant's claims are grounded upon the fact that the undercover agent was not called by the State, and when called by the defendant as a witness, was not able to positively identify the defendant as the person from whom he had purchased the cocaine. On cross-examination, however, he testified that "Mr. Young" was the only man he saw when he entered the house.

While much of the evidence is circumstantial, it was clearly more than sufficient to go to the jury. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Morgan, 187 Neb. 706, 193 N. W. 2d 742. The circumstantial evidence in this case was overwhelming. It would require a vivid imagination and a fairy tale background to conjure up an explanation of the facts which would produce even a ghostly image of innocence for the defendant.

The defendant also asserts that the testimony of the officers as to the transmitted conversation they overheard was hearsay and inadmissible. The testimony was not offered to prove the truth of any factual statements overheard but only that the conversation took place. Ordinarily the hearsay rule does not operate to exclude evidence of a statement, request, or message offered for the mere purpose of proving the fact that the statement request, or message was made or delivered, where such occurrence establishes a fact in issue or circumstantially bears on such a fact. See State v. Goings, 184 Neb. 81, 165 N. W. 2d 366. It

should be noted here also that the statements overheard established a part of the probable cause for the defendant's arrest.

The defendant likewise contends that exhibit 1, a letter addressed to "Ron" and containing instructions and prices with respect to various drugs tended to establish the defendant's guilt of other crimes and was therefore irrelevant and inadmissible. The defendant relies upon the general rule that evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. In State v. Casados, 188 Neb. 91, 195 N. W. 2d 210, after stating the general rule, we said: "Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. * * * In many instances, courts have limited such evidence to proof of prior similar acts. * * * In any event, proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue." Here the requisite legal connection is transparent. Exhibit 1 suggests that the defendant was actively engaged in drug traffic. It was relevant to establish the necessary knowledge and intent for the specific crimes with which he was charged.

Finally, the defendant asserts that he was prejudiced because the tape recording of the conversation with the undercover agent was not available at trial and not introduced. At the preliminary hearing, the court had ordered the state patrol investigator to make the tape available to counsel for the defendant. The record indicates that the tape was not available or introduced because the voice recording was poor quality and the tape was later used for other purposes. Exactly how or why the tape was erased is not shown. We do not condone the conduct of the investigator in destroying

the tape or permitting it to be destroyed, whatever the circumstances may have been. Evidence must be carefully preserved and the confusion and carelessness apparent in this case might well have been critical or even fatal to the prosecution under other circumstances.

The defendant contends that the destruction of the tape recording deprived him of the opportunity of proving the defense of entrapment. Where a person has no previous intent or purpose to violate the law but does so only because persuaded or induced to commit the act by law enforcement agents, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction. On the other hand, where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation, or merely seeks to collect evidence of the offense, does not constitute unlawful entrapment and is no defense. State v. Smith, 187 Neb. 511, 192 N. W. 2d 158.

In this case only 5 minutes were required for the undercover agent to complete the purchase. The undercover agent who was one of the parties to the conversation testified about it. The police officers who monitored the transmission testified to the conversation they heard and the destroyed tape was only cumulative evidence. The absence of the tape under these circumstances, while it may have been a violation of the court's order, was not prejudicial to any right or defense of the defendant. If the evidence had been in conflict or if the taped recording were the only direct evidence available, the absence of the tape might well have been critical but that is not the case. The facts here fall far short of establishing any reasonable basis upon which a defense of unlawful entrapment might rest.

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

AFFIRMED.

KAMI KOUNTRY BROADCASTING COMPANY, A CORPORATION, APPELLANT, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, APPELLEE.
208 N. W. 2d 254

Filed June 8, 1973. No. 38707.

Insurance: Contracts: Bonds. The insurer under a fidelity bond is liable only for losses sustained by the insured and of the type described in the insurance contract.

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

Joseph F. Chilen of Denney & Chilen, for appellant.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellee.

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

CLINTON, J.

This is an action on a fidelity bond to recover losses allegedly suffered by the plaintiff KAMI Kountry Broadcasting Company, a corporation, through fraudulent and dishonest acts of its general manager, Dean L. McLain, whose fidelity was insured by the bond.

The defendant insurer filed in the District Court a motion to strike, on the grounds of immateriality and their conclusionary nature, certain specific allegations of the plaintiff's sixth cause of action, which is the only cause involved on this appeal. The District Court sustained the motion, ordered the allegations stricken, and dismissed the sixth cause of action without prejudice. The plaintiff appeals and we affirm.

The pertinent allegations of the petition are the following: The execution and delivery by the plaintiff to the defendant of the bond which insured the plaintiff against ". . . any loss of money or any other property which the insured shall sustain . . . through any fraud-

ulent or dishonest act or acts committed by any of the employees, acting alone or in collusion with other, while in any position at any location in the service of the insured. . . .

"2. That while said employee was in charge of said radio station, and between March 11, 1970 and July 6, 1970 without permission or authorization of the Plaintiff or George Powers, its president, forged the president's signature on a promissory note in the amount of Four Thousand Dollars ($4,000.00) to the First National Bank, Cozad, Nebraska; and wrongfully appropriated the proceeds thereof to his own use.

"3. That the First National Bank of Cozad was one of the largest advertisers of the Plaintiff; that the Plaintiff was incorporated during the month of February of 1970.

"4. That the First National Bank of Cozad intimated that it would no longer advertise with the Plaintiff unless the Plaintiff paid the note to the First National Bank.

"5. That the Plaintiff paid to the First National Bank of Cozad, Nebraska the sum of $4,000.00 with interest of $37.84 in payment of said promissory note which was illegally and wrongfully forged by said employee by executing to the Bank a new promissory note."

In its order striking the allegations of paragraphs numbered 2 to 5 inclusive and dismissing the sixth cause of action, the court found that: "there was no legal liability on the part of plaintiff KAMI Kountry Broadcasting Company to pay the First National Bank of Cozad the sum of $4,000.00 plus interest as set forth in the Sixth Cause of Action contained in the plaintiff's Amended Petition." The court also in its order striking and dismissing included an order adjudging that there was no liability by KAMI to pay the bank the sum of $4,000.

KAMI does not on this appeal complain that it was not permitted to amend its sixth cause prior to dismissal, and the briefs of both parties are directed to

the question of whether or not the plaintiff is entitled to recover if the facts of the pleaded but stricken allegations are true. Accordingly we look at this matter the same as if a demurrer had been sustained and the plaintiff had elected to stand on its petition and dismissal had followed.

The pleadings present the concise issue of whether the defendant is liable on the bond because KAMI, in order to avoid the loss of a customer, paid the note forged by its manager and on which it was not legally liable and from which it did not receive the proceeds.

Section 3-404, U. C. C., provides: "(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; . . . ." See, also, Farmers Union Coop Assn. v. Commercial State Bank, 187 Neb. 376, 191 N. W. 2d 168. Section 1-201(43), U. C. C., states: " 'Unauthorized' signature or indorsement means one made without actual, implied or apparent authority and includes a forgery." Comment 4 to section 3-404, U. C. C., is as follows: "The words 'or is precluded from denying it' are retained in subsection (1) to recognize the possibility of an estoppel against the person whose name is signed, as where he expressly or tacitly represents to an innocent purchaser that the signature is genuine; and to recognize the negligence which precludes a denial of the signature."

KAMI has not pleaded any facts which would indicate it was precluded from asserting the defense of forgery as against the bank. Estoppel, if it constitutes the foundation for a cause of action, must be pleaded. Robbins v. National Life & Acc. Ins. Co., 182 Neb. 749, 157 N. W. 2d 188; Nebraska Mortgage Loan Co. v. Van Kloster, 42 Neb. 746, 60 N. W. 1016; Diehl v. Johnson, 123 Neb. 699, 243 N. W. 901.

The alleged facts disclose KAMI suffered no direct loss as a result of the fraudulent acts of its manager. The pleadings indicate this fraud was directed at the

bank and that it was the one defrauded by the acts of KAMI's manager. KAMI lost only when it determined to pay the bank.

The parties cite no Nebraska case in point. We believe the reasoning of the Supreme Court of Kansas in Ronnau v. Caravan International Corp., 205 Kan. 154, 468 P. 2d 118, applies in this case. There the plaintiff suffered damage by reason of the fraud of employees of the indemnitee in the bond. The indemnitee became insolvent. The plaintiff obtained a default judgment against the indemnitee and then brought garnishment proceedings against the indemnitor insurance company. The Supreme Court of Kansas approved the holding of the lower court denying liability, saying: "With respect to Claim One, the district court concluded the bond issued to Caravan by INA did not insure Caravan against liability to third parties and imposed no obligation upon INA to indemnify creditors of Caravan, such as the appellant; that the bond was not a third party beneficiary contract, nor a contract of insurance against liability; that the purpose and intent of the bond was to indemnify Caravan against direct losses of money or property through employee dishonesty—not to insure Caravan against liability to third parties; that Caravan had not sustained a direct loss of money or property by reason of appellant's judgment, and that the judgment was not a loss to Caravan within the coverage of the bond. . . .

"The appellant maintains that, in support of Claim One, the focal point of this issue is the fact the Blanket Honesty Bond is, at least in part, a policy of liability insurance, which insures against liability of Caravan to third persons, including himself. He contends that one policy of insurance may indemnify against both direct loss and against liability. He asserts the policy indemnifies or insures against four conditions, and that the third coverage—loss of money or other property for which the insured is legally liable—in consequence of fraudulent and dishonest acts of Caravan's employees,

indemnifies against both direct loss and against liability. He argues that INA, as garnishee under the policy, agreed to insure Caravan for any loss of money or other property for which it was 'legally liable'; that Caravan sustained a loss by the fraudulent conduct of its employees, and legal liability therefor was established by the judgment below in favor of appellant; that to hold otherwise would be to eliminate the words 'for which the Insured is legally liable' from the policy, which cannot be done; that the words are clear and unmistakable and are to be construed in their natural and ordinary meaning; that no other provisions of the policy control their meaning, and the indemnity being against liability under the third coverage of the policy, INA became liable to appellant upon determination of Caravan's liability to him by reason of the judgment rendered on Count II of the petition.

"We cannot agree with appellant's construction of the bond. The insuring clause and other pertinent provisions of the bond have been set forth. In clear and unambiguous terms, INA agreed to indemnify Caravan against loss of money or other property caused by 'fraudulent or dishonest' acts of its employees. The category of insurance contracts into which the Blanket Honesty Bond falls is termed fidelity guaranty insurance. A fidelity bond is an indemnity insurance contract whereby one for consideration agrees to indemnify the insured against loss arising from the want of integrity, fidelity or honesty of employees or other persons holding positions of trust. Such a contract is considered to be one on which the insurer is liable only in the event of a loss sustained by the insured. It is direct insurance procured by him in favor of himself, as contrasted with bonds running to the benefit of members of the public harmed by the misconduct of the covered individual, which bonds are third-party beneficiary contracts (13 Couch on Insurance 2d, §§ 446:1, 446:2.)"

It is true that in this case the action is brought by

the indemnitee. However, the reasoning in the cited case applies and the situation here would be the same had the bank not been paid by KAMI and the bank sought recovery on the bond.

Another and older decision of the Supreme Court of Indiana in accord is National Surety Co. v. Fletcher Sav. & Trust Co., 201 Ind. 631, 169 N. E. 524. In that case, insofar as it is applicable here, the Indiana court held the conduct of the manager of a corporation in making false representations to banks as to the financial condition of the corporation in order to secure corporate loans did not afford a basis for the bank to recover from the insurance company on the fidelity bond since the loss was not sustained by the corporation.

The original loss suffered by the bank in this case is not, under the facts alleged, converted into a direct loss by the insured because it determined to pay the bank on an obligation for which it was not liable.

AFFIRMED.

McCOWN, J., dissenting.

The District Court not only dismissed the sixth cause of action but also specifically held and decreed that "there was no legal liability on the part of plaintiff KAMI Kountry Broadcasting Company to pay the First National Bank of Cozad the sum of $4,000 plus interest as set forth in the Sixth Cause of Action contained in the plaintiff's Amended Petition."

The majority opinion correctly equates the dismissal of the sixth cause of action with sustaining a demurrer and at least tacitly concedes that the finding there was no legal liability on the part of plaintiff to pay the First National Bank of Cozad the sum of $4,000 plus interest may be equated with the granting of a judgment on the pleadings or a summary judgment.

The parties' arguments and contentions are all directed at issues grounded on the legal effect of the forged promissory note. The majority opinion adopts the same approach. All have concentrated on whether the forged

promissory note was legally and contractually binding on the plaintiff to the exclusion of other critical issues. Even if it be assumed that the defendant is correct and that the forged signature is wholly inoperative to bind the plaintiff on contract liability for the note, that does not affect the possible tort liability of the plaintiff to the bank for $4,000 for the fraud of its agent and general manager. It is obvious that if the manager of the radio station forged the $4,000 note and wrongfully appropriated the proceeds to his own use he committed a fraud upon the plaintiff or the bank or both.

While the pleadings may be inept and skeletal as to some details, they establish that Dean L. McLain, while he was acting as general manager of the plaintiff in charge of its radio station, without authority forged the signature of the plaintiff's president on a promissory note in the amount of $4,000 to the First National Bank of Cozad, Nebraska, and wrongfully appropriated the proceeds thereof to his own use. The pleadings also specifically allege that plaintiff later paid to the bank the sum of $4,000, plus interest, in payment of the promissory note.

Other portions of the pleadings and exhibits establish that plaintiff's bank account was maintained at the First National Bank of Cozad and that McLain had authority to and did write checks on that account, many of which were unauthorized and fraudulent. Reasonable inferences may be drawn that the forged note purported to be a note of the plaintiff, signed by its president, and that the proceeds of the forged note were delivered by the bank and received by McLain in his capacity as general manager of the plaintiff. While the allegation that McLain "wrongfully appropriated the proceeds thereof to his own use" might well have been subject to a motion to make more definite and certain as to details, that was not done. Taken in the light most favorable to plaintiff, if McLain appropriated the proceeds from the bank account of the plaintiff, there was a loss of

plaintiff's money or property within the language of the fidelity bond.

At this point it is also appropriate to note that the fidelity bond was not limited to money or property owned by the insured. Section 7 of the bond provides: "The insured property may be owned by the Insured or held by the Insured in any capacity whether or not the Insured is liable for the loss thereof, or may be property as respects which the Insured is legally liable."

Restatement, Agency 2d, section 261, provides: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." Comment a to this section states: "The principal is subject to liability under the rule stated in this Section although he is entirely innocent, has received no benefit from the transaction, and, as stated in Section 262, although the agent acted solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." Illustration 1 involves a forged document delivered by a bank employee who received payment for it.

Restatement, Agency 2d, section 262, provides: "A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact that the servant or other agent acts entirely for his own purposes, unless the other has notice of this." The comment to this section, in expressing the rationale for the rule states: "It is, however, for the ultimate interest of persons employing agents as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are pur-

porting to act and are apparently acting in the interests of the principal."

Restatement, Agency 2d, section 161, provides: "A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized."

Section 1-103, U. C. C., provides: "Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

Section 3-404, U. C. C., quite clearly provides that any unauthorized signature to a promissory note is wholly inoperative unless ratified, and that any unauthorized signature may be ratified. Comment 3 to that section establishes that a forgery may be ratified and that such adoption or ratification is retroactive and may be found from conduct as well as from express statements. In this case, payment of the note to the bank by the plaintiff after full knowledge of the facts constituted ratification. The only real issue is whether there was any legal liability of plaintiff to the bank arising out of the acts of McLain in obtaining the $4,000 from the bank, or whether the ratification was voluntary.

The facts pleaded here and the reasonable inferences from them were sufficient to withstand demurrer. Neither was the defendant entitled as a matter of law to a judgment that there was no legal liability on the part of plaintiff to pay the First National Bank of Cozad the sum of $4,000 plus interest. Such determinations should await the presentation of evidence. No evidence has yet been presented.

If there was a legal liability on the plaintiff to respond in tort to the bank for the fraud of McLain, the payment of $4,000 to the bank was clearly a loss covered by the bond. The cases cited in the majority opinion simply do not reach such an issue.

The judgment of the District Court should have been reversed and the cause remanded to determine whether the evidence could or would support the possible tort liability of the plaintiff to the bank for the fraud of plaintiff's agent and general manager.

SPENCER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. LESLIE D. HARE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. MELVIN P. HARE, APPELLANT.

208 N. W. 2d 264

Filed June 8, 1973. Nos. 38761, 38762.

1. **Criminal Law: Homicide: Assault and Battery: Time.** In a prosecution for manslaughter in the commission of an assault and battery, the time of the offense is fixed at the time the fatal blow is struck.
2. **Criminal Law: Homicide: Evidence.** To sustain a conviction for manslaughter, the evidence must be sufficient to justify the finding of a causal connection between the unlawful act and the death of the victim.

Appeals from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Fisher & Fisher, 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.

SMITH, J.

In criminal prosecutions for false imprisonment and

manslaughter a jury found Leslie D. Hare and Melvin P. Hare guilty of both offenses. The Hares appeal. Some assignments of error relate to variance and sufficiency of the evidence to sustain the verdicts of guilty on the charges of manslaughter.

On Saturday, February 12, 1972, Leslie, Melvin, Bernard Lutter, Robert Bayliss, and a girl were riding for pleasure in an automobile that Bayliss was operating in Gordon. Bayliss stopped at 9 p.m. upon the request of Leslie. The latter stepped out, shoved an Indian man, who was afoot, and reentered the automobile saying, "Let's go." He also said "something about really getting him." Leslie and Bayliss spoke of throwing an Indian into the American Legion Club for a prank.

The Bayliss party subsequently saw the same Indian, Raymond Yellow Thunder, enter Borman's used car lot. Bayliss stopped, and the four men began to search for Yellow Thunder. Leslie found him in an old pickup truck and opened the door, causing Yellow Thunder to fall to the ground. Leslie, who wore low-heeled, heavy boots, grasped the stock rail and appeared to be "hopping" up and down. He said he was "really stomping him." Bayliss and Melvin rushed to the scene. The former struck Yellow Thunder several times in the face, saying, "It's lots of fun." There was no direct testimony to Leslie's striking the Indian on the head, to Bayliss' blows landing above the nose or cheeks, or to Melvin's striking the Indian anywhere.

Melvin and Leslie proceeded to remove Yellow Thunder's trousers. Leslie "just kind of asked him if he wanted to go for a ride," and Melvin suggested taking him to the American Legion Club. They placed him in the automobile trunk which, according to photographic evidence and testimony of many witnesses, had a latch to open the trunk from the inside. A Nebraska patrolman, who had examined the trunk thoroughly on February 21, however, testified that the trunk then had no inside latch.

With Yellow Thunder in the trunk the automobile was driven around in Gordon 45 minutes. The trunk was opened between 11 p.m. and midnight. Yellow Thunder climbed out and Melvin walked to the door of the Legion Club. Lutter opened the door and Melvin shoved Yellow Thunder inside. Lutter shut the door, and the two men ran.

Inside the club the Indian, Raymond Yellow Thunder, shielded his face with his right hand, pulling his shirt tail with his left hand and hanging his head in embarrassment. Injury to his forehead was not seen there, but a bruise on the right hip was observed. According to Yellow Thunder, he had been "roughed up" and desired to leave. Age 51, he walked out of the club steadily and subsequently proceeded north toward the used car lot.

Again finding Yellow Thunder at the used car lot, Leslie and others once more placed him in the trunk of the Bayliss automobile. They intended to drive him one block to a laundromat where they would release him with his clothes. Prior to releasing him, however, they actually drove several miles to Dean Hare's residence where Melvin left them. The party without Melvin then returned to the laundromat, and someone released Yellow Thunder, Lutter throwing the trousers inside the establishment.

John Paul, a Gordon police officer, saw Yellow Thunder at the police station shortly after midnight the morning of February 13. Yellow Thunder at his own request spent the remainder of the night there. Paul observed "bruises and scratches above the right eye and below the eye, and along the cheek on his right side. . . . (and) right directly above the right eyebrow there was a small cut or wound." The wound glistened, appearing fresh, but blood was not running out of it. Paul smelled the odor of liquor on the breath of Yellow Thunder, who did not appear, however, to be intoxicated.

According to the witness Ghost Dog, on February 13

he talked to Yellow Thunder inside a green pickup truck in the used car lot. "Several days" afterwards, on Friday, the 18th, Ghost Dog again saw Yellow Thunder who appeared to be asleep in the same truck in the used car lot.

In response to a report at 4:20 p.m., February 20, Paul and others removed the body of Yellow Thunder from a panel wagon in the used car lot. Yellow Thunder bore the same bruises, scratches, and wounds that Paul had seen February 13, although the wounds appeared older. He apparently had not been struck subsequent to the time he had been struck by Leslie and Bayliss. A pathologist, Dr. W. O. Brown, performed the autopsy on the body of Yellow Thunder at Rushville on February 21. External examination revealed superficial lacerations, tears in the skin on the head and face, above the right eye, and on the right hip and right leg particularly. A wound above the right eye and forehead, the largest of several wounds, measured one and one-half centimeters in length. "(T)hey looked like they were . . . anywhere from several hours to perhaps several days old. So they were covered by a crust and scabs."

The largest wound above the right eye became impressive on internal examination, for it was larger and deeper than the outer aspects had led Dr. Brown to believe. The entire skin thickness, seven to ten millimeters, was cut, but the skull was not fractured. The wound caused a subdural hematoma and death. Such a wound causes death mechanically by bleeding that builds up pressure and ultimately interferes with vital processes of the brain. The pressure increases slowly because the vessels are usually small and the bleeding, slow. "(D)eath is usually a matter of at least a number of hours; even days; and, even weeks."

According to Dr. Brown, an accurate opinion of time of death is difficult in cases of bodies dead a day or longer. ". . . (Y)ou have to allow for rather large margins there." His report fixes the date of death of Yellow

Thunder on February 17 approximately. He testified that he would underline the word "approximately." Respecting the subdural hematoma, Dr. Brown testified: "Q . . . It had been . . . just the day before or two days before? A It was recent. I wouldn't rule out two or three days, no . . . . Q It could have been two or three days? A Yes . . . That's positive. Yes. Q It could have been ten days? A Well, I doubt if it were ten days because by ten days changes occur in these hematomas . . . —such as, the blood begins to break down and things like that. I don't think it was ten days old. Q And that hadn't occurred? A No, this hadn't occurred."

The fatal wound appeared to have been caused by a fairly broad-surfaced instrument and not by a sharp edge. The findings of Dr. Brown were compatible with any one of a great variety of blows or injuries.

The fatal variance argued by the Hares is said to have been present for the reason that the informations alleged that the Hares committed the offense of manslaughter on February 12, but evidence established that Yellow Thunder died February 18 or 19. In a prosecution for manslaughter in the commission of an assault and battery, the time of the offense is fixed at the time the fatal blow is struck. Debney v. State, 45 Neb. 856, 64 N. W. 446 (1895). The date of death of Yellow Thunder in the context of the foregoing part of the argument is therefore immaterial.

To sustain a conviction for manslaughter, the evidence must be sufficient to justify the finding of a causal connection between the unlawful act and the death of the victim. See, Hamblin v. State, 81 Neb. 148, 115 N. W. 850 (1908); McNamee v. State, 34 Neb. 288, 51 N. W. 821 (1892); Denman v. State, 15 Neb. 138, 17 N. W. 347 (1883). The testimony of Dr. Brown was indefinite and perhaps contradictory in some respects, but it was definite enough for a proper finding that the largest wound above the right eye caused the death of Yellow Thunder.

The testimony of Paul to similarity in appearance of the wounds on February 13 and 20 was important. That testimony in conjunction with other evidence was sufficient for the jury properly to find both Leslie and Melvin guilty of manslaughter.

The judgments are affirmed.

AFFIRMED.

SUSAN TOTH, BY HER FATHER AND NEXT FRIEND, EMERY J. TOTH, APPELLANT, V. CHRIS ANN BACON ET AL., APPELLEES.
208 N. W. 2d 271

Filed June 8, 1973. No. 38829.

1. **Negligence: Motor Vehicles: Words and Phrases.** Gross negligence within the meaning of the Motor Vehicle Guest Act means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief there was an indifference to the safety of others.
2. **Negligence: Motor Vehicles.** A failure to heed a warning of imminent danger not made in time to afford the driver a reasonable opportunity to avoid the accident is not evidence of gross negligence.
3. ———: ———. Failure to maintain a proper lookout alone does not ordinarily constitute gross negligence.
4. ———: ———. Where the negligence of the driver of an automobile in which the plaintiff is riding is the sole proximate cause of the accident, the plaintiff has no right of recovery as against a third person.

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

Lyle Q. Hills, for appellant.

Pilcher, Howard & Dustin and Harry B. Otis of Gaines, Spittler & Otis, for appellees.

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

BOSLAUGH, J.

This is an action for damages arising out of an automobile accident. The plaintiff, Susan Toth, was injured while riding in an automobile operated by the defendant, Cydney Beardmore, which collided with an automobile operated by the defendant, Chris Ann Bacon. At the close of the plaintiff's evidence the trial court dismissed the action as to both defendants. The plaintiff appeals.

The accident happened at the intersection of 84th Street and West Dodge Road in Omaha, Nebraska, at about 11:30 a.m., on October 21, 1970. The sun was shining and the streets were dry. West Dodge Road runs approximately east and west and is 42 feet wide. Eighty-fourth Street runs north and south and is 25 feet wide.

The Beardmore automobile, which was a 1971 Chevrolet Vega two-door sedan, approached the intersection from the west. The plaintiff was sitting in the center of the front seat between Cydney and another passenger identified as "Debbie." When the Beardmore automobile reached the intersection there was an automobile stopped on the east side of the intersection in the south lane for westbound traffic waiting to make a left turn onto 84th Street. The Bacon automobile, which was a 1971 two-door Pontiac, approached the intersection from the east in the north lane for westbound traffic.

The Beardmore automobile stopped in the north lane for eastbound traffic just west of the intersection. Her left turn signal was flashing, and Cydney intended to turn left onto 84th Street.

When the Bacon automobile was just east of the intersection, the Beardmore automobile proceeded into the intersection and commenced a left turn. The left front of the Bacon automobile struck the front of the Beardmore automobile. The impact occurred in the north lane for westbound traffic on West Dodge Road.

Cydney testified, by deposition, that Debbie and the

plaintiff screamed just before the impact and she did not see the Bacon automobile before the impact. The amended petition alleged Cydney was guilty of gross negligence in failing to keep a proper lookout and failing to heed the warning of the plaintiff and Debbie.

The plaintiff testified she did not see the Bacon automobile until after Cydney had started her left turn and the Bacon car was "coming right towards us." At that time the plaintiff and Debbie screamed, "Look out!" The warning from the plaintiff and Debbie came just before the impact and was of no assistance to Cydney in attempting to avoid the accident. A failure to heed a warning of imminent danger not made in time to afford the driver a reasonable opportunity to avoid the accident is not evidence of gross negligence. Kiser v. Christensen, 163 Neb. 155, 78 N. W. 2d 823.

Gross negligence within the meaning of the Motor Vehicle Guest Act means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief there was an indifference to the safety of others. Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321, 29 A. L. R. 3d 236.

Cydney's failure to see the Bacon automobile until after she had turned in front of it was evidence of negligence but not gross negligence. Failure to maintain a proper lookout alone does not ordinarily constitute gross negligence. Brugh v. Peterson, *supra;* Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266; Sandrock v. Taylor, 185 Neb. 106, 174 N. W. 2d 186; Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310.

Chris testified, by deposition, she was traveling 40 to 45 miles per hour as she approached the intersection; she did not reduce her speed until she applied her brakes just before the impact; she was about 1 car length away when she saw the Beardmore automobile in the intersection turning into the north lane for westbound

traffic; and she then applied her brakes and turned to the right.

The posted speed limit for West Dodge Road was 45 miles per hour. The circumstances did not make the speed of the Bacon automobile unreasonable, but the failure of Chris to reduce her speed as she approached the intersection might be considered to be evidence of negligence. § 39-7,108 (4), R. R. S. 1943. It is clear, however, the proximate cause of the accident was the left turn by Cydney in front of the Bacon automobile when it was but a car length away.

Where the negligence of the driver of the automobile in which the plaintiff is riding is the sole proximate cause of the accident, the plaintiff has no right of recovery as against a third person. Napier v. Pedersen, 175 Neb. 703, 123 N. W. 2d 577.

The action was properly dismissed as to both defendants. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA IN RE INTEREST OF STEVEN ALVIN FRIESZ ET AL.

STATE OF NEBRASKA, APPELLEE, V. LUCILLE FRIESZ CAHA, APPELLANT.

208 N. W. 2d 259

Filed June 8, 1973. No. 38901.

1. **Parent and Child: Infants: Right to Counsel.** In a proceeding to terminate parental rights under section 43-209, R. R. S. 1943, an indigent parent, upon request, is entitled to the appointment of counsel at the expense of the county.
2. ———: ———: ———. In a proceeding to terminate parental rights under section 43-209, R. R. S. 1943, a guardian ad litem should be appointed to represent the children where it appears necessary or desirable.

Appeal from the District Court for Stanton County: MERRITT C. WARREN, Judge. Cause remanded to the Dis-

trict Court for further proceedings in conformity with this opinion.

Robert S. Catz, Terrence J. Ferguson, and Vard R. Johnson, for appellant.

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

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

BOSLAUGH, J.

This was a proceeding under section 43-209, R. R. S. 1943, in which the parental rights of Lucille Friesz Caha and Alvin C. Friesz to their seven minor children were terminated. Mrs. Caha appeals.

Alvin C. Friesz and the appellant were divorced on January 29, 1971. The custody of Steven Alvin Friesz, Charlotte Marie Friesz, Marcia Ann Friesz, Vicky Lyn Friesz, Stanley Robert Friesz, Lisa Coral Friesz, and Kathy Jean Friesz was awarded to the appellant.

On April 13, 1971, the county court found the children were dependent, neglected, delinquent, and in need of special supervision. Temporary custody was awarded to the Stanton county division of public welfare. Upon appeal from the county court, the District Court found the children were grossly neglected and dependent. Temporary custody was continued in the Stanton county division of public welfare.

A supplemental petition praying for the termination of parental rights was filed on September 6, 1972. A hearing on this petition was held on October 4, 1972. The trial court found the parental rights should be terminated and permanent custody was awarded to the Department of Public Welfare of the State of Nebraska.

The appellant remarried on October 28, 1972. The children now range from 8 to 17 years of age.

The appellant was represented by private counsel at the hearing in the county court and the hearing on

appeal in the District Court. This counsel withdrew from the case on September 22, 1972.

At the commencement of the hearing on the supplemental petition the appellant stated she was not represented by counsel; she did not "have any money to afford one"; and she requested the court to appoint counsel for her. The trial court stated the law did not provide for the appointment of an attorney in such a case; and since she was employed, the appellant was considered able to hire an attorney.

The record shows the appellant was then employed as a motel maid in Omaha, Nebraska. Her net income was $225 per month. Although the trial court found the appellant was not an indigent on October 4, 1972, leave to appeal in forma pauperis was granted on November 28, 1972. In view of this state of the record, we assume the appellant was an indigent at the time of the hearing on the supplemental petition.

The appellant contends due process of law in a proceeding to terminate parental rights requires that an indigent parent be furnished counsel at the expense of the county upon request.

Since 1967, the Legislature has provided for the appointment of counsel for a minor child of indigent parents when brought before a juvenile court, and has required the judge to advise the minor and his parents "of their right" to counsel at the expense of the county. § 43-205.06, R. R. S. 1943. Section 43-209, R. R. S. 1943, authorizes the appointment of a guardian ad litem for any party as may be deemed necessary or desirable.

In a very similar case the New York Court of Appeals held that an indigent parent was entitled to the assistance of counsel at the expense of the State. In re B., 30 N. Y. 2d 352, 334 N. Y. Supp. 2d 133, 285 N. E. 2d 288. The New York court said: "In our view, an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges (Family Ct. Act, §§ 1014, 1052, 1055; Penal Law, Consol. Laws,

c. 40, § 260.10), is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right (see, e. g., Stanley v. State of Illinois, 405 U. S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551, decided April 3, 1972; Matter of Spence-Chapin Adoption Serv. v. Polk, 29 N. Y. 2d 196, 203, 324 N. Y. S. 2d 937, 943, 274 N. E. 2d 431, 435), to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would — as the courts of other jurisdictions have already held (see, e. g., Cleaver v. Wilcox, decided March 22, 1972 [40 USLW 2658]; State v. Jamison, 251 Or. 114, 118, 444 P. 2d 15, 444 P. 2d 1005; see, also, Boddie v. Connecticut, 401 U. S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113; Note, Child Neglect: Due Process for the Parent, 70 Col. L. Rev. 465; but cf. In re Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678, cert. den. sub nom. Kaufman v. Carter, 402 U. S. 954, 964, 91 S. Ct. 1624, 29 L. Ed. 2d 128) — constitute a violation of his due process rights and, in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well. As the Federal District Court wrote in the very similar Cleaver case [40 USLW, at p. 2659]. 'whether the proceeding be labelled "civil" or "criminal," it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel. * * * Since the state is the adversary * * * there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel. The parent's interest in the liberty of the child, in his care and in his control, has long been recognized as a fundamental interest. * * * Such an interest may not be curtailed by the state with-

out a meaningful opportunity to be heard, which in these circumstances includes the assistance of counsel.'" See, also, State v. Jamison, 251 Ore. 114, 444 P. 2d 15; Chambers v. District Ct. of Dubuque County, 261 Iowa 31, 152 N. W. 2d 818; Cleaver v. Wilcox, United States Dist. Ct., N. D. Calif., 40 U.S.L.W. 2658; Danforth v. State Dept. of Health & Welfare (Maine), 303 A. 2d 794, 41 U.S.L.W. 2586.

The evidence which was before the District Court at the hearing on the appeal from the county court is not before us. We must assume, therefore, that it fully supported the finding of dependency and neglect.

The evidence at the hearing on October 4, 1972, consisted principally of the testimony of the Stanton county director of public assistance and three caseworkers. Two of the caseworkers were employed by the Lutheran Family and Social Services at Omaha where Charlotte, Stanley, and Kathy had been staying. The other caseworker was employed by the Grace Children's Home in Henderson, Nebraska, where Marcia, Vicky, and Lisa had been staying. Although far from conclusive, this testimony generally supported the finding that the parental rights of the appellant should be terminated. There was very little evidence concerning the present circumstances of the appellant, her home, or her ability to care for some or all of the children.

We think justice will best be served in this case by remanding it to the District Court for further hearing upon the supplemental petition. The special county attorney and the appellant, who is now represented by counsel, should be permitted to make whatever further showing they desire in support of or in resistance to the supplemental petition. The District Court is directed to appoint a guardian ad litem for the children for the purpose of this hearing. Until the further order of the District Court, the children shall remain in the custody of the Department of Public Welfare of the State of Nebraska.

The cause is remanded to the District Court for further proceedings in conformity with this opinion.

CAUSE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS IN CONFORMITY WITH THIS OPINION.

STATE OF NEBRASKA, APPELLEE, V. ROGER LEGER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JOHN PRESLEY, APPELLANT.
208 N. W. 2d 276

Filed June 15, 1973. Nos. 38756, 38780.

1. **Criminal Law: Guilty Plea: Trial.** Rule 11 of the Federal Rules of Criminal Procedure is not applicable to the states.
2. ———: ———: ———. It is not required that the court, prior to sentence, ascertain that a factual basis exists for a plea of guilty, or that the defendant be personally addressed for that purpose.

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

Roger Leger and John Presley, 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.

NEWTON, J.

Defendants were charged with the same act of burglary. Each plead guilty. Sentencing in each instance was postponed approximately a month pending presentence reports. Each was represented by the public defender. They now appeal pro se. Errors assigned are: (1) A plea bargain was made and dishonored; and (2) the court failed to ascertain that there was a factual basis for the pleas of guilty. We affirm.

The records in these cases completely fail to indicate

that plea bargains were entered into. On the contrary, both defendants assured the court that no promises had been made to them in regard to the possible sentences.

Was the court derelict in ascertaining that a factual basis existed for the pleas of guilty? Rule 11 of the Federal Rules of Criminal Procedure provides that before accepting a plea of guilty, the court shall address the defendant personally in determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. It further provides that the court shall be satisfied there is a factual basis for the plea. In McCarthy v. United States, 394 U. S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418, the court held that the rule must be complied with but specifically stated that it did not base its decision on constitutional grounds.

In North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, the court considered the constitutionality of a plea of nolo contendere. Under such a plea a defendant need not admit commission of the acts charged against him and there is no inquiry into the "factual basis" for the plea. The following excerpts clarify the holding of the court: "Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. The plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment. * * *

"Implicit in the nolo contendere cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence. * * *

"Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the

latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

It is evident that there is no constitutional basis for the requirement in the federal Rule 11 that the court accepting a plea of guilty personally address the defendant with a view to ascertaining the existence of a factual basis for the plea.

Federal Rule 11 is not applicable to the state courts. See Wade v. Coiner, 468 F. 2d 1059 (4th Cir., 1972). Nebraska does not have a similar statutorily imposed rule and consequently is not restricted in a similar manner. The only basic requirement is that constitutional principles be complied with. Nevertheless it is good practice to comply with Rule 11.

Verification of the fact that the court was aware of the "factual basis" for the pleas is found in the presentence reports which were before the court when sentences were pronounced. Each defendant gave a complete and detailed factual statement pertaining to the commission of the crime charged as well as admitting the commission of other offenses in other jurisdictions. Both had been previously convicted on a similar charge and in the present instance were apprehended in the building they were charged with burglarizing.

A motion for new trial was not filed in either of these cases. Ordinarily, preliminary to an appeal, assigned errors must be presented to and ruled upon by the trial court by means of a motion for new trial. See, State v. Haile, 185 Neb. 421, 176 N. W. 2d 232; State v. Burnside, 185 Neb. 234, 175 N. W. 2d 1.

The judgments of the District Court are affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the result in these cases. The presentence

reports which were available to the trial court *before sentencing,* established a factual basis for the pleas of guilty.

The requirement that the trial court determine there is a factual basis for a plea of guilty does not originate in federal Rule 11. The requirement is a part of the Standards Relating to Pleas of Guilty which were adopted by this court in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, as the minimum procedure for the taking of pleas of guilty. The standards require the trial court to determine there is a factual basis for the plea *before entering judgment* upon the plea. A.B.A. Standards Relating to Pleas of Guilty, Approved Draft, 1968, § 1.6, p. 30.

The trial court is not required to inquire of the defendant. Inquiry of the county attorney or examination of the presentence reports are alternative methods. State v. LeGear, 187 Neb. 763, 193 N. W. 2d 763. In North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162, the court heard testimony which summarized the State's case before accepting the plea of guilty.

SPENCER, SMITH, MCCOWN, and CLINTON, JJ., join in this concurrence.

HAROLD SYROVATKA AND TIMOTHY SYROVATKA, MINORS, EX REL. THEIR PARENTS AND NEXT FRIENDS, LAWRENCE J. SYROVATKA AND LORRAINE A. SYROVATKA, APPELLANTS, V. LAWRENCE L. GRAHAM, DIRECTOR, STATE DEPARTMENT OF PUBLIC WELFARE, APPELLEE.

208 N. W. 2d 281

Filed June 15, 1973. No. 38835.

1. **Infants: Habeas Corpus.** Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is

concerned not so much about the illegality of the detention as about the welfare of the child.

2. **Infants: Adoption: Limitations of Actions: Parent and Child.** When any county court in the State of Nebraska shall enter of record a decree of adoption it shall be conclusively presumed that said adoption and all instruments and proceedings in connection therewith are valid in all respects unless an action is brought within 2 years from the entry of such decree of adoption attacking its validity.

Appeal from the District Court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

Phillips & Murphy, for appellants.

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

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

SPENCER, J.

This is a habeas corpus action attacking an order of commitment of two minor children. Plaintiffs appeal from the dismissal of their petition. We affirm.

The two children were committed on January 4, 1967, into the permanent custody of the State of Nebraska Department of Public Welfare by an order of the Saunders county court. With the consent of the Department of Public Welfare, they were adopted on October 2, 1968, pursuant to an order of a Nebraska county court.

The petition for habeas corpus was filed March 6, 1972. It alleged the 1967 commitment was void for want of notice to petitioners. That order recites: "Present in court are Laurence Syrovatka and Lorraine Syrovatka, father and mother of the above named minor children." This action is a collateral attack on the jurisdiction to enter the order.

From November 29, 1966, to March 10, 1967, Lawrence Syrovatka was confined in the county jail of Saunders county, charged with statutory rape. He was represented by counsel. He now alleges that he did not consult

counsel relative to the juvenile proceedings pending at that time in the county court of Saunders county. Lorraine Syrovatka was confined in the county jail of Saunders county from November 29, 1966, to approximately December 17, 1966. They both admit they were in county court on some juvenile hearing, but contend that they only signed a paper for temporary custody of the children.

Mrs. Syrovatka testified that she first became aware the children had been taken away sometime in 1967. She later received a letter from the Department of Public Welfare advising that the children had been adopted. Mr. Syrovatka testified the first time he became aware that the children had been adopted was in November of 1969. A photocopy of a letter from the Department of Public Welfare, dated December 30, 1968, which the Syrovatkas admit receiving, advised them their children had been placed and adopted.

The writ was properly refused. There is no merit to the Syrovatkas' contention. The record imports verity. The question of jurisdiction can be attacked only by clear and convincing evidence. It is quite obvious from the record that the Syrovatkas were utterly confused as to which hearings had been held, where, and when. Their evidence falls far short of meeting the test of clear and convincing. Our review of the record supports the conclusion that when Judge Edstrom, in his order of January 4, 1967, found Lawrence Syrovatka and Lorraine Syrovatka present in court, they, in fact, were present in court.

The order of commitment was entered 5 years and 2 months before the filing of the petition herein. The adoption had been completed for 3 years and 5 months before its filing. Viewing the testimony of the plaintiffs in its most favorable light, they must have known for approximately 5 years that their children had been taken from them. In any event, they knew their children had been placed and adopted for more than 3

years before they filed their petition. Considering the welfare of the children they have not seen for more than 5 years, plaintiffs would be barred by laches even if there were more merit to their present contention.

We said in Christopherson v. Christopherson (1964), 177 Neb. 414, 129 N. W. 2d 113: "Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child."

Plaintiffs here are attacking the validity of the commitment to the Department of Public Welfare for placement and adoption, and only inferentially the decree of adoption. They had known of the adoption at least since late December 1968. Section 43-116, R. R. S. 1943, provides, so far as material herein: "When any county court in the State of Nebraska shall * * * hereafter enter of record such a decree of adoption, it shall in like manner be conclusively presumed that said adoption and all instruments and proceedings in connection therewith are valid in all respects notwithstanding some defect or defects may appear on the face of the record, or the absence of any record of such court, unless an action is brought within two years from the entry of such decree of adoption attacking its validity."

An adoption proceeding determines more than the custody of the adopted children. Section 43-110, R. R. S. 1943, provides: "After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred."

For more than 5 years Timothy and Harold Syrovatka have been in their adopted home. Their natural parents, after this lapse of time, would in effect be virtual strangers to them. To disturb the present relationship

at this late date would be a cruel travesty on justice.

The petition was properly dismissed. The judgment of dismissal is affirmed.

AFFIRMED.

DEANNA FLESHER, APPELLANT, V. DONALD J. FLESHER, APPELLEE.

208 N. W. 2d 677

Filed June 15, 1973. No. 38864.

1. **Divorce: Parent and Child: Infants.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. **Divorce: Parent and Child: Infants: Appeal and Error.** The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Joseph Savin, for appellant.

Kerrigan, Line & Martin, for appellee.

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

SPENCER, J.

This appeal is from an order denying plaintiff-appellant's motion for a change in the custody and control of the minor children of the parties. We affirm.

Plaintiff's action for divorce was filed June 28, 1971. Defendant filed an answer and a cross-petition, contesting on the grounds of plaintiff's alleged adulterous conduct. Both parties were represented by counsel. Subsequently, an agreement was reached between the

parties which permitted plaintiff to obtain the divorce but gave the defendant custody and control of the minor children. The decree was entered October 15, 1971.

On February 25, 1972, plaintiff, by different counsel, filed a motion to vacate that part of the decree relating to the custody of the minor children of the parties. On June 30, 1972, an order was entered vacating that part of the decree relating to the custody, but leaving the children in the custody of the defendant and setting the case for trial. On September 27, 1972, after further hearing, the permanent custody of the children was awarded again to the defendant.

After reviewing the record, we find this case is controlled by our holdings in Bennett v. Bennett (1973), 189 Neb. 654, 204 N. W. 2d 379. In that case we said: "A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.

"The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence."

Plaintiff's allegations of coercion were resolved against her by the trial judge who heard the divorce action. We accept his findings. We find no abuse of discretion and the judgment is not against the weight of the evidence. The judgment should be and is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JAMES MADDOX, APPELLANT.
208 N. W. 2d 274

Filed June 15, 1973. No. 38879.

Criminal Law: Double Jeopardy: Constitutional Law: Penal Institutions. An administrative disciplinary proceeding in which a prisoner loses good time for escape from confinement does not place him in jeopardy. A subsequent conviction and sentence in a criminal prosecution for the escape do not therefore constitute double jeopardy which federal constitutional clauses prohibit.

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

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

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

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

SMITH, J.

In a criminal prosecution in District Court, defendant pleaded nolo contendere to a charge that on May 13, 1972, he had feloniously escaped from confinement in the Nebraska Penal and Correctional Complex. On October 20 a sentence of imprisonment for 1 year was imposed, such sentence to run consecutively with the sentence he was already serving. On May 15 in an administrative disciplinary proceeding concerning the escape, good time of 11 months and 21 days credited to defendant had been revoked. See § 83-185(2), R. R. S. 1943.

Defendant appeals. He asserts that (1) the sentence ought to have been concurrent and (2) he was placed in double jeopardy by the prosecution in District Court after revocation of his good time.

Defendant had commenced serving the prior sentence

- imprisonment for 15 years - October 1964. He has served more than 8 years, but a long period of imprisonment remains. According to him, disciplinary action caused him to escape.

The offense of escape from confinement is punishable by a maximum fine of $500 or by imprisonment for not less than 1 year nor more than 10 years. § 28-736, R. R. S. 1943. Upon consideration of the presentence report and other circumstances in the present case, we conclude that the consecutive sentence was not excessive. See § 29-2308, R. R. S. 1943.

An administrative disciplinary proceeding in which a prisoner loses good time for escape from confinement does not place him in jeopardy. A subsequent conviction and sentence in a criminal prosecution for the escape do not, therefore, constitute double jeopardy which federal constitutional clauses prohibit. United States v. Williamson, 469 F. 2d 88 (5th Cir., 1972); State v. Williams, 208 Kan. 480, 493 P. 2d 258 (1972); State v. Tise, 283 A. 2d 666 (Me., 1971); State v. Lebo, 129 Vt. 449, 282 A. 2d 804 (1971). The second contention of defendant is without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY P. AMEN, ALSO KNOWN AS GREG AMEN, APPELLANT.
208 N. W. 2d 279

Filed June 15, 1973. No. 38907.

1. **Criminal Law: Trial: Prosecuting Attorneys.** The county attorney, under the direction of the District Court, has statutory authority to procure assistance in any trial of any person charged with a felony, and in the absence of facts which indicate the contrary, it is presumed that the District Court properly exercised its discretion in that regard.
2. **Criminal Law: Entrapment.** Where a person already has the readiness or willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity

for such violation or merely seeks to collect evidence of the offense does not constitute unlawful entrapment and is no defense.

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

William H. Hein, 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 was convicted in the District Court for Box Butte county of distributing or delivering marijuana. He presents four assignments of error. First, the court erred in permitting Bruce Teichman to act as a prosecuting attorney. Second, the evidence was insufficient to establish that the defendant knowingly or intentionally delivered a controlled substance. Third, the information should have been dismissed for entrapment. Fourth, the sentence imposed is excessive. We affirm.

On February 24, 1972, a paid female informant for the State asked defendant if he knew where she could get some dope. He replied that he wished she had seen him a couple of days earlier because the stuff he had had gone like 15 cent hamburgers. Following this inquiry, the defendant and the informant met 15 minutes later at the Wonder Bar in Alliance, Nebraska. At his suggestion they went for a ride in her car with Les Kincaid and Myla Steele. They drove around Alliance and dropped off Myla Steele, and then picked up Karen Smith. They drove into the country to smoke marijuana. During this period defendant put a plastic baggie in the informant's purse. This was later turned over to a State officer. It was stipulated that the plastic bag contained marijuana.

Paul D. Empson, county attorney of Box Butte county, and Bruce Teichman, an attorney at Hyannis, Nebraska, appeared for the State. Mr. Teichman examined the State's witnesses and made the argument for the State.

We will discuss the defendant's assignments seriatim. If there was any question as to the right of Mr. Teichman to appear for the State it has been waived by the defendant. Defendant made no objection to his appearance at any time before, during, or after the trial, nor did he raise any objection in his motion for a new trial. In any event, the county attorney, under the direction of the District Court, has statutory authority to procure assistance in any trial of any person charged with a felony, and in the absence of facts which indicate the contrary, it is presumed that the District Court properly exercised its discretion in that regard. Goldsberry v. State (1912), 92 Neb. 211, 137 N. W. 1116.

On defendant's second assignment of error, the evidence clearly shows that the defendant knowingly and intentionally delivered a controlled substance, marijuana, to the informant.

There is no merit to defendant's claim of entrapment. The female informant was sent to Alliance at the request of the county attorney because of reports of a drug problem in that area. Upon her arrival in Alliance she gave one Myla Steele a ride in her motor vehicle. She asked Myla Steele if she knew where informant could get some dope. Myla Steele replied in the affirmative, directed her to Dietrich's Bar in Alliance, and there introduced her to the defendant. Defendant's reply when he was asked as to where the informant could get some dope indicates that he had been distributing it. The fact that the informant provided an opportunity for the defendant to violate the law, which violation originated in the mind of the defendant, is not an unlawful entrapment. In State v. Ransburg (1967), 181 Neb. 352, 148 N. W. 2d 324, this court said: "* * * where a person already has the readiness or

willingness to violate the law, the mere fact that an officer provides what appears to be a favorable opportunity for such violation or merely seeks to collect evidence of the offense does not constitute unlawful entrapment and is no defense."

Has defendant received an excessive sentence? The answer is no. He was sentenced for a period of not less than 1 nor more than 2 years to the Division of Corrections of the Department of Public Institutions of the State of Nebraska for violating the Uniform Controlled Substances Act. Testimony was adduced at defendant's sentencing hearing that subsequent to the present offense and while he was out on bond he offered to sell the witness some marijuana or mescaline.

For the reasons given above, the judgment is affirmed.

AFFIRMED.

RODNEY V. JARMIN, APPELLEE, V. JOHN W. KISSACK, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

208 N. W. 2d 675

Filed June 15, 1973. No. 38927.

1. **Motor Vehicles: Administrative Law: Records.** Under the point system an abstract of conviction for speeding should show the amount by which the applicable speed limit was exceeded.
2. **Motor Vehicles: Administrative Law.** Under the point system the Director of Motor Vehicles is required to interpret abstracts of conviction in accordance with the laws regulating the use and operation of motor vehicles.

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

Clarence A. H. Meyer, Attorney General, James J. Duggan, and Herbert T. White, for appellant.

C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

BOSLAUGH, J.

The plaintiff's driving privileges were revoked by the Director of Motor Vehicles under the point system on April 5, 1972. The plaintiff then appealed to the District Court, alleging the evidence before the Director did not sustain a finding that he had accumulated 12 or more points within a 2-year period as provided in section 39-7,129, R. R. S. 1943. The trial court found generally for the plaintiff and reversed the order of the Director. The Director has appealed to this court.

The controversy centers around the interpretation of two abstracts of conviction. On January 4, 1971, the plaintiff was convicted of speeding in the county court of Kearney County, Nebraska. The abstract recites: "Speeding 79 MPH Day." On March 20, 1972, the plaintiff was convicted of speeding in the county court of Holt County, Nebraska. The corrected abstract recites "Speeding - Day, to-wit: 75.0 miles per hour." The Director assessed a total of 5 points for these convictions. The trial court found the Director should have assessed only 1 point each for these convictions, thus reducing the total points accumulated by the plaintiff from 13 to 10.

The plaintiff contends it was not possible for the Director to ascertain the applicable speed limit from the abstracts for the Kearney County and Holt County convictions. If that were true, the Director should have returned the abstracts for correction because the abstracts should show the amount by which the applicable speed limit was exceeded. Melanson v. State, 188 Neb. 446, 197 N. W. 2d 401.

Under the point system the Director of Motor Vehicles is required to interpret abstracts of conviction in accordance with the laws regulating the use and opera-

tion of motor vehicles. Westenburg v. Weedlun, 187 Neb. 679, 193 N. W. 2d 566.

In this case the abstracts were sufficient to permit the Director to assess the correct number of points. At the time of the Kearney County offense, the statute prescribed a limit of 65 miles per hour during the daytime and 60 miles per hour during the nighttime on a state highway other than the interstate or a freeway. § 39-723, R. R. S. 1943. The word "day" in the abstract signified a 65-mile-per-hour limit. The Director was correct in assessing 3 points for the Kearney County conviction.

At the time of the Holt County offense, the statute had been amended to prescribe a 65-mile-per-hour limit for both daytime and nighttime on state highways other than the interstate or a freeway. § 39-723, R. S. Supp., 1972. However, if the plaintiff had been driving on the interstate or a freeway, the applicable limit would have been 75 miles per hour and, presumably, there would have been no offense. See Westenburg v. Weedlun, *supra*. Consequently, it was proper for the Director to assess 2 points for the Holt County conviction.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment affirming the order of the Director of Motor Vehicles.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. THEODORE MCCAULEY, SR., APPELLANT.
208 N. W. 2d 275

Filed June 15, 1973. No. 38934.

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

John C. Mitchell and Larry R. Demerath of Mitchell & Beatty, 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.

BOSLAUGH, J.

The defendant pleaded nolo contendere to robbery and was sentenced to 3 years' imprisonment. He appeals, contending the sentence was excessive.

The sentence imposed was the minimum prescribed by statute. § 28-414, R. R. S. 1943. The defendant argues that he should have been placed on probation.

The defendant is 22 years of age. He has worked in packing houses and as a taxi driver. At the time of the offense he was employed by Greater Omaha Community Action, Inc. He is married but is separated from his wife. He has no prior felony convictions but has been absent without leave from the military service since 1968. The record indicates he has an alcohol problem.

The robbery took place on August 7, 1972, near Arlington, Nebraska. The defendant had been drinking and had driven to Macy, Nebraska, with his cousin. On the way back to Omaha, they forced another car off the road and then beat and robbed the driver. The defendant continued on to Omaha where he continued to drink the rest of that day.

The crime was one of violence. The record indicates the defendant has engaged in violence on other occasions and has little regard for the responsibility he owes to his family and society. The sentence imposed was not excessive but was appropriate under the facts and circumstances of the case.

The judgment is affirmed.

AFFIRMED.

WILGRO, INC., A CORPORATION, APPELLEE, V. VOWERS & BURBACK, A PARTNERSHIP, ET AL., APPELLANTS.

208 N. W. 2d 698

Filed June 22, 1973. No. 38717.

1. **Motions, Rules, and Orders: Trial: Evidence.** For the purposes of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed, and he must be given the benefit of all inferences therefrom.
2. **Trial: Evidence.** Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.
3. ———: ———. Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by reliance alone on the inferencss which would entitle them to recover.

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

O'Brien & Everson and Darrel J. Huenergardt, for appellants.

Wright & Simmons, John F. Wright, and John F. Simmons, for appellee.

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

WHITE, C. J.

This is an action for payment of an open account for livestock feed supplement furnished by the plaintiff to the defendants. The defendants counterclaimed for damages, alleging that the plaintiff had breached certain warranties in connection with the nutritional composition of the supplement. The trial court directed a verdict for the plaintiff on the open account and dismissed

defendants' counterclaim for insufficient evidence. We affirm.

Defendant Vowers & Burback is a partnership which has been engaged in the cattle-feeding business since 1951. Between August 6, 1968, and December 21, 1968, the partnership was feeding 1,605 head on its lot in Kimball, Nebraska. The feed consisted of 50 pounds of corn silage and 3 pounds of supplement per head per day, the latter being added in order to increase the cattle's weight gain.

The supplement and the silage were not premixed or stored together. The defendants would spread supplement in the bottom of a feed truck bed and then auger out silage on top of it, approximating amounts by timing the auger. Whatever mixing took place was accomplished by means of "beaters" through which the feed had to pass when it was dumped from the truck into the feed bunks. Since the bunks were open, there was no way to regulate the amount each animal ate. The bunks were merely filled with the total amount of feed needed by all the cattle per day, leaving each animal free to eat the amount it desired.

Since 1966 Vowers & Burback had used feed supplements manufactured by the plaintiff, Wilgro, Inc., and in this case the partners were using the plaintiff's "WIL-GRO-MATIC" as part of a feeding plan recommended by the plaintiff's salesman, Robert Scriven. With each load of supplement, the defendants received a ticket which bore the heading "GUARANTEED ANALYSIS" and which listed the various ingredients used in the supplement's manufacture, together with their percentage amounts. The ticket which accompanied each load of WIL-GRO-MATIC contained, in part, the following listing: "Crude Protein, not less than—32.0% (This includes not more than 14.4% equivalent protein from non-protein Nitrogen.)"

In early October of 1968, approximately 30 days after the animals had been placed in the feed lot, the partners

began to notice problems developing. The cattle were not gaining properly, and their appearance became rough instead of slick and clean. The plaintiff's nutritionist, Dr. James Sprague, made two trips to the lot to inspect the cattle and discuss the problem with the defendants, but he recommended no change in the feeding program. On both occasions he observed that the cattle were being fed silage which was both green and wet, and he took samples of this silage, as well as of the feed, on his second visit. By that time the cattle had been switched to a different feeding program by the defendants, and Wilgro supplement had been replaced by another brand.

Sprague had a laboratory analysis done on the feed and silage samples, and rechecked the results himself. He found that the silage had a comparatively high moisture and protein content and a low grain content, all of which is consistent with immaturity. The supplement was found to have been compounded according to a mathematically erroneous formula. While the amount of non-protein nitrogen (urea) was correct, a decrease in the amount of natural crude protein had made the *percentage* of non-protein nitrogen higher than that listed on the analysis ticket. Thus, whereas the ticket indicated a maximum percentage of 14.4% urea, the supplement samples contained percentages as high as 15.2%. A similar test had earlier been commissioned by the defendants, and it had indicated a urea level of 16.3% in different samples. However, the figure generally used by both parties at trial was 15.2%.

Meanwhile, during the latter part of November and early part of December, 19 of the Vowers & Burback cattle died, and the rest continued to develop behind schedule. More feed had to be purchased because these surviving cattle needed a longer feeding period to reach proper weight.

Defendants retained Dr. Robert Newell, a veterinarian, to inspect and treat the cattle, and to perform autopsies

on the animals which had died. He had dealt with the partners before, and had, in fact, inspected this group of animals when they were placed on the feed lot. He found them to be in good condition at that time. On the morning of December 15, in the presence of two Burback brothers, the autopsies were performed on four head, and it was found that the animals had died as a result of a toxemia condition. Dr. Newell testified that this condition was caused by an abnormal production of carbon dioxide and ammonia in the rumen, resulting from a diet too high in urea. In short, it was Dr. Newell's opinion that the animals died of urea poisoning. He further testified that many of the surviving cattle showed symptoms of what appeared to be toxemia in lesser degrees, and that he treated some of them for this condition.

The record before us discloses no serious dispute concerning the issue of breach of warranty. That an express warranty was made is manifest; the words "GUARANTEED ANALYSIS" can hardly be interpreted as suggesting anything else. Furthermore, much of the evidence of breach of that warranty came from the plaintiff's own witness, James Sprague.

What is in dispute, however, is whether or not the breach was the proximate cause, or even the cause-in-fact, of the injuries sustained by the Vowers & Burback cattle. The narrow issue before us is whether the defendants adduced sufficient evidence in that regard to create a jury question and we hold that they did not.

Defendants cite our holding in Morton v. Travelers Indemnity Co., 171 Neb. 433, 106 N. W. 2d 710 (1960), for the well-established proposition that, for the purposes of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed, and he must be given the benefit of all inferences therefrom. The question must

be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor. Lund v. Mangelson, 183 Neb. 99, 158 N. W. 2d 223 (1968).

But even when viewed in this favorable light defendants' evidence is insufficient to support their allegations. A variety of causation theories, all supported in some degree by the record, could account for the toxemia condition which Dr. Newell found. For example, the affected cattle may have ingested feed which was improperly mixed, thus containing more than the recommended 3 pounds of supplement per day. One of the partners admitted that the supplement is merely spread on the bottom of a truck and silage is augered out on top. Perhaps the truck's beaters failed properly to mix a portion of the feed and some of the cattle thus received too much supplement.

On the other hand, the feed could have been properly mixed, but the affected animals might simply have overeaten. The difference in percentage of urea which is alleged to constitute the breach here is slight - approximately 0.8% according to the plaintiff's sample and 1.9% according to the defendants'. If an animal consumed the recommended 3 pounds of properly compounded supplement in a day, it would ingest approximately .432 lb. urea. The same intake of the 15.2% supplement should result in the ingestion of .456 lb. urea. Three pounds of the 16.3% sample would contain .489 lb. urea. This means that an animal which, by virtue of the "free feeding" method employed by the defendants, consumed only 3.167 lbs. of properly compounded supplement in a day would take in the same amount of urea as an animal which ate 3 lbs. of the 15.2% mixture. Furthermore, an animal which consumed only 3.3958 lbs. of properly compounded supplement would take in as much urea as one which ate 3 lbs. of a 16.3% mixture.

That this over-consumption is possible is illustrated

by the following testimony of the defendant Richard Burback:

"Q So, you really don't know whether each animal got three pounds a day or whether he got more than three pounds a day?

"A It was rationed out to them so they would eat three pounds a day, yes.

"Q You mean you put out three pounds a day for every animal?

"A Yes.

"Q If the animal didn't eat his full share that day, he didn't get three pounds?

"A I guess not.

"Q And if some other animal ate more than his share, he got more than three pounds?

"A Most definitely."

Plaintiff also demonstrated that the wet, immature silage, while not causing urea poisoning, could account for some of the symptoms observed in the majority of animals which were not examined.

In short, there are several causative theories which account for the toxemia condition and apparently related symptoms other than the theory urged by the defendants, and in neither of the former theories is the breach of warranty the proximate cause of the injury. In Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309 (1966) this court held: "* * * circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. * * * The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible * * * Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sus-

tain their position by reliance alone on the inferences which would entitle them to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728." See, also, Haynes v. County of Custer, 186 Neb. 740, 186 N. W. 2d 483 (1971); J. R. Watkins Co. v. Wiley, 184 Neb. 144, 165 N. W. 2d 585 (1969); Guy v. Doeschot, 183 Neb. 557, 162 N. W. 2d 524 (1968); Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919 (1967).

This is not to say that a party who relies on circumstantial evidence for proof of causation must always exclude any other possible causes. Such is not the rule. Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712 (1940); Petracek v. Haas O.K. Rubber Welders, Inc., 176 Neb. 438, 126 N. W. 2d 466 (1964). But the evidence must be sufficient to fairly and reasonably justify the conclusion that a cause of action has been made out. Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584 (1962). As we said in Popken v. Farmers Mutual Home Ins. Co., *supra:* "Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other."

Thus, while the defendants were not required to exclude every other conceivable cause of the toxemia condition, they were required to adduce some evidence which would lead the reasonable man to accept their theory of causation over those presented by the plaintiff. This they did not do, and their cause of action was properly dismissed.

Since there was no real controversy concerning the plaintiff's cause of action for payment of the account, the trial court's action in directing a verdict in the plaintiff's favor on that issue was equally proper.

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

AFFIRMED.

CLINTON, J., concurs in the result.

ROBERT KRUEGER ET AL., APPELLEES, V. DUANE L. CALLIES ET AL., APPELLANTS.
208 N. W. 2d 685

Filed June 22, 1973. No. 38764.

1. **Deeds.** Delivery is essential to the validity of a deed.
2. **Deeds: Homesteads.** A homestead cannot be conveyed or encumbered except by an instrument executed and acknowledged by both husband and wife.
3. **Contracts: Frauds, Statute of.** The statute of frauds provides that an agreement for the sale of land is void in the absence of a written memorandum signed by the vendor.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Reversed and dismissed.

Moyer & Moyer and W. G. Whitford, for appellants.

Thomas E. Brogan and Richard D. Stafford, for appellees.

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

NEWTON, J.

This is an action for the specific performance of an alleged agreement for the sale of a homestead. The District Court decreed specific performance. We reverse the judgment.

Defendants are the administrators of the estate of Lawrence C. Callies, deceased. Callies, during his lifetime, was the owner of a 160 acre farm comprising the west half of the west half of Section 34, Township 22 North, Range 4 West of the 6th P.M., in Madison County, Nebraska.

It is stipulated that the land was the homestead of Callies and his wife. On September 5, 1963, he listed the property for sale with O. V. and George Scheer, real estate brokers. Arrangements were promptly made for a sale to plaintiffs and on the following day, September 6, 1963, Callies and wife executed, but did not acknowledge, a sale agreement. On September 7, 1963,

the Callieses signed and acknowledged a warranty deed to plaintiffs. The deed failed to describe any land and was left with the real estate agents who are stipulated to have been acting as agents of Callies. It was never delivered. The sum of $2,000 was paid down on the contract on September 6, 1963.

On December 11, 1963, the Callieses moved off the farm to a home they had purchased in Newman Grove, Nebraska. Callies changed his mind about making the sale and so notified plaintiffs on December 16, 1963. The following day they met at the Scheer office. The north 80 acres was then conveyed to plaintiffs and a mortgage given for the remainder of the purchase price. A note, with interest coupons, was signed by the plaintiffs but apparently not used or delivered. This note stated that: "It is agreed that Robert Krueger & Marie O. Krueger have the privilege of buying back W ½ of SW ¼ 34-22-4, Madison County, Nebraska, anytime the owner whishes (sic) to sell during the term of mortgage which held by Lawrence C, or Myrtle Callies, on W ½ NW ¼-34-22-4 at $165.00 per acre." A second note, with coupons, was made out, executed by plaintiffs, and delivered with the mortgage. On the back of this note is the following: "It is agreed that Robert & Marie O. Krueger, shall have the privilege to make two payments in one year of both principal and interest. It is further agreed that Robert & Marie O. Krueger shall have the privilege of buying said 80 acres secured by this mortgage at the price of $165.00 per acre after five years on or before the maturity of this mortgage." This note is due January 1, 1974.

Callies was predeceased by his wife and following his death, plaintiffs demanded performance of the alleged agreement to convey the south 80 acres. This action was then instituted.

Delivery is essential to the validity of a deed. See Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182. There having been no delivery, it is apparent that the

deed with the blank description executed on September 6, 1963, is a nullity.

A homestead cannot be conveyed or encumbered except by an instrument executed and acknowledged by both husband and wife. See § 40-104, R. R. S. 1943. Such a conveyance is void and unenforceable and it being conceded that the land was on September 6, 1963, when the contract of sale was signed, the Callieses' homestead, it is evident that this unacknowledged instrument is also a nullity.

The notations on the two mortgage notes bear conflicting provisions but are ineffective in any event. The statute of frauds provides that an agreement for the sale of land is void in the absence of a written memorandum signed by the vendor. See § 36-105, R. R. S. 1943. The notes were not signed by the Callieses. In this connection plaintiffs produced and attempted to identify and introduce in evidence the following: "It is agreed that Robert & Marie Krueger have privilege to buy said 80 acres $165.00 per acre on or after maturity of mortgage. Lawrence Callies." The instrument being otherwise without foundation was correctly rejected by the trial court. A person having a direct legal interest in the result of a civil action when the adverse party is the representative of a deceased person is incompetent to testify to any transaction had with such deceased person. See § 25-1202, R. S. Supp., 1972.

Although not briefed, in argument plaintiffs sought to sustain their position by contending that their agreement to forego the agreement contained in the September 6, 1963, contract of sale was a consideration, together with the $2,000 downpayment, for the alleged agreement for the later right to purchase the south 80. The downpayment was subsequently applied on the purchase of the north 80 and the contract of purchase being void it cannot, in our judgment, be considered a valid consideration for any later agreement. They fur-

ther argued that there was sufficient part performance of the alleged agreement for the purchase of the south 80 to remove it from the purview of the statute of frauds. They base this argument also on the relinquishment of their rights under the September 6, 1963, contract of sale. This contract being void, plaintiffs acquired no rights under it, had nothing to relinquish, and the record is barren of anything that could conceivably be construed to constitute part performance of any agreement for the purchase of the south 80.

The judgment of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein for the following reasons: First. The land was not a homestead at the time of the sale. The evidence shows that the parties left the premises claimed as a homestead without any intention of returning to it for homestead purposes. An abandonment of the homestead right has been established. Phifer v. Miller (1951), 153 Neb. 748, 45 N. W. 2d 907.

Second. The deed took the contract out of the statute of frauds. Even if the property were a homestead, an unacknowledged contract for its sale would be valid where it is made simultaneously with a deed which is acknowledged. Farmers Investment Co. v. O'Brien (1922), 109 Neb. 19, 189 N. W. 291.

Third. Specific performance is not barred by the statute of frauds where there has been part performance. Section 36-106, R. R. S. 1943, provides: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

Fourth. The land involved herein increased in value after the option was given, but that is no reason to

deny specific performance. Musser v. Zurcher (1966), 180 Neb. 882, 146 N. W. 2d 559.

McCOWN, J., joins in this dissent.

THOMAS H. TINSLEY ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.
208 N. W. 2d 693

Filed June 22, 1973. No. 38810.

Administrative Law: Appeal and Error: Evidence. Where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

Herbert M. Fitle and James E. Fellows, for appellants.

Arthur D. O'Leary of McGrath, North, Nelson, Dwyer & O'Leary, for appellees.

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

SMITH, J.

The public safety director of Omaha suspended two officers from the police force 30 days for improper handling of a prisoner. On appeal and after an evidentiary hearing, decisions of the personnel board affirmed the suspension orders as modified by decreases of the duration to 15 days. On error proceedings brought by the officers, the District Court reversed the decisions of the personnel board and ordered reimbursement of the officers for pay and allowances. The city and the personnel board appeal.

During the afternoon of February 6, 1971, the officers, E. Paul Stone and Thomas H. Tinsley, received a call

that a man was threatening violence in order to see his children at 4003 Cuming Street. Arriving at that address, they saw a man sitting in the driver's seat of a Pontiac automobile parked in front of the address. After having parked and left their police cruiser, however, the officers discovered that the man was no longer visible to them. The man, Allen Harris, was found lying intoxicated on the front seat. The Pontiac was locked, and the officers were ignored by Harris. The officers eventually removed Harris, who in their opinion continued mostly to ignore them. According to D. B. Chase, an off-duty officer watching the arrest, Harris appeared belligerent and refused to leave the Pontiac. After his removal from the automobile, Harris appeared to struggle momentarily with both Stone and Tinsley, who began to handcuff him. He twice pulled his hand away from Tinsley, but the officers finally handcuffed his hands behind his back. The argument, according to Chase, continued.

A report dated February 7, 1971, and signed by Stone and Tinsley reads: "Re: Reporting officers knowledge of HARRIS' involvement in the threat call at 4003 Cuming St. On 6 SAT. 71, after receiving the threat call . . ., Officer TINSLEY advised officer STONE that he had received a phone call approximately one week prior to 6 FEB. 71 concerning some difficulty at 4003 Cuming St. The call came from a Dr. Ellerbrock, Nebr. Psych. Inst. and the information was that a man, possibly drunk and in a poor mental condition was enroute to 4003 Cuming St. and had threatened to kill his family.

"Due to the close proximate of HARRIS' position in relation to the call plus the fact that he made an attempt to hide from the arresting officers by laying down in his seat, STONE & TINSLEY decided to check HARRIS before going into the house. HARRIS' name was first determined from a Nebr. In-Transit tag found in the rear window of his 65 Pont. The name on the tag was Allen HARRIS . . .. This tag was checked before any conversation was had with HARRIS."

During transportation of Harris in the police cruiser to central police station, he calumniated the officers in obscene language. Inside the police garage, the cruiser was parked 50 feet from a doorway through which Harris was to be taken. Stone placed his briefcase, which contained his nightstick and other paraphernalia, on the trunk of the cruiser. Harris was removed from the cruiser without incident and escorted by Stone to the door. Since it was time for a shift of personnel, Tinsley followed, 6 steps behind, carrying the officers' briefcases and his nightstick under his arm.

When Stone and Harris arrived at a heavy-gauge steel door that led to a 6 by 10 feet alcove next to the elevator, Stone began to open the door. Harris, age 27, height 69 inches, and weight 160 pounds, then pulled away from Stone and fell, his face striking a wall. Tinsley caught up with them. Harris kicked both officers, tripped Stone, and proceeded to kick Stone numerous times on the legs. With his fist, Stone struck Harris twice near the left ear. The blows caused shallow tears of the skin 10 millimeters long on the mastoid process behind the ear. In the scuffle Tinsley only struck one blow with his nightstick and that on Harris' leg below the knee. Harris lost consciousness. His blood alcohol test was .25 percent.

The Omaha chief of police, Richard Andersen, in his testimony before the board, read his report, which states in part as follows: "Instead of both officers maintaining the custody and balance of a handcuffed prisoner from the car to the booking area . . . Stone went on ahead with the prisoner while . . . Tinsley stayed with the car . . . to get the equipment out of it so they could, apparently, check out of their tour of duty. . . . (I)f both officers had stayed with . . . Harris, on into the elevator and into the booking area, the incident very probably would not have occurred. The fact that a person is handcuffed means that he has no balancing capacities or they are very limited; and, if he does go off bal-

ance, he has no way of catching himself to prevent injury so, therefore, the custodial responsibility of officers is extremely high with a handcuffed person, particularly one in an intoxicated condition . . ..

"(T)he striking with a fist would not defend an officer from a handcuffed person lying on the floor kicking. It would certainly not be done to defend the person of another as there were no other parties present."

The departmental rules that the officers allegedly violated read in part as follows: "No officer . . . shall abuse . . . any person in his custody . . . during the performance of his duty. He shall use only such force as may be reasonably necessary to effect an arrest, to defend his person, or to defend the person of another. Any arresting officer assumes full responsibility for an arrested person . . . upon taking him in custody."

Where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed. Hartnett v. City of Omaha, 188 Neb. 449, 197 N. W. 2d 375 (1972); Lynch v. City of Omaha, 153 Neb. 147, 43 N. W. 2d 589 (1950); Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17 (1908).

The judgment of the District Court in the error proceeding was prejudicially erroneous. It is reversed and the cause remanded with directions to affirm both decisions of the personnel board.

REVERSED AND REMANDED WITH DIRECTIONS.

RUTH M. CORN, APPELLANT, V. ROBERT K. CORN, APPELLEE.
208 N. W. 2d 678

Filed June 22, 1973. No. 38840.

1. **Evidence: Records: Statutes: Trial.** Under section 25-12,112, R. S. Supp., 1972, a copy or reproduction of any memorandum kept or recorded in the regular course of business or activity

of any department or agency of government, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding.

2. **Divorce: Alimony.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.
3. ———: ———. The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable.

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

Collins & Collins, for appellant.

Harold W. Kauffman and William J. Dunn of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

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

McCOWN, J.

This is a divorce proceeding. The trial court entered its decree declaring the marriage irretrievably broken and dissolved the marriage. The plaintiff, Ruth M. Corn, has appealed. The only issues involve the property division and the alimony provisions of the decree.

The parties were married on August 18, 1945. The two children born to the marriage are now married adults, neither of whom is dependent upon the parties. The wife was 47 years of age at the time of the hearing. Prior to the marriage she had been employed as a telephone operator and in a bomber plant. During the course of the marriage she had been predominantly a housewife. She has only a high school education and has received no specialized training. Commencing in

1961-62, she was employed as a nurse's aid in a hospital at various times. Her annual earnings from 1965 to 1970 ranged from $628.59 to $3,146.26, and in 1970, her earnings were $1,835.59. She had to quit her employment because of a broken leg and was not employed in 1971. She testified that she has not been able to work since that time. She again sustained a compound fracture of the leg in February 1972, and in August the treating physician reported her unemployable for the remainder of that year. She suffered from obesity and was also a diabetic under a doctor's care.

The husband was also 47 years old and had been the postmaster in Papillion, Nebraska, for the preceding 24 years. His salary for 1971 was slightly over $14,000. He also bought and sold real estate. He testified that he was contemplating voluntary retirement from the postal service on December 31, 1972, in which event he would be eligible to receive retirement compensation of $590 per month. At the time of argument in this court he had retired. There is no evidence of any health problems nor of any disability which would affect his earning ability.

At the time of dissolution of the marriage, the parties owned their home valued at between $30,000 and $35,000 on which there was a mortgage indebtedness of approximately $16,000. The monthly payments on the mortgage indebtedness are $177. The home contained two furnished apartments presently rented. The monthly rental income from the apartments is $170 and the expense with respect to each unit is approximately $35 per month. The furniture in the home and in the apartments was apparently of nominal value and not shown. There was also a 1970 Chevrolet automobile, one share of stock of nominal value, and two life insurance policies on the husband's life, one of which had no cash value and the cash value of the other was unknown. At the time of the marriage, the wife owned real estate valued at $10,000. Proceeds from the sale of those properties

was traced into the home of the parties.

The decree of the District Court awarded the wife the home of the parties, including the furnishings and personal property, subject to the $16,000 mortgage indebtedness; required her to make all payments for principal, interest, taxes, insurance, and other expenses in connection with the property; and authorized her to retain all rents from the apartments in the home. The decree also made the property subject to a second mortgage to be given by the wife to the husband for the sum of $4,000, representing the equity awarded by the court to the husband. The $4,000 was to be due and payable on the 1st day of October 1982, together with interest at the rate of 5 percent per annum.

The husband received the $4,000 mortgage lien on the home, and a one-sixth interest in two lots presently the home of his mother. He also was awarded the automobile and the share of corporate stock. The decree also required the husband to pay alimony in the sum of $200 per month until either 150 payments or $30,000 has been paid, or until the death or remarriage of the wife or the death of the husband, whichever occurs first. The husband was also required to maintain in force a $10,000 life insurance policy and a group health and accident policy currently in effect with the wife as beneficiary.

The appellant first asserts that a memorandum dated June 5, 1972, from the Postmaster General to all postal employees dealing with early retirement opportunities for postal employees in 1972 and incorporating a schedule of retirement annuities was hearsay and improperly admitted. The Uniform Photographic Copies of Business and Public Records as Evidence Act specifically extends to any department or agency of government. A copy or reproduction of any memorandum kept or recorded in the regular course of business or activity, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or admin-

istrative proceeding. See § 25-12,112, R. S. Supp., 1972. The testimony of the husband who was himself a postmaster was more than sufficient to satisfactorily identify the memorandum here.

The appellant's principal contention is that the division of property and the alimony award are insufficient under the circumstances. In making the property division the District Court assumed a $16,000 equity in the home. He first credited the wife with the $10,000 of property brought by her to the marriage. At the same time, he reduced that allowance by one-half of a $4,000 loss on the sale of an intervening residence. The remaining equity he divided between the parties and required the wife to execute a $4,000 mortgage to the husband with interest at 5 percent payable approximately 10 years in the future. At the same time he required the husband to pay alimony to the wife which, if both parties lived, might extend beyond the due date of the mortgage. It should be noted also that the property division becomes a judgment not subject to modification, while the alimony payments are modifiable under changed circumstances as well as terminable in any event upon the death or remarriage of the wife as well as upon the death of the husband.

The wife was improperly charged with any portion of the loss which occurred in connection with the sale of one in a series of residences. The only critical issues here were the amount of the wife's original contribution and the current value of the property accumulated. There is no iron-clad requirement that property must be divided equally after allowances for the separate contributions of the parties. Particularly is that true where alimony provisions are also included in the decree and the combined provisions require payments from each party to the other. While a property division is technically separate and distinct from alimony, the circumstances may well require that they be considered together. A solution which involves secondary liens

and deferred payments by each party to the other is generally impracticable. It adds unnecessary complications to real estate titles and the use or sale of a residence, particularly where it extends over a period of years and the secured lien represents only a small percentage of the overall value of the property. Under the circumstances here, the provisions for the second mortgage from the wife to the husband should be eliminated.

The appellant also asserts that the alimony award was insufficient. Section 42-365, R. S. Supp., 1972, a part of the so-called No-Fault Divorce Act of 1972, provides in part: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." It should be noted that this section also provides that orders for alimony may be modified or revoked for good cause shown.

The rules for determining alimony or the division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. Sees v. Sees, 188 Neb. 769, 199 N. W. 2d 496.

The evidence here establishes without contradiction that the wife was infirm, in poor health, and currently unemployable. It establishes also that she had no special training or skills and that for the great majority of the 27 years duration of the marriage, she had not been employed outside the home. The husband voluntarily retired from the postal service at age 47. There is no evidence that he was disabled or in poor health. Under the circumstances here, the alimony award was reason-

able. The fixing of the amount of alimony rests in the sound discretion of the court. Hoffmann v. Hoffmann, 188 Neb. 408, 197 N. W. 2d 373. That discretion was not abused here.

The decree of the District Court is modified by assigning all right, title, and interest in and to the home of the parties to Ruth M. Corn, subject to the existing first mortgage indebtedness, and eliminating all provisions requiring her to give a $4,000 second mortgage to Robert K. Corn. As so modified, the decree is affirmed.

The appellant is allowed $500 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

LAWRENCE F. WEBER, ADMINISTRATOR OF THE ESTATE OF MARIE E. HICKMAN, DECEASED, APPELLANT, V. SOUTHWEST NEBRASKA DAIRY SUPPLIERS, INC., A CORPORATION, ET AL., APPELLEES.

208 N. W. 2d 667

Filed June 22, 1973. No. 38873.

1. **Appeal and Error: New Trial.** A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different.
2. **Evidence: New Trial.** Under the principle of the law of the case the burden of showing a material and substantial difference in the facts on retrial is upon the party who asserts the difference.
3. **Appeal and Error: Trial.** Alleged improper conduct of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.

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

Mitchell & Beatty and Larry R. Demerath, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr and Kenneth C. Fritzler, for appellees.

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

SMITH, J.

In a wrongful death action a jury returned a verdict for defendants. Plaintiff appeals. He contends that (1) the court gave erroneous instructions to the jury and failed to give them certain peremptory instructions, and (2) conduct of the trial judge in the presence of the jury constituted reversible error.

The deceased, Marie Hickman, and her husband, Robert Hickman, were passengers in a pickup owned by them, but operated by a friend, Audrey Grassmeyer. Their truck collided at a county intersection with a vehicle owned by the defendant Southwest Nebraska Dairy Suppliers Inc., and operated by its employee, defendant Johnson. This action was tried twice. In the first trial, at the conclusion of plaintiff's case-in-chief, the District Court dismissed the action. On appeal we reversed the judgment and remanded the cause for a new trial. Our decision on that first appeal was as follows. The exclusive beneficiary of any recovery by plaintiff would be Robert N. Hickman. The operator of the motor vehicle, Audrey, was as a matter of law guilty of causal negligence more than slight. Her negligence was present without consideration of defendants' possible negligence. Should the trier of fact find that the negligence of Audrey was imputable to Robert, plaintiff would possess no right of recovery. Weber v. Southwest Nebraska Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274 (1971).

Plaintiff's contentions respecting the giving and refusal of jury instructions are that the court erroneously (1) instructed that Audrey in the operation of the Hickman truck had been negligent as a matter of law; (2) failed to give a peremptory instruction for plaintiff

on liability; (3) instructed that the negligence of a motor vehicle operator may be imputed to the owner of the vehicle; and (4) instructed that because of imputation of negligence Robert as sole heir could not recover if there was a finding of negligence on the part of Audrey.

The foregoing contentions are governed by rules pertaining to law of the case. A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different. Landmesser v. Ahlberg, 184 Neb. 182, 166 N. W. 2d 124 (1969). The burden of showing the material and substantial difference in the facts is upon the party who asserts the difference. Gable v. Pathfinder Irr. Dist., 163 Neb. 349, 79 N. W. 2d 708 (1956). Plaintiff has failed to carry his burden of showing a material and substantial difference of facts to substantiate the above contentions.

The plaintiff has also requested us to reexamine the law issues respecting imputation of negligence and to depart from our first opinion. We decline. See Berg v. Midwest Laundry Equipment Corp., 178 Neb. 770, 135 N. W. 2d 457 (1965).

The first assertion of improper conduct by the trial judge in the presence of the jury was made by plaintiff in his motion for a new trial. It was not well taken. Alleged improper conduct of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection. Drahota v. Wieser, 183 Neb. 66, 157 N. W. 2d 857 (1968); Chicago Lumber Co. v. Gibson, 179 Neb. 461, 138 N. W. 2d 832 (1965).

Other contentions are determined against plaintiff. The judgment is affirmed.

AFFIRMED.

McCOWN, J., concurring.

I concur in the affirmance here in view of our former opinion in Weber v. Southwest Nebraska Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274, which is

controlling. I emphatically reaffirm the position set forth in my separate opinion in that case.

EDWARD ALBRECHT, APPELLANT, V. PEARL ALBRECHT, APPELLEE.
208 N. W. 2d 669

Filed June 22, 1973. No. 38876.

1. **Divorce: Alimony.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.
2. ———: ———. The fixing of alimony rests in the sound discretion of the court and in the absence of an abuse of discretion will not be disturbed on appeal.

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

William L. Walker and Earl Ludlam, for appellant.

Fred J. Swihart, for appellee.

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

SPENCER, J.

This is a divorce action. Appellant appeals the allowance of alimony in the amount of $300 per month for a period of 120 months, with the proviso that it cease and terminate on the death or remarriage of the appellee. We affirm.

The parties concede that the marriage relation is irretrievably broken. The trial court divided the property of the parties on an approximately equal basis. Appellant makes no complaint as to the division of the property.

At the time plaintiff-appellant filed this action, December 14, 1971, he was a postal clerk earning approxi-

mately $11,000 annually. Appellant left the home of the parties December 24, 1970. The parties have not lived together since that time. In June of 1972, while this action was pending, appellant, who was 53 years of age and had 31 years of service with the Post Office Department, elected to take an optional retirement then being offered by the department. His retirement income is $494 per month. After the deduction of an annuity payment and insurance, he has a net income of $453 from this source. Since his retirement, appellant, who is able-bodied and in good health, has taken a part-time janitorial job which pays him about $60 per month. He also has income from his 80-acre farm on which he works from 4 to 10 hours a day.

Appellee-defendant is 51 years of age. She suffers with a spastic colon which has prevented her from holding employment outside the home for the last 4 years. She had been steadily employed previously from the time of the marriage except for two short periods for the birth of the two children of the parties. These children are now of age.

Section 42-365, R. S. Supp., 1972, provides in part: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment * * *."

The fixing of alimony rests in the sound discretion of the court and in the absence of an abuse of discretion will not be disturbed on appeal. Person v. Person (1972), 189 Neb. 329, 202 N. W. 2d 629. On a review of the record herein, we cannot say that the trial court abused its discretion.

The judgment of the District Court is affirmed. Appellee is allowed $250 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN HENRY CAMPBELL, APPELLANT.
208 N. W. 2d 670

Filed June 22, 1973. No. 38897.

1. **Burglary: Criminal Law.** A breaking necessary to constitute the offense of burglary may be by an act of physical force, however slight, by which the obstruction to the entering is removed. The lifting of a hook with which a door is fastened or the opening of a closed door in order to enter a building is a breaking, although entry might have been effected through a door already open.
2. **Juries: Constitutional Law.** Although a defendant is not entitled under all circumstances to a jury containing members of his race, a state's purposeful racial denial of their participation as jurors in the administration of justice violates the Equal Protection Clause. Such discrimination, however, may not be assumed but must be proved. It is not proved by establishing that an identifiable group in a community is underrepresented by as much as ten percent.

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

Casey & Elworth, 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.

SMITH, J.

In a criminal prosecution a jury returned a verdict of guilty against defendant on counts of robbery and burglary of a dwelling. Defendant appeals. He contends (1) evidence of a breaking was insufficient in that he entered through an open window and (2) the court erroneously overruled his objection to the array which included no Negros, although defendant is himself a Negro.

The dwelling in question was a recreational cabin, the south side of which consisted of a screened porch.

Entrance by defendant to the porch was gained by the opening of a door that had been closed but not fastened. Indeed some time earlier the victims of the robbery without consent of the lessee or the owner had entered the porch. No door or way connected the porch with any other room of the cabin. Several windows, however, were located on the north side of the porch. One, which was broken and open, led to a bedroom from which access to other rooms was provided by doors and ways. Defendant gained entry from the porch to the bedroom by climbing through the open window, and he took property from rooms other than the screened porch.

A breaking necessary to constitute the offense of burglary may be by any act of physical force, however slight, by which the obstruction to the entering is removed. The lifting of a hook with which a door is fastened or the opening of a closed door in order to enter a building is a breaking, although the entry might have been effected through a door already open. State v. Sedlacek, 178 Neb. 322, 133 N. W. 2d 380 (1965); Hayward v. State, 97 Neb. 9, 149 N. W. 105 (1914); Ferguson v. State, 52 Neb. 432, 72 N. W. 590 (1897); McGrath v. State, 25 Neb. 780, 41 N. W. 780 (1889). In the present case the evidence was sufficient to sustain findings that the porch door had been closed and that the opening of the door was a breaking.

Defendant objected to the array without offering to show any facts to support his objection. The county attorney estimated that not more than 10 Negro families resided in Cass County.

Although a defendant is not entitled under all circumstances to a jury containing members of his race, a state's purposeful racial denial of their participation as jurors in the administration of justice violates the Equal Protection Clause. Such discrimination, however, may not be assumed, but must be proved. It is not proved by establishing that an identifiable group in a

community is underrepresented by as much as 10 percent. Swain v. Alabama, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965). There is no proof of such discrimination in the present case.

The judgment is affirmed.

AFFIRMED.

RONALD ABBOUD, DOING BUSINESS AS COMMERCIAL REALTY, APPELLANT, V. CIR CAL STABLES, A PARTNERSHIP, ET AL., APPELLEES.

208 N. W. 2d 682

Filed June 22, 1973. No. 38906.

1. **Contracts.** Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it.
2. **Contracts: Brokers.** Where plaintiff's contract is that he should sell or furnish the defendant a purchaser for the land, in order to entitle him to the compensation provided in the contract, he must show performance on his part; in other words, that he was the efficient, procuring cause of the sale.
3. **Brokers: Pleadings.** A broker's petition for recovery of a brokerage commission which fails to allege that he was the efficient, procuring cause of the sale of the land fails to state a cause of action.
4. **Contracts: Frauds, Statute of: Evidence.** While writing consisting of several separate documents may satisfy the statute of frauds, the fact that each is a part of a total writing relied upon must be shown either by express references in documents or from contents of documents, but, in attempting to satisfy the statute of frauds, the fact that two or more writings constitute part of an entire written agreement may not be shown by parol.

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

Richard D. Myers of Matthews, Kelley, Cannon & Carpenter, for appellant.

John E. North and Dennis E. Martin of McGrath,

North, Nelson, Dwyer & O'Leary, for appellees.

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

NEWTON, J.

This is an action to recover a real estate broker's commission. On demurrers judgment was entered for defendants. We affirm.

The petition alleges that on December 18, 1970, defendants listed a 29-acre tract of real estate with plaintiff. The agreement provided that: "In consideration of your *showing* * * * to Girls Town and Church, * * *," a 6 percent commission would be paid if sale to them were consummated within 1 year. (Emphasis supplied.) "Price: $12,000.00 per acre." Apparently a sale was not effected to the parties mentioned and the petition further alleges a modification of the agreement as follows: "Listing on 30 acres on 132nd St. Approx 30 acres S 668' W ¾ NW ¼ except cemetery to Agent Charles O. Neese for only Omaha Jewish Community Center, at $13,000 per acre. By Agent Charles O. Neese

4-13-71

/s/ S. A. CIRCO."

It was also alleged that plaintiff showed the property to the Omaha Jewish Community Center, that defendants sold the property to the Center for $317,500, that Charles O. Neese was an agent of plaintiff, that S. A. Circo and Paul J. Circo were partners in Cir Cal Stables, a partnership, and that S. A. Circo was acting as their agent.

Did the two listings constitute one contract or two separate contracts? Assuming that the first lising perhaps satisfied the requirements of section 36-107, R. R. S. 1943, a sale thereunder was not effected. The second listing, standing alone, is void for failure to set forth the compensation to be allowed the broker.

Ordinarily a modification or amendment of a contract incorporates only minor changes. Here the changes

relate to major items of substance. It is conceded that both listings refer to the same property but there is no reference in the second listing to the first one. Charles O. Neese is referred to as "Agent." The contract does not make it clear whether this means he was an agent of plaintiff or simply a real estate agent. The price per acre was $1,000 higher in the second listing. The first listing required only a "showing" to entitle plaintiff to a commission in the event of a sale of the property. Strictly according to its terms, plaintiff could have collected even though a sale was effected by some other broker. This was not an exclusive listing. The second contract is apparently in line with the ordinary requirement that an actual sale be effected by plaintiff himself. If plaintiff's theory that the second listing is simply a modification or amendment of the first is adopted, then it also amended the contract in this respect and plaintiff has failed to allege that the subsequent sale was effected through his efforts. Obviously, this is not an instance wherein plaintiff broker produced a purchaser. Defendants were aware at the time of the listing that the Center was a possible purchaser and the contract does not bar a sale by defendants themselves or by other real estate brokers. The sale was for a less sum than that specified in either listing but there is no allegation of a further modification in this respect.

The second listing is in long hand. Plaintiff alleges that it is signed by Charles O. Neese. If so, he must have drafted the instrument since his name appears only in the body of the instrument. If, as alleged, Neese was plaintiff's agent, then the instrument must be deemed to have been drafted by plaintiff. Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. See Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497.

In a situation such as is here presented the parties may have effectuated the new understanding either by amendment of the former contract or by a new and

separate listing. The second listing has all the essentials of a new independent contract except for the failure to mention the amount of the commission to be paid. As mentioned, it fails to refer to the original contract or in any way indicate it is a modification and not a separate contract. In a sense this is a patent ambiguity and must be resolved against the plaintiff who drew the contract.

It is held in Schmelzel v. Leecy, 104 Neb. 672, 178 N. W. 267, that: "The plaintiff's contract was that he should sell or furnish the defendant a purchaser for the land. In order to entitle him to the compensation provided in the contract, he must show performance on his part; in other words, that he was the efficient, procuring cause of the sale." See, also, Starbird v. McShane Timber Co., 94 Neb. 79, 142 N. W. 683. The petition is lacking any such allegation. A broker's petition for recovery of a brokerage commission which fails to allege that he was the efficient, procuring cause of the sale of the land fails to state a cause of action. See, Myres v. Seward, 238 Miss. 520, 118 So. 2nd 864; Spilky v. McDonald, 94 Ill. App. 2d 411, 236 N. E. 2d 907; Dowling v. Wheeler-Kelly-Hagny Trust Co., 152 Kan. 322, 103 P. 2d 866.

"While writing consisting of several separate documents may satisfy statute of frauds, fact that each is a part of total writing relied upon must be shown either by express references in documents or from contents of documents, but, in attempting to satisfy statute of frauds, fact that two or more writings constitute part of an entire written agreement may not be shown by parol." Frostwood Drugs, Inc. v. Fischer & Frichtel Constr. Co. (Mo.), 352 S. W. 2d 694. See, also, Herman Brothers Co. v. Wacker, 96 Neb. 102, 147 N. W. 127; Gruss v. Cummins (Tex. Civ. App.), 329 S. W. 2d 496.

We conclude that the demurrers to plaintiff's petition were properly sustained.

AFFIRMED.

THEODORE SCHWEITZ, DOING BUSINESS AS SCHWEITZ EQUIPMENT COMPANY, FULLERTON, NEBRASKA, APPELLANT, V. STATE FARM FIRE AND CASUALTY COMPANY, APPELLEE.
208 N. W. 2d 664

Filed June 22, 1973. No. 38923.

1. **Contracts: Reformation of Instruments.** An action for the relief of reformation of a contract rests on the theory that the parties came to an understanding, but in reducing it to writing, through mutual mistake or mistake and fraud, some provision of language was omitted, inserted, or incorrectly worded, and the action is to change the instrument so as to conform it to the contract agreed upon.
2. **Contracts: Reformation of Instruments: Trial.** In a proceeding to reform a contract on the ground of mutual mistake, the burden of proof is on the party interposing that plea.
3. **Contracts: Reformation of Instruments: Equity.** In order to obtain reformation of a written instrument on the ground of mistake, the mistake must be mutual. To grant such relief, equity insists that the reformation must be consistent with a complete mutual understanding of the essential terms of their bargain.
4. **Contracts: Reformation of Instruments: Trial: Evidence.** In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.

Appeal from the District Court for Nance County: C. THOMAS WHITE, Judge. Affirmed.

Philip T. Morgan, for appellant.

Luebs, Tracy, Huebner, Dowding & Beltzer and D. Steven Leininger, for appellee.

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

CLINTON, J.

This is an action to reform a contract of liability insurance. The District Court denied reformation. We affirm.

On June 11, 1968, the defendant issued to the plaintiff a policy of insurance which included a form providing liability coverage. The insuring clause thereof was as follows: "The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements." The policy contained the following exclusions: "(1) to property damage to the named insured's products arising out of such products or any part of such products; (m) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith."

The plaintiff was engaged in the business of selling and installing dairy equipment including constructing dairy barns. This latter work he performed by subcontracting the work to others.

The plaintiff, after issuance of the policy, caused to be constructed for one of his customers a dairy barn of concrete block walls and a wooden roof. Following completion of the building and delivery of possession to the customer, but before the customer had fully paid the contract price, a storm occurred and in the plain-

tiff's language the "roof blew away. It took off like a kite off of the block building."

The plaintiff brought an action against his customer to recover the balance of the contract price. The customer cross-claimed for the cost of repairing and replacing the roof. The cross-petition alleged in what purport to be three separate causes of action alternate grounds of recovery including construction in an "unskilled manner," "implied warranty," and "negligent and improper construction."

After the cross-petition was filed the plaintiff requested the defendant to defend the cross-petition and to pay the judgment against him if one was obtained. It refused. He brought this action. It is clear the policy as written afforded no coverage to the plaintiff under these circumstances. See Hartford Acc. & Ind. Co. v. Olson Bros., Inc., 187 Neb. 179, 188 N. W. 2d 699.

The evidence discloses that previous to the issuance of the policy the plaintiff, because his business was expanding, became concerned about his insurance coverage. He conferred with an agent and other representatives of the defendant with whom he was already insured. In this conference there was fully discussed the nature of the plaintiff's business and its operations. The plaintiff's testimony on direct examination was as follows: "Q. What was said to you about the type of coverage you would have? A. It's been so long ago, but I think that I was assured that I would have complete coverage for the work that I was doing. I can't recall what exact words were said and what each individual said anymore." On cross-examination his testimony included the following: "Q. Your statement is that you wanted general coverage for your business operations, is that right? A. Yes, I wanted complete coverage for my business operations. Q. Did you ever cover any specific situations that you wanted covered with Mr. Rumsey or the people that were with him? A. I can't recall anything, but I do know that during

this conversation that we did discuss all things that we done in regards to our work. Q. Did anyone ever say to you that you would have coverage for defective workmanship claims? A. To my knowledge, no. Q. Did anyone ever say that there would be coverage if wind blew a roof off of an installed building after you installed it? A. No. Q. Now, this particular claim by Mr. Robatham covered a damage claim to one of your products, did it not? A. Yes. Q. And this wind damage was to work that was performed by you or on your behalf, was it not? A. Yes. Q. Did you have any builders risk coverage on this Robatham job? A. No, sir."

The agent testified: "Q. Can you tell the Court what was discussed at this particular meeting? A. Mr. Schweitz came over to my office and met with us. We sat there and visited about his particular operation and he told us what he was concerned about. He wanted his operations covered to protect him for any and all things that he might be liable for. Q. Was there ever any discussion about coverage after Mr. Schweitz's operations or specific jobs were completed? A. No, not after they were completed. The discussion was that we would protect him from the time he started until they were completed, and it was, I am sure all of our thinking, that this was naturally the end of our protection, I guess you would say. Q. Was there ever any discussion about protection for claims which arose to buildings, or damage to buildings, after Mr. Schweitz completed the construction? A. Only up until completion date as far as I recall. This discussion has been several years ago and it is kind of hard to remember all those things, but this is the way I remember it."

Although neither in the pleadings nor in the evidence does the plaintiff set forth the language which he claims should be added to or deleted from the policy to conform to his claim to reformation, it appears that his position is that he wants coverage to protect him from

liability under the usual express or implied provisions in a construction contract as to the quality of work. The plaintiff's difficulty is that the evidence does not support the claim that there was any agreement for such insurance. There is no proof that such coverage is even available, much less that the defendant agreed to furnish it.

The applicable rules are: An action for the relief of reformation of a contract rests on the theory that the parties came to an understanding, but in reducing it to writing, through mutual mistake or mistake and fraud, some provision or language was omitted, inserted, or incorrectly worded, and the action is to change the instrument so as to conform it to the contract agreed upon. 66 Am. Jur. 2d, Reformation of Instruments, § 1, p. 526; Heikes v. Farm Bureau Ins. Co., 181 Neb. 827, 151 N. W. 2d 336. In a proceeding to reform a contract on the ground of mutual mistake, the burden of proof is on the party interposing that plea. Paine-Fishburn Granite Co. v. Reynoldson, 115 Neb. 520, 213 N. W. 750. In order to obtain reformation of a written instrument on the ground of mistake, the mistake must be mutual. To grant such relief, equity insists that the reformation must be consistent with a complete mutual understanding of the essential terms of their bargain. Ready Sand & Gravel Co. v. Cornett, 184 Neb. 726, 171 N. W. 2d 775; Beideck v. National Fire Ins. Co., 139 Neb. 171, 296 N. W. 873; Corrigan v. Fireman's Fund Ins. Co., 180 Neb. 13, 141 N. W. 2d 170. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties. Ready Sand & Gravel Co. v. Cornett, *supra;* Beideck v. National Fire Ins. Co., *supra.*

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY LYNN GRIGER, APPELLANT.

208 N. W. 2d 672

Filed June 22, 1973. No. 38976.

1. **Appeal and Error: New Trial: Waiver.** A failure to assert an alleged error in the motion for new trial will be deemed a waiver of the claimed error and it will not be considered on appeal.
2. **Criminal Law: Guilty Plea: Waiver.** When a defendant voluntarily and understandingly enters a plea of guilty with full knowledge and understanding of a prior violation of his rights, the plea of guilty waives such rights.
3. **Appeal and Error: Evidence: Records.** Purported evidence which is not included in the record before the Supreme Court on appeal cannot be considered.

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

Lee A. Larsen, for appellant.

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

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

CLINTON, J.

The defendant entered a plea of guilty to a charge of robbery and was sentenced to a term of 5 to 15 years. He appeals. We affirm.

The error assigned in the brief on this appeal is that there was a privately made plea bargain between the prosecutor and the defendant at a time when the defendant was represented by counsel and without consultation or knowledge of the defendant's counsel. It is claimed that the prosecutor promised the defendant would receive a flat 5-year term. The defendant contends that any plea bargain made by the prosecutor with the defendant binds the trial judge who accepts the plea.

Two obstacles stand in the way of the defendant's

success on this appeal. The record before us does not support the assignment of error. Secondly, no such error was assigned in the motion for new trial. A failure to assert an alleged error on motion for new trial will be deemed a waiver of the claimed error and need not be considered on appeal. State v. Stanosheck, 186 Neb. 17, 180 N. W. 2d 226; State v. Haile, 185 Neb. 421, 176 N. W. 2d 232.

The record shows that the defendant on October 20, 1972, appeared with counsel, was arraigned, and entered a plea of not guilty. On November 16, 1972, he again appeared with his attorney and asked leave to change his plea. On both occasions his various constitutional and statutory rights were explained to him in detail. On the second occasion before the court accepted the plea of guilty, proceedings occurred in open court which clearly contradict the defendant's claim of error and also show a clear waiver of error if it had occurred. We set forth verbatim portions of the record as follows:

"BY THE COURT: Mr. Griger, before I accept that, is this plea a result of plea bargaining between your court-appointed counsel and the county attorney's office with respect to any possible sentence? MR. GRIGER: I don't understand. MR. ARPS: I would like to say one thing, Your Honor. A couple of these boys, these four young men involved here, I have offered them a flat five years for this charge. I don't— It isn't really in the nature of plea bargaining, but it will be at least the recommendation from our office. But we recommend the Court give no more than five years on this man. BY THE COURT: Mr. Griger, do you understand that that's not binding on me? MR. GRIGER: Yes, sir. BY THE COURT: Even if the county attorney's office recommends five, if I determine that a longer sentence would be justified, I could impose it or likewise, if a shorter sentence should be justified, I could impose it. MR. GRIGER: Yes, sir. BY THE COURT: You clearly understand that, it's not binding on this

Court? MR. GRIGER: Right. BY THE COURT: Mr. Atkinson? MR. ATKINSON: Your Honor, one other thing that I promised Mr. Griger, that I would request of the Court that he be given the benefit of a pre-sentence investigation, which I'm sure— BY THE COURT: Well, I would indicate to you now that I would have a pre-sentence investigation before I sentenced you, but I want to— I want you to clearly understand that whatever your counsel and the county attorney's office have reached in the way of an agreement with respect to sentence isn't binding on me. MR. GRIGER: Yes, sir. BY THE COURT: You understand that? MR. GRIGER: Yes, sir. BY THE COURT: Mr. Griger, do you think that if you were to stand on your original plea and we went to trial, do you believe the State could prove the charge of robbery? MR. GRIGER: Yes, sir. BY THE COURT: They could prove the facts constituting the robbery charge? MR. GRIGER: Yes, sir. BY THE COURT: You're sure of that? MR. GRIGER: Positive. BY THE COURT: You're shaking your head? MR. GRIGER: Yes, sir. BY THE COURT: You're positive that they could. What's your education? MR. GRIGER: I graduated. BY THE COURT: From high school? MR. GRIGER: Yes, sir. BY THE COURT: Have you been confined in a mental institution in the last year? MR. GRIGER: No, sir. BY THE COURT: Have any mental problems that you know of? MR. GRIGER: No. BY THE COURT: Do you understand that by the plea of guilty, if it's accepted, that it would waive any defects that there might have been in the record up to now? MR. GRIGER: I don't know what you mean by that. BY THE COURT: Well, do you understand that if the Court accepts the plea of guilty, that after today you can't go back and say, 'Well, I didn't understand, you didn't advise me of this,' or 'I was told this.' You waive any defects that there may have been in the proceedings up to this point in time. MR. GRIGER: Yes, sir. BY THE COURT: Do you

understand that? MR. GRIGER: Yes, sir. . . . BY THE COURT: I take it you've discussed this at some length with Mr. Atkinson? MR. GRIGER: Yes, sir."

Following presentence investigation the defendant appeared with counsel on December 15, 1972, for sentencing. At that time under questioning of the court he acknowledged his prior plea of guilty, he was reinformed of the possible sentence, and he stated he had no reason to give why sentence should not be pronounced. The defendant's counsel then made a statement on the defendant's behalf and referred to conversations between himself, the county attorney, and the defendant as to the inducement to the plea.

The prosecutor then recommended to the court a flat 5-year sentence, stating that the recommendation was the bargain which had been given for the plea of guilty. The court then imposed sentence.

The record clearly establishes that the plea of the defendant was knowing and voluntary. Such a plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional. State v. Mason, 187 Neb. 675, 193 N. W. 2d 576; State v. Clifton, 187 Neb. 714, 193 N. W. 2d 558.

The contention of the defendant that the sentencing court is bound by the sentence recommendations of the prosecutor when these are part of a plea bargain is not supportable. The reason is obvious for to so hold would be to transfer the function of the court to the prosecutor.

To support his contention that there was a privately made guarantee of a flat 5-year sentence by the prosecutor, defendant relies upon a purported affidavit made by him which is printed in his brief. This purported evidence does not appear in the record and will not be considered by us on appeal. State v. Reed, 178 Neb. 370, 133 N. W. 2d 591. There is some evidence of a hearsay nature, but unobjected to, that a private conversation did at some time take place between the

prosecutor and the defendant. If it did occur there is nothing to show when it occurred, what was said, or whether it was with the knowledge or consent of defendant's counsel. If there was a communication by the prosecutor with the defendant and if it occurred while defendant was represented by counsel and without consent of defendant's counsel, it was improper and unethical and a violation of the Code of Professional Responsibility which prohibits communications with one having an adverse interest and who is represented by counsel. Such action is to be strongly condemned. In any event defendant and his counsel made no issue of it prior to sentencing.

The record does not establish grounds for withdrawal of the plea of guilty and the trial court did not abuse its discretion. The record, as we have noted, establishes a knowing and voluntary plea of guilty and this waived preexisting errors, if any. State v. Mason, *supra;* State v. Clifton, *supra.*

AFFIRMED.

MARY ANNA GILMAN, APPELLANT, V. CLINTON EMIL RIIS, APPELLEE.

209 N. W. 2d 173

Filed June 29, 1973. No. 38705.

1. **Divorce: Parent and Child: Infants.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. **Divorce: Parent and Child: Infants: Appeal and Error.** The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Van Steenberg, Brower & Chaloupka, for appellant.

Leo M. Bayer, for appellee.

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

WHITE, C. J.

This is an appeal from an order denying plaintiff-appellant's motion for a change in the custody and control of Victoria and Joyce, minor daughters of the parties, now 6 and 4 years of age, respectively. We affirm the judgment and order of the District Court.

The defendant father, Clinton Riis, was granted an absolute divorce from the plaintiff, Mary Anna Riis, on November 4, 1970, on the grounds of adultery. The District Court, in the decree granting the divorce, specifically found that Mary Anna was not a fit, suitable, or proper person to have the care and custody of Victoria and Joyce. The District Court also, in granting the custody of the daughters to Clinton, found that Clinton was a fit, suitable, and proper person to have the care, custody, and control of said children. This decree became final and no appeal was taken by Mary Anna. The basic issue presented by the record in this case is that Mary Anna has now remarried, claims that her own circumstances have changed, that she has rehabilitated herself, and is now entitled to the custody of her two daughters.

The record in this case reveals an exhaustive and able exploration by both counsel of all the minute details of the lives of the parties subsequent to the time of the decree and their interrelation with the care, condition, and welfare of the two children. We point out that this court does not retry the issue of custody as an original matter. We review only the discretion of the District Court in denying a *change* in the custody of children

based upon a change of circumstances and the paramount and overriding consideration of what is for the best interests of these two minor daughters of the parties. This case is controlled by our holdings in Bennett v. Bennett (1973), 189 Neb. 654, 204 N. W. 2d 379, and our recently released cases of Scripter v. Scripter, *ante* p. 317, 208 N. W. 2d 85, and Flesher v. Flesher, *ante* p. 359, 208 N. W. 2d 677. In these cases we have reaffirmed our recent holdings by stating: "A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. * * * The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence."

Mary Anna persuasively argues that she has rehabilitated herself, has now remarried, and will be able to give the children a stable home environment and to give them the care, devotion, and love that they are entitled to from their mother. There was conflicting evidence on this issue. It appears that Mary Anna gave birth to an illegitimate child on July 20, 1970. It appears that Mary Anna and one Gilman were married May 10, 1971, about a month after he was divorced from his second wife and about 6 days after the Riis divorce became final. Gilman was a truck driver. He has one child by his first marriage, about 11 years of age, and three children by his second marriage, whose ages are 7, 5, and 2 years of age. The evidence supports the finding that he does not support any of these children. Mary Anna herself testified that Gilman was not supporting any of these children by his prior marriages. There is much other evidence in the record to the effect that Mary Anna would not give the children proper medical care; that she did not comply with the visitation rights granted

her by the court in the original decree; and other evidence as to the interchange between Mary Anna and Lela Riis, the paternal grandmother in whose actual care and custody the children were during the period of time that Clinton was in Alaska. There is considerable favorable testimony as to a change in the attitude and character on the part of Mary Anna and to the effect that she has rehabilitated herself and is willing to accept the full mature responsibility of caring for her two daughters and devoting the care and attention to them that a mother should.

But, as we have pointed out, the issue in this case is not the determination as an original matter as to whether the children should go to the mother on the assumption that her conduct now makes her a proper custodian for the children. The only real question in this case is whether the trial court, who saw and heard the witnesses and observed the parties, abused its discretion in refusing to change the custody of the children. Under the rule of law that we have announced above, the evidence falls far short of showing that Clinton is an unfit custodian for the two minor daughters. The main thrust of the plaintiff's argument concerns Clinton's actions and departure to Alaska, his job as a pilot, and leaving the children with his father and mother, Lela and William Riis. But the evidence strongly supports that the children, while in the custody of the paternal grandparents, were given love and affection, proper medical attention, were in good health, were given religious training and all the normal childhood attention that children deserve, such as swimming lessons, going on picnics, fishing trips, to the park, and there is other evidence that these two girls were shown great affection by the Riis family. The record shows that the trial court carefully explored and considered the pertinent evidence in this case. He had before him the report of the District Court probation officer about the William Riis farm and the condition of the children. This report is very favor-

able and showed that the children were well dressed and groomed, were conversant and articulate, expressed themselves unusually well, were well trained, and appeared to be in fine health, and there was no evidence of physical abuse. The evidence further showed that Clinton paid his mother and father $2,900 for the support of the children from February 1971 to August 7, 1972. He bought clothing for them, sent them Christmas cards and presents, sent them letters and cards at least every 2 weeks, remembered them on holidays, made numerous phone calls from Alaska to talk to them, and when he returned home for quite numerous visits he devoted all his time to his children, took them for swimming lessons, to Sunday School, took them fishing, played with them, and performed all the other normal acts of a loving father.

The discretion of a trial court in this situation is necessarily subjective and must be founded to a significant extent upon his observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature. A change of custody hearing should not be converted into a punitive expedition that small errors in judgment and a hindsight determination about more care and attention could have been given than was. The attack upon the custody of the children with the William Riis family, the paternal grandmother and grandfather, that the plaintiff makes was largely answered by the persuasive evidence before the court as to the prospective change in Clinton's circumstances. Clinton is now married to Linda and has been since February 11, 1972. The evidence is that they are happily married. Linda is 24 years of age, has never been married before, she has been with the two daughters and she loves the children, and they love her. She is a Sunday School teacher, is a high school graduate, and a graduate of the Seattle Dental Assistant Technicians School and is now a dental

technician. She is willing to take care of the children and will quit her present job. Linda has taken care of her paralyzed grandfather and has taken care of her younger sisters when she was in high school, and she has done extensive baby sitting. The record reveals that the trial judge was greatly impressed by Linda. Their new home is in Homer, Alaska, has weather that is milder than it is in Alliance, Nebraska, and has a population of about 2,500, a new school, two doctors, a dentist, an airport, hospital, and several churches, and the other usual conveniences of modern, comfortable, and secure living conditions. Clinton has a home which consists of two bedroms, completely furnished, carpeted, washer and dryer, utility room, bathroom and living room, and a furnished kitchen.

We belabor the record no further. Even on the assumption that Mary Anna has rehabilitated herself, the evidence in this case is far short of showing an abuse of the trial court's discretion in continuing the custody of these two daughters in the defendant. There is no evidence to support a finding of the defendant's unfitness to retain custody. From the circumstances we have recited the trial court's finding that it is in the best interests of the children to remain with their father is not only supported by the evidence but a contrary decision would be against the weight of the evidence and an abuse of discretion. Children are not chattels. A parent found unfit for custody should not, by the mere passage of time and without further misconduct, be able to change child custody provisions in a divorce decree in the absence of clear and convincing evidence that the custodial parent is failing to provide proper and reasonable care for the children and that the best interests and welfare of the children are adversely affected. Stability is a paramount consideration in the welfare, health, and proper training of children of tender years. It is not in the best interests of children of tender years to unnecessarily change custody and bandy them back and

forth in a custody action between recriminatory parents. Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445; Scripter v. Scripter, *supra*.

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

AFFIRMED.

CYNTHIA K. McGEE, APPELLEE, V. JERRY E. McGEE, APPELLANT.

209 N. W. 2d 339

Filed June 29, 1973. No. 38819.

1. **Divorce: Parent and Child: Infants.** A judgment for child support may be revised or altered at any time as to future payments if the circumstances of the parties change.
2. ———: ———: ———. Where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. The mother's removal of the children from the state without the consent of the father or of the court may be sufficient change of circumstances to justify the court in suspending or reducing the amount of child support payments until the children have returned to the state.

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

Jack W. Meyer, for appellant.

Yost, Schafersman, Yost & Lamme, for appellee.

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

WHITE, C. J.

This is an action brought by the father-defendant to reduce or terminate child support payments. The District Court did not suspend or terminate the payments; however, the lower court did decrease the defendant's payments. We modify the judgment of the District

Court and order that the defendant's child support payments be suspended as of July 1, 1972.

We turn to the record. It shows that the parties were divorced on October 13, 1967; the plaintiff-wife received custody of the three children of the marriage and the defendant-husband was required to pay $135 per month for child support. Furthermore, the decree of divorce specifically provided that the husband would have reasonable visitation rights.

In the present action, the defendant-father moved the court for an order to reduce or terminate his child support payments. He has alleged, and this allegation has not been attacked, that the plaintiff-mother has taken the three children from Nebraska to another state with the intention of establishing a permanent residence. This was done without the consent of the court or the father, and has deprived the father of all visitation rights. The plaintiff-mother has made no attempt to answer the defendant's motion in the trial court or in this court. It is thus a reasonable inference that she has decided to make a new life for herself and the children without the father's presence. The District Court entered an order lowering the defendant's child support payments from $135 per month to $100 per month and the defendant has appealed to this court seeking further relief.

"A judgment for child support may be revised or altered at any time as to future payments if the circumstances of the parties change * * *." Walters v. Walters, 177 Neb. 731, 131 N. W. 2d 166. See, also, Rubottom v. Rubottom, 185 Neb. 39, 173 N. W. 2d 447; Shipley v. Shipley, 175 Neb. 119, 120 N. W. 2d 582. More specifically, this court has held that: "Where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. The mother's removal of the children from the state without the consent of the father or of the court may be sufficient change of circum-

stances to justify the court in suspending or reducing the amount of child support payments until the children have returned to the state." Prell v. Prell, 181 Neb. 504, 149 N. W. 2d 104. Applying this rule to the case at bar, it is clear that the defendant's obligation for making child support payments should be temporarily suspended. The mother's actions in this case have deprived the father of all opportunity to even be with his children, much less to exercise a parental influence over them. Such a change in circumstances demands a strong remedy.

It must be emphasized that this rather extraordinary relief should not, and will not, be granted in every case seeking termination of child support. It is only in those rare cases like the instant one where the mother has removed the children from the state and the jurisdiction of the court and has deprived the father of all visitation rights that suspension of child support payments should be granted. We do not in any way intimate that a dispute between parents as to visitation rights may be used by a father as a threat collaterally to relieve himself from his duty and obligation to support his children. But the removal of the children from the jurisdiction of the court without consent, together with the deprivation of all visitation rights and no suggestion or showing, after notice, that the children are in need or not properly taken care of warrants a court to invoke a suspension of the payments to preserve its jurisdiction in the matter. The remedy of suspension is the only one that can be used to meet an intentional violation of the law and destroy the jurisdiction of the court.

The District Court, recognizing the competing interests underlying the decision in this case, did decrease the amount of the child support payments. The remedy should fit the mischief. We, therefore, modify the order of the District Court to provide that the defendant's child support payments be suspended retroactively from

the date the children were removed from the state, July 1, 1972.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. GERALD HECKATHORN, APPELLANT.
208 N. W. 2d 689

Filed June 29, 1973. No. 38821.

Criminal Law: Sentences: Probation and Parole: Appeal and Error. In imposing sentence and denying probation in a criminal case the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion.

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

Douglas 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.

WHITE, C. J.

The sole question involved in this case is the excessiveness of the sentence imposed on the defendant for 1 year's incarceration as the result of a prosecution and plea of guilty to the offense of second offense petit larceny. The defendant's contention is that he should have been granted probation. In imposing sentence and denying probation in a criminal case the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Cottone, 188 Neb. 102, 195 N. W. 2d 196. The defendant does not quarrel with the trial court's recital into the record of the facts apparently acquired in the presentence investigation of this case. In the record in this case the bill of exceptions enumerates nearly three

pages of delinquency, misdemeanors, felonies, violations of probation, and failure to appear for trial. The record further shows that another information charging the defendant with a felony under section 29-908, R. S. Supp., 1972, for failure to appear while out on bail in connection with the present case, was dismissed in connection with a plea bargain in this case. The record utterly fails to show any abuse of discretion by the District Court in imposing the minimum sentence that it did.

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

AFFIRMED.

MANFRED PIECK, APPELLANT, V. GILDA LEE PIECK, APPELLEE.
209 N. W. 2d 191

Filed June 29, 1973. No. 38822.

Divorce: Parent and Child: Infants: Right to Counsel. The District Court in its discretion may appoint an attorney to protect the interests of any minor children of the parties. The limits upon the discretion must evolve case by case.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed in part, and in part reversed and remanded.

Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

James E. McBride, William B. Craig, and C. Maurice Rawe, for appellee.

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

SMITH, J.

The District Court in connection with a decree of absolute divorce divided the property of the parties,

Manfred Pieck and his wife, Gilda. It also granted Gilda (1) alimony, (2) custody of the parties' three minor children subject to visitation rights of Manfred, (3) child support, and (4) leave for Gilda to remove the children to Virginia.

Manfred appeals. His assignments of error relate to alimony, visitation rights, removal of the children to Virginia, and denial of his motion for appointment of counsel for the children.

Although suit was commenced prior to July 6, 1972, the issues in question were heard after July 6, and a decree was not spread on the journal of the court until September 12. Our review is therefore governed by the no-fault divorce law. See, § 25-1301(3), R. R. S. 1943; § 42-379(2), R. S. Supp., 1972; cf. Lienemann v. Lienemann, 189 Neb. 626, 204 N. W. 2d 170 (1973).

The children, girls ages 6, 9, and 13, have resided in Omaha all their lives but have visited Gilda's parents in Virginia each summer for 1 month. On motion of Gilda to remove them to Virginia, the District Court announced in effect that it would refuse to receive any evidence offered by Manfred. It also denied the motion of Manfred to appoint counsel to represent the interests of the minor children. Manfred was financially able to pay the costs, and his liability for costs was undisputed.

The District Court in its discretion may appoint an attorney to protect the interests of any minor children of the parties. See § 42-358, R. S. Supp., 1972. The limits upon the discretion must evolve case by case.

The rulings in question were erroneous; the refusal to receive evidence from Manfred on the issue of removal and to appoint counsel was not in the best interests of the children.

The award of an absolute divorce is affirmed. The award of property, alimony, child custody, child support, leave for Gilda to remove the children to Virginia, and visitation rights of Manfred is reversed, and the cause

remanded for a new trial on those issues. Costs on appeal are taxed to Manfred, but Gilda is allowed nothing for services of her attorneys in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

MARCELLA PAASCH, APPELLANT, V. JULIE BROWN, APPELLEE.
208 N. W. 2d 695

Filed June 29, 1973. No. 38830.

1. **Waters: Drains.** Diffused surface waters, which ordinarily result from rainfall and melting snow and have no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence.
2. ———: ———. When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, the flow may not be arrested or interfered with to the injury of neighboring proprietors.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded.

Homer E. Hurt, Jr., and James A. Gallant, for appellant.

Neil W. Schilke of Sidner, Svoboda, Schilke & Wiseman, for appellee.

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

SMITH, J.

Plaintiff, an upper landowner, claimed that defendant, a lower landowner, had obstructed the flow of surface waters in a natural drainway that was not a stream, river, brook, or watercourse. Injunctive relief and damages were sought. After a trial, and on a general finding, the District Court dismissed the claims, and plaintiff appeals.

In August 1970, plaintiff purchased a tract of 40 acres of land located in Section 23, Township 20 North, Range 6 East, Dodge County. The tract, a "long 40," was ½ mile in length east-west. Its south boundary represented an extension of the south boundary line of a somewhat triangular tract of 26 acres owned by defendant. The east boundary of the "long 40" abutted part of the west boundary of defendant's tract. The defendant's tract for practical purposes formed a right triangle, the hypotenuse of which abutted a drainage ditch alongside U.S. Highway No. 275. A mulberry tree stood midway between the north and south boundaries of the "long 40" and on the division line between plaintiff's and defendant's tracts.

The "long 40" was generally flat and declined gently eastward. No steady stream of water flowed on it, but water flows did occur in periods of heavy rain or melting snow. Surface water from the west entered the "long 40" near the southwest corner. The water spread over the "long 40" in a diffused state until it reached the center, a depressed area, from which it meandered in natural depressions. Although these natural depressions could not be classified as streams, rivers, brooks, or watercourses, they were deep enough that no one farmed across them. The waters were discharged near the mulberry tree and across defendant's tract in a diffused state eastward to the highway ditch.

In 1949 a ditch was constructed along the south side of defendant's tract. During heavy rains it carried part of the water from the "long 40" to the highway ditch. Since 1949 overflow of the highway ditch has at times delayed drainage of the "long 40."

In May 1961, defendant's tract was leveled for irrigation under supervision of the Soil Conservation Service. Preleveling elevations indicated gradual declines eastward and also northward and southward to a line between the mulberry tree and the highway ditch. The record is devoid of expert testimony respecting the rela-

tionship between the elevations and drainage. There is testimony that prior to the project surface water was diffused and did not flow in a natural depression or draw.

In the leveling of defendant's tract a ditch, 18 inches deep, 15 feet wide, and 1,200 feet long, was built between a point near the mulberry tree and the highway ditch. Its downward grade toward the highway ditch was 2.01 percent. In connection with the project defendant caused the installation of a metal tube 15 inches in diameter and 23 feet long at the west end of the ditch to receive water from the "long 40." After August 1970, defendant built a ditch that ran southward from the mulberry tree to the ditch alongside the south line of defendant's tract.

In 1970 plaintiff straightened the meandering drainage by constructing a ditch that ran due east from the depressed area in the center to the west end of defendant's ditch near the mulberry tree. The depth of the ditch was 18 inches. The "long 40" was subsequently covered with water in the springs of 1971 and 1972 and water backed into the area north of the mulberry tree. Crops were damaged. The depth of the water rose after the leveling of defendant's tract.

The "long 40" was placed in the soil bank on many occasions prior to 1970 because of its wetness. Until commencement of the present suit on April 29, 1971, almost 10 years after the leveling of defendant's tract, defendant received no complaint respecting flooding of the "long 40."

Our law relating to diffused surface water has no clear, accurate label. See, 5 Clark, Waters and Water Rights, § 456.2, p. 561 (1972); Comments, 41 Neb. L. Rev. 765 (1962). The reason is apparent in light of certain statutory and common law rules.

"Owners of land may drain the same in the general course of natural drainage by constructing an open ditch . . ., discharging the water therefrom into any natural

watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation." § 31-201, R. R. S. 1943.

"Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." § 31-202, R. R. S. 1943.

"(D)iffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply. . . . '(A) natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. . . .'" Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195 (1962).

"'. . . But, so far as one parcel has been subjected by nature to a servitude in favor of an adjoining parcel, the enjoyment of which will be materially injured by destroying the servitude, it would seem that the rule by which a purchaser of property is bound by its condition when he acquires title would prevent the destruction of such servitude. In order to be within the operation of this rule, the servitude must be clearly and permanently impressed upon the property so as to be plainly visible to the intending purchaser. Under this rule, the great weight of authority is in favor of the proposition that a lower proprietor cannot place any obstruction in an obvious drainage channel which has been formed by nature and carries the water from a higher to a lower estate.'" Id.

We find defendant obstructed surface water that ran

in the equivalent of a natural drainage channel from plaintiff's "long 40." Plaintiff is accordingly entitled to an order of injunction.

The general finding by the District Court on the injunction question implies that the court did not reach issues pertaining to existence or amount of 1971-72 crop damage for which defendant may be liable. The trial judge viewed the premises. The only testimony to the amount of damage was given by plaintiff's husband. It is not clear enough for us to determine liability without the opportunity to observe his demeanor. Respecting those issues the District Court on remand may make appropriate findings and judgment or in its discretion grant a new trial.

Judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

LARUTAN CORPORATION, APPELLANT AND CROSS-APPELLEE, V. MAGNOLIA HOMES MANUFACTURING COMPANY OF NEBRASKA, A CORPORATION, APPELLEE AND CROSS-APPELLANT, DONALD LYNCH ET AL., APPELLEES.

209 N. W. 2d 177

Filed June 29, 1973. No. 38842.

1. **Trial: Judgments: Appeal and Error.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Trial: Judgments.** In a declaratory judgment action, issues of fact may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.
3. **Trial: Judgments: Appeal and Error.** The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived.
4. **Sales: Warranty.** Under the Uniform Commercial Code, any affirmation of fact or promise made by the seller to the buyer

which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

5. ———: ———. Any description of the goods or any sample or model which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description or to the sample.

6. **Sales: Warranty: Time.** Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., an implied warranty that the goods shall be fit for such purpose.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed in part, and in part reversed and remanded.

Wright & Simmons, John F. Wright, and John F. Simmons, for appellant.

Van Steenberg, Brower & Chaloupka and Steven T. Swihart, for appellee Magnolia Homes Manuf. Co.

Lyman & Meister, for appellees Lynch.

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

MCCOWN, J.

This is a declaratory judgment action brought by plaintiff, Larutan Corporation, the manufacturer and marketer of a soil compaction substance called Paczyme, against the defendant, Magnolia Homes Manufacturing Corporation, a manufacturer of mobile homes, and Donald Lynch and Herbert Ziegler, copartners, doing business as Donald Lynch Contracting Company, the local dealer of plaintiff in Scottsbluff, Nebraska. The action sought determination of whether or not plaintiff was liable to the defendants or any of them upon claims arising out of the use of the product Paczyme upon the surface of the area around the Magnolia factory. Mag-

nolia cross-petitioned against the plaintiff and the other defendants for damages, allegedly resulting from a breach of warranties in connection with the work done on the Magnolia property. The trial court entered judgment in favor of the defendant Magnolia Homes Manufacturing Corporation against the plaintiff Larutan in the sum of $16,125, and released the defendants Donald Lynch and Donald Lynch Contracting Company from any and all liability. The plaintiff Larutan Corporation has appealed and the defendant Magnolia Homes Manufacturing Corporation has cross-appealed, contending that judgment should also be entered against Lynch.

On April 28, 1969, Donald Lynch Contracting Company entered into an agreement with plaintiff Larutan to become a dealer engaged in the business of selling and applying the product Paczyme. Lynch paid to Larutan the sum of $15,000 for the area dealership. The dealer agreement provided among other things that during its term Larutan, the supplier, "will furnish to Dealer instructions on the application of Paczyme soil compaction materials * * *." The agreement also provided that the dealer "will apply such materials only in strict accordance with Supplier's terms and specifications." The agreement also provided: "Dealer agrees that he will warrant and guarantee to each of his customers the proper application of all soil compaction materials applied by him and will supply and pay for such labor as is necessary to perform all warranty obligations assumed by Dealer, including any obligations under Supplier's Warranty Agreement for materials furnished by Supplier, provided, however, there is no warranty by Supplier unless Dealer so requests on Supplier's Form F66 in accordance with its terms." The agreement also provided that the dealer was an independent contractor and not an agent of nor acting on behalf of Larutan.

Paczyme is a soil compaction substance marketed by Larutan, a Texas corporation with offices in California.

Water and Paczyme are applied to the soil with the quantities dependent upon the soil analysis and the amount of moisture in the soil at the time of application. Larutan's published promotional material states: "Paczyme is an enzymic product developed specifically for the road construction industry. It is designed for on-site stabilization of existing native soils to be used in the construction of roads, base and sub-base, fills, embankments, airfields, back fill and other surfaces requiring high densities and heavy load-bearing capacities. * * * Paczyme treated soils require a curing period of approximately 24 to 72 hours. This curing time results in the cohesion of individual soil particles. Paczyme develops a molecular attraction between soil components so that cementation occurs when the treated soil undergoes compaction. After curing, Paczyme-treated soil strongly resists the re-entry of moisture. Through a combination of cohesion, cementation, and compaction, the moisture-carrying capillaries of the treated soil become restricted, thus precluding disintegration or frost-heaving due to re-entry of moisture."

Lynch received its first supplies of Paczyme in June 1969. In the late summer and early fall of 1969, Magnolia was looking for some way to surface the area around its factory to get it out of the mud. Magnolia's manager told Lynch and his agent the areas of trouble where forklifts had bogged down in the main traffic area and the area for parking mobile homes, and where the earth was softened by water from roofs. Magnolia was told that Lynch "could stabilize the entire area probably four to six inches" in depth and make it a good hard clean surface. The Magnolia manager was given Larutan's literature showing pictures of areas that had been treated with Paczyme and was also shown a demonstration strip of Paczyme-treated surface which Lynch had put down on Avenue B in Scottsbluff. The manager relied on the literature and on the view of the demonstration strip. In addition, Lynch told him he

felt it would do the job. The manager was aware of the fact that the cost of Paczyme treatment was approximately half the cost of asphalt and that he was "taking a gamble."

In September and October 1969, Lynch submitted proposals for stabilizing the area around the Magnolia plant to a depth of 6 inches with Paczyme and seal coating with local materials. Magnolia issued its purchase order to Lynch on October 23, 1969, covering the work proposed. It was to be done "as weather permits." Lynch did not want to do the job until an engineer from Larutan could come out to advise on the mixing. Paczyme could not be used in freezing weather so the work was delayed.

In the spring of 1970, Magnolia obtained a new manager. Because of the delay, Lynch offered to let Magnolia back out. However, after viewing the demonstration strip on Avenue B and receiving Lynch's assurances that the product would do the job, and that Lynch and Larutan would stand behind it, he directed Lynch to proceed.

Soil samples were sent to Larutan in May and on May 14, 1970, Larutan sent back an analysis of them and recommended that this soil type be treated with Paczyme at the rate of 1 gallon per 26 to 31 cubic yards. In addition, Lynch was advised: "Care should be used not to exceed optimum moisture when treating this soil. The treated area should be well graded for good drainage and a surface seal should be applied."

Lynch would not do the work until a factory representative of Larutan could be present to see that it was done right. Lynch was advised by the president of Larutan that Paczyme and water, if it was applied right, would do a satisfactory job. Machinery was moved in on July 3, 1970. A Mr. Valentine, Larutan's superintendent of field operations, arrived on July 4th or 5th. Lynch or his subcontractors did the grading of the area and took soil samples to determine whether the soil was com-

pacted sufficiently to make a good subgrade. The area was prepared so that in general it drained away from the buildings. The area of the Magnolia property might be likened to an inverted saucer with the buildings toward the middle. This subgrading work was done before Larutan's engineer arrived, although there was a little dirt moved after he arrived.

Ten barrels of Paczyme containing 55 gallons each were used in the Magnolia job. Six barrels were from lot 99, two from lot PA-026, and two from lot 204-004. Around July 8, Valentine discovered that the quantity of Paczyme being used in relation to the water in applying lot 99 was wrong and they then added a half gallon of another mixture to give a better seal. Later samples of lots PA-026 and 204-004 were analyzed by testing laboratories. The results showed that lot PA-026 contained 3.40 percent solids while lot 204-004 contained 17.95 percent solids.

The job was not completed by July 12 when the plant went back into operation, but it was completed before July 21. On July 14 or 15, Mr. Valentine told Magnolia's manager that Paczyme would give them a hard surface. At that time all equipment used at Magnolia, including forklifts, were present and in operation. All parties agree that the job looked beautiful when it was completed, that it drained, and still drained at the time of trial. Although the surface sloped so that water would drain from it, there was no way on the east and an inadequate way on the west by which water could be carried away and it backed up on the property in times of heavy rain. Lynch had reinforced the area in the southwest corner with concrete because he was afraid water would stand there and had applied asphalt to a heavy-use area. Magnolia made full payment of $21,500 for the job on August 11, 1970.

About three weeks after the job was completed, two soft spots developed on the west side of the building where the plant sewer went into the ground under the

Paczyme surface. Magnolia accepted fault for this area and made its own repairs. Cracks in the surface appeared on the east side of the building in eight weeks. Repairs were made by Lynch. Water backed up on the property after the first rain and stood for one week but drained when a drainage ditch was opened by Lynch. The whole area east and west of the building started breaking up in October of 1970, after two rains and one snow. Magnolia had parked completed trailers on the surface with some of the weight resting on 2 inch pipes. The pipes broke up the surface seal immediately under it. Forklifts were also taking the seal off the top. The employees' parking lot, which constituted a little more than one-fifth of the total area treated with Paczyme, remained in good condition and was still in good condition at the time of trial which was some 2 years after the job was completed. Magnolia's evidence was that the area which broke up was in as bad or worse condition than it had been before the work was commenced.

The trial court determined that Donald Lynch Contracting Company performed its contract in a workmanlike and satisfactory manner but that the results were unsatisfactory because the product Paczyme did not conform to the implied and express warranties made by plaintiff. It also found that there was a material breach of both an implied and express warranty by plaintiff to defendant Magnolia with reference to the product Paczyme which did not meet the purposes for which it was represented and intended in this case. The court entered judgment for Magnolia against the plaintiff Larutan in the sum of $16,125 and released Donald Lynch Contracting Company and its individual partners from any and all liability.

The appellant's basic contention is that this was a declaratory judgment proceeding tried to the court without a jury, and that it therefore becomes the duty of this court to redetermine the issues of fact upon trial

de novo on the record and reach an independent conclusion without reference to the findings or conclusions of the District Court, as in equitable proceedings. Any other course, says the appellant, would be unconstitutional in view of the separate statutory provisions which, in one instance require trial de novo in this court in suits in equity; and in another, establish one form of action and abolish the distinctions between actions at law and suits in equity. See, §§ 25-101 and 25-1925, R. R. S. 1943.

Section 25-101, R. R. S. 1943, creating one form of civil action and abolishing the distinctions between actions at law and suits in equity and the forms thereof has not changed since its adoption in 1867. Section 25-1925, R. R. S. 1943, providing for trial de novo of questions of fact in equity cases in this court was first adopted in 1903. In First National Bank of West Point v. Crawford, 78 Neb. 665, 111 N. W. 587, this court said: "We do not understand that the act of 1903 * * * relative to the mode of review in this court of judgments in suits of equity, disturbs the conclusiveness of decisions of fact by juries, or by trial judges sitting in their stead, in law cases." That interpretation was recently restated in First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N. W. 2d 115. This court said: "Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed unless clearly wrong."

Section 25-1925, R. R. S. 1943, describes the manner in which suits in equity are to be reviewed in this court and is a special statute modifying section 25-101, R. R. S. 1943. The appellant contends that Article V, section 19, Constitution of Nebraska, requires that the proceedings and practice of all courts of the same class or grade shall be uniform. That provision, however, does not require complete uniformity in all kinds of proceedings in the same court. The issue in this case is not of con-

stitutional dimensions and the appellant's contention is not well taken.

The proceeding here commenced in the form of a declaratory judgment and the cross-petition upon which judgment was actually entered was clearly in the form of an action at law for the breach of express and implied warranties. In a declaratory judgment action, issues of fact "may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." See § 25-21,157, R. R. S. 1943. This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong. See Belek v. Travelers Ind. Co., 187 Neb. 470, 191 N. W. 2d 819. That rule is applicable here.

Under the Uniform Commercial Code, any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. Any description of the goods or any sample or model which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description or to the sample. See § 2-313, U.C.C.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U.C.C., an implied warranty that the goods shall be fit for such purpose. § 2-315, U.C.C.

In this case there was evidence to support the assertion that express and implied warranties were made. All the direct contact with Magnolia prior to the time

the contract became effectively binding was carried on by Lynch. In the fall of 1969 and later in the spring of 1970, Lynch and its agents showed two different managers of Magnolia the demonstration installation of Paczyme which Lynch had installed on Avenue B. There is evidence that both managers relied upon their view of that sample, as well as upon the assurances of Lynch that Paczyme could do the job. The contract between Magnolia and Lynch became finally effective only after Lynch had assured Wilson, the general manager of Magnolia, that Paczyme would do it; that he would stand behind it; and Larutan would stand behind him. Wilson testified that he relied on that assurance, as well as the demonstration strip, in making the decision to have Lynch proceed. Lynch was familiar with the problems Magnolia desired to correct. He knew the use made of the property by Magnolia and the uses intended. He knew that forklifts were to be used and mobile homes were to be parked on the area. Lynch also testified that the information given him concerning the use to be made of the area upon which Paczyme was to be applied was communicated by Lynch to Larutan prior to the commencement of the job by Lynch. Three persons at Larutan assured Lynch that Paczyme, together with other ingredients properly applied, would serve the purposes outlined by Magnolia, and Larutan sent its representative to assist Lynch in performing the job.

The evidence here supports a finding that Paczyme did not conform to the implied and express warranties made by both Lynch and Larutan. It does not support a finding that Larutan alone was liable and that Donald Lynch Contracting Company and its partners were not liable to Magnolia. The trial court found that the Lynch partnership "performed its contract in a workmanlike and satisfactory manner * * *." Donald Lynch Contracting Company was not merely the contractor that performed the work, it was also the dealer which had issued express and implied warranties to Magnolia in

order to induce Magnolia to contract. Larutan's liability was primarily premised upon the conduct of Lynch but it was stipulated that Magnolia had no evidence that Lynch or the partners were agents of Larutan except for statements made by Lynch or Herbert Ziegler, partners in Donald Lynch Contracting Company. It was also stipulated that any question of indemnification between Lynch and Larutan under paragraph 11a of the dealer agreement was not to be considered in the trial.

Under the evidence here, the trial court erroneously found that neither the partnership of Donald Lynch Contracting Company nor its members were liable to defendant Magnolia Homes Manufacturing Company on its cross-petition, and erroneously released them from any and all liability. Magnolia's cross-appeal is well taken.

On the issue of damages, the trial court viewed the premises in addition to hearing the evidence. We cannot say that its determination was in error.

Judgment in favor of Magnolia Homes Manufacturing Company in the sum of $16,125 should be entered jointly against both the Larutan Corporation and defendants Donald Lynch, Donald Lynch Contracting Company, and Herbert Ziegler. The judgment against the Larutan Corporation is affirmed. The judgment releasing defendants Donald Lynch, Donald Lynch Contracting Company, and Herbert Ziegler from liability is vacated and the cause remanded with directions to enter judgment against said defendants in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

SMITH, J., concurring.

The Legislature ought to abolish differences between law and equity actions in respect to the scope and standard of appellate review. Any difference should be one between cases tried to juries as a matter of right and other cases. Our advice to the Legislature on practice is authorized. See Art. V, § 25, Constitution of Nebraska.

STATE OF NEBRASKA, APPELLEE, V. LESLIE FITZGERALD, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. MICHAEL FINAZZO, APPELLANT.
208 N. W. 2d 688

Filed June 29, 1973. Nos. 38849, 38850.

Criminal Law: Guilty Plea. A threat to prosecute under state law where the facts warrant prosecution should not be considered as coercive or intimidating. To constitute fear and coercion on a plea, petitioner must show he was subjected to threats or promises of illegitimate action; and fear of a greater sentence may induce a valid plea of guilty.

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

Paul E. Watts, J. Joseph McQuillan, and Bill Campbell, for appellants.

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.

NEWTON, J.

The defendants, when charged with a criminal offense, entered pleas of nolo contendere and were convicted. The records show there were plea bargains in each case resulting in the dismissal of other charges, the recommendations of comparatively light sentences, and promises not to file habitual criminal charges. Defendants were represented by counsel.

The sole assignment of error on appeal is that the pleas were coerced by threats of the prosecuting attorney to file habitual criminal charges. The records disclose that both defendants denied they had been subjected to threats or coercion and stated their pleas were entirely voluntary.

It is now well recognized that plea bargaining is an acceptable procedure and in these instances, the bar-

gaining results were fully disclosed to the court. The pleas were entered deliberately, with full knowledge of the facts, and after adequate consultation with counsel.

In Ford v. United States, 418 F. 2d 855 (8th Cir., 1969), it is stated: "A threat to prosecute under state law where the facts warrant prosecution should not be considered as coercive or intimidating. To constitute fear and coercion on a plea 'Petitioner must show he was subjected to threats or promises of illegitimate action'; and fear of a greater sentence may induce a valid plea of guilty." To the same effect is State v. Reed, 187 Neb. 792, 194 N. W. 2d 179.

The appeals are without merit and the judgments of the District Court are affirmed.

AFFIRMED.

THOMAS W. ELSON ET AL., APPELLANTS, V. MARY HARBERT ET AL., APPELLEES.
208 N. W. 2d 703

Filed June 29, 1973. No. 38851.

Schools and School Districts: Appeal and Error: Notice: County Officers and Employees. In counties where, by virtue of the provisions of section 32-307, R. R. S. 1943, a person who holds the position of county clerk is ex officio clerk of the District Court, service of notice upon the county clerk of intention to appeal from proceedings before a freeholders' board under section 79-403, R. R. S. 1943, will be deemed to have been sufficiently proved and shown, notwithstanding absence of proof by attached acknowledgment of service, affidavit of service, or other means, where an appropriate notice directed to the county clerk of the proper county appears in the proper case file in the District Court, and where the notice in that file bears the completed filing stamp, showing date and time of filing, and the signature as ex officio clerk of the District Court of the person who holds both offices.

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

Thomas A. Wagoner, for appellants.

Cunningham Law Office, for appellee Conroy.

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

CLINTON, J.

This action originated as an appeal to the District Court for Frontier County, Nebraska, from the action under section 79-403, R. R. S. 1943, of the freeholders' boards of Frontier and Red Willow Counties, Nebraska, upon the petition of a landowner, setting off certain land from one school district and attaching it to another. The District Court sustained a demurrer to the petition on appeal on the ground that the court had no jurisdiction of the matter and then dismissed the appeal. The plaintiffs appeal to this court. We reverse.

The question presented here is whether or not the record sufficiently shows compliance by the plaintiffs with the provisions of section 23-135, R. R. S. 1943, which governs such appeals and which provides, among other things, that the appeal is made "by causing a written notice to be served on the county clerk, within twenty days after making such decision."

The order of dismissal does not recite the grounds upon which the District Court concluded that it did not have jurisdiction. However, the parties on this appeal have joined issue on whether or not the provisions of the statute just quoted have been complied with.

In the record before us and in that which was before the District Court appears the certified transcript of the proceedings before the freeholders' boards, which transcript is certified by Louis M. Hovey, county clerk of Frontier County. That transcript does not include a notice of appeal nor any proof of service of such notice on the county clerk. However, the record before us does disclose that the filings in this case in the District Court for Frontier County include: (1) The appeal

bond required by section 23-135, R. R. S. 1943. (2) A notice of appeal directed to the county clerk of Frontier County, Nebraska. This instrument carries no proof of service upon the officer to whom it is directed either by acknowledgment of the officer of receipt of a written copy of the notice, or by affidavit of service. (3) Request for transcript of the freeholders' proceedings directed to the county clerk of Frontier County. All three instruments bear the completed filing stamp of Louis M. Hovey, clerk of the District Court, showing that the instruments were filed in that office on February 28, 1972, at 11 o'clock a.m., and all include the signature of Louis M. Hovey as clerk of the District Court. Item (3) above, the request for transcript, but not items (1) and (2), has the completed filing stamp of the county clerk of Frontier County, showing the same date and hour of filing and the signature of Louis M. Hovey as county clerk of Frontier County.

Section 23-135, R. R. S. 1943, does not describe the form of notice of appeal; nor the exact manner of service of the written notice; nor prescribe any particular method of proving service. It would seem clear, however, that in counties where the office of county clerk and the clerk of the District Court are held by two different persons the appearance in the case records in the office of the clerk of the District Court of a notice of appeal directed to the county clerk of the same county would be no proof at all that such notice was ever served in writing on the county clerk.

In this case we take judicial notice that Frontier County is a county of less than 7,000 people and that section 32-307, R. R. S. 1943, is applicable, and that therefore the person who holds the office of county clerk is ex officio clerk of the District Court. On the issue of judicial notice, see, Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N. W. 2d 838; Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602.

In the case before us the county clerk is ex officio

clerk of the District Court and the filings and certificates clearly show that they are one and the same person.

We hold that in counties where, by virtue of the provisions of section 32-307, R. R. S. 1943, a person who holds the position of county clerk is ex officio clerk of the District Court, service of notice upon the county clerk of intention to appeal from proceedings before a freeholders' board under section 79-403, R. R. S. 1943, will be deemed to have been sufficiently proved and shown, notwithstanding absence of proof by attached acknowledgment of service, affidavit of service, or other means, where an appropriate notice directed to the county clerk in the proper county appears in the proper case file in the District Court, and where the notice in that file bears the completed filing stamp, showing date and time of filing, and the signature as ex officio clerk of the District Court of the person who holds both offices. The purposes of section 23-135, R. R. S. 1943, are satisfied here because the record shows that the actual notice in writing of the intention to appeal came to the attention of the proper person in his official capacity. In State v. Odd Fellows Hall Assn., 123 Neb. 440, 445, 243 N. W. 616, in a somewhat similar situation, we held that the purposes of the statute were satisfied.

Reiber v. Harris, 179 Neb. 582, 139 N. W. 2d 353, which is relied upon by the appellee Conroy, is clearly distinguishable. In that case there was no proof of any kind that the appeal bond which appeared in the court file had been furnished to the county clerk within the time required and that it had been approved by him. In addition in that case, the county involved was one in which the two offices are held by different persons.

Questions of the nature here presented need never occur if counsel will cause proof of service by acknowledgment of receipt or affidavit of service to appear in the record. This is not such a case as Harte v. Gallagher, 186 Neb. 141, 181 N. W. 2d 251; or Liljehorn v. Fyfe, 178 Neb. 532, 134 N. W. 2d 230, where we held that the

failure of a public officer to perform acts imposed upon him by law cannot be charged to the litigant nor operate to defeat the appeal. In the case at hand there is no duty on the officer to show the service of notice upon him. This was, under the statute in question, the duty of the litigant. What we hold here is simply that the records prove service of notice of appeal in this case.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL JOHN COLEMAN, APPELLANT.
208 N. W. 2d 690

Filed June 29, 1973. No. 38884.

1. **Criminal Law: Continuances.** The matter of the granting of a continuance in a criminal case is peculiarly within the province of the discretionary judgment of the trial court.
2. ———: ———. A criminal defendant may not discharge his counsel at the eve of trial and seek a continuance without demonstrating good cause therefor.
3. **Criminal Law: Continuances: Right to Counsel.** Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay.
4. **Criminal Law: Arrest: Searches and Seizures.** Any search of the person of the arrestee incident to such arrest is constitutionally reasonable.

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

Albert C. Walsh, 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.

WHITE, C. J.

In this criminal prosecution of the defendant for burglary under section 28-533, R. R. S. 1943, the defendant

was convicted by the jury and sentenced by the court and now appeals, asserting an abuse of discretion by the trial court in failing to grant him a continuance, permitting the State to amend the information against the defendant, the admission into evidence of certain exhibits, and error in the instructions. We affirm the judgment and sentence of the trial court.

The defendant herein assigns as error the ruling of the District Court in denying his motion for a continuance to secure and give new substitute counsel time to prepare his defense. The record shows that Mr. Albert Walsh was appointed counsel for the defendant after a showing of indigency on May 17, 1972. Mr. Walsh is the same counsel who now presents and argues the appeal in this court. It shows that he was present and represented the defendant at a preliminary hearing on June 1, 1972, and that he continued to represent the defendant as his attorney right up to the trial date on October 30, 1972. The record reveals that Walsh successfully applied to the court for funds for a locksmith's service, successfully opposed a motion to consolidate the defendant's trial with a codefendant, appeared at the defendant's arraignment in which he pled not guilty, appeared and unsuccessfully resisted the filing of an amended information by the State, and otherwise thoroughly and completely represented the defendant in the preliminary stages before the trial. The record reveals that the trial court was diligent in according the defendant a right to a speedy trial within the 6-months' period provided by section 29-1207, R. S. Supp., 1972. Mr. Walsh and the defendant were advised to be ready for the trial at any time after September 25, 1972, because the court wanted the case to be tried within the required 6-month period. Trial had apparently been set for September 26, 1972, but the defendant's counsel, Mr. Walsh, filed several motions attacking the information and a preliminary hearing was held on the amended information on October 20, 1972. The defendant had

already advised the court as early as September 26, 1972, that he was ready for trial upon the original information. After the disposition of the various motions and the holding of the preliminary hearing the trial court informed the defendant and counsel that trial was scheduled for October 30 and October 31, 1972. The defendant did not appear for his scheduled arraignment on the amended information on October 20, 1972, and it was continued until October 24, 1972. Finally the defendant was arraigned on October 27, 1972. On that late date, October 27, 1972, which was a Friday, the defendant did appear before the court, addressed the court personally, and stated he desired to consult with another attorney and that he wanted him to work with Mr. Albert Walsh, his present counsel. We belabor the facts no further.

The matter of the granting of a continuance in a criminal case is peculiarly within the province of the discretionary judgment of the trial court. State v. Woods, 182 Neb. 668, 156 N. W. 2d 786. From what we have stated concerning the representation of the court-appointed counsel in this case, it appears that the record falls far short of showing any abuse of discretion in denying the continuance, particularly in light of the fact that the trial courts in the State of Nebraska are under compulsion, by virtue of section 29-1207, R. S. Supp., 1972, to afford a defendant a trial within the mandatory period of 6 months. The record in this case is silent concerning any fact which would support an allegation by the accused that he had good cause to dismiss his court-appointed attorney on almost the eve of the trial date. The most that can be said of the record in this respect is that it demonstrates only that the accused was dissatisfied because of the inability of his trial counsel to prevail in the numerous motions and hearings held prior to the date of trial. A criminal defendant may not discharge his counsel at the eve of trial and seek a continuance without demonstrating good

cause therefor. § 29-1206, R. S. Supp., 1972; United States ex rel. Jackson v. Follette, 425 F. 2d 257 (2d Cir., 1970); State v. Fagerstrom, 286 Minn. 295, 176 N. W. 2d 261. This case directly raises the issue of the right of a criminal defendant to seek substitute counsel on the very eve of trial without demonstrating a good cause therefor, when the record shows that he has been represented throughout by court-appointed counsel in a diligent and competent manner. We hold that the right of counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay. United States v. Llanes, 374 F. 2d 712 (2d Cir., 1967), cert. den., 388 U. S. 917. See, also, Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921. We further point out that even though the defendant decided to proceed pro se the District Judge, carefully preserving and protecting the defendant's rights, proceeded to appoint Mr. Walsh to serve as legal advisor during the trial. State v. Walle, 182 Neb. 642, 156 N. W. 2d 810. We point out further, without objection, Mr. Walsh conducted the entire trial, and now appears in this court to present the very argument contending that the District Court erred in not appointing a new counsel to replace him. The contention of the defendant is utterly without merit.

The defendant objects to the admission of evidence consisting of three items: A gun, a radio, and a razor, all of which were found outside the service station when the defendant and his companion were arrested inside, and were subsequently tagged by the police and introduced into evidence with the tags still attached. The tags all stated "Evidence against Coleman/Turner." The defendant contends that the tags attached to the exhibits amount to a substantial change in the exhibits' condition. We are utterly unable to understand his conten-

tion. No reason or authority is presented for the proposition that the addition of an identification tag to the real evidence materially alters the condition of such evidence for the purpose of admission into evidence. State v. Allen, 183 Neb. 831, 164 N. W. 2d 662. Each one of these exhibits was identified and testified to by the police officers from their personal knowledge. It is clear that when such direct testimony indentifies and defines the purpose of the exhibits the information on the tags was merely cumulative. It is necessary for such identification to be made by the police in the line of good law enforcement so that the history of the exhibit may be preserved to demonstrate its admissibility in evidence.

The defendant next contends that a lighter, which was a part of the police inventory of his personal belongings, was unconstitutionally admitted in evidence. The defendant and his companion were actually arrested inside the service station by the police during the actual commission of this offense. No suggestion is made that the arrest was not reasonable and any search of the person of the arrestee incident to such arrest is constitutionally reasonable. Golliher v. United States, 362 F. 2d 594 (8th Cir., 1966); Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142.

We have examined the other contentions of the defendant and they are without merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS D. KEYSER, APPELLANT.
209 N. W. 2d 187

Filed June 29, 1973. No. 38895.

1. **Criminal Law: Sentences: Appeal and Error.** Where the pun-

ishment 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.

2. **Criminal Law: Sentences: Probation and Parole.** In the absence of statute the District Court after commitment of a prisoner possesses no authority to set aside the sentence and place the prisoner on probation.

Appeal from the District Court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

Donn K. Bieber, 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.

NEWTON, J.

The defendant plead guilty to a charge of forgery and was sentenced to serve 3 years in the Nebraska Penal and Correctional Complex. He charges that the sentence is excessive and that the court erred in failing to reduce the sentence on motion made therefor in conjunction with a motion for new trial. We affirm.

"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." State v. Van Ackeren, 189 Neb. 639, 204 N. W. 2d 165. No abuse of discretion appears.

Defendant contends that the trial court has authority to reduce a sentence. This court has repeatedly held that: "In the absence of statute the district court after commitment of a prisoner possesses no authority to set aside the sentence and place the prisoner on probation." Housand v. Sigler, 186 Neb. 414, 183 N. W. 2d 493. See, also, State v. Carpenter, 186 Neb. 605, 185 N. W. 2d 663. It is true that some changes have been made in the

statutes in regard to sentencing and probation, but we are unable to find any statute making a change of this nature. It is generally held, in the absence of specific statutory authorization, that once the court has pronounced sentence, and the defendant has been committed, the court is without authority to change or set aside the sentence. See, Weston v. State, 28 Wis. 2d 136, 135 N. W. 2d 820; State ex rel. Bennett v. Rigg, 257 Minn. 406, 102 N. W. 2d 17; Annotation, 168 A. L. R. 706.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. JOHN G. TOMEK, COUNTY ATTORNEY OF BUTLER COUNTY, NEBRASKA, APPELLANT, V. COLFAX COUNTY REORGANIZATION COMMITTEE ET AL., APPELLEES.

209 N. W. 2d 188

Filed June 29, 1973. No. 38912.

1. **Quo Warranto: Schools and School Districts: Public Officers and Employees.** Generally, the only issue in a quo warranto action which may be litigated is the right of the respondents to hold public office, and the action must be strictly confined to that issue.
2. **Quo Warranto: Schools and School Districts.** As a general rule quo warranto will not lie for a mere irregular exercise of a conferred power although such irregularity may be sufficient when tested by other remedies to vitiate or render void the act done. If the power attaches the manner of its exercise cannot be challenged by information in quo warranto.

Appeal from the District Court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

John G. Tomek, Vrana & Gless, and Perry, Perry & Witthoff, for appellant.

Otradovsky & Bieber, Robert D. Westadt, Wilson, Barlow & Watson, and Francis O'Brien, for appellees.

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

WHITE, C. J.

In this quo warranto action the relator Tomek, county attorney of Butler County, seeks to challenge the validity of a reorganization of School District No. 123, Colfax County, Nebraska, in which certain portions of other school districts in both Butler and Colfax Counties were added to School District No. 123. The District Court entered a judgment dismissing the action because quo warranto could not be used to test the validity of the reorganization proceedings. We affirm the judgment of dismissal by the District Court.

The record shows that the Colfax County Committee for Reorganization of School Districts prepared a plan to enlarge School District No. 123 of Colfax County. All of School Districts Nos. 1, 2, and 10, all in Butler County, and a portion of School District No. 5-R in Colfax County were to be added to School District No. 123. The result of the plan was that School District No. 123 would provide secondary education for the students of the enlarged district. The members of the board of education of District No. 123 had been elected before the reorganization plan was formulated. Pursuant to the plan, an election was held December 3, 1971; and as a result of this election, actions were taken to implement the plan.

An examination of the pleadings in the record in this case shows that it does not involve, question, or dispute the right of any of the officers of School District No. 123 or of the reorganization committee to hold their positions and to perform the function of their office.

The case at bar thus falls squarely within this rule, repeated just a year ago in Stasch v. Weber, 188 Neb. 710, 199 N. W. 2d 391 (1972): "* * * the only issue in a quo warranto action which may be litigated is the right of the defendant to hold public office, and the

action must be strictly confined to that issue. The legality of the official action * * * under which the officer purports to act may not be litigated in a quo warranto action." In the instant case, the relator is not challenging the validity or authority of the officers of School District No. 123; rather, he is challenging the legality and propriety of different steps and actions by them to accomplish the reorganization.

In summary the relator in the instant case is not seeking to challenge the authority or legitimacy of School District No. 123 or the validity or authority of the officers of School District No. 123. He is rather attempting to test the issue of whether the reorganization proceedings were validly accomplished under the appropriate statutes. This is an impermissible use of quo warranto. A public official's right to hold and exercise the powers of his office cannot be jeopardized or harassed by actions seeking to test the irregularity or invalidity of the exercise of his official power.

The general rule is that quo warranto will not lie for a mere irregular exercise of a conferred power although such irregularity may be sufficient when tested by other remedies to vitiate or render void the act done. If the power attaches the manner of its exercise cannot be challenged by information in quo warranto. State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784.

There is no question that School District No. 123 of Colfax County had a lawful existence prior to the time of the performance of acts which are now claimed to be illegal and void. See, School District D v. School District No. 80, 112 Neb. 867, 201 N. W. 964; State ex rel. Johnson v. Consumers Public Power Dist., *supra;* Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566; Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196; 74 C. J. S., Quo Warranto, § 4, p. 181.

The action of the District Court in dismissing the

relator's petition is correct and is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. LONNIE C. NORMAN, APPELLANT.
209 N. W. 2d 186

Filed June 29, 1973. No. 38914.

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

Holtorf, Hansen, Kovarik & Nuttleman, 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.

WHITE, C. J.

This case is controlled by the opinion in State v. Watkins, *post* p. 450, 209 N. W. 2d 184.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES WATKINS, APPELLANT.
209 N. W. 2d 184

Filed June 29, 1973. No. 38915.

1. **Criminal Law: Trial: Time.** Section 29-1207, R. S. Supp., 1972, provides for a limitation of 6 months for the time of trial and states that such 6 months' period shall commence to run from the date the indictment is returned or the information filed.
2. **Criminal Law: Bail: Habeas Corpus.** The appropriate form of relief from claimed excessive bail in Nebraska is by habeas corpus.

3. **Criminal Law: Bail: Appeal and Error.** Excessiveness of pretrial bail is not reviewable after a conviction and sentence.

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

Holtorf, Hansen, Kovarik & Nuttleman, 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.

WHITE, C. J.

The defendant was charged and convicted for an attempted burglary on May 16, 1971, at a Safeway store in Scottsbluff, Nebraska. The defendant appeals, asserting that he was not accorded a speedy trial; that his bail was excessive; and that there was irregularity in the appointment of counsel to defend him. We affirm the judgment and the sentence of the District Court.

This case and the case of State v. Norman, *ante* p. 450, 209 N. W. 2d 186, are companion cases to State v. Alvarez, Brown, Smith, Skinner, and Mai decided by this court on November 24, 1972, 189 Neb. 281, 297, 202 N. W. 2d 604, 585. The information in this case was filed on June 4, 1971. Trial was had before a jury beginning on December 2, 1971, and was completed on December 3. 1971, within the 6-months' limitation provided for in section 29-1207, R. S. Supp., 1972. In companion cases, arising out of the same offense, this court upheld the convictions of the defendants occurring subsequent to the 6-months' period because of the presence of "good cause" under all the circumstances of those cases, which are very closely similar to the situation present on the record in this case. Those decisions would appear to be controlling in the present case even if the trial occurred within the range of time after the 6-months' period that those cases were actually tried and disposed of. Section 29-1207, R. S. Supp., 1972, provides for a

limitation of 6 months for the time of trial and states that such "six months' period shall commence to run from the date the indictment is returned or the information filed." The subdivisions of subsection (4) of the statute are devoted to defining exclusionary periods which may be added to extend the absolute limit of 6 months for trial. The defendant, however, contends that the District Court could have tried his case earlier than it did if the trial court in the management of its calendar had given absolute preference to the trial of criminal cases. There is nothing in the applicable statutes, sections 29-1207 and 29-1208, R. S. Supp., 1972, that indicates or requires such a construction. The legislative intent is clear. The standard set and required is a time period of 6 months. There is no right of discharge granted at any time short of the 6 months' period. His contention is based upon the provisions of section 29-1205, R. S. Supp., 1972, which contains a provision that states: "To effectuate the right of the accused to a speedy trial * * insofar as is practicable: * * * (1) The trial of criminal cases shall be given preference over civil cases; * * *." This obviously directory provision to the District Court in the management of calendars of criminal cases is designed to promote the accomplishment of the objectives set out in section 29-1207, R. S. Supp., 1972. The argument of the defendant is irrelevant because the record conclusively establishes that the objectives and the time limitation provided for in section 29-1207, R. S. Supp., 1972, were met by the State and the District Court. There is no merit to this contention. We point out further that the defendant was given credit for the time he spent in jail on the sentence that was imposed, and there is utterly no showing of prejudice to the defendant in the preparation or the trial of his case.

The next contention of the defendant in this case is that his pretrial bail of $5,000 was excessive. The record shows that an "F.B.I. report" regarding the de-

fendant was before the trial court in the consideration of the matter. The appropriate form of relief from claimed excessive bail in Nebraska is by habeas corpus. In re Scott, 38 Neb. 502, 56 N. W. 1009. There is nothing in the record to show an abuse of discretion on the part of the trial court in the setting of bail of the defendant, and it further appears that the issue of excessiveness of pretrial bail is not reviewable after a conviction and sentence. State v. Sheppard, 100 Ohio App. 345, 60 Ohio Op. 298, 128 N. E. 2d 471, affirmed 165 Ohio St. 293, 59 Ohio Op. 398, 135 N. E. 2d 340, cert. den. 352 U. S. 910, 77 S. Ct. 118, 1 L. Ed. 2d 119, reh. den. 352 U. S. 955, 77 S. Ct. 323, 1 L. Ed. 2d 245.

The record reveals that the defendant was represented at his preliminary hearing in county court by a lawyer who was not then a member of the bar of the State of Nebraska. He was admitted to the bar in another state. The defendant now contends error in the overruling of his request for a new preliminary hearing in District Court on the ground that it was prejudicial error to permit an attorney who was not admitted to practice in this state and who has not associated with local counsel to represent him at the first preliminary hearing. The record reveals that the defendant was not denied the representation of counsel in any sense. The defendant was first advised by the county court on May 17, 1971, that he had a right to counsel, and that if he were indigent, counsel would be appointed. *At the defendant's request* the matter was continued in order that the defendant might consult an attorney. When the hearing was taken up again, the defendant appeared on May 26, 1971, "with his attorney Lou Mankus" and this attorney represented him, without objection on his part, during the preliminary hearing. Nothing in the record suggests other than that the defendant freely selected Mr. Mankus to represent him, after a full explanation of his rights, with neither the court nor the prosecution participating in the selection process. It

is not argued that his attorney did not adequately represent him and it further appears that any practicing attorney in the courts of another state may be admitted, by the court, for the purpose of representing a client in an individual case. Revised Rules of the Supreme Court, 1971, Chapter II, section 5, page 24. The contention is without merit.

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

AFFIRMED.

SCHOOL DISTRICT NO. 30 OF CHERRY COUNTY ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 6 OF CHERRY COUNTY ET AL., APPELLEES.

209 N. W. 2d 290

Filed June 29, 1973. No. 38968.

1. **Quo Warranto: Schools and School Districts.** An action in quo warranto is a proper remedy to determine the validity of the organization of a school district.
2. **Quo Warranto: Schools and School Districts: Declaratory Judgments.** An action for a declaratory judgment will not ordinarily be entertained where another equally serviceable remedy has been provided by law.

Appeal from the District Court for Cherry County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Michael V. Smith, for appellants.

Wagoner & Wagoner and W. Gerald O'Kief, for appellees.

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

SMITH, J.

A petition for a declaratory judgment that a school district possessed no legal existence was dismissed by the District Court on demurrers. Plaintiffs appeal. The

question is whether declaratory judgment was a proper remedy.

The petition contains the following allegations. School District No. 6 of Cherry County was purportedly formed in reorganization proceedings after a favorable vote on September 1, 1970, by the electors of Cherry County. In the reorganization proceedings Clyde Weber, Cleo Bloom, Jr., Samuel K. Hanna, and 7 others claimed to be the Cherry County Committee for the Reorganization of School Districts in Cherry County. They purportedly conducted all proceedings that the law required such a committee to conduct. In September 1972 the District Court ordered the ouster of the 10 claimants in accordance with our mandate and opinion in Stasch v. Weber, 188 Neb. 710, 199 N. W. 2d 391 (1972), a quo warranto action. This court in the latter case found that none of the claimants acted as a member of the committee at any time.

An action in quo warranto is a proper remedy to determine the validity of the organization of a school district. Murphy v. Holt County Committee of Reorganization, 181 Neb. 182, 147 N. W. 2d 522 (1966). That rule is harmonious with the rule that ordinarily the validity of proceedings for statutory reorganization of a school district may not be tested in quo warranto. See, State ex rel. Tomek v. Colfax County Reorganization Committee, *ante* p. 447, 209 N. W. 2d 188 (1973) (by implication); cf. Stasch v. Weber, *supra*. An action for a declaratory judgment will not ordinarily be entertained where another equally serviceable remedy has been provided by law. Murphy v. Holt County Committee of Reorganization, *supra*.

Quo warranto was an equally serviceable remedy available to plaintiffs, and the dismissal of their petition was therefore correct.

AFFIRMED.

CLINTON, J., concurs in the result.

IN RE ESTATE OF HERBERT CAMPBELL, DECEASED.
GLORIA JUNE BATES ET AL., APPELLANTS, V. SCOTTSBLUFF NATIONAL BANK ET AL., APPELLEES.
209 N. W. 2d 165

Filed July 6, 1973. No. 38784.

1. **Executors and Administrators.** An executor in discharging his trust duties must exercise the care, prudence, and judgment that a man of fair, average capacity and ability exercises in the transaction of his own business.
2. **Executors and Administrators: Wills: Time.** Where the will directs an executor to convert the property of the deceased into cash, any loss resulting from an unreasonable delay in selling the property must be charged to the executor. § 30-1408, R. R. S. 1943.
3. **Executors and Administrators: Wills: Trusts.** Section 24-602, R. R. S. 1943, which provides that trust funds received by an executor may be kept invested in the securities received by him, unless otherwise ordered by the court or unless the trust instrument directs a change in investments, is not applicable where the will directs that securities owned by the deceased shall be converted into cash.
4. **Executors and Administrators: Wills: Time.** A delay of more than 6 months in converting securities of a speculative nature into cash, as directed by the will, was unreasonable under the facts and circumstances of this case.
5. **Executors and Administrators: Damages: Time.** The loss resulting from unreasonable delay in liquidating the property of the deceased is determined to be the difference between the lowest price reached during the 6-month period following the appointment of the executor and the price eventually obtained.

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

Murphy, Pedersen & Piccolo, for appellants.

Wright & Simmons, John F. Wright, and John F. Simmons, for appellees.

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

BOSLAUGH, J.

Herbert Campbell died testate on August 13, 1969.

His will was admitted to probate and letters testamentary issued to Elmer Glantz and The Scottsbluff National Bank on September 11, 1969.

The executors filed their report and petition for final settlement on October 14, 1970. Objections to the report were filed by the widow and eight of the residuary legatees. The objectors alleged that neglect and unreasonable delay by the executors in selling the personal estate of the deceased resulted in a substantial loss to the estate for which the executors should be held liable. The county court overruled the objections and approved the report of the executors. Upon appeal, the District Court found the executors did not unreasonably delay in selling the personal estate of the deceased and dismissed the objections. The objectors appeal.

The will directed the executors to convert into cash all the property of the testator except that specifically bequeathed to his widow. At the time of his death the testator owned shares of stock which had a market value of $191,690. The Scientific Controls stock was sold on April 27, 1970. All the other stock, except fractional shares, was sold on August 12, 1970. At the time it was sold the stock had a market value of $125,356 or $66,334 less than its market value on the date of the testator's death. The objectors contend that if the stock had been sold at a "logical time," it would have had a market value of $202,468, and the executors' account should be charged with the difference of $77,112.

The objectors rely on section 30-1408, R. R. S. 1943, which provides when an executor shall neglect or unreasonably delay to raise money by selling the personal estate of the deceased and the value of the estate shall thereby be lessened, the same shall be deemed waste, and damages sustained may be charged against the executor in his account.

The general rule is that an executor in discharging his trust duties must exercise the care, prudence, and judgment that a man of fair, average capacity and ability

exercises in the transaction of his own business. In re Estate of Bush, 89 Neb. 334, 131 N. W. 602; In re Estate of Hunter, 129 Neb. 529, 262 N. W. 41. The executor is not required to liquidate the personal estate at the earliest possible time. He is entitled to sufficient time to consider and consult. Instantaneous action based upon extraordinary foresight is not required. In re Re's Estate, 22 Misc. 2d 939, 199 N. Y. S. 2d 172. But, if there is an unreasonable delay in complying with the testamentary direction to convert the property into cash, any loss resulting should be charged to the executor.

The executors rely on section 24-602, R. R. S. 1943, which provides that trust funds received by executors may be kept invested in the securities received by them, unless otherwise ordered by the court or unless the trust instrument directs a change in investments, and they shall not be liable for any loss that may occur through the depreciation of such securities.

Section 24-602, R. R. S. 1943, refers to trust funds that may be kept invested. We are of the opinion it does not apply to securities which the will directs shall be sold. Consequently, the issue here is whether the executors were guilty of neglect or unreasonable delay in selling the stock owned by the deceased.

Most of the securities which were owned by the deceased are described in the record as being speculative or medium grade securities. After the deceased died there was a general decline in the securities market. Some of the securities owned by the deceased declined in price steadily from the time of his death until they were sold. Others appreciated in value and then declined sharply.

On or about the date the executors were appointed and qualified, the market value of the stock owned by the deceased had depreciated to $187,418. If the stock had been sold within the next 90 days, there could have been a small gain. On March 13, 1970, 6 months after

the appointment of the executors, the stock had a market value of $171,943.

The executors argue it was reasonable to expect market conditions to improve and they would have been criticized if the stock had increased in value after it had been liquidated. The difficulty with this argument is that it was not the duty of the executors to hold the stock for appreciation. Their duty was to convert the stock into cash without unreasonable delay. The executors did not seek the instructions of the court or attempt to obtain the consent of the beneficiaries to a delay in the liquidation of the stock.

The fact that most of the securities involved in this case were of a speculative nature was a circumstance that weighed heavily against any delay in their liquidation. Prompt liquidation of speculative assets is the proper rule. In re Stumpp's Estate, 153 Misc. 92, 274 N. Y. S. 466.

The objectors' contention that the stock should have been sold at a "logical time" was based on the testimony of Curtis Cramer, an associate professor of Economics at the University of Wyoming. Professor Cramer made an analysis of each security, based upon its market performance and other factors, and arrived at an opinion as to a "logical" date upon which each individual security should have been sold. The study involved expert opinion and was made in retrospect. It was not a reasonable basis upon which the liability of the executors should be determined.

We have concluded that under the facts and circumstances in this case it was unreasonable for the executors to delay the sale of the securities owned by the deceased beyond a period of 6 months from the date of their appointment. We find their account should be surcharged in an amount equal to the difference between the amount which would have been realized if each stock had been sold at the lowest price reached during the 6-month period following their appointment and the price at

which the stock was eventually sold, but less the amount of any additional estate and inheritance taxes which would have been payable if the stock had been sold during the 6-month period. See, In re Draser's Estate, 81 N. Y. S. 2d 648; In re Garvin's Will, 256 N. Y. 518, 177 N. E. 24.

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

REVERSED AND REMANDED.

HELEN KREMLACEK, APPELLEE AND CROSS-APPELLANT, V. JOHN L. SEDLACEK, APPELLANT AND CROSS-APPELLEE.
209 N. W. 2d 149

Filed July 6, 1973. No. 38790.

1. **New Trial: Motions, Rules, and Orders: Jury.** A motion for a new trial for alleged juror misconduct is addressed to the sound discretion of the trial court.
2. **New Trial: Appeal and Error: Evidence.** A new trial may not be granted for arbitrary, vague, or fanciful reasons. But when the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal.
3. **New Trial: Jury.** An unauthorized view or visit by a juror, even though uncommunicated to his fellow jurors, is sufficient to sustain a finding of prejudicial error and warrant the granting of a new trial.
4. **Trial: Jury: Verdicts: Evidence.** A trial court has wide discretion in receiving affidavits and in the weight that it gives them, in accordance with the general rule that affidavits of jurors may be received, for the purpose of voiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself.
5. **Joint Ventures: Motor Vehicles.** To be joint venturers, there must be not only a joint interest in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle.
6. **Motor Vehicles: Negligence.** Where the owner is a passenger in his own automobile while it is being operated by another, the

negligence of the operator is imputable to the owner where the owner assumes to direct or has the power to direct the operation of the automobile and to exercise control over it.

7. **Trial: Motor Vehicles: Negligence.** Before a verdict can be directed against a motorist for failing to see an approaching vehicle at an unprotected intersection, the position of the approaching vehicle must be undisputedly located in a favored position.

Appeal from the District Court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Patrick L. Cooney of McCormack, Cooney & Mooney, for appellant.

George O. Kanouff and Curtiss Bromm, for appellee.

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

WHITE, C. J.

This is an appeal from an order of the District Court granting a new trial in an action for damages sustained in an automobile accident occurring at an open intersection of two country roads, in which the jury returned a verdict for the defendant. The defendant asserts error in the court's determination that the misconduct of a juror in visiting the scene of the accident warranted the granting of a new trial. The plaintiff, riding in a car owned by her and driven by her minor son, cross-appeals asserting error in the instructions and failure to direct a verdict in favor of the plaintiff on the issue of liability. We affirm the judgment and order of the District Court in granting a new trial and find the errors assigned on cross-appeal to be without merit.

A crucial issue in the trial of this open intersection country road case was the location of a row of seven red cedar trees on the south side of the east-west road. The evidence at the trial was to the effect that the row of trees blocked the view for both drivers. A juror's affidavit offered and received in evidence on the motion for new trial recited that another juror had

stated that he had driven out to the scene of the accident during the trial, had observed the scene of the accident, and that in his opinion the trees located near the scene of the accident were *farther back from the corner than the testimony indicated.* The District Court determined that the juror's statement that the trees were farther back from the intersection than the testimony indicated was prejudicial, and required a new trial. A motion for a new trial for alleged juror misconduct is addressed to the sound discretion of the trial court. Huff v. Seipold, 183 Neb. 863, 164 N. W. 2d 916; Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672. It is true that a new trial may not be granted for arbitrary, vague, or fanciful reasons. But when the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal. Scherz v. Platte Valley Public Power & Irr. Dist., 151 Neb. 415, 37 N. W. 2d 721; De Porte v. State Furniture Co., 129 Neb. 282, 261 N. W. 419. Here, the evidence is amply sufficient to sustain the finding of the trial court that prejudicial error occurred. An unauthorized view or visit by a juror, even though uncommunicated to his fellow jurors, is sufficient to sustain a finding of prejudicial error and warrant the granting of a new trial. Meyer v. Omaha & C. B. St. Ry. Co., 125 Neb. 712, 251 N. W. 841; Kelley v. Adams County, 113 Neb. 377, 203 N. W. 544. See, also, Merritt v. Ash Grove Lime & Portland Cement Co., 136 Neb. 52, 285 N. W. 97.

The defendant attacks the hearsay nature of the affidavit that supported the trial court's finding. We point out that the affidavit in question was not used to prove the truth of the matter asserted by the unnamed juror but only that he did visit the scene of the accident and did make a report upon the visibility of the trees to the jury. See 29 Am. Jur. 2d, Evidence, § 497, p. 555. A trial court has wide discretion in receiving affidavits and in the weight that it gives them, in accordance with

the general rule that affidavits of jurors may be received, for the purpose of voiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself. Scherz v. Platte Valley Public Power & Irr. Dist., *supra;* De Porte v. State Furniture Co., *supra.* We find no abuse of discretion in the trial court's judgment and determination that error occurred from the report of a juror of an unauthorized visit to the scene of the accident, and the contention of the defendant is without merit.

Since this case must be retried, it becomes necessary for this court to determine the contentions of the plaintiff on cross-appeal. The plaintiff contends that the trial court erred in giving instructions Nos. 14 and 15 which permitted the jury to impute the negligence of the minor son driver, Thomas Mueller, to the plaintiff if it found that they were engaged in a joint enterprise in the operation of the vehicle. The plaintiff is correct in her assertion that the evidence fails to show that she and her son were engaged in a joint enterprise when the accident occurred. To be joint venturers, there must be not only a joint interest in the objects and purposes of the enterprise but also an equal right to direct and control the conduct of each other in the operation of the vehicle. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. The evidence was insufficient to sustain the submission of this theory of imputed negligence to the jury. However, the fact that they were not engaged in a joint enterprise is not determinative of the issue of imputed negligence. The plaintiff here was the mother of the child driving the vehicle, who at the time possessed only a learner's permit, which required him to have a licensed driver over the age of 21 at his side when he operated an automobile. Mueller, the son, testified that on the occasion of the accident the plaintiff did not actually direct him how to drive or which direction to go but he stated that if

his mother, the plaintiff, had told him to take another route, he would have complied. Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is imputable to the owner where the owner assumes to direct or has the power to direct the operation of the automobile and to exercise control over it. This is ordinarily a question for the jury, unless the evidence is so conclusive that the minds of men could not reasonably arrive at any other conclusion. Weber v. Southwest Nebraska Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274; Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107. It is abundantly clear, considering the age of the driver, his relationship with the owner, the intent and purpose of the requirement that an adult accompany him under a learner's permit, and the actual inferences flowing from the power to control a child's action, that there was sufficient evidence to submit this issue of imputed negligence to the jury.

Finally, the plaintiff contends that she was entitled to a directed verdict on the issue of the liability of the defendant because the vehicle in which she was riding was to the right of the defendant's car as they approached the intersection, and she asserts that the failure of the defendant to see such favored automobile is negligence as a matter of law. Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36; Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596. The difficulty with the plaintiff's argument is that before a verdict can be directed against a motorist for failing to see an approaching vehicle at an unprotected intersection, the position of the approaching vehicle must be *undisputedly* located in a favored position. Whitaker v. Keogh, *supra;* Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561; Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556. We have reviewed the evidence in the record in this respect and it sustains the trial court's determination of submission of this issue to the jury.

Although there is persuasive evidence on the merits to establish the conclusion that the plaintiff's driver had the right-of-way; that the collision occurred in the center of the intersection; and that the defendant's failure to see was the proximate cause of the accident, there is evidence to support a jury's finding that the defendant was traveling at a lawful rate of speed, and that he entered the intersection far enough in advance of the plaintiff's driver to submit the question of whether Mueller had the right-of-way. As we said in Costanzo v. Trustin Manuf. Corp., *supra*, the true test is whether, considering the elements of speed, lookout, and control, and the particular circumstances of the case, there is imminent danger of collision if the car on the left proceeds into the intersection. The statute contemplates that the driver on the left entering first has the right-of-way when outside the range of "at approximately the same time." There is evidence that would support the finding that the plaintiff's vehicle was not definitely located in the favored position. Consequently the applicable rule is that where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury. Costanzo v. Trustin Manuf. Corp., *supra;* Whitaker v. Keogh, *supra;* Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246. Consequently, we determine that there is no merit to this contention on cross-appeal and that this issue should be submitted to the jury on retrial.

The judgment and order of the District Court granting a new trial are affirmed. The contentions of the plaintiff on cross-appeal are without merit.

AFFIRMED.

McCOWN, J., concurring in result.

I do not agree with the holding that where the owner is a passenger in his own automobile while it is being operated by another the negligence of the operator is

imputable to the owner where the owner assumes to direct or has the power to direct the operation of the automobile and to exercise control over it. See my concurring opinion in Weber v. Southwest Nebraska Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274.

STATE OF NEBRASKA, APPELLEE, V. LEWIS MYERS, APPELLANT.
STATE OF NEBRASKA, APPELLEE. V. JIM BRODRICK, APPELLANT.
209 N. W. 2d 345

Filed July 6, 1973. Nos. 38797, 38796.

1. **Criminal Law: Jury: Trial.** It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias or prejudice can attach to any member thereof.
2. **Criminal Law: Jury: Trial: Constitutional Law.** Where a jury has been impaneled and sworn as one of several juries selected from a single jury panel for the subsequent trial of a series of criminal cases, if the court is informed before the presentation of evidence begins of matters which might reasonably constitute grounds for a challenge for cause of one or more jurors, which grounds arose out of matters occurring after the jury was sworn, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guaranty of the right to trial by an impartial jury.

Appeals from the District Court for Dawes County: ROBERT R. MORAN, Judge. Reversed and remanded for further proceedings.

Charles A. Fisher, for appellants.

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

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

McCOWN, J.

The defendants in these two cases, Lewis Myers and Jim Brodrick, after separate jury trials, were found guilty of unlawful delivery and distribution of a controlled substance, and sentenced to terms of imprisonment. Each defendant appealed and the cases have been consolidated on appeal in this court. Both appeals involve the procedure of impaneling multiple juries at one time from a single jury panel for the subsequent trial of criminal cases which may be interrelated.

On May 30, 1972, in the District Court for Dawes County, four juries were impaneled for the trial of four criminal cases involving the possession and sale of controlled substances. The four juries were all passed for cause, impaneled, and sworn on May 30. The multiple impaneling was an innovation in procedure motivated by the court's desire to economize on jury expenses. There was no objection to the procedure at the time of the original impaneling on May 30. Following impaneling, the cases were set for trial in sequence.

The first of the four cases tried was against Dale (Spike) Myers, a brother of the Lewis Myers involved here. The second case tried was a joint trial involving Kathy Shimp and Dan Clark. The cases involving the two defendants here were the third and fourth cases tried. The trial of defendant Lewis Myers began on June 2, 1972, and the trial of defendant Jim Brodrick began on June 5, 1972.

In each of the two cases now before the court, the defendant moved the court for a reexamination of the jurors previously examined and impaneled and requested further voir dire. The motion also included a request for a continuance. The basis for the motions was that some jurors had served on previous juries in the series, had heard the evidence in those trials, and all previous defendants had been found guilty of the drug offenses charged. The record establishes that the jury for the trial of defendant Lewis Myers included eight jurors

who had served on the jury for the first trial in the series. The jury for the trial of the defendant Brodrick included one juror from the first trial, seven jurors from the second trial, and one juror from the third trial in the series.

The same undercover agent for the Nebraska State Patrol was the principal witness for the State in all four trials. Max B. Ibach was also a witness for the State in both the third and fourth trials. Violet Woodrum and Steve Crow were also defense witnesses common to both the third and fourth trials. Dale (Spike) Myers, the defendant in the case tried first, was a witness for himself at the first trial as well as a witness for the defendants in both of the trials here. As an example of the possible interrelationship of the various cases, the undercover agent for the State who was the principal witness in all four cases, in the fourth case testified to a conversation involving himself, the defendant in the fourth case, and the defendant in the first case. The conversation dealt with the sale and payment for controlled substances.

Before either of the two trials involved here commenced, the court, out of the presence of the jury, held a hearing on the motion to reexamine the jurors. At that hearing the jury lists of the preceding trials in the series were presented and it was stipulated that the principal undercover agent was a witness in all previous cases and would be a witness in the case about to be tried. No evidence was presented to support the allegations of the motions that the principal undercover agent had appeared before service clubs where the testimony had been generally discussed. It was also stipulated that there had been guilty verdicts from the juries in all the previous cases in the series. The court then overruled the motions for reexamination and additional voir dire, and a continuance, called the jury, and the trials proceeded.

Article I, section 11, of the Constitution of Nebraska,

provides in part: "In all criminal prosecutions, the accused shall have the right to * * * a speedy public trial by an impartial jury * * *." Challenges for cause against prospective jurors are unlimited in number while peremptory challenges are limited in number by statute. See, §§ 29-2005, 29-2006, R. R. S. 1943.

Section 29-2006, R. R. S. 1943, provides, among other things, that it shall be good cause for challenge to any person called as a juror "that he has formed or expressed an opinion as to the guilt or innocence of the accused." Other portions of that statute indicate clearly that if any such opinion of a juror was founded upon "conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify" the dismissal of such a juror is mandatory. It has been so interpreted. See Flege v. State, 93 Neb. 610, 142 N. W. 276. In that case a prospective juror who had read reports of a witness' testimony was held to be disqualified without reference to what he might say as to his ability to render an impartial verdict.

Section 29-2003, R. R. S. 1943, specifically provides that a juror having heard the evidence as to one defendant tried separately under a joint indictment, where the same evidence is later required, is incompetent to sit in further causes in the same indictment or information. It must be noted here that section 29-2007, R. R. S. 1943, requires that all challenges for cause "shall be made before the jury is sworn, and not afterward."

In the normal course of events trial to the jury follows immediately upon the impaneling and swearing of the jury. For that reason this court has consistently held that: "A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection." See, Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483; Regier v. Nebraska P. P. Dist., 189 Neb. 56, 199 N. W. 2d 742. Those holdings are not applicable to the factual situation under the experimental procedure used here. A

challenge for cause at the time the juries were impaneled and sworn based upon the mere possibility that a juror sitting on an early case might form an opinion about the guilt or innocence of a defendant to be tried later would have been purely speculative and unauthorized by statute. The failure to object at that time should certainly not be treated as a voluntary waiver of the constitutional right to be tried by an impartial jury.

In State v. Eggers, 175 Neb. 79, 120 N. W. 2d 541, we held that by passing the jurors for cause the defendant waived any objection to their selection as jurors and that the defendant is not permitted to change his mind after an unfavorable verdict. In that same case it should be noted this court specifically approved the following language from Seaton v. State, 106 Neb. 833, 184 N. W. 890: "It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof. Unless the jury be absolutely impartial, the jury system becomes an awkward instrument of justice and the constitutional guaranty that every person charged with an offense against the laws of this state * * * shall have a public and speedy trial by an impartial jury * * * is worthless."

The first sentence of the above quotation was also quoted in one of the dissents in Bufford v. State, 148 Neb. 38, 26 N. W. 2d 383, followed by the statement: "It was the duty of the trial court under the clear circumstances of this case and under this authority to see to it that this defendant had a trial to a fair and impartial jury, and no amount of discussion of waiver or failure to further object by counsel for defendant can wipe out the failure of the trial court to accord to the defendant his constitutionally guaranteed right to a trial by a fair and impartial jury."

Ordinarily, juries in criminal cases are impaneled and sworn one case at a time and do not hear other cases

in any recessed time interval. Because the procedure involved here was experimental, this court has never passed on the specific issues involved. Analogous comparison may be made to situations in which juror disqualification arises after the jury has been impaneled, passed for cause, and sworn. In Fetty v. State, 119 Neb. 619, 230 N. W. 440, for example, the jury had been impaneled and sworn, opening statements of counsel had been made, some witnesses had testified, and the court adjourned for the day. Before trial resumed the next day, one juror was arrested for drunkenness and was in jail at the time for resumption of the trial. The trial court held a hearing and discharged the juror. This court held that under such circumstances it is the duty of the trial court to determine whether the juror's condition was such as to require his disqualification and if it was, the discharge of the entire jury was required. This court also clearly indicated that the trial court should not only hear the evidence as to disqualification but also examine the allegedly disqualified juror. The court in Fetty held that the disqualification of a juror after the jury had been impaneled and sworn required the discharge of the jury and the reexamination of the eleven remaining jurors for cause.

In the cases now before us, the trial court's failure to examine the jurors himself at the time of the motion for reexamination made it impossible to determine whether or not the witnesses and evidence the jurors had heard in the other trials had caused any of them to form or express an opinion as to the guilt or innocence of the defendants in the cases about to be tried. If even one juror could no longer be impartial, the Constitution and the statutes demanded the discharge of the jury and the impaneling of a new jury. At that point no evidence had been heard and a reimpaneling would have been relatively uncomplicated. The statute requiring that all challenges for cause shall be made before the jury was sworn was obviously designed for

the normal procedure in which trial regularly proceeds after the jury is sworn and without time intervals of several days during which the jury is hearing other criminal cases which may be interrelated.

The impaneling of multiple juries from a single jury panel for the subsequent trial of a series of criminal cases creates difficult substantive and procedural problems whenever individual jurors are selected on more than one jury and the cases to be tried may be interrelated. The possible saving of some jury expense cannot outweigh the constitutionally mandated requirements of a fair trial by an impartial jury. Where a jury has been impaneled and sworn as one of several juries selected from a single jury panel for the subsequent trial of a series of criminal cases, if the court is informed before the presentation of evidence begins of matters which might reasonably constitute grounds for a challenge for cause of one or more jurors, which grounds arose out of matters occurring after the jury was sworn, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guaranty of the right to trial by an impartial jury. Any lowering of those constitutional standards strikes at the very heart of the jury system.

In view of the disposition made, the remaining assignments of error have not been considered.

The convictions and sentences in each case are vacated and the causes remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NEWTON, J., concurring.

I concur in the result reached in this case and in the opinion generally. Where multiple defendants have been apprehended and are tried for the same criminal offense, jurors who have sat upon and determined one case are disqualified to sit upon a second or third case

necessarily tried upon the same facts. This does not, however, disqualify other members of the jury panel.

STATE OF NEBRASKA, APPELLEE, V. DANNY ATKINSON, APPELLANT.
209 N. W. 2d 154

Filed July 6, 1973. No. 38883.

1. **Criminal Law: Rape: Evidence.** The slightest penetration of the sexual organ of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence.
2. **Criminal Law: Trial: Evidence.** 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 a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant.
3. **Crimnal Law: Trial: Rape: Evidence.** It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, although never so innocent, and that courts should be the more cautious upon trials of offenses of this nature. In the light thereof, courts have generally exercised great care and vigilance to insure that a verdict of conviction was supported by sufficient competent evidence and not the result of passion and prejudice, inspired by the wiles of a malicious contriver or the very heinousness of the offense charged.
4. **Criminal Law: Trial: Appeal and Error.** Error may creep into the proceedings in criminal prosecutions in spite of impartiality, care, learning, and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the reversal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice.
5. **Criminal Law: Sentences: Appeal and Error.** Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Edward E. Hannon, 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.

This appeal is from defendant's conviction of having carnal knowledge of a female child under 15 years of age. He was sentenced to a term of 3 to 7 years in the Nebraska Penal and Correctional Complex. Defendant questions the sufficiency of the evidence, undue restriction of cross-examination, the exclusion of certain testimony, and the excessiveness of the sentence. We affirm.

The prosecutrix, who was in a special education section of the 8th grade, was 14 years and 5 months of age at the time of the alleged crime, May 12, 1972. She was riding with a Truman Rossman, who was 16 years of age, about 11:30 p.m., when their car was stopped by a car driven by Gary Seger and containing Danny Atkinson the defendant, Terry Stevens, and Gary Ogden as passengers. Defendant, who was 23 years of age, and Seger were both married.

Rossman got out of his automobile. Atkinson got into the Rossman car on the driver's side, and Seger got in on the right side, with prosecutrix between them. Rossman had taken out his keys. When he refused to give them to Atkinson, Seger, over her protest, pulled prosecutrix to his car. She got in on the driver's side. Seger got in after her on the same side. Defendant restrained Rossman while this was happening and then got into the Seger car on the other side of the prosecutrix. Ogden was in the back of the Seger automobile. Defendant told Stevens to get into the Rossman car, which he did. When

Seger drove off, Rossman and Stevens attempted to follow but lost sight of the car.

Prosecutrix testified she kept asking Seger if Rossman knew where they were going. The car went through a big mud puddle and stalled. When prosecutrix said she had to get home, she and Seger started walking back to town. Defendant and Ogden stayed with the car. Prosecutrix and Seger walked up the road about ½ mile. To this point the evidence is relatively undisputed.

We do not believe it necessary to recite the salacious and obscene details of the evidence incident to the alleged offenses. Suffice it to say that prosecutrix testified that Seger had sexual relations with her. When defendant and Ogden came up with the car, they also had relations with her. Later, in the car Ogden and the defendant again had intercourse with her. The defendant, Seger, and Ogden all admit being with the prosecutrix and corroborate most of her testimony except that they deny having intercourse with her.

The prosecutrix was examined by a physician at 3:30 a.m., May 13, 1972, within 3 hours of the alleged occurrences. He found a torn hymen, oozing drops of blood, which definitely established that she had been sexually molested and that this had occurred within a few hours of his examination. The doctor also found live sperm and a fresh injection of the gonorrhea germ.

The defendant's claim of insufficiency of the evidence goes to the issue of penetration. The prosecutrix testified to penetration on each occasion. On cross-examination she did get confused, but the evidence was sufficient to present a jury question. It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labium is sufficient. As we said in State v. Chaney (1969), 184 Neb. 734, 171 N. W. 2d 787: "The slightest penetration of the sexual organ of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element

may be proved by either direct or circumstantial evidence."

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 a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant. Callies v. State (1953), 157 Neb. 640, 61 N. W. 2d 370.

This is a second trial of this defendant. He was convicted on a prior occasion but was granted a new trial. His theory of defense is summed up in the following statement from his brief: "Furthermore proof of sperm in her vagina and the tear in the hymen does not rule out the defense position that she probably had intercourse earlier in the evening while running around Atkinson with a group of boys."

We said in State v. Chaney, *supra:* " 'This court has always recognized the age-old admonition of Sir Mathew Hale that "It is true rape is a most detestable crime, and therefore ought severly and impartially to be punished * * * but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent," and that courts should "be the more cautious upon trials of offenses of this nature." In the light thereof, courts have generally exercised great care and vigilance to insure that a verdict of conviction was supported by sufficient competent evidence and not the result of passion and prejudice, inspired by the wiles of a malicious contriver or the very heinousness of the offense charged. * * *.' " Two juries have found the defendant guilty. We do not believe a jury would consider a 14-year-old, who was in an 8th grade special education class, to be a malicious contriver. On the record we see no reason to question their judgment.

Defendant next complains that there is insufficient corroboration of the testimony of the prosecutrix. While

the testimony of the prosecutrix does have some contradictions, they can easily be explained, and the opportunity for the commission of the offense is unquestioned. Further, corroboration is found, as in State v. Hunt (1965), 178 Neb. 783, 135 N. W. 2d 475, in the fact that she told her mother what had happened at the earliest opportunity. The fact that she failed to confide in her uncle or grandfather when they found her does not in any way weaken the corroboration. The fact that she confided in her mother at the first opportunity, coupled with the testimony of the State's medical expert, the admission of defendant's group that they took prosecutrix from Rossman, and the testimony of Rossman that his opposition to Kathy being taken resulted in his being restrained by the defendant, provide circumstantial evidence of the most cogent character for corroboration within the controlling authorities.

Defendant complains of the restriction on the cross-examination of prosecutrix' uncle who found her at home 5 minutes after she arrived. In response to his question, she told him that she had been walking around the town of Atkinson with the Hagan girls and that the Hagan boys had brought her home. This testimony was within the limits of permissible cross-examination, but its exclusion herein was harmless error. Defendant admits that he was with the prosecutrix at the times testified to by her. It is obvious that she was trying to hide her plight from her uncle. When he accused her, however, of being with the defendant she admitted it to him.

Defendant also complains of several instances wherein the trial court restricted his cross-examination of the prosecutrix. The defendant offered exhibit 2 at the trial. This is a statement written by the prosecutrix shortly after the alleged offense. In that statement the witness stated that she was "raped." Defendant's counsel asked her what she thought the word "rape" meant. An objection was sustained. The word was not used by her at the trial. Exhibit 2 was offered by the de-

fense, undoubtedly for impeachment purposes. However, exhibit 2 substantially corroborates prosecutrix' testimony at the trial. While the objection should have been overruled, we do not consider the ruling prejudicial to the defendant.

We said in Texter v. State (1960), 170 Neb. 426, 102 N. W. 2d 655: " 'Error may creep into the proceedings in criminal prosecutions in spite of impartiality, care, learning and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the reversal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice.' "

Prosecutrix had been generally in Rossman's automobile after about 8:30 on the evening in question. During most of this time other boys and her sister were also in the automobile. About 11:30 p.m., Rossman and prosecutrix left the others to drive to the country. They were followed by the defendant and his group. The Rossman car was stopped and prosecutrix was taken to the other vehicle. Shortly thereafter the subject offense was committed. Defendant attempted through cross-examination of Rossman and prosecutrix to discover the activities in the Rossman vehicle prior to prosecutrix leaving that vehicle. Defendant was not permitted to ask Rossman whether any "hanky-pank" had gone on in the Rossman vehicle. The word "hanky-pank" is filled with innuendo imprecise in common meaning. The trial court properly sustained an objection to the question. If the defendant wished to know whether the prosecutrix had been kissed, fondled, or carnally contacted while in the Rossman vehicle, appropriate questions should have been but were not asked. We have reviewed the other assignments of restriction of cross-examination

and find them to be either frivolous, fully covered by other evidence, or nonprejudicial.

Defendant argues that he was prejudiced by the exclusion of certain medical testimony concerning gonorrhea. The prosecutrix' doctor testified when he examined her shortly after the offense her vagina had a fresh infestation of gonorrhea germs. Defendant's doctor was not allowed to state his opinion for the jury that Gary Seger and Gary Ogden were free from venereal disease when examined by him. Both Seger and Ogden would testify that they did not receive any medical treatment between May 12, 1972, and the date of the medical examinations. Defendant also attempted to introduce evidence that Gary Seger's wife and his own wife did not have venereal disease when their tests were made.

Defendant's medical witness took specimens from Sharon Atkinson, Gary Ogden, and Sharon Seger. They were processed by his office staff and then sent to a laboratory at Norfolk, Nebraska. He attempted to testify from the report he received from the laboratory. The objection to the testimony was sustained on the basis of insufficient foundation. The doctor's opinion was based not on his own examination but upon the report of someone who analyzed the samples taken by him. No one connected with the analyses was called as a witness.

Defendant relies on Houghton v. Houghton (1965), 179 Neb. 275, 137 N. W. 2d 861, for the proposition that the opinion evidence should have been admitted. However, in Houghton the testimony indicated that the persons who made the tests were working under the personal direction of the doctor. In the present case, the analyses on which the opinon evidence was based had been prepared by a wholly independent laboratory with which the testifying physician had no connection. There was no testimony as to the testing methods used or the

qualifications or competency of the persons who actually made the tests.

Evidence was admitted to show that the defendant was examined for gonorrhea on June 3, 1972, and none was found at that time. As above noted, evidence was excluded as to whether or not his companions were free of a gonorrhea infection. Seger was examined May 31, 1972, and Ogden July 8, 1972. The offense occurred May 12, 1972. This evidence was offered in an attempt to prove that an unknown fourth male, who was suffering from gonorrhea, had intercourse with prosecutrix that evening, thus explaining the sperm in her vagina and weakening the corroboration.

Defendant's doctor testified: "Medicine used to feel that 100% of men who had gonorrhea were symptomatic of the gonorrhea. It has only been in recent years that we now recognize the fact that some 15% of men are asymptomatic of gonorrhea. That is, they have the active disease, but have no symptoms from this disease."

Defendant's doctor also testified that the fact that the defendant did not have gonorrhea at the time he tested him does not prove that he did not have sexual intercourse with somebody who had it.

While it would have been within the limits of the trial judge's discretion to have permitted the introduction of the evidence, we do not find that he abused his discretion on the present record by its exclusion.

This is a prosecution for statutory rape. We are not here concerned with previous chastity. Callies v. State (1953), 157 Neb. 640, 61 N. W. 2d 370. Even if the prosecutrix had had sexual relations earlier in the evening, this would not absolve the defendant, nor would the proffered testimony establish that defendant's companions could not have had intercourse with the prosecutrix. They could have done so even if the gonococcus germ had been deposited by a fourth person earlier in the evening. We find no error in the exclusion of the testimony.

The evidence that defendant did not have gonorrhea when tested on June 3, 1972, was before the jury. It is apparent that the jurors did not believe this absolved the defendant. It does test credulity to believe that defendant and his associates forcibly took the prosecutrix from her 16-year-old companion and spent more than 2 hours only riding around with her.

Defendant's final assignment of error is the excessiveness of the sentence. The subject offense, having carnal knowledge of a female under 15 years of age, is a serious one. The statutory penalty is 3 to 50 years. On the record before us, we cannot say that the trial court abused its discretion. As we said in State v. Jones (1972), 187 Neb. 669, 193 N. W. 2d 562: "Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears."

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPEAL OF GERALD EUGENE RIEN ET AL., FROM THE ACTION OF THE BOARD OF EQUALIZATION OF SCOTTS BLUFF COUNTY, NEBRASKA.

GERALD EUGENE RIEN ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF SCOTTS BLUFF COUNTY, NEBRASKA, APPELLEE.

IN RE APPEAL OF GERALD A. MORRIS ET AL., FROM THE ACTION OF THE BOARD OF EQUALIZATION OF SCOTTS BLUFF COUNTY, NEBRASKA.

GERALD A. MORRIS ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF SCOTTS BLUFF COUNTY, NEBRASKA, APPELLEE.

209 N. W. 2d 144

Filed July 6, 1973. Nos. 38892, 38893.

1. **Taxation: Trial.** The burden of proof is upon a taxpayer to

establish that the value of his property has been arbitrarily or unlawfully fixed in an amount greater than its actual value.

2. **Taxation: Administrative Law.** The court must affirm the action taken by the board of equalization unless it is established that its action was arbitrary or unreasonable.
3. **Taxation: Administrative Law: Appeal and Error.** Where the assessed value of real property has been determined and fixed in the course of a professional county-wide reappraisal, such assessed values will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to such valuation.

Appeals from the District Court for Scotts Bluff County: JOHN H. KUNS, Judge. Affirmed.

Wright & Simmons, John F. Wright, and John F. Simmons, for appellants.

Marvin L. Holscher and W. H. Kirwin, for appellee.

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

NEWTON, J.

These are appeals from the Board of Equalization of Scotts Bluff County, Nebraska. Involved is the south half of Lot 3, and Lots 4 and 5, Block 13, Original Town. At the time of assessment in January 1971, there were two 4-unit apartment buildings on Lot 5 which had been completed in September and November 1970. Lot 5 was assessed at $75,000 and the south half of Lot 3 and Lot 4 at $8,000. Also involved are 6 and 12-unit apartment buildings located on part of Lots 1 and 2, of 5th and 27th subdivision. These properties were assessed at $60,000 and $125,000 respectively. The trial court sustained the actions of the Board of Equalization and we affirm those judgments.

No question regarding equalization of assessments is presented and the only issue is whether or not the assessed values exceed actual values. One of the owner-plaintiffs testified that construction of the apartment buildings was accomplished primarily with the labor of

plaintiffs. They did painting, cement and carpenter work, laid brick and concrete blocks, etc. In figuring costs of construction, the sum of $3 per hour was allowed for such services. He fixed cost of construction of the two 4-unit apartments at $61,083.07 but had no similar figures on the other buildings. It appears he had paid $6,000 for the site of the 4-unit apartments and had demolished an old house on the property. The site of the two larger apartments had been purchased for $12,500.

This witness valued the 4-unit apartment buildings at his alleged cost of construction of $61,083.07. This does not take into account the value of the lots and he offered no competent statement in this respect. He placed a value of $40,000 and $80,000 on the 6 and 12-unit apartment properties and stated gross income from them was $26,080.19 with a net income of $9,126.72. He displayed little, if any, knowledge of current cash market values of such properties.

A local real estate broker was called by plaintiffs. He valued the 4-unit apartments at $60,000 and the 6 and 12-unit properties at $40,000 and $80,000 respectively. His estimates were based on the cost and income factors. He was unfamiliar with recent apartment house sales in Scottsbluff.

All properties in Scotts Bluff County had been appraised for taxation purposes by Justin H. Haynes & Co. Representatives of this firm had made studies of construction costs and rental values in Scottsbluff and also of recent sales of various types of properties. Much of the evidence offered was refused or discounted on the ground that it was based on hearsay or was directed to the ultimate question to be determined, namely, values. Experts on real estate values are invariably dependent upon information received from others in determining construction costs, rental income and expense, and values for which comparative properties have been sold. In fixing a market value on real property

which is the subject of assessment for tax purposes, they necessarily testify as to the ultimate issue. The properties were assessed in accordance with appraisals for tax purposes made by the Justin H. Haynes & Co. firm, professional appraisers. The evidence of the representatives of this firm tended to support the assessments made.

The burden of proof is upon a taxpayer to establish that the value of his property has been arbitrarily or unlawfully fixed in an amount greater than its actual value. See Lexington Building Co., Inc. v. Board of Equalization, 186 Neb. 821, 187 N. W. 2d 94. The court must affirm the action taken by the board of equalization unless it is established that its action was arbitrary or unreasonable. See § 77-1511, R. R. S. 1943.

The trial court found that plaintiffs had failed to sustain this burden of proof, a finding with which we are inclined to agree. Plaintiffs' evidence as to construction costs failed to take into account the high cost of skilled labor and their estimate of value based on cost failed to include the value of the land. Their estimate of expenses of operation was conclusionary in nature without verification by the production of books or bank accounts. Their expert witness was rather thoroughly impeached when he admitted ignorance of comparative sales in the city and relied largely on figures as to net income and construction costs supplied by plaintiffs.

The plaintiffs have failed to sustain their burden of proof and the evidence will not sustain a finding of arbitrary or unreasonable assessments. The judgments of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WALTER KOESTER, APPELLANT.
209 N. W. 2d 172

Filed July 6, 1973. No. 38911.

1. **Criminal Law: Checks.** The offense of issuing a check without sufficient funds is complete when the check is issued with knowledge and the intent to defraud, even though no one is defrauded thereby.
2. ———: ———. To be guilty of the crime of uttering an insufficient fund check under section 28-1213, R. S. Supp., 1972, it is not necessary that there be any reliance upon a false representation of the defendant as is necessary in a prosecution for the obtaining of money under false pretenses.

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

T. Clement Gaughan and Richard L. Goos, 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 was convicted and sentenced under section 28-1213, R. S. Supp., 1972, for the offense of uttering an insufficient fund check. The defendant appeals asserting, in substance, that the trial court committed error in not submitting to the jury the issue of whether there had been justifiable reliance by the bank upon the misrepresentation of the defendant in the making and the issuing of the check for the insufficiency of funds to pay same for which he was prosecuted. We affirm the judgment and sentence of the District Court.

The offense of issuing a check without sufficient funds is complete when the check is issued with knowledge and the intent to defraud, even though no one is defrauded thereby. State v. Martin, 177 Neb. 209, 128 N. W. 2d 583. In the above-cited recent case this court held that

to be guilty of the crime of uttering an insufficient fund check under section 28-1213, R. S. Supp., 1972, it is not necessary that there be any reliance upon a false representation of the defendant as is necessary in a prosecution for the obtaining of money under false pretenses. The defendant's contention is based upon a citation of authority in United States v. Western Contracting Corp., 341 F. 2d 383, which was a civil action where the issue was liability on a contractor's performance bond and in which several insufficient fund checks were involved. Based on this case and analogy to an Iowa decision, the defendant argues that this was a fundamental element of the offense. We reaffirm our holding in State v. Martin, *supra,* which completely answers the defendant's contentions as follows:

"The defendant further argues the insufficiency of the evidence because the hotel bookkeeper, in cashing the check, relied on the representation by the Provo bank that sufficient funds were on deposit. Berneice Linden, the bookkeeper, testified that she listened in on the telephone conversation with the bank, that the bank stated to her that the defendant had $200 in his bank account, and that she cashed the check relying on this representation. The defendant in support of his contention cites Beyl v. State, 165 Neb. 260, 85 N. W. 2d 653, and several cases from other jurisdictions. The Beyl case, supra, was a prosecution for the obtaining of money by false pretenses. This case and the other cases cited arose under statutes which hold that the false pretense must be an effective cause in inducing the owner to part with his property. In other words, there must be reliance upon a false representation. The defendant here was not informed against for obtaining money by false pretenses. He was prosecuted for the crime of uttering an insufficient fund check under section 28-1213, R. R. S. 1943. The elements are an intention to defraud and a knowledge that at the time of the making of such check he has not sufficient funds for its payment upon

presentation. It is not required under this statute that the State prove that the payee of an insufficient fund check actually parted with any money or property. In State v. Eggers, supra, the court said: 'The crime of obtaining money by means of an insufficient fund check is completed at the time the check is uttered and passed.' The offense of issuing a check without sufficient funds is complete when the check is issued with the intent to defraud, even though no one is defrauded thereby. People v. Freedman, 111 Cal. App. 2d 611, 245 P. 2d 45; People v. Cortze, 108 Cal. App. 111, 290 P. 1083; People v. Kitchens, 164 Cal. App. 2d 529, 331 P. 2d 127."

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

AFFIRMED.

WILLIAM JOSEPH CROWDER ET AL., APPELLEES, V. ALLIED INVESTMENT COMPANY, A NEBRASKA CORPORATION, APPELLANT.

WILLIAM JOSEPH CROWDER ET AL., APPELLEES, V. GILBERT GIBREAL, DOING BUSINESS AS GIBREAL LEASING CO., ET AL., APPELLANTS.

209 N. W. 2d 141

Filed July 6, 1973. Nos. 38920, 38922.

1. **Security Interest: Leases and Consignments.** If upon compliance with the terms of a lease the lessee has an option to become the owner of the property for a nominal consideration, the lease is intended for security.
2. **Security Interest: Sale: Notice.** A secured party who disposes of collateral without reasonable notification to the debtor is liable for any loss caused by a failure to comply with the provisions of the Uniform Commercial Code.
3. **Damages: Evidence: Trial.** Damages must be proved with as much certainty as the case permits and cannot be left to conjecture, guess, or speculation. Generally, the evidence must be sufficient to enable the court or jury to determine the amount of damages with reasonable certainty.

Appeals from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

Floersch & Floersch, for appellants.

Stern, Harris, Feldman, Becker & Thompson and James J. Stumpf, for appellees.

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

BOSLAUGH, J.

These actions arise out of a truck lease agreement, dated May 29, 1969, between the plaintiffs and Gibreal Leasing Co., a trade name for the defendant, Gibreal Auto Sales, Inc. Gibreal Auto Sales, Inc., will be referred to as Gibreal. Allied Investment Company, a separate corporation, was merged into Gibreal on July 15, 1971.

The lease agreement covered a 1966 Kenworth truck. It provided for a downpayment of $2,500 and 36 monthly payments of $400 each. The plaintiffs had an option to purchase the truck at the termination of the lease for an additional payment of $665.

The plaintiffs became delinquent in their payments in 1970 and the truck was repossessed by Gibreal. The plaintiffs then borrowed $2,000 from Allied Investment Company and paid the delinquent installments on the lease agreement and some repair expense that had been incurred by Gibreal.

The plaintiffs made no payments after July 1970, and the truck was repossessed by Gibreal the second time in September 1970.

The first action was commenced on September 30, 1970, to enjoin the sale or leasing of the truck to another party; to cancel the $2,000 note and mortgage to Allied Investment Company; and to recover damages for the wrongful serving of a wage assignment. The cause of action for cancellation of the note and mortgage was

later docketed as a separate action. By cross-petition Gibreal sought to recover one installment of rent, insurance premiums advanced, and repair expense incurred.

On February 1, 1971, while the first action was pending, the truck was sold by Gibreal at private sale without prior notice to the plaintiffs. During the trial the plaintiffs were allowed to amend their petition to pray for damages.

The trial court found the lease agreement was a contract of sale with a purchase money security interest reserved to Gibreal; the repossession and sale of the truck was illegal and the plaintiffs were damaged in the amount remaining due on the note and mortgage to Allied Investment Company; and the plaintiff Eloise M. Crowder was entitled to recover $200 damages for the wrongful service of the wage assignment. The cross-petition was dismissed and the note and mortgage canceled. Gibreal and Allied Investment Company appeal.

The defendants contend the trial court erred in finding the lease agreement was a contract of sale with a purchase money security interest reserved. They rely on Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co., 186 Neb. 763, 186 N. W. 2d 719, in which a somewhat similar lease agreement was held to be a lease. The principal difference between the lease agreement in the Missouri Valley case and the lease agreement involved here is the consideration that was to be paid if the option to purchase was exercised. In the Missouri Valley case the additional consideration was $8,580. The additional consideration to be paid here was $665, approximately 4 percent of the total consideration payable under the agreement.

Section 1-201 (37), U. C. C., provides that if upon compliance with the terms of the lease the lessee has an option to become the owner of the property for a nominal consideration, the lease is intended for security. The additional consideration here was nominal, and the

finding of the District Court that the lease was intended for security was correct.

Section 9-504, U. C. C., provides that after default, a secured party may dispose of collateral at public or private sale after reasonable notification to the debtor. Since there was no notice given in this case, the plaintiffs could recover any loss caused by the failure of the secured party to comply with the statute. § 9-507, U. C. C. The problem here is there was no competent evidence to show the amount of any loss sustained by the plaintiffs.

Gilbert Gibreal, who operated the leasing company, testified he sold the truck for $8,900 cash which was its fair market value at the time it was sold. The balance due under the agreement was $9,465. The plaintiffs produced no evidence as to the value of the truck. Their original theory of damages was based on section 9-507 (1), U. C. C., but they concede that the truck was not "consumer goods" and the statute is not applicable. The evidence does not support the finding of the trial court that the plaintiffs were damaged in the amount due on the note and mortgage to Allied Investment Company.

The plaintiffs sought cancellation of the note and mortgage to Allied Investment Company on the theory that Gibreal intended to repossess the truck and defraud them at the time the note and mortgage were given. The plaintiffs were in default at the time of the second repossession. The evidence does not sustain the allegations of fraud. The finding that the note and mortgage should be canceled is not supported by the evidence.

The wage assignment that is in dispute is dated July 15, 1970, and runs from Mrs. Crowder to Allied Investment Company. It appears to be regular on its face and the certificate of the notary public recites that it was acknowledged on the day it was executed. In substance, the plaintiffs admit their signatures are genuine but deny they acknowledged the assignment before a

notary public. The plaintiffs seem to have no recollection that they acknowledged the assignment rather than a positive recollection that it was not acknowledged. If it is assumed that the assignment was void because it was not acknowledged, there is no evidence to support a finding that Mrs. Crowder was damaged in the amount of $200 by the service of a copy of the assignment upon her employer.

Mrs. Crowder testified she was employed by Western Electric; that an employee who has three wage assignments or garnishments is given time off without pay; and an employee with four wage assignments is discharged. Apparently Mrs. Crowder is no longer employed by Western Electric. In the event she was reemployed and additional wage assignments were served on the employer, she might be penalized by a suspension or discharge. It is speculative and conjectural whether there was any damage to Mrs. Crowder resulting from the service of the wage assignment upon her employer. The judgment in her favor is not sustained by sufficient evidence.

So far as the cross-petition is concerned, the evidence shows the $400 payment due on August 29, 1970, was not paid. The truck was repossessed in September 1970, but the insurance on the truck was not canceled until October 24, 1970. The repair expense appears to have included a number of items that might be considered routine maintenance or within the range of "ordinary wear and tear."

The judgment in case No. 38922 is reversed and the cause remanded with directions to enter judgment in favor of the defendant Gibreal Auto Sales, Inc., against the plaintiffs in the amount of $400.

The judgment in case No. 38920 is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROLYN BLIVEN, APPELLANT, V. JAMES BLIVEN, APPELLEE.
209 N. W. 2d 168

Filed July 6, 1973. No. 38937.

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

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Norris G. Leamer and Leamer & Galvin, for appellant.

Johansen, Clemens & Johansen and Raymond B. Johansen, for appellee.

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

MCCOWN, J.

Carolyn Bliven, the plaintiff in this divorce action, has appealed from the decree of the District Court contending that the property settlement and the provisions for alimony and child support are insufficient. We affirm the decree of the District Court.

The parties were married on June 12, 1965. The petition for divorce was filed May 12, 1972. The trial in the District Court was on September 19, 1972. Both parties were then 28 years old. Two children were born to the marriage, both girls, one age 6 and the other age 2 at the time of trial. The wife was given custody of the children.

At the time of the marriage, the husband had approximately $7,000 in assets, consisting of a car and some farm machinery. He had had 2 years of college education. During the entire period of the marriage, the husband has been a tenant farmer. His income during the period of the marriage averaged approximately $6,500 per year. In the 3 years immediately before the hearing, his income averaged approximately $10,000 a year. He estimated in September that his income for 1972 would be approximately $2,200.

At the time of the marriage, the wife had completed 3 years of college. Following the marriage she completed her college education and has taught school since 1967. Her salary at the time of the trial was approximately $7,100 per year.

At the time of the divorce, the combined assets of the parties, aside from the household goods, personal effects, and plaintiff's car, totaled approximately $12,000. Approximately $10,000 of that sum was the value of defendant's farm machinery and the remaining sum of less than $2,000 was in cash or in bank accounts held in plaintiff's name or jointly. The household goods and plaintiff's personal effects and the car were valued by her at $3,000 and were assigned to her. In addition to assigning that property to her, the District Court found that "as a property settlement and alimony the Petitioner shall receive $10,000.00. $4,000.00 payable now as hereinafter provided and $600.00 per year starting January 1, 1973 and on the first day of each January thereafter until fully paid. * * * The aforesaid alimony payments shall terminate upon the death of either party or the remarriage of the Petitioner." The $4,000 was to be paid by the application of the cash and checking accounts of approximately $1,800 with the defendant to pay the remaining $2,200.

The court also required the defendant to pay as child support $150 per month, $75 for each child. In addition, the defendant was required to maintain a hospital and

medical insurance policy for the children or pay any unusual medical or dental bills for the two children.

The plaintiff contends that the bank accounts in her name which were applied to the $4,000 payment in connection with the property division, although accumulated during the marriage, belonged solely to her and should not have been applied nor included in any computation of the combined assets of the parties. She also contends that the manner of paying the $6,000 of alimony and the provision to terminate it on the death of either party or the remarriage of the plaintiff was an abuse of discretion. She also contends that the amount of child support is insufficient.

The rules for determining alimony or division of property in a divorce action provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts will consider all pertinent facts in reaching an award that is just and equitable. Corn v. Corn, *ante* p. 383, 208 N. W. 2d 678.

In this case the defendant had $7,000 of separate property at the time of the marriage. It was mostly farm machinery. At the conclusion of the marriage he was assigned all the farm machinery, which was worth approximately $10,000. The increase in value was $3,000. The plaintiff, who brought no property to the marriage, received $3,000 in household goods, personal effects, and an automobile, plus $4,000 in cash and, in addition, an award of alimony of $6,000 payable over a period of less than 10 years but terminable upon the death of either party or her remarriage. She is 28 years of age, is a qualified teacher and has been teaching since 1967.

Section 42-365, R. S. Supp., 1972, provides for payment of reasonable alimony "having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." That

section also specifically provides: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient."

The fixing of the amount of alimony rests in the sound discretion of the court. Hoffmann v. Hoffmann, 188 Neb. 408, 197 N. W. 2d 373. Under the circumstances here, the property division and alimony awards were reasonable and there was no abuse of discretion.

The plaintiff also asserts that the amount of child support is wholly insufficient. She estimated that the cost of supporting each child was $200 per month. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all the attendant circumstances must be considered and the amount determined in accordance with the best judgment and sound discretion of the court. Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262. In determining the situation and circumstances of the parties, the financial position of the husband, as well as the estimated costs of supporting the children, must be taken into account. Any judgment of what is a fair amount of child support includes not only a consideration of the circumstances of the children but of the father as well. See Fogel v. Fogel, 184 Neb. 425, 168 N. W. 2d 275. Here the husband testified without direct contradiction that his estimated income for 1972 would be approximately $2,200. The court in considering that testimony could consider the past record and could take judicial notice of the uncertainties of farm income. While the amount of child support may be somewhat small in an inflationary economy, it was not unreasonably so under the circumstances disclosed by the evidence at the time of trial.

The plaintiff complains that she was not allowed to introduce evidence of any possible inheritance which the defendant may receive in the future. The trial court's refusal to accept such testimony was clearly

correct. It should be noted here that orders for child support may be modified or altered at any time in the event of a change of circumstances or for good cause. See, Fogel v. Fogel, *supra;* § 42-365, R. S. Supp., 1972.

The provisions of the decree here were reasonable in view of all the circumstances reflected by the evidence. There was no abuse of discretion. The decree of the District Court was correct and is affirmed. Plaintiff is allowed an attorney's fee of $400 for services in this court.

AFFIRMED.

L. S. CORNETT, APPELLANT AND CROSS-APPELLEE, V. WHITE MOTOR CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, NATIONAL INDEMNITY COMPANY, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, UNITED STATES OF AMERICA, INTERVENER-APPELLANT.

209 N. W. 2d 341

Filed July 13, 1973. No. 38877.

1. **Trial: Evidence.** The burden of production of evidence of the value of labor or materials is satisfied if such value may be reasonably inferred from the evidence.
2. **Sales: Security Interest: Damages.** The direct effect of a sale that is not commercially reasonable under section 9-504, U. C. C., is to alter the measure of the deficiency. In such case the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement.
3. **Contracts: Bonds.** The contract of a surety for compensation receives an interpretation in favor of objectively reasonable expectations of the obligee.

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

Marks, Clare, Hopkins. Rauth & Garber, for appellant Cornett.

William K. Schaphorst and Paul W. Madgett, for appellant United States of America.

Hird Stryker of Fraser, Stryker, Marshall & Veach, for appellee White Motor Corp.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, Kutak, Rock, Cohen, Campbell & Peters, Abrahams, Kaslow & Cassman, and Beber & Richards, for appellees National Indemnity Co. et al.

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

SMITH, J.

The central issues on appeal arise out of an arguable train of transactions. A contract between the City of Omaha and defendant Metropolitan Sanitation Company for the latter to collect refuse. Respecting the contract, delivery and acceptance of a performance bond with the city the obligee, Metropolitan the principal, and defendant National Indemnity Company the surety. Metropolitan's purchase of 45 new garbage trucks subject to 4 security agreements for payment of the balance owing the seller, defendant White Motor Corporation. Plaintiff's guaranty of payment of the obligations of Metropolitan under the security agreements. Default by Metropolitan. Expenses incurred by White Motor in repossession, repair, and sale of the trucks.

In a declaratory judgment action plaintiff, L. S. Cornett, alleged in part as follows: White Motor failed to prove the reasonable value of its expenses relating to repossession, repair, and cleaning of the repossessed trucks for sale. It also failed to sell the repossessed trucks in a commercially reasonable manner and therefore ought not to recover a deficiency judgment. The performance bond executed by National Indemnity covered the alleged deficiency liability to White Motor.

White Motor in a counterclaim against Cornett and cross-claims against Metropolitan and National Indemnity sought a deficiency judgment against Cornett and a declaratory judgment of liability of National Indemnity.

After trial in April 1972, the court entered its judgment on October 2, 1972. White Motor recovered $180,895.18, which represented not only a deficiency liability of Metropolitan and Cornett but also the expenses of repossession, repair, and cleaning. White Motor was also awarded interest on the judgment at 6 percent a year from September 29, 1972, the date the claims were found to have become liquidated. The court in effect adjudged that the bond of National Indemnity did not cover the deficiency judgment for White Motor.

Cornett appeals. He asserts that the court erred in its judgment on the above allegations of his petition. White Motor cross-appeals. Under the security agreements it asserts a right to interest at 9 percent a year on the balance of the unpaid obligations from March 10, 1972, the date of default, less proceeds realized by it from sales of the trucks.

The refuse collection contract between Metropolitan and the city extended over a period of 10 years from January 1, 1968. It required a bond for performance and payment in accordance with a contract specification. The specification reads: "To secure . . . full . . . performance of . . . all terms . . . of this contract, the Contractor shall furnish a bond with . . . surety . . . in the amount of $250,000.00. The . . . bond . . . shall in part indemnify the City against any loss resulting from any failure of performance by the Contractor . . . ."

The bond which National Indemnity executed November 3, 1967, for a minimum of 5 years incorporated the refuse collection "Contract, Proposal and Specification." It provided as follows: "THIRD: The Principal and Surety . . . agree to pay all persons . . . having Contracts directly with the Principal or with sub-contractors all just claims due them for the payment of all laborers and mechanics for labor that shall be performed, for the payment of all material and equipment furnished, and for the payment of material and equipment rental which is actually used or rented in the performance of

the Contract for which this Bond is given, when the same are not satisfied out of the portion of the Contract price which the City may retain until completion of the Contract period . . . ."

In November 1968 Metropolitan agreed to purchase the 45 trucks from White Motor, but the parties consummated the agreement during the period between April 30 and June 28. White Motor recorded 4 security agreements covering the purchases. The time price differential was computed at 5 percent, and the time balances were payable in monthly installments as follows:

AGREEMENT DATE	TIME BALANCE	INSTALLMENTS
April 30	$189,750.12	$3,405.12 on June 10, 1969
		3,411.00 next 23 months
		2,997.00 next 36 months
May 29	$505,999.92	$9,079.92 on July 10, 1969
		9,096.00 next 23 months
		7,992.00 next 36 months
May 29	$105,416.65	$1,891.65 on July 10, 1969
		1,895.00 next 23 months
		1,891.65 next 36 months
June 28	$147,583.31	$2,648.31 on August 10, 1969
		2,653.00 next 23 months
		2,331.00 next 36 months

The security agreements also provided: In event the time balance was not paid within the time contemplated by the monthly installments, time being of the essence, Metropolitan was to pay interest at the highest legal rate allowable on the amount outstanding after such time.

Cornett orally agreed in November 1968 to guarantee Metropolitan's performance of the agreement to purchase and pay for the 45 trucks from White Motor. On May 27, 1969, he accordingly signed and delivered to White Motor a written guarantee of "punctual payment and prompt performance of all indebtedness or obligation," present or future, of Metropolitan to White Motor. Cor-

nett then owned 49 percent of Metropolitan's capital stock.

Deterioration in the financial condition of Metropolitan and in performance of the contract caused Metropolitan and Omaha on January 8, 1970, to agree to terminate the contract March 1, 1970. Default on the security agreement occurred March 10, 1970. According to Leroy Olson, a certified public accountant in the firm of Haskins & Sells, the unpaid principal on the security agreements then totaled $681,568.07.

On March 10, 1970, Metropolitan with Cornett's knowledge and acquiescence formally requested White Motor to repossess the 45 trucks. The next day White Motor in notifications to Metropolitan and Cornett demanded payment of the balance due. It also threatened in the event of nonpayment to sell the trucks and look to Cornett for payment of any deficiency. The only reply was a letter in which Cornett by his lawyer denied any personal liability on his part.

On March 27, 1970, White Motor gave notice of public sale of the 45 trucks which it had repossessed. At the public sale which occurred April 20, 1970, White Motor itself purchased the trucks at a price of $8,500 each or a total of $382,500.

From repossession to the sale White Motor had performed repairs on some trucks and had contracted with National Disposal Company to steam clean the trucks. Necessity for the work was clear. Time was too short, however, for completion prior to the public sale; consequently, White Motor continued the work afterwards. It subsequently negotiated piecemeal sales from which it realized $577,500. The amount of the unpaid principal decreased as White Motor sold the trucks piecemeal at private sales from May 18 to December 31, 1970. Interest on those amounts to the entry of the judgment, we judicially notice, computed at 9 percent a year, is $49,059.99.

There was no direct testimony that the expenses in-

curred by White Motor in the repossession, repair, and cleaning of the trucks were reasonable. There was no evidence, however, of unreasonableness. White Motor kept voluminous, detailed records pertaining to the repairs performed by it and to the cost, all of which it did in the regular course of its business. The accountant, Olson, testified from the records to expenses of $76,827.11. The District Court found that White Motor was entitled to recover that sum, and it therefore increased the amount of recovery to $180,895.18.

The burden of production of evidence of the value of labor or materials is satisfied if such value may be reasonably inferred from the evidence. See Sorensen Constr. Co. v. Broyhill, 165 Neb. 397, 85 N. W. 2d 898 (1957). Allowance of the expenses to White Motor was not erroneous.

The contention of Cornett on the commercial unreasonableness of the public sale is governed by the Uniform Commercial Code. The direct effect of a sale that is not commercially reasonable is to alter the measure of the deficiency. In such case the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement. See, § 9-504, U. C. C.; Mercantile Financial Corp. v. Miller, 292 F. Supp. 797 (E. D. Pa., 1968). No sound policy requires us to inject a drastic punitive element into a commercial context. The measure of the deficiency is not otherwise questioned, and the nature of the public sale by White Motor under the circumstances is immaterial.

We turn to the rule that governs the claims of liability against National Indemnity. The contract of a surety for compensation receives an interpretation in favor of objectively reasonable expectations of the obligee. Abel v. Southwest Cas. Ins. Co., 182 Neb. 605, 156 N. W. 2d 166 (1968).

We interpret the provisions of the National Indemnity bond to be a financial resource to which Omaha could

resort in the event the city took over the garbage collection operation on default of Metropolitan. See 10 Appleman, Insurance Law and Practice, § 5835, p. 53 (1943). From that resource the city could reasonably expect only to obtain money required to continue the operation from day to day. In our interpretation, the bond of National Indemnity did not cover the liability of Metropolitan to White Motor.

We have decided on Cornett's appeal that the National Indemnity bond did not cover the obligations in question. That conclusion applies to the same contention of White Motor.

The provisions of the security agreements that amounts outstanding on default should bear interest at the highest legal rate allowable were valid. The applicable statutory maximum is 9 percent a year. § 45-101, R. R. S. 1943. The amounts outstanding on default included the items of principal less the resale proceeds, or $104,068.07, and interest, $49,059.99, or a total of $153,128.06. White Motor was also entitled to recover $76,827.11 for the repossession, repair, and cleaning. It expressly does not seek prejudgment interest on the latter sum. It was therefore entitled to recover judgment against Cornett in the sum of $229,955.17 plus interest at the rate of 9 percent a year from October 2, 1972. See, §§ 45-101, R. R. S. 1943, 45-103, R. S. Supp., 1972; Western Securities Co. v. Naughton, 124 Neb. 702, 248 N. W. 56 (1933); Omaha Loan & Trust Co. v. Hanson, 46 Neb. 870, 65 N. W. 1058 (1896); Havemeyer v. Paul, 45 Neb. 373, 63 N. W. 932 (1895).

We modify the judgment of the District Court by awarding White Motor judgment against Cornett in the sum of $229,955.17 plus interest at 9 percent a year from October 2, 1972. The judgment, so modified, is affirmed.

AFFIRMED AS MODIFIED.