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REPORTS OF CASES

DECIDED BETWEEN

January 16, 1975 and May 28, 1975

IN THE

Supreme Court of Nebraska

JANUARY TERM 1975

VOLUME CXCIII

H. EMERSON KOKJER

OFFICIAL REPORTER

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By H. Emerson Kokjer, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1975

ROBERT KUJALA, APPELLANT, V. CHARLES HEADLEY, HALL COUNTY SHERIFF, APPELLEE.

225 N. W. 2d 25

Filed January 16, 1975. No. 39385.

1. **Habeas Corpus: Extradition.** In habeas corpus proceedings to release a prisoner detained under a warrant of extradition, the fact that a criminal complaint was filed against him in the demanding state is prima facie evidence that he was there charged with a crime, and if he contends otherwise, the burden is on him to establish the fact.
2. **Extradition.** To be a fugitive from justice, it is not necessary that one shall have left the demanding state for the purpose of avoiding prosecution, but only that, having committed an act charged to be criminal under the laws of that state, he has left that jurisdiction and is found in another state.
3. ———. The issuance of a warrant of extradition creates a presumption that the prisoner detained under it is a fugitive from justice.
4. **Habeas Corpus: Extradition.** In an extradition proceeding, it is within the power of the Governor of the asylum state to inquire into the motives or purposes of the prosecution, but his inquiry is final and not subject to review by the courts.

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

Robert E. Paulick, for appellant.

Sam Grimminger, for appellee.

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

McCOWN, J.

This is a habeas corpus action instituted in the District Court for Hall County, Nebraska, by Robert Kujala against the defendant, Charles Headley, sheriff of Hall County, Nebraska. The action is to resist an effort to extradite the plaintiff from the State of Nebraska to the State of Tennessee to answer a charge of removing mortgaged property from the state without consent. The District Court denied plaintiff's petition for the writ of habeas corpus. Plaintiff has appealed from an order overruling a motion for new trial.

The plaintiff, Robert Kujala, while a resident of Tennessee, mortgaged two automobiles to the Williamson County Bank of Franklin, Tennessee, to secure payment of a debt to that bank. On or about January 15, 1973, the plaintiff moved to Grand Island, Nebraska, and brought the automobiles to this state. At the time of the removal of the cars, the mortgage loan was delinquent and the approximate amount due was $2,000. On March 26, 1973, a state warrant was issued from Williamson County, Tennessee, alleging that Robert Kujala had been charged with the offense of removing mortgaged property from the state without permission. After demand by the Governor of the State of Tennessee on the Governor of Nebraska, an arrest warrant was issued by the State of Nebraska, under the signature of the Governor, on June 12, 1973, directed to the sheriff of Hall County, Nebraska, the defendant here. The plaintiff was arrested on that warrant. After the plaintiff's arrest, both of the automobiles were returned to the Williamson County Bank in Tennessee by the plaintiff's wife. This habeas corpus proceeding followed.

The plaintiff's assignments of error charge that the complaint against him does not charge a crime under the statutes of Tennessee; that there is insufficient evidence he was a fugitive from justice; and, finally and primarily, that the motives and purposes of the extradition proceeding were improper and the proceeding was

being used solely to enforce a civil liability. In support of those contentions the plaintiff introduced evidence to establish that the affidavit upon which the Tennessee state warrant was issued was signed by one Lowell Martin, who was an employee of both the Williamson County Bank and the Williamson County, Tennessee, sheriff's department. The evidence tended to establish that Martin represented to the plaintiff that if plaintiff paid the sum owing, Martin would recommend that the charges be dropped, and that if the amount owing was paid, the Tennessee judge would probably dismiss the case.

The District Court for Hall County, Nebraska, after hearing, found that an offense was charged under the laws of Tennessee; that the plaintiff relator was the person charged, and was a fugitive from justice; and also found that the extradition was not for the purpose of enforcing a civil liability. This appeal followed the dismissal of the petition for habeas corpus and the overruling of the motion for new trial.

The case of Gorgen v. Tomjack, 160 Neb. 457, 70 N. W. 2d 514, is directly in point on virtually all issues and is controlling here. That case held the fact that a criminal complaint was filed against the petitioner in the demanding state is prima facie evidence he was there charged with a crime; and that if he contends otherwise, the burden is on him to maintain his position by producing the statute of the demanding state. Gorgen also held it is not necessary, in order that one be a fugitive from justice, he shall have left the demanding state for the purpose of avoiding prosecution, but simply that, having committed an act charged to be a crime under the laws of that state, he has left that jurisdiction and is found in another state. The issuance of a warrant of extradition creates a presumption that the prisoner detained under it is a fugitive from justice.

In answer to the contention that the extradition was not made in good faith and that it was, in fact, made for the purpose of collecting a debt, this court said in the

Gorgen case: "We are in accord with the view that extradition proceedings should not be used at the instance of a private person to gratify his malice or to aid him in the collection of a debt. It is not a matter, however, which the courts of the asylum state may properly inquire into." Where a warrant of extradition is sought for the collection of private debts, it is within the discretionary power of the Governor of a state to refuse to issue it. If the Governor of the asylum state issues a warrant of rendition, it is the general rule that at a court hearing on habeas corpus it is not proper to hear evidence upon, or inquire into, the motives or purposes of the prosecution, or into the motives of the Governor of the demanding state. Gorgen v. Tomjack, *supra*. See, also, Annotation, 94 A. L. R. 1493.

The motives behind extradition are open to inquiry by the demanding state. It is also within the power of the Governor of the asylum state to inquire into such motives, but his inquiry is final and not subject to review by the courts. Here the Governor of Nebraska has honored the requisition from the Governor of Tennessee, and signed a Nebraska state warrant for the extradition of the plaintiff. Under such circumstances, there is no foundation upon which this court may inquire into the motives or purposes of the prosecution.

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

AFFIRMED.

SHERYL ANN BIGLEY, APPELLEE, V. HOWARD AND EULALIA TIBBS, APPELLANTS.
225 N. W. 2d 27

Filed January 16, 1975. No. 39511.

1. **Habeas Corpus: Infants.** In a habeas corpus proceeding to determine the custody of a child, the primary consideration is the welfare of the child.

2. ———: ———. To the extent that Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892, does not hold that the first and primary consideration in any case involving the custody of a child is the best interests of the child, it is overruled.
3. **Habeas Corpus: Infants: Parent and Child.** When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Reversed and dismissed.

E. Merle McDermott, for appellants.

Lester R. Seiler, for appellee.

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

SPENCER, J.

This is a civil habeas corpus action brought by plaintiff-appellee to obtain permanent care and custody of her son, Kevin Bigley. Eulalia Tibbs is a sister of the child's deceased father. The trial court found the plaintiff to be a fit and suitable person to have the care and custody of Kevin. We reverse and dismiss.

Plaintiff filed a petition for writ of habeas corpus alleging that she was the mother of Kevin Bigley, age 7 years, and that the defendants unlawfully and forcibly detain him contrary to his wishes; and praying that the care, custody, and possession of said minor be awarded to her. Defendants filed a return and answer to the petition, admitting that plaintiff was the mother of the child and that the father was dead. They alleged that the father of the child during his lifetime placed the child in their custody for the reason that the mother had abandoned the child and the family and there was no other one who would take proper care and custody of him other than the defendants.

The plaintiff was married to Lyle Bigley on Novem-

ber 16, 1955. Kevin is the youngest of six children born of the marriage, two of whom were twins, and the oldest of whom was 16 years of age. Lyle Bigley died February 13, 1974. The Bigleys had moved to Colorado with the help of Mr. Bigley's brother, 15 or 16 years previous to the hearing. In June 1970, plaintiff left Denver, abandoning her husband and six children, including Kevin who at that time had just turned 4 years of age. Since that date she has never been back; has not seen the children; and has not communicated with nor had any contact of any nature with them.

The oldest daughter, who was 16 years of age at the time of the trial, testified that she and her dad, with the help of neighbors, relatives, and the welfare agency, took care of the children until her father's death. In her judgment the plaintiff would not be a suitable person to have the care and custody of Kevin. From the time she was 8 years old her mother was gone for weekends and intermittently for a week at a time at least once a month until she left permanently the middle of June 1970. Her testimony of the lack of care given the children by the mother when she was in the home, and an accident which happened while she was in bed, or out of the home cannot be ignored.

Plaintiff's brother-in-law testified to the occasion when he broke a locked door down because the children were crying so violently and found the plaintiff with a pillow over her head so she could not hear them. He corroborated the daughter's testimony of plaintiff being away on numerous weekends during the marriage. He also testified she never kept a good house when she was there.

The plaintiff admitted that she had not seen nor communicated with any of the children after she left the home in 1970. For the past 2 years she has been living with a Donald Baker without the benefit of marriage. After the filing of the petition herein they decided to get married and she expected to marry him 4 days after

the hearing. Donald Baker testified he was 33 years of age and had been previously married. He had been living with the plaintiff for the past 2 years. They were buying a two-bedroom mobile home, which was purchased jointly under the names of Baker and Bigley. He was willing to let plaintiff bring Kevin into their home.

A caseworker for the Adams county division of public welfare visited plaintiff's two-bedroom mobile home 4 days before the trial. There was nothing out of order so far as unsanitary conditions. The plaintiff had four pets, two dogs and two cats. The worker did not find any adverse conditions, but testified it was impossible to make any recommendation on one home study. She had had no contact with the plaintiff previous to the visit.

Mrs. Eulalia Tibbs is the sister of Kevin's father. She is 54 years of age, in good health, and has raised 10 children. Kevin, who is a slow learner, seems to be happy with her. She has him in school and he is getting along all right. She wants the custody of Kevin and would give him as good care as if he were her own child. She wanted him to have a nice, decent, religious home. Howard Tibbs, her husband, is 60 years of age. He has been in the garage business in Grand Island for the past 43 years. He is in full accord with Mrs. Tibbs and believes they can give Kevin a good home.

The plaintiff left the family home permanently 3 months after she had a hysterectomy operation in 1970. The comments of the trial judge would seem to indicate that this might have been the reason for her leaving the home. The evidence, however, is that her problems started long before that period. She had been neglecting the children throughout most of her marriage. For at least 6 or 7 years she had been staying out nights and on occasions was gone for a week at a time. She conceded that this was at least partially the cause of her trouble with her husband.

Plaintiff made no attempt to shed any light on why she left her family. There is no rebuttal of the testimony of her daughter or her brother-in-law about her conduct or about the conditions in the home before she left. The record does not indicate what she did during the approximately 2 years after she left her husband and children in June 1970, and the time she started living with Donald Baker in Hastings, Nebraska.

In a habeas corpus proceeding to determine the custody of a child, the prime consideration is the welfare of the child. Loveall v. Loveall (1972), 188 Neb. 457, 197 N. W. 2d 381.

Plaintiff suggests that Raymond v. Cotner (1963), 175 Neb. 158, 120 N. W. 2d 892, on which she places much reliance, is the proverbial "cow-case." To the extent that Raymond v. Cotner, *supra*, does not hold that the first and primary consideration in any case involving the custody of a child is the best interests of the child, it is overruled.

When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent. State ex rel. Cochrane v. Blanco (1964), 177 Neb. 149, 128 N. W. 2d 615.

Plaintiff left her husband when the child she now seeks was 4 years old. She made no attempt to communicate with or to see him after June 1970. She provided nothing toward the child's care and upbringing after leaving the family home in 1970. She deserted and completely abandoned the child for more than 3 and ½ years preceding the trial herein. No attempt is made in the record to explain or justify this abandonment. During at least the last 2 years immediately preceding the trial, she had been living in a meretricious arrangement with the man she decided to marry only after the filing of the petition herein. We can come to

no other conclusion than that the plaintiff abandoned the child she now seeks and is not a fit, proper, and suitable parent to have his care, control, and custody.

While the ages of the aunt, 54, and the uncle, 60, may have been the influencing consideration for the trial court placing the child with his mother, we do not feel the best interests of the child are served by this action. The child is almost 8 years of age. He is a slow learner, stutters, and has been subjected to much instability. The next 10 years of his life will be crucial. By virtue of a $2,000 supersedeas bond, Kevin has remained in the Tibbs' home pending appeal. The Tibbs' home is a stable one. The Tibbses are willing to raise Kevin as their own child. He has been adjusting in their home. There he will have the best opportunity for a normal and wholesome development. On the record, the petition of the plaintiff should have been denied. We reverse the judgment of the trial court and dismiss the petition for habeas corpus.

REVERSED AND DISMISSED.

CLINTON, J., concurs in result.

STATE OF NERRASKA EX REL. STUART F. HANSEN, APPELLEE, V. HAROLD SEILER ET AL., APPELLEES, GEORGE V. SCHEER ET AL., INTERVENERS-APPELLANTS, JAMES R. MILLER ET AL., INTERVENERS-APPELLEES.

225 N. W. 2d 388

Filed January 16, 1975. No. 39544.

Elections: Counties: Public Officers and Employees: Statutes. L.B. 549, Laws 1973, page 1309 (now section 5-108, R. S. Supp., 1974), does not permanently change the method of electing governing boards by districts but provides for at large elections for counties with district elections until the county is properly redistricted.

Appeal from the District Court for Madison County:

GEORGE W. DITTRICK, Judge. Reversed and remanded with directions.

George H. Moyer, Jr., of Moyer & Moyer, Nelson, Harding, Marchetti, Leonard & Tate, and Thomas D. Sutherland, for interveners-appellants.

Vincent J. Kirby, for appellee State ex rel. Hansen.

Jeremy F. Beitz, for appellees Seiler et al.

Jewell, Otte, Gatz & Collins, for interveners-appellees.

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

SPENCER, J.

This is an appeal from the granting of interveners-appellees' motion for summary judgment dismissing petitions seeking a writ of mandamus requiring the Madison County commissioners to reconstitute the commissioner districts so that each district would be of approximately equal population. The judgment also enjoined the commissioners from redistricting until otherwise directed by a vote of the electors of the county. We reverse.

The initial petition was filed in July 1971, by Stuart F. Hansen. Pursuant to an alternative writ of mandamus the commissioners on November 2, 1971, adopted a resolution reconstituting the districts. On December 28, 1971, the court entered an order finding that the resolution passed November 2 did not comply with the court's order and was void, and ordered the county commissioners to redistrict the county on or before December 31, 1972. It further ordered that candidates for the office of county commissioner should thereafter be elected at large until such time as redistricting was completed and approved by the court.

No further action was taken until January 31, 1973, when George V. Scheer, H. L. Gerhart, Jr., James Volk, and Woodrow Collins, hereinafter referred to as appel-

lants, filed a motion for leave to intervene and a petition in intervention. The motion for leave to intervene was sustained. On January 2, 1974, the county commissioners of Madison County adopted a resolution dividing the county into three commissioner districts of substantially equal population. Appellants filed a motion seeking an order approving that resolution.

On January 22, 1974, James R. Miller, Ralph Reeves, and Glen Zobel, residents of the city of Norfolk, hereinafter referred to as appellees, filed a petition in intervention. Their petition alleged that by the passage of L.B. 549, Laws 1973, page 1309, the court and county commissioners of Madison County, Nebraska, were precluded from reforming the commissioner districts of the county because the people had not voted to elect commissioners by district, pursuant to L.B. 549. They further moved the court for an order declaring the resolution of January 2, 1974, void because the notice of the meeting of the county board did not comply with the provisions of section 84-1402, R. S. Supp., 1972, the Public Meetings Law. The court found the notice was defective in a material respect and held the resolution was void.

Appellants then attempted to have the county commissioners reapprove the resolution. At a meeting held January 30, 1974, the commissioners declined to do so. Thereafter, appellees amended their petition in intervention to pray that the county commissioners of Madison County be permanently enjoined from redistricting the county and orally moved the court for summary judgment dismissing the petitions of relator Hansen and appellants. The trial court sustained the motion for summary judgment, enjoined the county commissioners from redistricting Madison County until otherwise directed by a vote of the electors of the county, and dismissed the relators' and appellants' petitions.

Appellants' first assignment of error challenges the order of December 28, 1971, holding the commissioners'

resolution of November 2, 1971, void. At that time, neither the appellants nor the appellees were parties to this action. The relator was then seeking a writ of mandamus to compel a redistricting of the county. That order became final before either appellants or appellees became parties hereto.

The only error we consider herein is appellants' third assignment: "The court erred in sustaining the Motion for Summary Judgment made by intervenors Miller, Reeves and Zobel." The court in sustaining appellees' motion for summary judgment dismissed the petition of relator and appellants; enjoined and restrained the county commissioners from dividing Madison County into three compact and contiguous commissioner districts having substantially equal population; and directed that further elections of county commissioners in said county be at large until such time as there is compliance with L.B. 549 of the Laws of the State of Nebraska for 1973.

L.B. 549, so far as material herein, amended section 5-108, R. S. Supp., 1972, by setting out detailed provisions permitting any county to change its method of electing members to its governing body from at large to district or ward, or vice versa. Section 5-108, R. S. Supp., 1972, in its entirety as it existed previously, was reenacted in the new statute. This portion of the statute is as follows: "When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population, as determined by the most recent federal census. Any such city, village, county, or school district in existence at the time the most recent federal census was completed shall redistrict by January 1, 1972, *and in the event it fails to do so candidates for the governing board shall thereafter be elected at large until such time as redistricting is completed* pursuant to this section. The provisions of this section shall apply to all counties, notwithstanding the limitations on alteration of districts contained in section 23-151. When any new city, village,

county, or school district is established, members of the governing board shall be elected at large until such time as districts are established pursuant to this section." (Italics supplied.)

The effect of the summary judgment was to hold that until proper petitions from the electors were filed to require the submission of district elections pursuant to section 5-108, R. S. Supp., 1973, county commissioners shall be elected at large because the county had not properly redistricted by January 1, 1972, and by court order commissioners were being elected at large at that time. In so holding the District Court misinterpreted the effect of the amendment to section 5-108, R. S. Supp., 1972.

The original action herein was for a peremptory writ of mandamus to compel the county commissioners to divide the county into three districts, each consisting of two or more voting precincts, comprising compact and contiguous territory, and embracing as nearly as possible an equal division of the population of the county pursuant to section 23-151, R. R. S. 1943. The commissioners at that time were being elected from districts but the districts as then constituted did not comply with section 23-151, R. R. S. 1943. Section 23-151, R. R. S. 1943, requires a board of county commissioners to divide its county into three districts, consisting of two or more voting precincts, comprising compact and contiguous territory, and embracing as nearly as possible an equal division of the population of the county. When the District Court held the redistricting resolution void, it provided that until such time as the county commissioners complied with the law, commissioners would be elected at large. This judicial order was effective *until* such time as the commissioners complied with the law, but it did not effect a permanent change of the method provided by the people of the county for the election of their commissioners. The court may not permanently change the method of election. That is a prerogative

reserved to the people of the county. The peremptory writ of mandamus should have been granted.

Section 5-108, R. S. Supp., 1972, provided and still provides that the county shall be redistricted to provide substantially equal districts, and if this was not done by January 1, 1972, the candidates for the governing board thereafter would be elected at large "*until such time as redistricting is completed pursuant to this section.*" (Italics supplied.) It is evident that the intent of L.B. 549 (now section 5-108, R. S. Supp., 1974), is not to permanently change the method of electing governing boards or districts but to require at large elections for counties with district elections *only* until the county is properly redistricted. It was not the intent of the act to permanently change the method of election if redistricting was not completed by January 1, 1972, as the trial court held. The Madison County commissioners had been directed to properly redistrict the county, and should have been required to do so.

We reverse the judgment of the trial court and remand the cause with directions that it issue the requested peremptory writ of mandamus to compel the county commissioners of Madison County to divide the county into three districts, each consisting of two or more voting precincts, comprising compact and contiguous territory and embracing as nearly as possible an equal division of the population of the county pursuant to section 23-151, R. R. S. 1943. We further direct that if the commissioners fail or refuse to act pursuant to this order, proper action be taken to compel them to do so.

Judgment reversed and remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

DELBERT W. KORTE, APPELLANT AND CROSS-APPELLEE, V. GEORGE BETZER, APPELLEE AND CROSS-APPELLANT.
225 N. W. 2d 30

Filed January 16, 1975. No. 39547.

1. **Continuances.** A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
2. **New Trial.** When a new trial is granted, or a judgment vacated, as a matter of grace and not of right, the court may in its discretion impose reasonable conditions.

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

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

J. Arthur Curtiss of Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

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

NEWTON, J.

This is an action for damages resulting from an automobile accident. The action was commenced in November 1971. The errors assigned deal with the denial of a continuance and the conditional setting aside on motion for a new trial of a judgment dismissing the case. We affirm the order of the District Court.

The case was set for trial on December 17, 1973. On November 13, 1973, pretrial conference was set for November 21, 1973; at the pretrial conference, by agreement of the parties, approved by the court, trial was set for January 28, 1974. Thereafter plaintiff's attorney sought a further continuance on the ground he would be occupied in the trial of a case in federal court. The application was denied and it was conceded that another member of the firm representing plaintiff would

be available and would try the case. On January 24, 1974, the court was informed that both of plaintiff's counsel above-mentioned would be in federal court and local counsel was ill. Application was also made to take an audiovisual deposition and leave was granted to take a stenographic deposition. On January 27, 1974, plaintiff's counsel were notified of a continuance of the federal court case. On January 28, 1974, the court was informed that plaintiff's primary counsel was ill but no explanation was given as to the whereabouts of plaintiff's substitute counsel. The defendant, his counsel, and witnesses were present and prepared to proceed, and the jury was then on hand. The court refused to further continue the trial and, when informed by plaintiff's counsel that they would not proceed, entered judgment dismissing the action without prejudice. Subsequently, on a motion for new trial, the court was informed that the statute of limitations had run and then vacated its former judgment as follows: "IT IS THEREFORE, BY THE COURT, CONSIDERED AND ORDERED: 1. That the order of this court on January 28, 1974, dismissing plaintiff's cause be and is hereby set aside and vacated and this action reinstated; provided, that plaintiff, with thirty (30) days from this date, pay to the Clerk of this Court the jury fees and expenses incurred for this action on January 28, 1974, in the amount of $384.40, and in addition, an attorney's fee to defendant's attorney in the amount of $300.00;

"2. That in the event said amounts last set forth are not so paid within said time that plaintiff's cause stands dismissed for want of prosecution, Costs taxed to the plaintiff." Plaintiff appealed.

"A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal."

Elm Creek State Bank v. Department of Banking, 191 Neb. 584, 216 N. W. 2d 883.

On the morning for which trial was scheduled, plaintiff presented a written motion for a continuance but failed to support it by affidavit in evidence or testimony as required by section 25-1148, R. R. S. 1943, and failed to explain the whereabouts of alternate counsel. Plaintiff had had many months in which to take any deposition desired and we find no abuse of discretion in the denial of a continuance.

Plaintiff objects to the order of the court requiring the payment of costs, attorneys' fees, and jury expense as a condition to the reinstatement of the case on motion for new trial. When a new trial is granted, or a judgment vacated, as a matter of grace and not of right, the court may in its discretion impose reasonable conditions. See, 58 Am. Jur. 2d, New Trial, §§ 218, 219, p. 443; Annotation, 21 A. L. R. 2d 863; Ogden v. Rosenthal, 55 Neb. 163, 75 N. W. 545; Tupper v. Kroc, 88 Nev. 483, 500 P. 2d 571; Delagi v. Delagi, 313 N. Y. Supp. 2d 265, 34 App. Div. 2d 1005; Finden v. Klaas, 268 Minn. 268, 128 N. W. 2d 748. Under the circumstances present, the order of the court in this regard was not unreasonable nor an abuse of discretion.

The order of the District Court is affirmed.

AFFIRMED.

THE GEER COMPANY, A CORPORATION, APPELLANT, V. HALL COUNTY AIRPORT AUTHORITY, A CORPORATION, APPELLEE.
225 N. W. 2d 32

Filed January 16, 1975. No. 39553.

1. **Landlord and Tenant: Common Law: Contracts.** At common law a landlord has no duty to provide fire protection devices or services for his tenant. Such a duty may be assumed by contract or imposed by statute.

2. **Negligence.** Negligence presupposes the existence of a duty to perform some act, or act in a particular manner, and if there exists no such duty imposed by law or otherwise no liability can be predicated upon failure to perform the act.
3. **Summary Judgments.** A party is entitled to summary judgment if he can show (1) there is no genuine issue of material fact, and (2) where, under the facts, he is entitled to judgment as a matter of law.

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

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

Cronin, Shamberg & Wolf, for appellee.

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

CLINTON, J.

The question in this case is the propriety of the action of the trial court in granting the defendant's motion for summary judgment. We affirm.

The defendant is an airport authority created in the year 1970 pursuant to the provisions of section 3-611, R. R. S. 1943, and it operates the Hall County airport under the terms of the pertinent statutes. The plaintiff is a mobile and modular home manufacturer which carries on its business in buildings located on the airport property and leased from the defendant. On August 26, 1971, a fire occurred in one of the leased buildings and personal property of the plaintiff stored therein was destroyed. The plaintiff seeks to recover the value of the destroyed property from the defendant upon various theories of negligence allegedly attributable to the defendant.

The plaintiff, in its petition, alleged the existence of the lease; that the defendant "openly and notoriously maintained certain fire fighting apparatus and equipment" on the airport, including a firetruck "which truck

appeared to be in good working order but which, in fact, was not"; and that at the time of the execution of the lease the plaintiff was aware of the availability of the firetruck, but was "unaware of its defective and inoperable condition."

Similar allegations were made with reference to a "dry sprinkler system" in the leased building and with reference to certain fire hydrants and water mains in the area near the building which burned. Plaintiff further alleged that the existence of the firefighting facilities in an apparently operable condition "warranted to the Plaintiff that fire protection was afforded"; and that the reliance of the plaintiff thereon created in the defendant the duty to properly maintain and keep in good working order the truck, hydrants, pipes, and automatic sprinkler system, and also to inspect said items and disclose any defects to the plaintiff. It alleged that these circumstances created a duty on the part of the defendant to immediately notify the plaintiff and firefighting agencies of any fires which might occur and of which the defendant became aware. The petition alleges that except for breach of the alleged duties the fire in question could have been extinguished. In a second cause of action the plaintiff claims that the existence of the foregoing defective equipment, especially the hydrants and mains, created a dangerous condition for which the defendant is liable.

Evidence in the form of depositions and affidavits presented at the hearing on the motion for summary judgment may be summarized as follows: The lease was entered into on August 1, 1971. It provided among other things: "Lessee rents said premises as they now exist." It contained no provision of any kind warranting the condition of the premises or providing that fire protection be furnished by the lessor. It imposed upon plaintiff the obligation for repairs and alterations and provided that alterations were to be permitted only after notice to the lessor. The lease covered the building only

and none of the surrounding property although access to the building necessarily was by way of roads which were under the control of the defendant. The evidence shows that at the time the lease was executed utility services to the building, including the water, electrical, and heating systems, were inoperable. The lessee was aware of this, had no need for utilities on the premises, and did not seek to have them connected and placed in an operable condition. There existed no agreement between the parties other than the written lease.

The defendant authority at the time of its creation had acquired possession of the airport premises, including the various buildings thereon, from its predecessor, the city of Grand Island. The city had at some undisclosed time in the past acquired the airport from the United States government. Part of the airport property consisted of the system of water mains and fire hydrants. In January of 1969 the United States Bureau of Reclamation was in possession of a portion of the airport premises which included the building later leased to the plaintiff by the defendant. At that time the Bureau of Reclamation caused the water and utilities to be turned off in the area occupied by it. This included certain of the water mains and fire hydrants in the area of the leased building. A portion of that building was equipped with a dry sprinkler system, but this system had become inoperable when the utilities were turned off during cold weather without draining the pipes. When the defendant took over the airport operation it did not attempt to restore utility service in the area nor to maintain it in any way. The portion of the hydrant system in the area formerly occupied by the bureau was inoperational only because a valve furnishing water to it was closed. However, defendant had made no attempt to keep that part of the system in repair. The authority did, however, continue to maintain and keep operational other parts of the water main and hydrants system. Part of that maintenance was a semiannual flushing

and checking of the fire hydrants in parts of the system other than that which had been closed down.

The plaintiff's manager testified that he did not know that the water had been turned off in the hydrants system adjacent to the leased building and that "we assumed that we had water with the fire hydrant outside of the building."

When the defendant took over the airport operation it received from its predecessor a 1954 Ward LaFrance 750-gallon pumper fire engine and appurtenant equipment. This truck was operated and maintained by the authority. Its system of batteries providing power for starting had on occasion functioned improperly.

Fire protection for the airport had originally been provided by the United States Air Force. When the Air Force left, it donated its equipment to the city of Grand Island which provided fire protection up until the time the authority was created in April 1970. At that time the airport authority contracted with a rural fire protection district for its services.

On the day the fire occurred the airport manager was notified of the fire at about 8:05 a.m., by a person who observed it. This communication came by telephone. The manager testified that he immediately called emergency telephone number 911 and asked that the rural fire district be notified. The 911 message center records indicate that a call notifying of the fire was received at 8:31. The airport manager also called the office of the plaintiff at the airport and notified its warehouse manager of the fire. Other airport employees attempted to start the firetruck and were unable to do so because of the defective batteries. The airport manager proceeded to the fire in another truck. The employees who had attempted to start the fire engine then removed hose from it and placed it in a pickup truck and drove to the fire. Before they could apply water, however, one of them had to make a return trip to procure a wrench with which to open a valve to admit water

into the part of the hydrant system which had not been kept operational.

The airport manager testified that he reached the fire between 8:25 and 8:30 a.m. The rural fire department truck arrived at about 8:42. Plaintiff's stock supervisor, who stated that he had been notified of the fire by the airport manager, arrived at the fire about 30 minutes before the rural fire department truck arrived. This would indicate that he received notice of the fire shortly after 8:05 a.m.

When the first rural firetruck arrived its crew attached firehose to an inoperable hydrant. When this was discovered the truck then had to be backed up about 300 feet and attached to another hydrant. One of the members of the crew stated that it took 6 to 8 minutes to get water on the fire after arrival.

The position of the plaintiff may be stated as follows: (1) A landlord may, by acts and conduct, assume a duty he does not have at common law and that, as applied to the evidence in this case, the defendant assumed a duty to provide fire protection to its tenant because it appeared to the plaintiff that the defendant was maintaining firefighting equipment and a fire hydrant system for airport use; that concomitant thereto was the duty to keep the equipment in operable order. Plaintiff cites and relies upon Stewart v. Raleigh County Bank, 121 W. Va. 181, 2 S. E. 2d 274, 122 A. L. R. 161. (2) The existence of apparent firefighting facilities which were in fact inoperable, namely, the fire hydrant and water supply, created a dangerous condition on land retained by the landlord. Plaintiff cites Restatement, Torts 2d, §§ 360, 361, pp. 250, 253. (3) The landlord, upon learning of the existence of the fire on the leased premises, owed a duty to the tenant to timely notify the lessee and fire protection agencies.

The statutes defining the powers and duties of an airport authority authorize it to provide space and facilities "for business and commercial purposes." § 3-613

(10), R. R. S. 1943. The authority may also construct and maintain the various utilities, including "water mains." § 3-613(13), R. R. S. 1943. It is clearly evident that the statutes empower the authority to lease out airport property where such utilization does not hamper the airport function. An examination of these statutes discloses no statutory duty to provide fire protection for premises which the authority might lease. As both parties assume, it is clear that whatever fire protection duties the defendant owed the plaintiff necessarily arose by reason of their relationship of landlord and tenant. As we have previously noted, the contract between the parties neither expressly nor impliedly placed any duty upon the landlord to provide fire protection services.

At common law a landlord has no duty to equip and maintain fire equipment apparatus for leased premises. Stewart v. Raleigh County Bank, *supra*. In the absence of some provision in the lease imposing such an obligation, the landlord has no obligation to provide such facilities for leased premises. Blotcky v. Gahm, 108 Neb. 275, 187 N. W. 640. In this latter case the landlord defendant leased to the plaintiff two floors of a six-story commercial building. All floors were equipped with an automatic sprinkler system which was connected to an automatic alarm in the office of the American District Telegraph Company. The sprinkler system and the alarm were leased from a company providing such services and the landlord paid it an annual rental for use and maintenance. For some reason the fire alarm system failed and there was a delay in discovering the fire. The lease between landlord and tenant in this case was an oral one. However, the tenant was aware of the existence of the system and of the contract of the landlord with the party providing the service. This court affirmed a holding of the District Court directing a verdict for the defendant landlord, holding that where a landlord leases a portion of a building and retains a portion, in the absence of a specific agreement therefor, or the

existence of fraud and deceit, the landlord is not bound to make repairs, employ a watchman, or maintain a fire alarm system. The court noted the duty of the landlord to use reasonable care to properly maintain portions of the premises used in common by the landlord and the tenants. It held that in the absence of some provision in the lease the landlord had no duty to maintain the sprinkler or fire alarm system, that no duty arose by implication, and that none arose by contracting with a third party to furnish and maintain such a system. We there said: "Negligence presupposes duty, and, if there is no duty, there can be no liability predicated upon a failure to do it."

The plaintiff's reliance upon Stewart v. Raleigh County Bank, *supra*, is misplaced. The general holding of the court in that case conforms to our own opinion in Blotcky v. Gahm, *supra*. The West Virginia court, however, went on in what appears to us to be dictum to say: "However, we are not prepared to say that where a landlord voluntarily equips his building with what is commonly called 'stand-by' fire equipment which is disclosed to the view of tenants, present and prospective, thus holding out to them assurances of protection and thereby presumably lessening the risks which under the doctrine of assumption of risk they are held to assume, he can then so neglect the maintenance of such equipment as to render such assurances illusory and of no practical value." That case involved a fire in an apartment house where the landlord furnished the common areas with fire extinguishers and firehose connected to the municipal system. A fire occurred and these appliances failed. The plaintiff tenant suffered personal injuries as a consequence. The action of the trial court in setting aside a jury verdict for the plaintiff lessee was affirmed because the theory on which the case might have been actionable was not pled.

Unlike the facts in Stewart v. Raleigh County Bank, *supra*, in the case at hand the property involved is a

warehouse accepted by the tenant in the condition in which it was at the time the lease was entered into. The existence of firefighting equipment on a portion of the airport in the exclusive control of the authority does not, without more, give rise to a duty on the part of the authority in its capacity of a landlord to furnish those facilities for the use of its tenants. As we see it, the situation is not different from that in which a landlord owns two adjacent warehouse properties, one he leases and one he uses for his own purposes. On the exterior portion of the latter he has a firehose and nozzle attached to a water system. His tenant on the adjacent property notes and observes this. He may even know that the landlord would be willing to let him use these facilities if necessary. The landlord fails to maintain the hose and lets it deteriorate. It bursts while it is being used to fight a fire on the leased premises. In this instance the landlord has breached no duty to the tenant because none existed in the first place.

Such conflicts in the evidence as exist are therefore immaterial for no inference may be drawn from them of a duty imposed by law or contract to furnish and maintain in good working order the fire protection equipment.

The principles set forth in Restatement, Torts 2d, §§ 360, 361, pp. 250, 253, do not support the plaintiff's second position for several reasons. Both sections pertain to a "dangerous condition" upon a portion of the leased premises of which the landlord maintains control but the use of which by the tenant is "appurtenant to the part leased" or "which is necessary to the safe use of the leased part." In the absence of some provision in the lease or of a statutory duty placed upon the authority, the use of the firefighting facilities was not "appurtenant" to the leased premises. The existence of the firefighting facilities was not necessary to the "use of the leased part" in any way. An examination of the illustrations in the Restatement text shows the inap-

plicability of the principles to the facts before us.

In support of its third position, to wit, that the defendant authority had a duty to promptly call firefighting agencies once its manager had become aware of the fire, plaintiff cites both Restatement, Torts 2d, § 358, p. 243, and Stewart v. Raleigh County Bank, *supra.* Neither authority supports the plaintiff's position. Section 358, Restatement, Torts 2d, p. 243, pertains to notifying a lessee of a dangerous condition which exists on the premises when the lease is entered into. The duty to warn referred to in Stewart v. Raleigh County Bank, *supra,* is an extension to the owner of an apartment house, in a case where he is present and has actual notice of the fire, of the common law duty of an innkeeper to notify his guests of a fire. Even if it were felt that the facts of this particular case imposed on the defendant a duty to warn in case of a fire on the leased premises, that duty was certainly fulfilled by the prompt notification given plaintiff by the defendant's manager.

A party is entitled to summary judgment if he can show (1) there is no genuine issue of material fact, and (2) where, under the facts, he is entitled to judgment as a matter of law. Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152. The trial court properly granted summary judgment in this case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. REX EUGENE WILSON, APPELLANT.

225 N. W. 2d 37

Filed January 16, 1975. No. 39593.

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

Leo M. Williams, for appellant.

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

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

CLINTON, J.

The defendant, aged 17, pled guilty to a charge of burglary. As a part of a plea bargain another burglary charge against him was dismissed. He was sentenced to a term of 18 months to 3 years in the Nebraska Penal and Correctional Complex. The claim on appeal is that the sentence is excessive. We affirm.

Defendant acknowledged that he, either individually or with a companion, was guilty of a long series of burglaries in several towns in northeastern Nebraska, extending through most of the year 1973. In these burglaries thousands of dollars in money and property were damaged and taken. Some of these crimes occurred during a period when the defendant was still on probation for a burglary committed in 1971. The defendant was not apprehended on the present charge until after the period of that probation had expired. He had once earlier been on probation for a burglary committed at age 12.

He acknowledged fairly regular use of marijuana and that the use induced a lack of desire to work. Some of the proceeds of the burglaries were used for the purchase of marijuana. He had experimented with other drugs.

The court could conclude from the record, and apparently did, that in those burglaries in which he had a companion the defendant was the leader. The record creates doubt as to the desire or motivation of the defendant to change his ways.

We cannot say that the trial court abused its discretion in imposing the sentence it did.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEROY CASADOS, APPELLANT.
STATE OF NEBRASKA, APPELLEE V. JOHN T. ARBUCKLE, APPELLANT.

225 N. W. 2d 267

Filed January 23, 1975. Nos. 39321, 39435.

1. **Criminal Law: Witnesses: Trial: Time.** A defendant's character witness may, on cross-examination, be asked if he has heard that the defendant has been previously convicted or arrested for other crimes, provided such misconduct occurred prior to, and not after, the commission of the crime charged.
2. **Criminal Law: Witnesses: Trial.** The scope of the cross-examination of a character witness, in the absence of an abuse of discretion, is discretionary with the trial court.
3. ———: ———: ———. The cross-examination of a character witness as to other misconduct on the part of a defendant is admissible, not to establish the truth of the facts, but to test the credibility of the witness and ascertain the weight to be given to his testimony, and must be made in good faith.
4. **Criminal Law: Intent: Destructive Devices.** In the prosecution of a violation under section 28-1011.22 (7) (b), R. S. Supp., 1972, intent is a material element of the offense charged.

Appeals from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded for new trials.

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

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

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

NEWTON, J.

John T. Arbuckle and Leroy Casados were each charged with possession of concealed weapons and of a combination of parts intended for use in converting a device into a destructive device, to wit: a Molotov cocktail. Casados was acquitted of the concealed weapon charge but convicted on the destructive device charge.

Arbuckle was convicted on both counts. The items constituting the combination of parts for a destructive device consisted of candles, rope, pieces of cloth, gallon jugs, and gasoline found in the Casados automobile. We find the evidence sufficient to sustain the convictions but reverse both on other grounds.

In the trial of the defendant Arbuckle, the defense called several witnesses who testified that his general reputation was good; his reputation for truth and veracity was good; and his reputation as a law-abiding person was good. In cross-examining these witnesses, the county attorney asked them if they knew or had heard of his conviction in a federal court of making false and fictitious statements to purchase firearms, and on three other felony charges, or of his arrest in Lancaster County, Nebraska, on charges of assault with a deadly weapon, and being a felon in possession of a firearm.

It is the general rule that a defendant's character witness may, on cross-examination, be asked if he has heard that the defendant has been previously convicted or arrested for other crimes. See, Annotation, 47 A. L. R. 2d at 1297; State v. Newte, 188 Neb. 412, 197 N. W. 2d 403; Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168. It is likewise the general rule that such misconduct must have occurred prior to, and not after, the commission of the crime charged. See, Annotation, 47 A. L. R. 2d at 1301; II Whartons Criminal Evidence (13th Ed.), § 426, p. 327. The scope of the cross-examination of a character witness, in the absence of an abuse of discretion, is discretionary with the trial court. See State v. Newte, *supra*. The cross-examination of a character witness as to other misconduct on the part of a defendant is admissible, not to establish the truth of the facts, but to test the credibility of the witness and ascertain the weight to be given to his testimony, and must be made in good faith. See Annotation, 47 A. L. R. 2d at 1274 and 1314. The violation of these

rules in the Arbuckle case was prejudicial and would require its reversal on both counts.

In regard to the charges, in both cases, of unlawful possession of a combination of parts designed or intended for use in creating a destructive device, it appears that the minds of the trial judge and the attorneys were not clear on the question of "intent." The pertinent portion of the statute provides: "(7) * * * (a) Any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, (vi) booby trap, (vii) Molotov cocktail, or (viii) any similar device, the primary or common purpose of which is to explode and to be used as a weapon against any person or property; or

"(b) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (7) (a) of this section and from which a destructive device may be readily assembled. The term destructive device shall not include any device which is neither designed nor redesigned for use as a weapon to be used against persons or property; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of Section 4684 (2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the State Fire Marshal finds is not likely to be used as a weapon, or is an antique; or any other device possessed under circumstances negating an intent that the device be used as a weapon against any person or property; * * *." § 28-1011.22, R. S. Supp., 1972.

It is evident that simple possession of a completed destructive device designed for use as a weapon is unlawful regardless of intent unless it is one referred to in

section 28-1011.22, subdivision (7) (b), R. S. Supp., 1972, possessed under circumstances negating an intent that it should be used as a weapon. See United States v. Morningstar, 456 F. 2d 278 (4th Cir., 1972).

In the instructions on the elements of the offenses, the court stated: "1. That the defendant * * * did unlawfully have in his possession a destructive device, to-wit: a combination of parts either designed or intended for use in converting any device into a Molotov Cocktail and from which such Molotov Cocktail may be readily assembled." In the present instance the parts referred to were themselves, when not assembled, essentially innocent in nature and obviously not designed as a destructive device. The word "designed" was improperly included. The pertinent part of the statute is that the parts should be intended for assembly and use as a destructive device. The instruction given was confusing and not entirely clear on the issue of intent. Arguments to the jury in the Arbuckle case indicated the attorneys felt that intent was not an element of the charge, and in one instance when the defendant was asked, "Did you intend to use the articles in the van on the night of January 15th, to make a destructive device?" the county attorney objected to the question on the ground "His intent on use is immaterial, not relevant." The objection was sustained. The Nebraska statute is similar to the federal statute. In United States v. Morningstar, *supra,* it is said: "Instead, in subparagraph (3) it defined a second type of illegal materials as a 'combination of parts * * * *intended* for use in converting any device into a destructive device * * *' (Emphasis added) such as a bomb. It is apparent, therefore, that Congress provided that the use for which these materials are intended determines whether they fall within the Act."

In United States v. Posnjak, 457 F. 2d 1110 (2d Cir., 1972), the following was stated with approval: "In United States v. Davis, 313 F. Supp. 710 (D. Conn. 1970) in which the defendant was found with bottles, rags,

and a can of gasoline, the question of whether he intended to convert these components into a Molotov cocktail, a crude but well-known variety of incendiary bomb, was a central issue."

The jury should have been instructed in each case that intent is a material element of the offense charged and that before a verdict of guilty could be returned, it was necessary for the State to prove beyond a reasonable doubt that the defendant intended to convert the various items found in his possession into a destructive device. A showing as to where and when the destructive device was to be used is not essential. The failure to clarify the issue of intent was prejudicial.

There are other assignments of error submitted but we find them to be without merit.

The judgment of conviction is reversed in each of these cases and they are remanded for new trials.

REVERSED AND REMANDED FOR NEW TRIALS.

WHITE, C. J., took no part in the consideration or decision in these cases.

McCOWN, J., concurring.

The jury in each of these cases was instructed under the language of section 28-1011.24(13), R. S. Supp., 1972, that: "The presence in a vehicle other than a public conveyance of any * * * destructive device shall be prima facie evidence that it is in the possession of all persons occupying such vehicle at the time such * * * destructive device is found, * * *."

The defendants have contended that the statute is constitutionally defective because it creates a presumption which shifts the burden of proof to the defendant on the issue of possession, and that there is no rational connection between the fact proved and the fact presumed. The contention is that the mere fact that the defendant was an occupant of the vehicle provides an irrational and wholly arbitrary foundation and connection upon which to base the presumption that all occupants are in possession of any destructive device found in the vehicle.

If we were to hold that "any combination of parts" consisting of otherwise lawful and innocent items which could be converted or assembled into a destructive device was a "destructive device" without proof of an intent to use such parts by converting or assembling them into a destructive device, the defendant's argument as to constitutional validity might well be unanswerable. Where the individual items which make up the "combination of parts" are each ordinarily and generally designed and intended for lawful and innocent purposes, there is simply no rational basis upon which an individual's presence in a vehicle can justify a presumption that his knowledge and consciousness of the presence of such items is sufficient to give him the knowledge and consciousness of being in possession of a destructive device. A criminal statutory presumption must be regarded as irrational or arbitrary, and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Leary v. United States, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57. See, also, Turner v. United States, 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610.

We have now held, however, that an intent to use such combination of parts by converting or assembling them into a destructive device is a material element of the crime here. Under that holding and under the statutory definition of destructive device, a combination of otherwise innocent parts is not a destructive device within the meaning of the statutory presumption unless and until it is found that the defendant had an intent to use such combination of parts by converting or assembling them into a destructive device. That requirement of specific intent on the part of the defendant with respect to the particular items involved removes the constitutional infirmity and affords a completely rational and constitutional basis for the statutory presumption as to possession.

The instruction on the presumption as given, however, directed the jury to apply the presumption in the language of the statute. The instruction as given, in effect, instructed the jury that the articles comprising the combination of parts in this case were included in the statutory definition of a destructive device.

In a prosecution for possession of a destructive device involving a combination of otherwise lawful and innocent parts, a finding by the jury of the necessary specific intent is a prerequisite to the application of the presumption of possession under section 28-1011.24(13), R. S. Supp., 1972. The jury should therefore be instructed that if it finds that the defendant had an intent to use the combination of parts by converting or assembling them into a destructive device, then and in that event, the statutory presumption as to possession may be applied.

In the Arbuckle case here the record graphically demonstrates that the cross-examination of the character witnesses was for the purpose of establishing the truth of the facts inquired about rather than to test the witnesses' credibility. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Exceptions to that rule must be carefully and conscientiously applied. A criminal defendant should be convicted because the evidence establishes that he is guilty of the offense for which he is being tried, and not because he has been charged or convicted of other independent criminal offenses, nor because he is a "bad man." It is a fundamental concept of our system of criminal justice that an accused, whether guilty or innocent, is entitled to a fair trial. It is not only the duty of the trial court but of the prosecutor as well to see that he gets one.

SPENCER, J., dissenting.

I am in total disagreement with the majority opinion in these two cases. I do not agree that the court abused its discretion in its ruling on objections to the scope of

the cross-examination of character witnesses. I do not agree that the jury was not instructed that intent was a material element of the offense charged. Contrary to the conclusion in the majority opinion, the jury was instructed that intent was a material element of the offense charged in both cases. I further disagree that the instruction given was confusing in any particular.

To properly understand these cases some of the facts should be given. At approximately 8 p.m., on January 15, 1973, a police officer in Alliance observed Casados, who had been under observation, and Arbuckle purchasing gasoline for a 5-gallon gasoline container. Approximately 30 minutes later the Alliance police learned that a school in Scottsbluff had been firebombed. They then communicated the information on the purchase of the gasoline by the defendants to the Scottsbluff authorities. About 9:40 p.m., the same officer observed the parties in Casados' Volkswagen van leave Alliance on the highway leading to Scottsbluff. The Scottsbluff authorities were notified. The van was stopped after it entered the Scottsbluff city limits.

While one of the officers was checking Casados' license and vehicle registration, another officer observed the butt end of a pearl-handled pistol sticking out of a bag in the rear of the van. The defendant Casados and his passengers, who were members of the American Indian Movement, were arrested. A search of the van at the scene of the arrest, in addition to the pistol observed in the bag, revealed two other weapons; ammunition holders for the two automatic weapons; a leather shoulder strap holster; a poker with a taped handle; a 5-gallon gasoline can; four empty gallon jugs; a 50-foot length of clothesline rope; and some items that appeared to be marijuana. Search of the occupants produced several diaper-type cloth strip sections which were observed hanging from the pockets of three of them, one of whom was Arbuckle. A knife was strapped to the side of one

of the occupants, and a small box of candles was taken from defendant Casados' left front shirt pocket.

An explosives enforcement officer of the Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department was called as an expert witness. He testified that the jugs, gasoline, diaper strips, rope, and candles were a combination of parts from which a destructive device could readily be assembled. He also testified that the components were all that were required to form such destructive device and in combination they only could be used to cause damage or destruction. There was no other purpose for which they could be used as a unit.

I agree, intent is irrelevant when an assembled device falls within subdivision (7) (a) of section 28-1011.22, R. S. Supp., 1972. As set out in United States v. Tankersley (1974), 492 F. 2d 962, intent is irrelevant: "* * * when an assembled device falls 'within (1) or (2),' because: the parts are clearly 'designed' to convert the device into a destructive device. When it is equally clear that the end product does not fall within one of those categories, the same is true. When, however, the components are capable of conversion into both such a device and another object not covered by the statute, intention to convert the components into the 'destructive device' may be important." Here, however, the components were not capable of conversion into any object *except* a destructive device, as the testimony set out above clearly indicates.

I have difficulty with the statement in the majority opinion that the word "designed" was improperly included in the instruction. In the first place, the instruction said designed *or* intended. To me, the parts in combination are designed to create a destructive device. The record is clear that while the items in defendants' possession had social utility individually, they had none in combination. The majority opinion quotes from United States v. Posnjak (2d Cir., 1972), 457 F. 2d 1110. The

following from that case is instructive: "One source of confusion which possibly misled the trial court in this case is the use of 'intended' in the phrase in subparagraph (3), 'any combination of parts designed or intended for use in converting any device into a destructive device * * *.' It appears that in some instances this intention to convert a device into an article listed in the statute will be relevant. When it is clear that the assembled device created by combining the components falls within (1) or (2), intent is irrelevant, *for the parts are clearly 'designed' to* convert the device into a destructive device." (Italics supplied.)

Here, the parts in combination could be converted into a destructive device and nothing else. Consequently, as the term is used in the statute, they could be clearly designed for that purpose. It is obvious to me that the parts found in the possession of the defendants were both designed and intended to create a Molotov cocktail, which is covered by our statute. The words of the statute given in the instructions herein are designed *or* intended. A Molotov cocktail has one purpose, and one purpose only: Use as a destructive device against person or property.

The following observation from United States v. Ross (5th Cir., 1972), 458 F. 2d 1144, is instructive: "A Molotov cocktail has no purpose apart from criminal activities. It is not a device that is commonly created for legitimate purposes but the use of which may be perverted from that intended, ordinary purpose to an illegitimate end."

Instruction No. 10 in both cases itemized the material elements which it was necessary for the State to prove beyond a reasonable doubt. Those instructions read: "The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged in Count II are:

"Count II

"1. That the defendant * * * did unlawfully have in

his possession a destructive device, to-wit, a combination of parts either designed *or* intended for use in converting any device into a Molotov Cocktail and from which such Molotov Cocktail may be readily assembled.

"2. That he did so on January 15, 1973.

"3. That he did so in Scotts Bluff County, Nebraska.

"The state has the burden of proving beyond a reasonable doubt *each and every one of the foregoing material elements* necessary for conviction.

"If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty. On the other hand, if you find the state has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty.

"The burden of proof is always on the state to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts." (Italics supplied.)

Regardless of the understanding of the attorneys involved, the trial court instructed the jury that it could convict the defendants only if they unlawfully had a destructive device in their possession, which destructive device in this instance was the combination of parts *either* designed *or* intended for use in converting any device into a Molotov cocktail, and from which such Molotov cocktail could be readily assembled. Designed or intended were material elements, and the jury was required to find one or the other in order to convict the defendants.

The majority opinion does not specify the basis on which it predicates its ruling that the cross-examination of defendant Arbuckle's character witnesses was prejudicial. If, as I assume, it is relying on the general rule that such misconduct must have occurred prior to and not after the commission of the crime, it is not error in this case. The defendant Arbuckle's direct examination

of the character witnesses was not so limited. As Arbuckle concedes in his brief: "Usually it is not permissible to cross-examine as to acts committed after the date of the crime charged, but when the defendant's evidence, as in the instant case, is not confined to the reputation prior to the date of the alleged offense but rather is intended to cover the whole period of acquaintance up to the time of trial, it would appear the State would not be restricted and should be allowed to cross-examine as to the same span of time." This is an exception to the rule relied on by the majority and is clearly applicable in this case, because the defendant Arbuckle intentionally covered the period with his witnesses between the commission of the offense and the time of the trial. Consequently, it could not be prejudicial.

This case is clearly within the ambit of State v. Newte (1972), 188 Neb. 412, 197 N. W. 2d 403, in which we said: "'While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, yet this doctrine does not extend to cross-examination. It is firmly settled by the adjudications in this country that upon cross-examination of a witness who has testified to general reputation questions may be propounded for the purpose of eliciting the source of the witness' information and particular facts may be called to his attention, and asked whether he ever heard them. This is permissible not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony. *The extent of the cross-examination of a witness must be left to the discretion of the trial court.* The questions put to the several witnesses were within the scope of a legitimate cross-examination, and there was *no abuse of discretion in permitting them to be answered.*' (Emphasis supplied.)"

The concurring opinion of Judge McCown, in an attempt to bolster the majority opinion, suggests that de-

fendants' constitutional argument may be unanswerable, and cites Leary v. United States, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57, and Turner v. United States, 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610. These cases are reviewed in the later case of Barnes v. United States (1973), 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380.

In Barnes, the federal district court jury had been instructed that possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which one may reasonably draw the inference and find in the light of surrounding circumstances shown that the person in possession knew the property had been stolen. The Barnes court, in an opinion by Mr. Justice Powell, held the instruction comports with due process in the following language: "The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tells us that petitioner must have known or been aware of the high probability that the checks were stolen. Cf. Turner v. United States, 396 U. S., at 417; Leary v. United States, 395 U. S., at 46. Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable-doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, we conclude that it satisfies the requirements of due process."

I find no prejudicial error in either case, and believe that the judgments in each should be affirmed.

BOSLAUGH, J., concurring.

I concur generally in the opinions of Judge Newton and Judge McCown.

Intent is an element of the offense only where the defendant is charged with unlawful possession of a combination of parts intended for use in creating a destruc-

tive device. Where the statutory presumption is relied on the jury should be instructed that the evidence must show the defendant intended to use the parts to create a destructive device or knew that some other party present in the vehicle had such an intent.

In the Arbuckle case the cross-examination of the character witnesses went beyond an inquiry to test the credibility of the witnesses and ascertain the weight or value to be given to their testimony.

CLINTON, and BRODKEY, JJ., join in this concurrence.

WALTER WRASSE, JR., A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, WALTER WRASSE, SR., APPELLANT, v. WAYNE D. GUSTAVSON ET AL., APPELLEES.
225 N. W. 2d 274

Filed January 23, 1975. No. 39519.

1. **Trial: Verdicts.** A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Negligence: Motor Vehicles.** Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights.
3. ———: ———. An exception to the general rule occurs when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision, or reasonable minds might differ as to whether the motorist was exercising due care under the circumstances.
4. **Trial.** In an action wherein there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him.

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

Schmid, Ford, Mooney, Frederick & Caporale, Waldine H. Olson, and M. Brian Schmid, for appellant.

Emil F. Sodoro and Michael V. Cavel, for appellees.

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

SPENCER, J.

This action arises out of an automobile accident. The trial court dismissed the action at the close of the plaintiff's evidence. The sole question presented to us is whether the plaintiff's evidence presented a jury question. We reverse.

The accident occurred shortly after 10:15 p.m. on January 23, 1972, approximately ½ mile south of the Douglas-Washington county line of U. S. Highway No. 73. The right front of plaintiff's vehicle collided with the left rear corner of defendants' vehicle. Plaintiff was seriously injured and his passenger was killed. Plaintiff, who sustained a mild to moderate brain injury, had no memory of the accident. In the opinion of his medical witness he suffered from retrograde amnesia.

U. S. Highway No. 73 at the site of the accident is a four-lane highway, two traffic lanes northbound and two southbound, divided by a median. Each southbound lane is approximately 12 feet wide. U. S. Highway No. 73 at that point is an uphill grade, not steep but gradual, with a slight curve in the highway. The night of the accident was clear with no fog, mist, snow, or rain. Photos of the scene taken within an hour after the collision indicate the highway was snow packed but had been bladed.

A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his

favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Dryer v. Malm (1956), 163 Neb. 72, 77 N. W. 2d 804.

Applying this test, defendants' vehicle at the time of the collision was parked without lights, with the left rear extended from 1 to 1½ feet onto the right-hand driving lane of the highway. The parking lane alongside the highway had been cleared of snow for a sufficient width to allow defendants' vehicle to be parked entirely off the main-traveled portion of the highway. There was no artificial lighting in the vicinity of the collision. The dividing line between the traffic lane and the parking lane was visible on the night of the collision. Defendant Wayne D. Gustavson, who was driving a 1968 Ford pickup, parked approximately 10 feet south of the mailbox in front of his girl friend's residence. He did not have either his parking lights or his flashing lights on while parked.

A disinterested witness, who had passed defendants' parked car a very few minutes before the collision, testified that when he was approximately 100 feet from the vehicle he saw a reflection. He was unable to distinguish its shape against the dark background, nor was he able to determine whether it was in his lane of travel, which was the right-hand lane closest to the shoulder. As he approached the vehicle he saw that it was a Ford pickup occupied by a male and a female. The back of the pickup was sticking out into the right-hand traffic lane about 1 foot to 1½ feet. Although the interior light and taillights came on when he was about 35 to 40 feet away, the pickup had been previously unlighted. His wife, who was riding with him, testified that the lights went off after their vehicle passed the parked car.

An expert in accident reconstruction testified the distance from the snow line to the west edge of the traffic lane was 11 feet at the point where a snowplow had caused an indentation in the snow line and tapered down to a distance of 6 feet 8 inches as one proceeded north to

the mailbox. It was in this area that defendants' pickup was parked and the cleared area was of sufficient width to accommodate the entire width of defendants' vehicle which was 6 feet 7.4 inches. It was the opinion of this witness that defendants' vehicle was parked with at least 1 foot 10 inches of the vehicle extended into the driving lane.

Defendants rely on the rule that generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. See Fink v. Meister (1972), 188 Neb. 248, 196 N. W. 2d 122. However, an exception to the general rule occurs when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision, or reasonable minds might differ as to whether the motorist was exercising due care under the circumstances. See Bartosh v. Schlautman (1966), 181 Neb. 130, 147 N. W. 2d 492.

On Plaintiff's evidence a jury could possibly find that defendants' vehicle could not be distinguished against the dark background; that at a distance of approximately 100 feet a driver passing the defendants' vehicle would be unable to see that it partially blocked his lane of travel; and that a car traveling 65 miles an hour would travel approximately 97.5 feet in 1 second. This could bring the case within the exception to the general rule on stopping within the area lighted by headlights and present a jury question concerning plaintiff's ability to see the defendants' vehicle in time to avoid a collision.

While we might question the testimony that defendants' vehicle could not be distinguished against the dark background in view of the snow cover, the question presented is one for a jury. In an action wherein there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot dis-

regard it and direct a verdict against him. Dryer v. Malm (1956), 163 Neb. 72, 77 N. W. 2d 804.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES HOWARD, APPELLANT.

225 N. W. 2d 391

Filed January 23, 1975. No. 39542.

1. **Criminal Law: Probation and Parole: Trial: Evidence.** A finding that a defendant has violated his probation must be established by clear and convincing evidence.
2. **Criminal Law: Constitutional Law: Trial: Evidence: Intoxicating Liquors.** In the absence of a valid authorizing statute, such as section 39-669.08 et seq., R. R. S. 1943, the results of a test of blood for alcoholic content are inadmissible where the blood sample is taken involuntarily and the constitutional requirements of the Fourth Amendment to the United States Constitution have not been satisfied.
3. **Criminal Law: Motor Vehicles: Implied Consent Law: Intoxicating Liquors.** The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor.
4. **Criminal Law: Intoxicating Liquors: Trial: Evidence.** In the absence of some statute making provision for the effect to be given a test of body fluid for alcoholic content, expert testimony is necessary to make the results admissible.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed and dismissed.

Leo M. Bayer, for appellant.

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

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

CLINTON, J.

This is an appeal from an order revoking an order of probation. The defendant had pled guilty in the county court to a charge of trespass. § 28-588.01, R. S. Supp., 1972. He was placed on probation. The order of probation provided, among other conditions, that he should not "(d). Be found in a state of intoxication in any public place or any automobile." By motion and affidavit, the county attorney asked that the probation be revoked for violation of the condition mentioned. A hearing was held in the county court, after which defendant's probation was revoked. The defendant was sentenced to serve 60 days in the county jail. He appealed to the District Court where the order was affirmed. He then perfected his appeal to this court.

On this appeal only one issue requires consideration and that is the sufficiency and competency of the evidence to sustain the finding that the condition was violated.

A review of the evidence is necessary. On November 28, 1973, at about 6:30 p.m., two police officers of the city of Alliance responded to an accident call. They found the defendant inside an overturned automobile in an apparent state of unconsciousness. He had a cut on his forehead and had apparently received a severe blow across the face in the area of the bridge of the nose. The defendant was the only occupant of the vehicle. One of the officers detected the odor of alcoholic liquor on the defendant's breath. This officer placed a radio call for an ambulance, which promptly responded and immediately took the defendant to a hospital. At about the time the call for the ambulance was placed, the officer also called the police sergeant on duty and asked him to go to the hospital and obtain a sample of the defendant's blood. The sergeant arrived at the hospital at about the same time as the ambulance and, while the defendant was still on the table in the emergency room and unconscious, directed a nurse to draw a blood sam-

ple. Moments thereafter, the defendant recovered consciousness, was reexamined by a physician and immediately released. He left the hospital, walking without assistance. Then, apparently at the request of the police sergeant, he went to the police station in the automobile of friends and relatives for the purpose of getting the accident investigation completed. At the station he was interrogated by one of the police officers who had responded to the accident call. The defendant told the officer, among other things, that he was not the driver of the automobile when the accident occurred and gave him the name of the person whom he claimed was driving. The defendant, following the interview, left the station. All these events occurred within about 30 minutes of the time the officers reached the accident scene. The police officers, including the sergeant, affirmatively testified that they had not placed the defendant under arrest. Later, the blood sample was examined by a laboratory technician who submitted a written report indicating alcoholic content of the blood was .33 of 1 percent. At that time the proceedings for revocation of probation were commenced, an arrest warrant issued, and defendant was taken into custody.

At trial, the officer who conducted the investigation testified that neither defendant's speech nor action was seemingly affected by any alcohol he may have consumed. The only way the officer could tell he had consumed alcoholic liquor was by the odor on his breath. The laboratory report was offered in evidence. No foundational testimony whatever was offered. No expert or other supporting testimony was tendered as to the test methods employed in analyzing the blood. Nor was there testimony as to the effect of a given percentage of alcohol in the body fluid. Objection was made on the grounds of immateriality and that the record disclosed the blood sample had been drawn without the consent of the defendant and without his having been

placed under arrest. The court overruled the objection and received the evidence.

In this court the briefs of both parties are devoted to discussing the sufficiency of the evidence. The defendant does so in the terms of the lack of expert testimony as to the effect of a given percentage of alcohol in the blood and upon the inapplicability of the doctrine of judicial notice as to such effect. He contends that consequently the report is insufficient to support the finding. The State argues that section 39-727, R. S. Supp., 1973, now section 39-669.07, R. R. S. 1943, equates "under the influence of alcoholic liquor" and having "ten-hundredths of one per cent or more by weight of alcohol in . . . body fluid" and therefore no testimony of any kind is necessary to establish the connection between the alcoholic content of the blood and its effect in producing a state of intoxication.

It is clear from the arguments of counsel before the county court as shown in the record that the issue in connection with the offer and receipt of the chemistry report was its competence. It is also clear that the defendant, through his counsel, waived technical foundational requirements, such as tracing the sample and the qualifications and testimony of the person who made the test, and was questioning solely the competence of the report as evidence. The county attorney, in his argument, mentioned the provisions of section 39-727.03 et seq., R. R. S. 1943, now section 39-669.08 et seq., R. R. S. 1943. He made specific reference to an asserted right provided by statute to take a blood sample of an unconscious person. It is apparent that the statute referred to is section 39-669.10, R. R. S. 1943. He then went on to point out that these statutes are not applicable because the case is not a prosecution involving the operation of a motor vehicle and that the defendant was not under arrest, and indicated that the State relied upon Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908. He asserted that if probable cause to believe

the defendant guilty of being intoxicated existed, the police could compel the giving of a blood sample even if they had to sit on the defendant to enable the medical personnel to take the sample, irrespective of whether he was under arrest at the time.

We think the prosecutor misreads both Schmerber v. California, *supra,* and the state of the law in Nebraska. The effect of the argument is to claim that the right of the State to forcibly take a blood sample from a person charged with the offense of intoxication is unrestricted except for the existence of probable cause to believe that he is guilty of that charge, despite the fact that in those cases coming within the terms of the implied consent statute, section 39-669.08 et seq., R. R. S. 1943, the right to take such sample and make such test is restricted by the special requirements of those sections. No statute or decision of this court, or any other that we can find, supports the State's position. We will later analyze the statute. Let us first consider the holding in Schmerber v. California, *supra.*

That opinion makes it clear that Fourth Amendment strictures against unreasonable searches and seizures do apply to searches of the person which embody penetration of the body, as in this case by drawing blood. The court there said: "But if *compulsory administration of a blood test* does not implicate the Fifth Amendment, it *plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.* . . . It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. . . . the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the

means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." (Emphasis supplied.) Schmerber v. California, *supra.* The court in Schmerber justified the search on the basis of reasonable cause, the particular exigent circumstances of the case, and as an incident to arrest. The charge was operating a motor vehicle while under the influence of intoxicating liquor. The car the defendant was operating was involved in a collision. The defendant was observed both at the scene and at the hospital to which he was taken. There were clear indications of intoxication. Defendant was placed under arrest at the hospital approximately 2 hours after the accident. At that time, over the defendant's objection, and at the direction of the arresting officer, the blood sample was taken by trained medical personnel.

The court said in upholding the reasonableness of the search in that case: "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

"Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . .

"The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a

warrant, under the circumstances, threatened 'the destruction of evidence,' Preston v. United States, 376 U. S. 364, 367. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case *was an appropriate incident to petitioner's arrest.* . . .

"We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." (Emphasis supplied.) Schmerber v. California, *supra.* It is clear from what has been quoted from Schmerber that the State's position at trial is not supported by the holding of that case.

The prosecutor's position that the only requirement necessary to permit the forced taking of a blood sample from a person who is suspected of intoxication can scarcely stand scrutiny in the light of the stringent requirements laid down by our Legislature in the implied consent statutes which relate to much more serious offenses "arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor." § 39-669.08, R. R. S. 1943. These statutes permit the taking of a blood sample with-

out warrant and without consent, where "reasonable grounds" exist to believe the person was driving on a public highway while under the influence and where that person has been "arrested for any offense arising" out of the operation of a motor vehicle while under the influence of alcoholic liquor.

Under the provision of the statutes, if the accused has not been placed under arrest the sample may not be taken without consent. Otte v. State, 172 Neb. 110, 108 N. W. 2d 737; Prigge v. Johns, 184 Neb. 103, 165 N. W. 2d 559; State v. Baker, 184 Neb. 724, 171 N. W. 2d 798; State v. Seager, 178 Neb. 51, 131 N. W. 2d 676. Before the result of such a test is valid under the statute, the various other requirements of the statute must be complied with. Otte v. State, *supra;* Prigge v. Johns, *supra;* State v. Seager, *supra.* Under the provisions of section 39-669.10, R. R. S. 1943, blood may be withdrawn from an unconscious person, but even in that case the requirements of section 39-669.08, R. R. S. 1943, and related sections, including the provision of arrest, must be complied with. Otte v. State, *supra.* Such is not only the apparent holding in the case cited, but also follows from a reading of the various provisions of the statute.

If it be claimed that section 39-669.10, R. R. S. 1943, and subsection (1) of section 39-669.08, R. R. S. 1943, afford an independent basis for withdrawing the blood of an unconscious person, such a contention cannot stand under a close examination of the statutes. The sections are in pari materia and must be construed together. Stevenson v. Sullivan, 190 Neb. 295, 207 N. W. 2d 680. Such a reading would ignore the specific reference in section 39-669.10, R. R. S. 1943, to the consent under section 39-669.08, R. R. S. 1943. If section 39-669.10, R. R. S. 1943, were independent, then the immunity provided for medical personnel under section 39-669.12, R. S. Supp., 1974, would not be applicable for that section refers only to section 39-669.08, R. R. S. 1943. The Legislature could hardly have intended such a result.

In any event, the following propositions are clearly the law in this state. In the absence of a valid authorizing statute, such as section 39-669.08 et seq., R. R. S. 1943, the results of a test of blood for alcoholic content are inadmissible where the blood sample is taken involuntarily and the constitutional requirements of the Fourth Amendment to the United States Constitution have not been satisfied. Vore v. State, 158 Neb. 222, 63 N. W. 2d 141; Annotation, 127 A. L. R. 1514; Schmerber v. California, *supra*. Likewise the provisons of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. § 39-669.08, R. R. S. 1943; Hoffman v. State, 160 Neb. 375, 70 N. W. 2d 314; Raskey v. Hulewicz, 185 Neb. 608, 177 N. W. 2d 744. These two cases, decided under an earlier version of the implied consent statute, clearly require this construction of the present statute.

Thus, the State may not, in this case, resort to the implied consent statutes to supply the missing correlation between the blood analysis report and the possibility of defendant's intoxication. Moreover, in the absence of some statute making provison for the effect to be given a test of body fluid for alcoholic content, expert testimony is necessary to make the results admissible. Raskey v. Hulewicz, *supra*. We believe that case disposed of any argument that judicial notice may properly be taken of the effect of a given percentage of alcohol in a human being. Barring a legislative judgment, this area is not one in which a sufficient unanimity of readily ascertainable scientific opinion exists so as to allow for the substitution of judicial research for expert testimony. Rather, the question of intoxication can present issues, the resolution of which can vary greatly under the circumstances. See, Houghton v. Houghton, 179 Neb. 275,

137 N. W. 2d 861; Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900.

We have held that a finding that a defendant has violated his probation must be established by clear and convincing evidence. State v. Parker, 191 Neb. 263, 214 N. W. 2d 630. A concomitant of that principle is, of course, that the evidence must be competent for the purpose offered. There is in this case no clear and convincing competent evidence that the defendant violated the terms of his probation.

REVERSED AND DISMISSED.

IN RE THE TRUST KNOWN AS THE RELLER TRUST CREATED BY THE LAST WILL AND TESTAMENT OF MERRIL R. RELLER, DECEASED.

ROLLIE C. JOHNSON, APPELLANT AND CROSS-APPELLEE, V. DONALD R. HAYS, APPELLEE, IMPLEADED WITH VIRGINIA RELLER, APPELLEE AND CROSS-APPELLANT.

225 N. W. 2d 397

Filed January 30, 1975. Nos. 39291, 39292.

1. **Courts: Jurisdiction: Trusts.** The county court and the District Court have concurrent jurisdiction in supervision over the administration of testamentary trusts.
2. **Pleadings: Appeal and Error.** A petition may be attacked at any stage of the proceedings on the ground it fails to state a cause of action, but where the attack is delayed until appeal the pleading will be liberally construed.

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

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

Fredric H. Kauffman of Cline, Williams, Wright, Johnson & Oldfather, and Charles S. Reed, for appellee Reller.

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

BOSLAUGH, J.

These cases involve a controversy over the compensation due Rollie C. Johnson for his services as manager of the Commercial Center under the trust established by the will of Merril R. Reller, deceased. The testator died August 1, 1968. Case No. 39292 involves compensation for the period August 1, 1968, to December 31, 1970. Case No. 39291 involves compensation for the year 1971.

The cases were commenced by applications filed in the county court. The county court fixed the compensation in each case at $1,300 per month. Upon appeal the District Court fixed the compensation in each case at $1,500. The plaintiff has appealed and Virginia Reller, the life beneficiary of the trust, has cross-appealed.

The principal issue raised by the cross-appeal relates to jurisdiction of the subject-matter. The cross-appellant contends the lower court lacked jurisdiction because the applications filed by Johnson did not allege specifically the trustee had abused his discretion in fixing the compensation paid to Johnson.

The cross-appellant concedes the county court has concurrent jurisdiction with the District Court in the supervision of the administration of testamentary trusts; that Johnson could contest the trustee's discretionary determination in the county court; and that the county court could review the exercise of the trustee's discretion. See, § 30-1801, R. R. S. 1943; In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488. Thus, the cross-appellant's contention amounts to an attack upon the pleadings made for the first time in this court.

Although a petition may be attacked at any stage of the proceedings on the ground it fails to state a cause of action, where the attack is delayed until appeal the pleading will be liberally construed. Bader v. Hodwalker, 187 Neb. 138, 187 N. W. 2d 645. The applications filed by Johnson alleged in substance that the trustee had failed to pay Johnson what he was entitled to receive. Liberally construed, they were clearly sufficient.

The controlling issue in each case is the amount of compensation that should be paid to Johnson. The situation is somewhat unique in that Johnson is not an employee hired under an ordinary contract of employment. The will directed the trustee "in general to conduct the Commercial Center in as near the same manner as it is being operated on the date of my death." The will further provided the "present method of conducting business, rentals and divisions of profits shall be continued as near as practicable" with the share of profits formerly received by the testator to be paid to his widow, the life beneficiary. The will also provided that Johnson should be an income beneficiary of the trust for 5 years after the death of Mrs. Reller "provided he remain and operate said Commercial Center as he now is for said five year trust period." He is also a remainderman beneficiary of the trust.

The testator died August 1, 1968. Johnson had been employed at the Commercial Center since 1955 or 1956. He had designed the layout of the trailer court, constructed it, and had managed it from its inception. In addition to collecting the rent from the trailer court and other facilities he performs the maintenance work at the Center which has its own water and sewer system and electrical distribution service. He furnishes the use of two pickup trucks, a dump truck, a large tractor, a small tractor, a motor grader, hand tools of various types, and office equipment.

During the lifetime of the testator, he and Johnson had a complicated system for sharing income and expenses from the Commercial Center. In general, Johnson received 38 percent of the trailer court rentals, 50 percent of certain apartment rents, and $30 per month from the office rent paid by a labor union. Johnson also paid 50 percent of certain expenses and shared in the profit or loss resulting from the electrical billing to the tenants of the trailer court. The testator paid all the expenses the parties termed "capital improvements" and

expenses relating to facilities of the Center from which the testator received the entire rental income.

The will was construed in an action brought for that purpose in 1970. The District Court directed the trustee to "continue with the services of Rollie C. Johnson as an integral part of the operation of the Commercial Center in the same capacity as he occupied on the date of death of Merril R. Reller and as he now occupies, and shall pay him as compensation such sum as is fair and reasonable and necessary, but not in excess of compensation computed by using the method followed in fixing his compensation in the year 1967 as shown by the available records of the Commercial Center.

"The continued employment of Rollie C. Johnson in this capacity is in fulfillment of testator's intent that the Commercial Center be operated 'in as near the same manner as it is being operated on the date of my death.' This construction is not absolute and is subject to a special finding of a change of circumstances or condition requiring a change in the method of operation, or requiring a change in the distribution of the percentage of profits." This construction of the will was affirmed in Hays v. Johnson, 187 Neb. 307, 189 N. W. 2d 475.

Since the death of the testator, Johnson has continued to perform the same duties at the Commercial Center that he performed during the lifetime of Reller. In addition to these duties, he now does a number of things that Reller handled personally. Johnson negotiates with tenants, handles complaints from them, and generally represents the Commercial Center in the day-to-day operation of the Center. The trailer court has been enlarged somewhat and has operated at about 100 percent of capacity. There is no evidence of any dissatisfaction with Johnson's performance of his duties. The evidence sustains a finding that his performance has been satisfactory during the period involved.

The monthly settlement sheets for 1967 show Johnson received $17,131.30 that year. He reported only

$10,190.12 as income for tax purposes which was the amount shown on the partnership information return filed by Reller for 1967. The difference is probably due to the deductions for taxes, depreciation, and other expenses claimed on the partnership return. For the last 5 months in 1968 Johnson was paid $5,298 by the trustee. He has been paid $1,000 per month during 1969, 1970, and 1971.

An accountant employed by the cross-appellant, using a formula in which Johnson would receive 38 percent of trailer court rentals, 50 percent of certain apartment rentals, $30 per month of the rent paid by the labor union, and 50 percent of electric "long," and would pay 50 percent of all expenses shown on the settlement sheets and 50 percent of electric "short," computed the amount due Johnson as $8,511.36 for the last 5 months of 1968, $21,609.38 for 1969, $23,909.53 for 1970, and $19,856.56 for 1971.

Johnson, using a formula of 40 percent of the "net income" of the trust before payments to either Johnson or the life income beneficiary, claims he should receive $7,815.68 for the last 5 months of 1968, $24,182.02 for 1969, $25,355.28 for 1970, and $24,967.97 for 1971. Apparently, Johnson's theory is based upon the partnership information return for 1967 in which he was allocated 40 percent of $25,475.33 or $10,190.12. We think the formula disclosed by the settlement sheets for 1967 is a more reliable method of determining what Johnson's compensation would have been if the method used in 1967 had been continued after August 1, 1968.

Johnson claims he is entitled to the rent from the barber shop and the M & M TV shop which amounts to $1,800 per year. This rent was not accounted for on the 1967 settlement sheets and the available records of the Commercial Center do not show that Johnson received it or was entitled to receive it.

Johnson also claims that some of the expenses shown on the settlement sheets after August 1, 1968, are not

chargeable against his share of income. Thus, the allocation of 50 percent of all expenses to Johnson by the accountant would understate his compensation on the basis of the 1967 formula.

The judgment in Hays v. Johnson, *supra,* directed the trustee to pay Johnson such compensation as was fair and reasonable and necessary but not to exceed an amount computed by using the method followed in 1967 as shown by the available records of the Commercial Center. Upon the record presented we believe the compensation to Johnson for the periods in question should be fixed at an amount substantially equivalent to compensation determined by the 1967 formula. We determine this amount to be $2,000 per month and direct that the judgment in each case be modified accordingly.

The judgments as modified are affirmed.

AFFIRMED AS MODIFIED.

IN RE RULES AND REGULATIONS NOS. 31 AND 32.
NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, A CORPORATION, ET AL., APPELLANTS.
225 N. W. 2d 401

Filed January 30, 1975. No. 39448.

1. **Commerce: Constitutional Law.** The commerce clause of the Constitution of the United States delegates to Congress the power to regulate interstate commerce.
2. **Commerce.** The power to regulate interstate commerce is plenary in nature and has been held to embrace matters which are intrastate in nature but which affect interstate commerce.
3. **Commerce: Statutes.** The extent of federal preemption is determined by an inquiry into the congressional intent underlying the federal law.
4. ———: ———. The fact that the Interstate Commerce Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the act delegating the power. The question is whether

the federal act was intended to occupy the field.

5. **Commerce: Statutes: Constitutional Law.** Congress intended in the enactment of Title 49 U. S. C., section 1(15), that the exclusive power is vested in the Interstate Commerce Commission to regulate the distribution of railroad cars and to suspend administrative order-making due process pursuant to a declaration of emergency because of equipment shortage, priorities in use on a national level, or congestion.
6. **Commerce.** Implicit in the grant to the Interstate Commerce Commission of emergency powers is the implied power to determine that a particular subject or a particular geographical area remain unregulated.
7. **Commerce: Railroads: Words and Phrases.** The term "car service" includes the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property.
8. **Commerce: Railroads.** Congress delegated, under the supervision of the Interstate Commerce Commission, the power and the duty of every carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service.
9. **Commerce: Carriers: Words and Phrases.** "Car service" connotes the use to which the vehicles of transportation are put; not the transportation service by means of them.
10. **Commerce: Carriers: States.** Where a subject is national in its character and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one to another, Congress alone can provide the needed regulations. In such a case the federal power is exclusive, and the states may not act even though Congress has not exerted its legislative authority, the silence of Congress being equivalent to a declaration that the particular commerce shall be free from regulation.

Appeal from the Nebraska Public Service Commission. Reversed.

Harry B. Otis, Richard Knudsen, C. Arlen Beam, Robert Skochdopole, and John J. Burchell, for appellants.

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

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

WHITE, C. J.

On October 5, 1973, the Nebraska Public Service Commission enacted and promulgated its Rules and Regulations Nos. 31 and 32 setting up emergency powers in the Commission and standards relating thereto, which regulated the distribution of railroad grain cars by railroads to shippers in Nebraska. The question involved in this case is the constitutionality of these two rules and regulations under the supremacy and commerce clauses of the federal Constitution (Art. IV, § 2, and Art. I, § 8, of the Constitution of the United States). We hold that the state's power to regulate this aspect of interstate commerce has been preempted by the Congress through the Interstate Commerce Act, Title 49 U. S. C., section 1 (1) through (17), and accordingly Rules 31 and 32 are an unconstitutional exercise of state power.

Rule 31 provides as follows: "Whenever the Commission (Nebraska Public Service Commission) is of the opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists, the Commission shall have and is hereby given authority either upon complaint or upon its own motion without complaint, at once, if it so orders, without answer or other formal pleading by the interested carriers or carrier and without notice, hearing or making or filing of a report as the Commission may determine (A) to suspend the operation of any or all Commission rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission (B) to make such just and reasonable order with respect to car service during such emergency that will promote the service in the interest of the public and commerce of the people."

The Interstate Commerce Act, Title 49 U. S. C., section 1(15), states: "Powers of Commission in case of emer-

gency. Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; * * *."

More precisely, the question presented is whether Congress has "preempted" the area of regulation of the distribution of railroad grain cars to shippers in the State of Nebraska. At the outset we point out it is well-settled law that all federal regulations done in pursuance of one of Congress' delegated powers are capable of preempting any state legislation or regulation on the same subject. The commerce clause of the Constitution of the United States delegates to Congress the power to regulate interstate commerce; this power is plenary in nature and has been held to embrace matters which are intrastate in nature but which affect interstate commerce. The Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511 (1913); Gibbons v. Ogden, 9 Wheat. 1, 22 U. S. 1, 6 L. Ed. 23 (1824). As to the extent

of federal preemption, the determination does not await any actual operational conflict in the area of operations and actual frustration is not a criterion of preemption. The extent of federal preemption is determined by an inquiry into the *congressional intent* underlying the federal law. Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Commission, 283 U. S. 380, 51 S. Ct. 553, 75 L. Ed. 1128 (1931); Napier v. Atlantic Coast Line R. R. Co., 272 U. S. 605, 44 S. Ct. 207, 71 L. Ed. 432 (1926); Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182 (1912). In Savage v. Jones, *supra*, the general principle is stated: "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated powers."

The fact that the power delegated to the ICC has not been exerted is without legal significance. The fact that the ICC has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the act delegating the power. The question is whether the federal act was *intended* to occupy the field. Napier v. Atlantic Coast Line R. R. Co., *supra*; (Opinion by Brandeis, J.). See, also, Frontier Airlines Inc. v. Nebraska Department of Aeronautics, 175 Neb. 501, 122 N. W. 2d 476 (1963).

In our view, Congress intended in the enactment of Title 49 U. S. C., section 1(15), that the exclusive power is vested in the ICC to regulate the distribution of railroad cars and to suspend administrative order-making due process pursuant to a declaration of emergency because of equipment shortage, priorities in use on a national level, or congestion. On its face and by its terms, Rule 31 in verbatim language, purports and intends to

vest in the Nebraska Public Service Commission concurrent emergency power over the distribution of railroad grain cars or boxcars with that of the ICC. It attempts to assume or assert the same emergency power already enacted and delegated to the ICC by Congress and in full force and effect at the time of the promulgation of Rule 31. The movement and assignment of railroad grain cars on the railroads while operating in the State of Nebraska is unquestionably interstate commerce, whether the destination is intrastate or beyond the borders of the state. The record reflects that the overwhelming majority of railroad grain cars in Nebraska have outstate destinations. In this context Rule 31 can only be implemented in such a way as to frustrate, confuse and conflict with the identical ICC emergency power. The danger of directly contradictory simultaneous application of state and federal regulations by two separate entities which frustrates the effectiveness of the federal law lends support to the clear inference that the federal law was intended to exclude emergency state regulations. See, Amalgamated Assn. of Street Electric Ry. & Motor Coach Employees of America v. Lockridge, 403 U. S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971); Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co., 394 U. S. 369, 89 S. Ct. 1109, 22 L. Ed. 2d 344 (1969).

We point out that by the terms of Title 49 U. S. C., section 1(15), Congress lodged with the ICC, in effect, the power to declare an emergency in the area of boxcar shortage, distribution or congestion, and secondly, the power to *refuse* to declare such an emergency. These powers are, of course, exercisable by the ICC whether the emergency is localized only in Nebraska, or whether it exists wholly outside the State of Nebraska, or in both Nebraska and in other states. It is clear from an examination of Title 49 U. S. C., section 1(15), and the other related sections in Title 49, that Congress intended that the ICC must be left to regulate car service free of any possible state interference. For example, if the ICC

determined a national emergency existed which required that all available boxcars for shipment of perishable fruit be in some other state, the operation of Rule 31 would clearly frustrate the implementation of the ICC's emergency power.

We point out further that it is in the nature of emergency power which should be exercised by only one paramount authority. Unity in the control of emergency situations is not only common sense but is fundamental to the effective exercise of such power. Implicit in the grant to ICC of emergency powers is the implied power to determine that a particular subject or a particular geographical area remain unregulated, that it surely was the intent of Congress that the various state public service commissions must not be allowed to contradict or undermine this determination. See, Napier v. Atlantic Coast Line R. R. Co., *supra*; Pennsylvania R. R. Co. v. Public Service Commission of the Commonwealth of Pennsylvania, 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142 (1919).

We come to the conclusion that the Congress, by the enactment of Title 49 U. S. C., intended that the power to declare and regulate emergencies rests solely with the ICC and that Title 49 U. S. C., section 1(15), has preempted the state's purported exercise of concurrent power under Rule 31. Accordingly we hold that Rule 31 is unconstitutional and void under the supremacy and commerce clauses of the Constitution of the United States.

We turn now to an examination of Rule 32, as adopted by the Nebraska Public Service Commission. It provides:

"I.

"It is the *duty* of each and every *railroad* in the State of Nebraska to furnish to *any* shipper who makes a legitimate demand therefore, *at the time and at the station demanded by such shipper,* such number and type of cars as the shipper may require. To this end the rail-

road company or companies should make every reasonable and possible effort to supply all their customers with all such cars as and when demanded and required.

"II.

"When the supply of cars is not sufficient to meet the demands of all shippers, available cars will be distributed in the following manner:

"Each shipper will be placed in a category outlined below based on the average yearly number of cars shipped in the three (3) calendar years preceding the year in which the order for cars is placed.

" 'A' 500 or more cars annually
" 'B' 400 or more cars annually
" 'C' 300 or more cars annually
" 'D' 200 or more cars annually
" 'E' Less than 200 cars annually
" 'F' Less than 100 cars annually

"Cars available for distribution will be distributed beginning with the shippers in the 'A' category so that each shipper receives cars in proportion to past volume.

"Provided no shipper will be deprived of its share of cars because the shipper is located on a branch line receiving less than daily service. * * *

"IV.

"Provided, that no shipper shall be deprived of his due proportion of cars under these sections.

"V.

"No deviation from this policy will be allowed unless first authorized by this Commission." (Emphasis supplied.)

The relevant portions of the Interstate Commerce Act, Title 49 U. S. C., section 1(1), et seq., are as follows:

"§1. Regulation in general; *car service*; alteration of line. (1) Carriers subject to regulation. The provisions of this chapter shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by

water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

"From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States * * *.

"(10) 'Car service' defined. The term 'car service' in this chapter shall include the *use, control, supply, movement, distribution, exchange, interchange,* and return of locomotives, cars, and other vehicles used in *the transportation of property,* including special types of equipment and the supply of trains, by any carrier by railroad subject to this chapter.

"(11) Duty to furnish car service; rules and regulations.

"*It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.* * * *

"(14) Establishment by Commission of rules, etc., as to car service.

"(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, * * *

"(17) Directions of Commission as to car service; disobedience; rights of States; bribery.

"(a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) of this section may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this chapter, and of their officers, agents, and employees, to obey strictly

and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier (it shall be penalized) * * *. Provided, however, that nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter." (Emphasis supplied.)

Clearly the term "car service" as used in Title 49 U. S. C., section 1(10), embraces the subject of Rule 32. And clearly the congressional intent to occupy and preempt the whole field of car service is imported in the broad-ranging definition of the term, which says that it "shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment * * *." Just as clearly, Congress delegated, under the supervision of the ICC, the power and the duty of every carrier by railroad to furnish safe and *adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service.* And just as clearly the very nature of this action and the record herein demonstrates the reality of the conflicts between the enforcement of the intrastate standards and regulations and the rules and regulations of the carriers established under subsection (11) of the act and required to be enforced by them, absent emergency change by the ICC itself. We feel that the intention of Congress to occupy and preempt the field of car service, and to eliminate the chaotic condition of separate and conflicting control by the public service commissions of the various states, is obvious. This intention not only appears from the precise language and the directives for control in the language of the act,

but it is responsive to the very nature of a railroad boxcar shortage on interstate carriers which demands uniform and national regulation, and which can only be accomplished by the exercise of federal power over interstate commerce. The frustration and chaos of concurrent, permissive control by conflicting and competing regulations of the different states is apparent.

Decisive, if not conclusive, of the issue before us is the pronouncement of the United States Supreme Court in Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426, 33 S. Ct. 174, 57 L. Ed. 284 (1913), wherein the court in pronouncing upon a Minnesota regulation substantially comparable in effect to Rule 32 said as follows: "As legislation *concerning the delivery of cars for the carriage of interstate traffic* was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist *from the moment that Congress exerted its paramount and all embracing authority over the subject.* We say this because the elementary and long settled doctrine is that there can be *no divided* authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects *the State may exert authority until Congress acts under the assumption that Congress by inaction had tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power.* Southern Ry. Co. v. Reid, 222 U. S. 424." (Emphasis supplied.)

In St. Louis, I. M. & S. Ry. Co. v. Edwards, 227 U. S.

265, 33 S. Ct. 262, 57 L. Ed. 506 (1913), the Supreme Court of the United States held that state actions designed to improve car supply "were not enforceable because of a want of power in the State to impose them" in view of the fact that Congress had legislated on the subject. And in Missouri Pacific R. R. Co. v. Stroud, 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683 (1925), the Supreme Court held that "state law has no application to the furnishing of cars to shippers * * * in interstate commerce," because Congress in the exertion of its power over commerce among the states has enacted comprehensive laws for the regulation of the furnishing of cars to shippers.

The argument that the proviso in Title 49 U. S. C., section 1(17)(a), stating that ICC regulations shall not impair or affect the right of a state, in the exercise of its police power, to require just and reasonable *freight* and passenger service for intrastate business, has been rejected. Power is reserved to the states regarding only passenger and freight service, and *not* as to car service. "Car service" connotes the use to which the vehicles of transportation are put; not the transportation service by means of them. Peoria & P. U. Ry. Co. v. United States, 263 U. S. 528, 44 S. Ct. 194, 68 L. Ed. 427 (1924). And more recently in Chicago, M. St. P. & P. R. Co. v. McCree & Co., 91 F. Supp. 57 (D. Minn., 1950), it was held that limitations in the act on the powers of the commission over intrastate transportation service and intrastate freight and passenger rates cannot be read as limiting the powers of Congress over "car service" of carriers subject to the act.

Our own court recently held in Frontier Airlines, Inc. v. Nebraska Department of Aeronautics, 175 Neb. 501, 122 N. W. 2d 476 (1963), as follows: "In 11 Am. Jur., Commerce, § 10, p. 12, it is said: 'It has repeatedly been held by the courts that where a subject is national in its character and admits and requires uniformity of regulation, affecting alike all the states, such as transporta-

tion between the states, including the importation of goods from one state to another, Congress alone can provide the needed regulations. In such a case the Federal power is exclusive, and the states may not act even though Congress has not exerted its legislative authority, the silence of Congress being equivalent to a declaration that the particular commerce shall be free from regulation." (Emphasis supplied.)

Consequently, we hold that both Rules 31 and 32 are void and unconstitutional because the power of the Nebraska Public Service Commission in the area of the distribution of railroad cars has been preempted by congressional action under the commerce clause in the Interstate Commerce Act, Title 49 U. S. C., section 1(1) through (17).

In light of our decision, it becomes unnecessary to consider the other arguments and contentions of the parties herein. The action of the Nebraska Public Service Commission in the enactment and promulgation of Rules 31 and 32 is reversed.

REVERSED.

CAROL STAPLETON, APPELLEE, V. WILLIAM T. NORVELL, APPELLANT.

225 N. W. 2d 409

Filed January 30, 1975. No. 39543.

1. **Motor Vehicles: Negligence.** Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be indisputably located in a favored position.
2. **Motor Vehicles: Negligence: Trial.** If a driver fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross an intersection is for the jury.
3. **Negligence.** Negligence consisting in whole or in part of the violation of statutes or ordinances, like other negligence, is

without legal consequence unless it is a contributing cause of the injury for which recovery is sought.

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

Jewell, Otte, Gatz & Collins, for appellant.

Smith, Smith & Boyd, for appellee.

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

MCCOWN, J.

This is an action for damages resulting from an automobile accident. The jury returned a verdict for the plaintiff for $25,000, and the defendant has appealed.

The accident here occurred at around 10 p.m. on September 9, 1968, at the intersection of U. S. Highway No. 20 and a graveled county road in Dixon County, Nebraska. The plaintiff, Carol Stapleton, was regularly employed as a sales clerk in a department store in Sioux City, Iowa. On the night of the accident, she had worked until about 9 p.m., and was on her way home after work. She was proceeding westerly on U. S. Highway No. 20. As she reached a point approximately 150 feet east of the intersection at which State Highway No. 9 enters U. S. Highway No. 20 from the south, she first noticed the headlights of the defendant's car behind her. The north-south county road at which she was intending to turn left to her home was located some 800 feet west of State Highway No. 9. The plaintiff turned on her left-turn indicator and began to slow down. As she crossed a bridge some 250 feet east of the county road intersection, she again looked in her rearview mirror and saw defendant's headlights behind her, but closer. Her left-turn indicator was still on. She continued to slow down as she approached the county road and began her left turn as she entered the intersection. She could see the glare of defendant's lights and knew

that he was still behind her, but she did not again look directly into her rearview mirror.

The defendant had driven to South Sioux City, Nebraska, earlier in the evening, where he had dinner and drinks with business associates. He recalled leaving the restaurant to start home to Laurel, Nebraska, but other than that he has no recollection of the accident. The plaintiff's testimony is therefore the only eyewitness account of the accident.

The report of an officer of the Nebraska State Patrol establishes that the point of impact was some 3 feet 8 inches south of the centerline of U. S. Highway No. 20 and within the intersection of U. S. Highway No. 20 and the county road. The right front corner of the defendant's car struck the left side of plaintiff's car. The plaintiff's car was spun around and knocked down the road to the west. It came to rest some 56 feet 4 inches west of the point of impact, facing east, and in the middle of the south half of U. S. Highway No. 20. The defendant's car was 290 feet to the west of the point of impact and in the borrow pit on the south side of U. S. Highway No. 20.

The plaintiff suffered severe injuries, consisting principally of compound fractures of both the tibia and fibula of the right leg and severe lacerations of the neck and right leg, leaving her with permanent scarring.

The defendant's motions for directed verdict, or in the alternative to dismiss, were overruled. Issues of negligence of the defendant, contributory negligence of the plaintiff, and the comparative negligence of each were submitted to the jury under standard instructions as to which there is no dispute. The jury returned its verdict for the plaintiff in the sum of $25,000. Motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, was overruled and this appeal followed.

Defendant contends first that because the plaintiff looked in her rearview mirror at the time she crossed a bridge less than a city block east of the intersection,

and did not look again in her rearview mirror before commencing her left turn, she was guilty of contributory negligence sufficient to bar recovery as a matter of law.

We have consistently held that before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be indisputably located in a favored position. If a driver fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way, and the question of his contributory negligence in proceeding to cross an intersection is for the jury. See Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556.

It is also clear that the rule that failure to look before turning left across a public highway between intersections is negligence as a matter of law is expressly limited to turns between intersections. It does not apply to a left turn at an intersection. See Marquardt v. Nehawka Farmers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617. Any issues of plaintiff's contributory negligence in failing to look to the rear a third time at the moment she commenced her left turn were properly submitted to the jury. Under the facts here, plaintiff's actions did not constitute contributory negligence as a matter of law.

The defendant assigns as error the court's failure to give an instruction relative to the statutory direction in effect at the time of the accident that a driver shall pass beyond the center of an intersection before turning his vehicle to the left, and also in refusing to give a correlative requested instruction that the cutting of a corner in turning left into an intersecting road was evidence of negligence.

The jury was specifically instructed that no person shall turn a vehicle from a direct course upon a highway unless such movement can be made with reasonable safety, and that a signal of intention to turn right or

left shall be given continuously during not less than the last 50 feet traveled by the vehicle before turning. The jury was also instructed that no vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. It was also instructed that no vehicle shall be driven to the left of the centerline when approaching or traversing any intersection except when such right half is obstructed or impassable.

Negligence consisting in whole or in part of the violation of statutes or ordinances, like other negligence, is without legal consequence unless it is a contributing cause of the injury for which recovery is sought. Hersh v. Miller, 169 Neb. 517, 99 N. W. 2d 878.

Whether the plaintiff in this case did or did not proceed to the center of the intersection before turning would not have avoided the accident or changed the result. Under the facts here, a failure to comply with the statutory direction was not a proximate nor a contributing cause of the accident and injury.

Finally, the defendant complains that the instructions permitted the plaintiff to recover for future disability without evidence of permanent injury. A portion of the defendant's argument rests upon the implication that there is no permanent injury unless there is some functional disability. Defendant argues that since there was no medical evidence of functional disability in plaintiff's leg, knee, or ankle, there was therefore no permanent injury shown by the evidence.

Defendant's argument overlooks the medical testimony as to the scarring on plaintiff's neck and leg. The scar on plaintiff's neck was 2½ inches in length and ½ inch in width at the widest part, and was located 2 inches

below her left ear. There was also a scar on her leg between the ankle and knee. The doctor testified that these cosmetic deformities were permanent in nature. The evidence was sufficient to warrant the instruction and to authorize recovery for future disability. The remaining allegations of the defendant are without merit.

The issues were submitted to the jury and the jury returned its verdict in favor of the plaintiff. The judgment is supported by the evidence and is affirmed.

AFFIRMED.

JUDY E. BARTLETT, APPELLANT, V. WILLIAM L. BARTLETT, APPELLEE.

225 N. W. 2d 413

Filed January 30, 1975. No. 39565.

1. **Divorce: Parent and Child.** A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed.
2. **Divorce: Parent and Child: Time.** An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree.
3. **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.
4. ———: ———. In a proceeding involving the custody of minor children, the court may place custody in the court in order to facilitate judicial supervision and summary power to act swiftly in the best interests of the children.
5. **Divorce: Evidence: Parent and Child: Time.** A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree.

6. ———: ———: ———: ———. The discovery of material facts which existed but were unknown to the court and the opposing party and could not have been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are changed circumstances which the court will consider in an application for a change of child custody.
7. ———: ———: ———: ———. When custody of minor children is placed in the court, the court, at a subsequent hearing, may consider predivorce activities of the parties unknown to the court at the time the decree was entered.
8. **Divorce: Parent and Child.** 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.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Bradford & Bloch and Boyle & Hetzner, for appellant.

R. David Garber and Philip O. Crowley of Marks, Clare, Hopkins, Rauth & Garber, for appellee.

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

NEWTON, J.

This case involves the custody of minor children. The parties were divorced by decree entered February 20, 1973. The decree provided that custody of the minor children be placed in the court under the supervision of a conciliation counselor, with physical possession to remain in petitioner subject to the reasonable visitation rights of respondent. Soon after entry of the decree, respondent learned of new evidence but no action was taken to call it to the attention of the court until an application for modification was filed at the ensuing term. The decree was modified and physical possession of the children awarded to respondent. We affirm the order of the District Court.

The evidence adduced related to petitioner's conduct prior to the entry of the decree of divorce and pertained

to her moral fitness. The question presented is whether evidence of conduct transpiring prior to entry of the decree is admissible at a subsequent hearing on the question of child possession.

Among the various jurisdictions, considerable conflict exists in regard to considering evidence of prior conduct not presented in the original proceeding. See Annotation, 9 A. L. R. 2d 623. "A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed." Fox v. Fox, 180 Neb. 847, 146 N. W. 2d 208.

"An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree." Adamson v. Adamson, 190 Neb. 716, 211 N. W. 2d 895.

The latter rule is ordinarily applicable when the court has made a definite award of custody to one party or another. It does not apply when the court, as here, retains custody because of uncertainty as to where the best interests of the children may lie. "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." Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682.

Section 42-351, R. R. S. 1943, authorizes the court to "make such orders, both temporary and final, as are appropriate concerning * * * the custody and support of minor children * * *."

Section 42-364, R. R. S. 1943, authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the children, and to make subsequent changes when required. When the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court. In regard to such disposition

we have stated that: "Its purpose is to 'facilitate judicial supervision and summary power to act swiftly in their (the childrens') best interests.' * * * The parent having possession where the court has retained custody is in effect an agent of the court." Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51.

It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing. It is not res judicata. The court is at liberty to consider the evidence submitted in the original proceeding and pertinent material evidence of which the court was not apprised. "A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree. * * *

"The discovery of material facts which existed but were unknown to the court and the opposing party and could not have been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are changed circumstances which the court will consider in an application for a change of child custody." Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667.

In a case where custody had been awarded to the mother and was subsequently changed, it was held in

Warren v. Warren (Iowa), 191 N. W. 2d 659: "Evidence introduced concerning plaintiff's predivorce activities as they affected her fitness to care for the child all tended to establish facts unknown to the court at the time the decree was entered. This evidence was therefore admissible and properly considered regardless of whether or not it was known or available to the parties at the time of former hearing."

We note that although the court has made a change in regard to the physical possession of the children, it has still retained custody and supervision and we cannot say that there has been an abuse of discretion under the existing circumstances. "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." Broadstone v. Broadstone, *supra*.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH EUGENE PAPPAN, APPELLANT.

225 N. W. 2d 416

Filed January 30, 1975. No. 39574.

Criminal Law: Burglary. Unlimited consent to enter a building is generally a defense to burglary, but a consent limited as to place, time, or purpose is not a defense if the entry occurred outside the limitation.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

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

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

BOSLAUGH, J.

The defendant has appealed from a conviction and sentence for burglary. The sole assignment of error relates to the refusal of the trial court to give a requested instruction.

The burglary occurred at Maplewood Estates, a mobile home park located near Omaha, Nebraska. On the evening of December 28, 1973, the defendant attended a party at the Maplewood Estates Clubhouse. He was a guest of Michael Gans, a resident of Maplewood Estates.

The clubhouse is a building containing a large recreation room, kitchen, pool room, card room, sauna and whirlpool baths, laundry, and office. After the party the defendant stayed on to help clean up the clubhouse. At about 3 a.m., the defendant, who had been bathing, went to the Gans trailer to get a towel. When Gans returned to the trailer and found the defendant was there, he told the defendant to return to the clubhouse and get his clothes.

At about 6 a.m., on December 29, 1973, the manager and his wife discovered that a window in the office at the clubhouse had been broken and the office ransacked. The coin box in one of the dryers had been broken into. The defendant was found lying on the floor behind a counter near the office. The keys to the coin boxes were found on the floor where the defendant had been lying and several items that had been taken from the office were found in his pockets. He was wearing shoes or boots which matched footprints found in the snow outside the broken window.

The defendant testified that after leaving the Gans trailer he returned to the clubhouse, reentered the whirlpool, and then dressed. He claimed that he was lying on the floor behind the counter because the rooms in the

clubhouse were chilly and he was trying to avoid a draft. He also claimed that he had started toward the Gans trailer sometime between 3 a.m. and 6 a.m. to make a phone call, but changed his mind and went back to the clubhouse.

The trial court correctly instructed the jury that before the defendant could be found guilty, the State was required to prove beyond a reasonable doubt that the defendant forcibly broke and entered the clubhouse with intent to steal. The defendant requested the trial court to give the following instruction: "Where entry of a building is made with the expressed or implied consent of the owner or his agent or one having apparent authority to consent, there can be no 'breaking' and therefore there is no burglary." The refusal to give this instruction is assigned as error.

Unlimited consent to enter a building is generally a defense to burglary, but a consent limited as to place, time, or purpose is not a defense if the entry occurred outside the limitation. People v. Hart, 132 Ill. App. 2d 558, 270 N. E. 2d 102; Annotation, 93 A. L. R. 2d 531.

The defendant in this case had at most a limited consent to enter the clubhouse. The defendant was authorized to enter the building to attend the party to which he had been invited, but there is no evidence that he had any authority to reenter the building after the party was over for any purpose other than obtaining his clothes. Before Gans left the clubhouse he had checked the doors to make sure they were locked. There were two guests still in the clubhouse when Gans returned to his trailer, but he saw them leave about 15 minutes later. Gans had not suggested the defendant stay in the clubhouse although earlier in the evening he had extended an invitation to the defendant to stay at the Gans trailer.

The requested instruction related to unlimited consent. It was not applicable under the evidence in this case and the refusal to give it was not error.

The judgment of the District Court is affirmed.

AFFIRMED.

STEVEN FRITZ, BY AND THROUGH HIS FATHER AND NEXT FRIEND, DENNIS L. FRITZ, APPELLANT, V. FRANCIS L. MARTEN ET AL., APPELLEES.

225 N. W. 2d 418

Filed January 30, 1975. No. 39595.

1. **Animals: Negligence.** Ordinarily the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner.
2. **Evidence: Negligence: Trial.** In order for the plaintiff to recover upon the ground of negligence, the evidence must show with reasonable certainty the negligent act complained of.
3. **Evidence: Trial.** Where several inferences may be drawn from the facts proved, which inferences are opposed to each other, but are equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inference which would entitle him to recover.

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

Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellant.

William J. Brennan, Jr., of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellees.

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

BOSLAUGH, J.

This is an action by Dennis L. Fritz, as father and next friend of Steven Fritz, to recover damages for injuries to Steven inflicted by a cat owned by the defendants. The action was dismissed at the close of the plaintiff's evidence and the plaintiff has appealed.

The accident happened a little before noon on September 12, 1969. Steven was then approximately 2½ years old. Steven and his mother had been outside and Steven was playing in the driveway. Mrs. Fritz left Steven alone in the driveway while she went into the house for some personal reason. She testified she was in the house for 5 or 10 minutes at the most. When she came back outdoors she heard Steven crying and screaming. She found Steven sitting on a sidewalk in the defendant's back yard which is east of and adjacent to the Fritz property. The defendants' cat was sitting on the sidewalk near Steven. The right side of Steven's face which had been scratched was covered with blood. Steven told his mother the kitty had scratched him. Subsequent medical examination disclosed the cornea in Steven's right eye had been scratched resulting in a 71.4 percent loss of vision in that eye.

The defendants were not at home at the time of the accident. The cat had been ill that day so they had placed it outside the house. Later in the day they took the cat to a veterinarian.

On occasion Steven would play in the defendants' back yard with their children. The defendants did not object to Steven playing in their yard.

The plaintiff's theory of recovery was negligence. The petition alleged the defendants knew or should have known the cat had vicious propensities to attack children because it was ill. The particular acts of negligence alleged were: Placing the cat outside in an ill condition; leaving the cat unsupervised; and failing to warn Steven and his parents of the condition of the cat.

There was no evidence as to exactly how the accident happened. Steven was allowed to testify at the trial, on March 26, 1974, that the cat walked up to him, laid down, and scratched him in the eye. There is no other evidence of what happened at the time of the accident.

A veterinarian, called as a witness by the plaintiff, testified a cat which was ill "might or more likely"

would resent handling and might resist anyone handling it or around it. He also testified each cat behaves differently under different circumstances; that with some illnesses some cats would be more lethargic than others; and if a cat were abused he would react.

Ordinarily the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner. Huber v. Timmons, 184 Neb. 718, 171 N. W. 2d 794; Durrell v. Johnson, 31 Neb. 796, 48 N. W. 890. The evidence in this case did not show the defendants knew or should have known the cat had vicious or dangerous propensities, or as alleged in the petition, had vicious propensities to attack children because it was ill.

Huber v. Timmons, *supra,* involved the liability of the operator of a pony ride concession. In that case we said the owner of a domestic animal is charged with knowledge of the natural propensities of such an animal. The statement had reference to the duty of the operator of a concession to provide suitable handlers when furnishing pony rides for hire to children. White v. Sens, 13 La. App. 343, 127 So. 413, cited by the plaintiff, involved a dog bite to a customer in a store operated by the defendant. There was evidence in the White case that the dog was of a breed which was usually bad-tempered and it was unusually irritable at that time because it was nursing a litter of pups. Neither case is applicable here.

In order for the plaintiff to recover in this case it was necessary for the evidence to show with reasonable certainty the negligent act complained of. Vietz v. Texaco, Inc., 189 Neb. 514, 203 N. W. 2d 513. The evidence was such that a variety of inferences might have been drawn from the facts proved. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other, but are equally consistent with the facts proved, the plaintiff may not sustain his position by

a reliance alone on the inference which would entitle him to recover.

The judgment of the District Court dismissing the action is affirmed.

AFFIRMED.

BRODKEY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL CASTOR, APPELLANT.

225 N. W. 2d 420

Filed January 30, 1975. No. 39605.

1. **Criminal Law: Rape: Evidence: Trial.** In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.
2. ———: ———: ———: ———. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae.
3. **Evidence: Trial.** The admission of incompetent evidence is not prejudicial where the same facts are established by the testimony of the defendant.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Lathrop, Albracht & Dolan, for appellant.

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

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

NEWTON, J.

The defendant Michael Castor was tried before a jury

and convicted of kidnapping and rape. He appeals on the ground that evidence of the victim's statement to an officer was erroneously admitted. We affirm the judgment of the District Court.

Two girls, Margaret and Linda, were driving in Omaha, Nebraska, in the early morning of December 4, 1973. Their evidence is to the effect that they were curbed and stopped by a van occupied by the defendant, Eddie Wade, and Wayne Manzer. The defendant forced his way into their car and attempted to seize the ignition key. Linda grabbed the keys, got out, and ran down the hill. The defendant pursued her and took the keys. In the meantime Margaret ran down the street, was pursued, pulled back to the van by her hair, and pushed into it. The three men drove off with Margaret.

Margaret testified that they stopped in the OPPD parking lot. Enroute, two of the men were molesting and trying to partially undress her. She protested and screamed whereupon one threatened to break her jaw. All three then had intercourse with her. They later drove her to her home and threatened her if she told anyone. It was then after 2 a.m. She took a bath and went to bed.

In the meantime Linda had reported the incident to the police and an officer contacted Margaret about 2 hours after she got home. This officer was not permitted on direct examination to relate his conversation with Margaret. On cross-examination he was asked: "As a matter of fact when you went to the address on Laurel Avenue didn't you ask the young lady what happened and when she told you, you said 'You have been raped.' Isn't that the way the thing went?" He answered "No." Thereafter the officer was permitted to testify what Margaret told him about the car being stopped, the taking of the ignition key, her being placed in the van, driven away, and all three having intercourse with her after the threat to break her jaw. "In a prosecution for rape, after the prosecutrix has testified to the com-

mission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.

"The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae." State v. Chaney, 184 Neb. 734, 171 N. W. 2d 787.

The statement given by Margaret to the officer was not "a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae." Neither was it justifiedly admitted as a result of the very limited cross-examination. Its admission was clearly erroneous but does not constitute reversible error. The defendant testified in his own behalf and maintained that Margaret voluntarily participated in the sexual intercourse. He verified Margaret's statements to the officer regarding stopping the car, forcibly seizing the ignition key, her being driven away to the OPPD parking lot, her protesting and screaming, the threat to break her jaw, the acts of intercourse with her, and returning her home. In view of his own statements, it is evident that this evidence was not prejudicial. It is the rule that the admission of incompetent evidence is not prejudicial where the same facts are established by the testimony of the defendant. See, State v. Christiansen, 187 Neb. 73, 187 N. W. 2d 303; Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761; Wever v. State, 121 Neb. 816, 238 N. W. 736.

The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS LEE TEMPLE, APPELLANT.

225 N. W. 2d 422

Filed January 30, 1975. No. 39609.

1. **Trial: Instructions.** It is not error to refuse an instruction on an issue which is not supported by the evidence.
2. ———: ———. Related instructions must be read and construed together and if when so read and construed they correctly state the law, there is no error.

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

Edmund W. Hollstein, Charles A. Fisher, and Charles F. Fisher, for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

NEWTON, J.

A jury found the defendant guilty of assault and battery. His assignments of error deal primarily with his contention that he acted in self-defense and with the court's refusal to give instructions requested regarding the defense of self-defense. He also complains that the court omitted the word "unlawfully" in defining the elements of assault. We affirm.

A review of the record completely fails to substantiate defendant's claim that he acted in self-defense. Two young men were lying on the ground fighting. All witnesses, except defendant, concede that E. A. Anderson came on the scene, went to the fighters, bent over, placed a hand on one or both, and advised them to break it up. Defendant admits this except he states he did not know what Anderson was doing or intended. Defendant put his arm around Anderson, jerked him upright and struck him twice, knocking out six teeth. Defendant's intervention was completely unjustifiable.

It is not error to refuse an instruction on an issue which is not supported by the evidence. See, Nelson v. State, 159 Neb. 663, 68 N. W. 2d 194; Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51; Bell v. State, 159 Neb. 474, 67 N. W. 2d 762.

In instructing on the elements of the offense of assault and battery, the court did not state that the assault must be "unlawful." The court did define the term "assault" in a subsequent instruction which stated that it was "a wrongful offer or attempt with unlawful force or threats, made in a menacing manner, to inflict bodily injury upon another with present apparent ability to give effect to the attempt." Considering the two instructions together, it is clear that the jury could not have been misled or the defendant prejudiced. Related instructions must be read and construed together and if when so read and construed they correctly state the law, there is no error. See, State v. Jackson, 186 Neb. 22, 180 N. W. 2d 134; State v. Davis, 186 Neb. 457, 183 N. W. 2d 753.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE P. MANZER, APPELLANT.

225 N. W. 2d 424

Filed January 30, 1975. No. 39639.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

William J. Dunn of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

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

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

MCCOWN, J.

The defendant pleaded nolo contendere to a charge of forcible rape and was sentenced to a term of 7 to 10 years imprisonment. On appeal the sole issue is the excessiveness of sentence.

The 23-year-old defendant is one of three individuals all of whom were found guilty of a forcible gang rape of a 16-year-old girl. One was found guilty by a jury, one pleaded guilty, and this defendant pleaded nolo contendere. Each of them received the same sentence on the charge of forcible rape.

The defendant's record, although it does not disclose prior felony offenses or crimes of violence, shows a long list of misdemeanor convictions and multiple jail sentences extending over a period of 4 years prior to the conviction here.

A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Haigh, 189 Neb. 316, 202 N. W. 2d 593. There was no abuse of discretion here.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD ERVIN WRIGHT, APPELLANT.

225 N. W. 2d 425

Filed January 30, 1975. No. 39723.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

James P. Thornton, for appellant.

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

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

CLINTON, J.

This is a proceeding under the Post Conviction Act, sections 29-3001, et seq., R. S. Supp., 1974. Defendant was convicted of shooting with intent to kill, wound, or maim. We affirmed the conviction on direct appeal. State v. Wright, 189 Neb. 783, 205 N. W. 2d 351. Defendant later filed a motion to vacate in the District Court. The court ordered and held an evidentiary hearing, after which it denied the motion. Defendant appeals. We affirm.

The error assigned and argued here is that the defendant was denied effective assistance of counsel. The asserted grounds of the claim are that the court-appointed trial counsel did not make adequate preparation and that he conferred with the defendant for only about 5 minutes prior to trial; he did not call alibi witnesses; he did not let the defendant take the stand because of his prior felony conviction; he failed to develop and follow through on a "psychiatric defense"; he failed to peremptorily challenge a juror whom the defendant desired removed from the panel; and he failed to take appropriate steps to combat a statement by the prosecutor in closing argument that the defendant's failure to take the stand and testify in his own behalf indicated his guilt.

We have carefully examined the record of the evidentiary hearing and record of trial, both of which are contained in the bill of exceptions. Both the defendant and his trial counsel testified at the evidentiary hearing, as did the defendant's wife, who was a principal prosecution witness at the trial.

The record supports the following conclusions: Counsel conferred with the defendant on a number of occasions for an adequate length of time; he investigated thoroughly the circumstances of the alleged crime; the defendant did not have an alibi as he had no explana-

tion of his whereabouts at the time of the shooting and had no other witnesses (at the evidentiary hearing he avoided all attempts to disclose the names of such witnesses) to support his alibi; counsel's advice with regard to defendant's taking the stand at trial was not based on any prior felony conviction of defendant, rather, the reason the defendant did not take the stand was because his testimony would have been harmful to his claim of innocence; therefore prudence and judgment dictated reliance on failure of the State to prove its case beyond a reasonable doubt, the State's case being largely circumstantial; counsel had the defendant examined by a psychiatrist (admitted by the defendant) and no claim of insanity could be supported; if the defendant had requested the peremptory challenge of the juror in question, counsel would have exercised the challenge; and counsel would have moved for a mistrial during final argument if the prosecutor had in fact made the statement claimed.

Even on the cold record before us it is clear that the judge who conducted the evidentiary hearing came to the proper conclusions on the constitutional claim of ineffective assistance of counsel and that he also properly disposed of the other matters raised by the motion but not argued here.

Citation of authority would add nothing to this opinion and therefore we cite none.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. WHITE, ALSO KNOWN AS VERLOUS L. LIKE, APPELLANT.
225 N. W. 2d 426

Filed January 30, 1975. No. 39753.

Probation and Parole: Time. A proceeding to revoke probation may be instituted within the probationary period or within a reasonable time thereafter.

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

Robert E. White, pro se.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

BOSLAUGH, J.

On January 10, 1972, the defendant was placed on probation for 2 years following a plea of guilty to burglary. On January 11, 1974, a written notice of alleged violations of probation was served upon the defendant. The defendant was charged with failing to report and with leaving the jurisdiction of the court without permission. On January 25, 1974, he pleaded guilty. He was sentenced to 3 years imprisonment on March 13, 1974. This sentence was to be served concurrently with a federal sentence imposed on February 14, 1974. The defendant contends the sentence imposed on March 13, 1974, was unlawful because the probation period expired January 10, 1974.

A proceeding to revoke probation may be instituted within the probationary period or within a reasonable time thereafter. See, Phoenix v. State, 162 Neb. 669, 77 N. W. 2d 237; State v. Holiday, 182 Neb. 229, 153 N. W. 2d 855. The proceeding here commenced on the day after the term had ended. The judgment of the District Court denying relief to the defendant was correct and is affirmed.

AFFIRMED.

KNOEFLER HONEY FARMS, A PARTNERSHIP, APPELLANT, V. COUNTY OF SHERMAN, STATE OF NEBRASKA, BOARD OF EQUALIZATION, APPELLEE.

225 N. W. 2d 855

Filed February 6, 1975. No. 39456.

1. **Appeal and Error: Counties: Taxation.** The procedure and manner of appealing from an action of a county board of equalization is that formerly prescribed for an appeal of a judgment of a justice of the peace court to the District Court, but the time provisions therein referred to are inapplicable for the perfecting of such an appeal.
2. **Statutes.** Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned.
3. **Appeal and Error: Notice: Time: Counties: Taxation.** In order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to section 77-1510, R. R. S. 1943, all activities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board.
4. ———: ———: ———: ———: ———. The District Court acquires jurisdiction by appeal from a decision of a county board of equalization, where the taxpayer gives notice of appeal, furnishes an appeal bond, and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law.

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

Shaughnessy, Shaughnessy & Shaughnessy by Michael J. Shaughnessy, O'Hanlon & Martin, and Austin S. Bacon, for appellant.

Stephens & Beckner by Brian F. Beckner, for appellee.

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

BRODKEY, J.

This case arises out of a decision of a county board of

equalization to the effect that certain property of the appellant was to be added to the tax assessment rolls of the county. Appeal of that decision, taken to the District Court, was dismissed on the ground that the appellant had failed to perfect jurisdiction in that court within the time provided for by law. Appeal to this court involves the question of the effect of section 77-1510, R. R. S. 1943, upon the matter of what time limitations are applicable for the filing of those things necessary to perfect an appeal to the District Court, such as that herein made. Upon consideration, we have determined that the District Court did in fact have jurisdiction over the appeal in question. Consequently, we reverse.

On September 26, 1972, the appellant was notified that the board of equalization of Sherman County was to meet on October 4 of that year for the purpose of considering whether certain bee hives owned by the appellant should be added to the tax assessment rolls of the county. That hearing was held as scheduled and the matter was taken under advisement. On October 25, 1972, the board notified the appellant that it had decided to add the bee hives to the assessment rolls as omitted property. The appellant determined to protest that decision, and the hearing on that protest was held before the county board of equalization on November 8, 1972. At that meeting, the members of the board of equalization voted to follow the county assessor's recommendation to add the property in question to the assessment rolls, and also to have the chairman sign the notice of such addition. The transcript of such proceedings before the county board of equalization contains that notice, dated November 8, 1972, addressed to the appellant herein. The notice in question was on a form approved by the State Tax Commissioner and contained, among other things, the following language: "You are further notified that the action of the County Board of Equalization may be appealed to the District Court of this County in same manner as appeals are taken from

the actions of the County Board of Equalization under the provisions of Sections 77-1510 and 77-1511, R. R. S. 1943. Said appeal must be perfected within 45 days." Appellant's petition on appeal to District Court admits it was mailed notice on November 8, 1972.

The record reflects that on December 22, 1972, the appellant submitted notice of his intention to prosecute an appeal to the District Court, together with a request that a transcript of the proceedings before the county board be prepared. Appellant also filed an appeal bond on that date. On December 26, 1972, the appellant filed his petition on appeal with the District Court. On the same date the transcript of the proceedings before the county board of equalization was filed with the court. Subsequently, the appellee filed a motion to dismiss on the ground that the District Court lacked jurisdiction, citing section 77-1510, R. R. S. 1943, and section 23-135, R. R. S. 1943, for the proposition that since the appellant had not filed his notice of appeal within 20 days of the decision of the county board, the District Court was without jurisdiction to pass on the merits of that decision. Upon consideration, the District Court found that the board of equalization had given the appellant notice of its decision of November 8, 1972, as provided by law, and also found that appellant's notice of appeal had not been served within 20 days of the decision of the county board, and that the court lacked jurisdiction over the appeal. The District Court thereupon entered an order granting the appellee's motion to dismiss, from which order appellant has appealed to this court.

The key provision with which this appeal is concerned is section 77-1510, R. R. S. 1943, which provides in part that: "Appeals may be taken from any action of the county board of equalization to the district court within forty-five days after adjournment of the board, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of

claims against the county." The manner of taking such appeals is set out in section 23-135, R. R. S. 1943, which provides in part that: "When the claim of any person against the county is disallowed in whole or in part by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within *twenty days* after making such decision and executing a bond to such county, ..." (Emphasis supplied.) The appellee argues before this court, as it did before the District Court, that pursuant to these sections, an appellant has only 20 days in which to file notice of an appeal from the action of the county board of equalization. Appellant's notice of appeal in this case having been filed more than 20 days after the decision of the county board, the appellee asserts that the District Court was correct in determining that it lacked jurisdiction in this matter.

The argument of the appellant presents a different interpretation of sections 77-1510 and 23-135, R. R. S. 1943. It argues that although a 20-day period of limitation in which to file notice of appeal applies in other cases falling under section 23-135, R. R. S. 1943, that period is not controlling where the appeal is being brought pursuant to section 77-1510, R. R. S. 1943. Thus, the appellant asserts that the 45-day period established in the more specific statute, section 77-1510, R. R. S. 1943, which deals with appeals from county board of equalization, overrides the 20-day period provided for in section 23-135, R. R. S. 1943.

We are convinced from an investigation of the history of sections 77-1510 and 23-135, R. R. S. 1943, that appellant's interpretation of those sections is correct. From the time of its inception, section 23-135, R. R. S. 1943, has provided that written notice of the intent to appeal must be filed within 20 days of the time of the decision. See Laws 1879, § 37, p. 366. With the exception of a period between 1907 and 1913, during which period no time

limitation appeared in section 23-135, R. R. S. 1943, the 20-day time limitation has continued constantly in effect under section 23-135, R. R. S. 1943, until the present. See, Laws 1907, c. 33, § 1, p. 165; Laws 1911, c. 33, § 1, p. 198; R. S. 1913, § 965. Section 77-1510, R. R. S. 1943, was added to the law of this state more than 2 decades after the adoption of section 23-135, R. R. S. 1943. See Laws 1903, c. 73, § 124, p. 430. We note that section 77-1510, R. R. S. 1943, as originally enacted, provided that appeals could be taken to the District Court from the county board of equalization within "*twenty days*" after the adjournment of the board. It was not until 1959 that the section was altered to provide for a time limitation of 45 days. See Laws 1959, c. 371, § 2, p. 1308. Thus, with the exception of the period between 1907 and 1913, both sections 23-135 and 77-1510, R. R. S. 1943, provided for a 20-day time limitation until 1959, although historically the statutes have provided for different times for the commencement of such periods.

We have examined the available legislative history of the 1959 amendment to section 77-1510, R. R. S. 1943, which extended the time period for appeals from 20 days to 45 days. That examination failed to disclose any reference to section 23-135, R. R. S. 1943, and we can only assume that no actual consideration was given to section 23-135, R. R. S. 1943, at that time. If the legislators, in adopting the 1959 amendment to section 77-1510, R. R. S. 1943, had discussed the relationship of that amendment to section 23-135, R. R. S. 1943, then obviously the intention of the Legislature in that regard would be more clear. As it is, however, we can only conclude that in all probability the Legislature must not have contemplated that the 20-day limitation period appearing in section 23-135, R. R. S. 1943, would have any effect at all upon appeals brought pursuant to section 77-1510, R. R. S. 1943. In short, it is most likely that the Legislature understood that in adopting the 1959 amendment to section 77-1510, R. R. S. 1943, it was establish-

ing a time limitation for all activities necessary to perfect an appeal from the decision of a county board of equalization, including the filing of notice of appeal.

The appellee would have us reconcile sections 23-135 and 77-1510, R. R. S. 1943, by interpreting the former as establishing a time limitation for the filing of notice of appeal, while regarding the latter as fixing a time limitation for all other activities necessary to perfect an appeal to the District Court in cases such as this one. It must be added, of course, that if two time limitation periods apply in these cases, that is, one period for filing notice of appeal and another period for the carrying out of all other things necessary to perfect appeal, then not only is the perfecting of an appeal controlled by two different time limitation periods, but it is also controlled by two periods that may well begin to run at different times. Under section 23-135, R. R. S. 1943, the 20-day period of limitation begins to run on the day that the county board makes the decision from which appeal is to be taken. However, pursuant to section 77-1510, R. R. S. 1943, the 45-day period of limitation begins to run on the day that the county board of equalization adjourns. Thus, under the system proposed by the appellee, it would even be possible for the 45-day time limitation period to begin to run after the 20-day time limitation period had expired. It would be possible that a taxpayer, wishing to appeal from a decision made on the first day of a 60-day session of the board would be required to file his notice of appeal within 20 days after the decision and yet still have well over 2 months in which to carry out all other activities necessary to perfect his appeal. We believe it is highly unlikely that the Legislature would have intentionally devised such a complicated system for the bringing of appeals such as that involved herein.

The confusing nature of the results to which the argument of the appellee would result in is further emphasized when the full complexity of the statutory scheme

is realized. The procedure for an appeal to the District Court from an action of a county board of equalization is that prescribed for an appeal from a judgment of a justice of the peace court to the District Court. Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N. W. 2d 50 (1958); § 77-1510, R. R. S. 1943; § 23-137, R. R. S. 1943. See, also, former §§ 27-1301 to 27-1315, R. R. S. 1943. It is true, of course, that effective January 4, 1973, the statutes designed to set out the procedure for appeal from a judgment of a justice of the peace court were repealed. Laws 1972, L. B. 1032, § 287. However, that repeal did not take effect until after the occurrence of the activities with which we are now concerned. Furthermore, we are convinced that the act of the Legislature in repealing those statutes did not have the effect of changing the appellate procedure in cases such as this case. We have held that where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. Hanson v. City of Omaha, 157 Neb. 768, 61 N. W. 2d 556 (1953). Thus, in cases such as this, the procedure for taking an appeal from the county board to the District Court has been and *continues to be* the procedure prescribed for an appeal from a judgment of a justice of the peace court to the District Court.

The addition of the appellate procedure provided for in former sections 27-1301 to 27-1315, R. R. S. 1943, to the statutory scheme will illustrate that the theory of the appellee would result in a most confusing situation. If the appellee is correct in asserting that the 20-day time limitation period in section 23-135, R. R. S. 1943, overrides and controls the 45-day limitation period in section 77-1510, R. R. S. 1943, for the purpose of filing notice of appeal, then it would also follow that the time limitations in former section 27-1302, R. R. S. 1943 (10 days from the date of decision for the undertaking to be

made), and former section 27-1303, R. R. S. 1943 (30 days from the date of decision to file the transcript), should be regarded as overriding section 77-1510, R. R. S. 1943, for the purposes of furnishing appeal bond and filing the transcript. If that were so, then the ultimate result would be to render nugatory the 45-day limitation period of section 77-1510, R. R. S. 1943. Such a result would be incongruous, and it could not have been intended by the Legislature.

We believe that the Legislature did not intend for the 20-day time limitation period appearing in section 23-135, R. R. S. 1943, to have any effect upon the perfecting of appeals brought pursuant to section 77-1510, R. R. S. 1943. Our ultimate conclusion on the matter is that in order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to section 77-1510, R. R. S. 1943, all activities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board. Thus, there remains only to be determined whether in the case now before us, the appeal to the District Court was perfected within the 45-day limitation period.

The District Court acquires jurisdiction by appeal from a decision of a county board of equalization, where the taxpayer gives *notice of appeal,* furnishes an *appeal bond,* and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law. Myers v. Hall County, 130 Neb. 13, 263 N. W. 486 (1935). As we have already determined, "the time allowed by law" for such activities is 45 days from the day of the adjournment of the board. In the case now before us, the county board of equalization met, reached its decision, and adjourned all on November 8, 1972. Within 45 days of that date, on December 22, 1972, the appellant herein furnished an appeal bond and filed a notice of appeal and a request that the transcript be

prepared. The transcript itself was filed with the clerk of the District Court on December 26, 1972, a date actually more than 45 days after November 8. However, due to the intervening weekend and holiday between December 22 and December 26 of that year, the transcript must be regarded as having been timely filed. See § 25-2221, R. S. Supp., 1974. Thus, the appellant herein must be regarded as having perfected its appeal to the District Court.

In reaching this conclusion we have not ignored the provisions of section 77-412, R. R. S. 1943, providing among other things that an appeal de novo may be taken from the decision of the county board of equalization to the District Court of the county in which the assessment is made upon receipt of notice of action of the county board of equalization in the manner provided for by sections 77-1510 and 77-1511, R. R. S. 1943. Although the record does not disclose whether appellant received the notice of the action of the board of equalization on the same day it was dated, to wit, November 8, 1972, it is clear that the conclusion we have reached would not be changed if the facts were that the notice was not received by it until some subsequent date for the reason that this would further extend the time within which it would be entitled to perfect its appeal.

We have determined that the appellant was correct in asserting that it had 45 days in which to carry out all activities necessary to perfect its appeal to the District Court. Furthermore, it appears that the appellant did in fact perfect that appeal by carrying out all the necessary activities within the 45 days allowed. Under the circumstances, the judgment of the District Court must be reversed and the cause remanded.

REVERSED AND REMANDED.

CHARLES SHERMAN ET AL., APPELLANTS, V. TRAVELERS INDEMNITY COMPANY, APPELLEE.

225 N. W. 2d 547

Filed February 6, 1975. No. 39493.

1. **Evidence: Trial.** Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. Conjecture, speculation, or choice of possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another.
2. **Evidence: Damages: Trial.** Evidence as to damages must be such that a jury could determine the amount with reasonable certainty and the determination may not be based on pure speculation and conjecture.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Douglas F. Duchek and Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

WHITE, C. J.

In this suit on a windstorm clause in an insurance policy, the question involved is whether there is sufficient circumstantial evidence on liability and damages for submission to a jury. The District Court determined that the evidence was insufficient for submission and directed a verdict for the defendant. On appeal, we affirm the judgment of the District Court.

To recover, an insured must show that the windstorm was a wind of unusual violence or tumultuous force. Hoagland & Co. v. Insurance Co. of North America, 131 Neb. 105, 267 N. W. 239. A portion of the east wall of the insureds' building fell between the hours of 5 p.m.,

April 18, 1972, and 9 a.m., April 19, 1972. There is no direct evidence as to the circumstances surrounding the fall or when and how the wall fell. The police officers who informed one of the insureds of the falling of the wall and the damage on the early morning of April 19, 1972, were not called as witnesses. Consequently, the evidence is entirely circumstantial. In the 48-hour time period April 18, 1972, and April 19, 1972, the weather records show a maximum velocity on April 18th as 17 miles per hour and 22 miles per hour on April 19th. There is no evidence relating the time of the fall with wind velocity. We only know that during the total 48-hour time period surrounding the incident that a northeasterly wind *may* have reached a maximum velocity of 22 miles per hour. We do not pass upon the question of whether a 22 mile per hour wind is evidence of an unusually violent or tumultuous character, because it is obviously conjecture and speculation that the wind in fact did reach the maximum velocity during the early morning hours of April 19, 1972. More importantly, the plaintiffs' insurance agent testified in plaintiffs' behalf that he kept a diary of weather conditions and his record shows there was hail, but no wind, in the time period in question on April 19, 1972. The plaintiffs' own expert witness, although testifying that a windstorm could have caused the fall of the wall and the damage, testified on cross-examination that the insured premises were susceptible to failure by reason of the natural winds or elements that daily act upon structures in this part of the country, and that the wall failure *could* have been caused by just such actions, natural winds and elements prevalent and normal for this part of the country, and by that action alone. He did testify that he *believed* that wind was the proximate cause of the damage.

From the same source of evidence, by plaintiffs' expert witness, it was proved equally possible conclusions could be drawn, namely, that a wind caused the failure

of the insureds' wall, or that normal winds and conditions could have caused the damage.

We have repeatedly and recently held that in a civil case circumstantial evidence must be of such a nature and the circumstances so related to each other that the conclusion to be reached thereby is the only one that can fairly and reasonably be drawn therefrom. The evidence must be sufficient to make the theory of causation reasonably probable and not merely possible. Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something to be reasonably adduced from all the evidence which would lead a reasoning mind to one conclusion rather than another. Bohling v. Farm Bureau Ins. Co., 191 Neb. 141, 214 N. W. 2d 381; Southern v. Willis Shaw Frozen Express Inc., 185 Neb. 117, 174 N. W. 2d 90; Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309; Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52. Giving maximum reach to the plaintiffs' evidence and the inferences therefrom, equally reasonable deductions could be made that would support either a windstorm theory or a normal condition and wind theory of the cause of the damage. There must be something more in the evidence to warrant submission of the issue of liability to the jury. The evidence, as presented, presents nothing more than a conjectural or speculative determination by the fact-finder choosing between two equally possible theories of the cause of the damage. The District Court's determination of the insufficiency of the evidence to support submission is sustainable on this ground alone.

We point out further that the plaintiffs have failed to adduce sufficient evidence to sustain their burden of proof as to damages. Prior to the alleged damage on April 19, 1972, the building was in a deteriorated condition. The City of Lincoln in January 1972 requested the plaintiffs to take action to repair the building. The plaintiffs had received information concerning the cost

of the repairs and were told that it would cost approximately $10,500 to repair the building. Plaintiffs seek to use this estimate of costs of repair as their measure of damages in this case. The record conclusively shows that at no time after the alleged damage took place did the plaintiffs obtain a cost estimate for the repair of the damage. There was no evidence introduced to show that the building was wholly destroyed or that it had lost its distinctive character as a building. More precisely there is no evidence of any cost of repair estimates being obtained or offered for the alleged hole in the insureds' east wall as found on the morning of April 19, 1972. All the cost of repair estimates introduced in evidence related only to bringing the building into line with city specifications as the result of a previously deteriorated condition. It is significant that one of the plaintiffs himself testified he did not believe that even these estimates were fair and reasonable, in any event. The evidence must be such that a jury could determine the amount of damages with reasonable certainty. Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255; Carl R. Anderson & Co. v. Suhr, 181 Neb. 474, 149 N. W. 2d 101. Any finding by the jury as to damages would have had to rest on pure speculation and conjecture arising out of a cost of repair estimate prepared for the purpose of bringing the building up to the City of Lincoln's building code standards on account of its deteriorated condition. Such estimate was prepared prior to the time of the alleged damage and by plaintiffs' own testimony was not fair and reasonable. We hold, therefore, that there was insufficient evidence on the issue of damages to submit to the jury.

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

AFFIRMED.

WALLACE GANT, JR., IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
225 N. W. 2d 549

Filed February 6, 1975. No. 39506.

1. **Actions: Parties.** When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.
2. **Actions: Parties: Trial: Judgments.** In determining whether a class action is properly brought, considerable discretion is vested in the trial court. In the absence of appeal, that decision is final and even though it may have been erroneous, it is not void.
3. **Judgments: Time.** A judgment which is not void may only be set aside after the term at which it was entered as authorized in section 25-2001, R. R. S. 1943.
4. **Judgments: Actions: Parties.** The judgment in a class or representative suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.
5. **Judgments: Actions: Constitutional Law.** The Fourteenth Amendment to the Constitution of the United States does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits.
6. **Judgments: Actions: Constitutional Law: Parties.** A court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

Friedman & Berry and Healey, Healey, Brown, Wieland & Burchard, for appellant.

Bauer, Galter & Geier and Charles D. Humble, for appellees.

Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for amicus curiae.

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

NEWTON, J.

Between September 2, 1969, and December 24, 1969, a total of $20,355.60 was erroneously deducted for pension purposes from the salaries of policemen and firemen by the city of Lincoln. Plaintiff, a Lincoln policeman, filed a class action on behalf of himself and all Lincoln policemen and firemen to recover the amount due. Judgment was entered against the city by stipulation for the sum due. Plaintiff had entered into a contingent-fee contract with his attorney. This contract was approved by the court and attorney's fees allowed against the fund recovered on the contractual basis. Subsequently, after the term of court at which judgment was entered had terminated, the firemen, appellees, filed a motion to vacate the judgment on the ground that the suit was not a class action and that the judgment was void because due process requires that notice of suit be given all members of the class represented. The judgment was vacated. We reverse the judgment of the District Court.

Parties entitled to share in the fund in question numbered approximately 400 and the amounts due each were relatively small thus discouraging and rendering impractical the bringing of individual suits; the questions of law and fact presented were common to all and definitely predominated over individual interests; the claims of the interested individuals were similar to plaintiff's; in representing his own interests, plaintiff necessarily was required to represent the interests of all members of the class represented; and the class action rendered unnecessary the proliferation of litigation by individual suits. The accepted requirements for a class action were present. See, Keedy v. Reid, 165 Neb. 519, 86 N. W. 2d 370; Jacobs v. City of Omaha, 181 Neb. 101, 147 N. W. 2d 160. Section 25-319, R. R. S. 1943, provides

the basis for class actions in Nebraska. It provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The statute is in line with generally accepted practices. See 59 Am. Jur. 2d, Parties, § 54, p. 421, wherein it is stated: "As originally laid down in the decisions of the courts of chancery a class suit is an exception to the usual rules, an invention which enables the court to proceed to a decree where the number of persons interested in the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. In such cases, where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, so that the case may be tried fairly and honestly, the court will proceed to a decree." See, also, Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A. L. R. 741.

In determining whether a class action is properly brought, considerable discretion is vested in the trial court. In the absence of appeal, that decision is final and even though it may have been erroneous, it is not void. In the present instance the case did not come within the purview of section 25-2001, R. R. S. 1943, and unless the judgment was void, the District Court was without authority to set it aside.

The final question presented deals with due process. If violated, the judgment is void and a nullity. The case of Hansberry v. Lee, *supra,* held that where the parties purported to be represented by plaintiff did not necessarily have identical interests in the subject of the action, a judgment against one not made a party by the service of process was void as violative of due process requirements. The court did, however, recognize a dis-

tinction in regard to representative suits and stated: "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. * * *

"In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree, * * *." It further stated: "Nevertheless, there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is res judicata as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; cf. Brown v. New Jersey, 175 U. S. 172; Brown v. Mississippi, 297 U. S. 278; United Gas Public Service Co. v. Texas, 303 U. S. 123; Avery v. Alabama, 308 U. S. 444, 446, 447, nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, cf. Jackson County v. United States, 308 U. S. 343, 351, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. * * *

"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the

litigation in which members of the class are present as parties, * * *." This case remains the authoritative federal decision on the question of due process.

We note the later decision of Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865. The case is not in point. It was not a class action. No member of the interested class was a party to the suit and their interests were adverse to plaintiff's. Consequently due process required notice.

Appellees rely upon the case of Eisen v. Carlisle & Jacquelin, 417 U. S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732, and this was the case relied upon by the District Court in vacating the former judgment. The case was before the Court of Appeals for the Second Circuit on three occasions. See, 370 F. 2d 119, 391 F. 2d 555, and 479 F. 2d 1005. It is true that on at least one occasion the Court of Appeals held that due process required the service of process on all parties in all representative actions. When the case was finally determined in the United States Supreme Court, the lower court opinions were vacated and the case determined solely on the basis of the Federal Rules of Civil Procedure, Rule 23. The case was held to be one covered by Rule 23 (b) (3) and (c) (2) wherein the rule required the service of process on all members of the class affected. It is not authority for a statement that notice to class members is required by constitutional due process in all representative actions. The rule of this case appears in the following statement: "Turning to the merits of the case, we find that the District Court's resolution of the notice problem was erroneous in two respects. First, it failed to comply with the notice requirements of Rule 23 (c) (2), and second, it imposed part of the cost of notice on respondents." It leaves inviolate the prior federal decisions on the subject.

Nebraska does not have a rule similar to the federal rule and we still adhere to the general rule which dispenses with such notice in representative actions.

The judgment of the District Court vacating its former judgment is reversed.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. NICK KALLOS, APPELLANT.
225 N. W. 2d 553

Filed February 6, 1975. No. 39538.

1. **Searches and Seizures: Probable Cause: Time.** The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.
2. **Witnesses: Trial: Criminal Law.** A witness may be interrogated as to his previous convictions for a felony, but no other proof of such conviction is competent except the record thereof.
3. ———: ———: ———. Where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry of the witness on the subject other than as to the number of his prior felony convictions.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded for new trial.

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

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

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

BRODKEY, J.

This case involves a criminal prosecution of the appellant, Nick Kallos, on two counts of receiving stolen property. The appellant pleaded not guilty to both counts and was brought to trial after argument of various pretrial motions, including a motion to quash the search

warrant issued in this case and a motion to suppress evidence. Both the aforesaid motions were overruled by the court. The case was tried to a jury, which found the appellant guilty on both counts. His motion for a new trial was overruled and he thereafter filed an appeal to this court. For reasons hereinafter discussed, we reverse and remand the cause to the District Court for a new trial.

The appellant in this case is the owner and operator of Nick's Lounge and Restaurant in Grand Island; and, with the assistance of his wife, has operated this establishment for over 20 years. In count I of the information, unnumbered, he was charged with receiving stolen property obtained in a burglary of the Sportsman's Bar on March 25, 1973. In the second unnumbered count of the information he was charged with receiving certain meats, liquor, and cigarettes allegedly taken in a burglary of Schimmer's Steak House on April 17, 1973.

The principal witness against the appellant at the trial of the cause was an individual named Richard Perryman, a transient, who was the admitted perpetrator of both the afore-mentioned burglaries. The burglary of the Sportsman's Bar was committed by him alone. He testified that he had taken a large number of coins from various coin-operated machines in the Sportsman's Bar, and had later taken them to the appellant, who had converted the coins into currency for him, after deducting a certain amount from the face value of the coins given him. Perryman also testified as to the commission of the burglary at Schimmer's Steak House, with the assistance of an accomplice, one Orin Schultz. Perryman testified that later that evening they had taken the meat and other items obtained from Schimmer's Steak House to the residence of the appellant, and that an agreement was reached as to the amount to be paid for those items. He further testified that on the following day he went to appellant's place of business, and appellant at that time gave him a check in payment therefor,

which he endorsed and returned to appellant. Appellant then paid him cash for the check. The claimed accomplice, Orin Schultz, who at the time of the trial was serving a sentence for a prior felony, to wit, an alleged burglary of a farmhouse in company with Perryman, was returned to the trial of this case to testify as a witness, and denied any participation whatsoever with Perryman in the burglary of Schimmer's Steak House, about which more will be stated later in this opinion. We wish to add that the record reveals the witness Perryman had committed numerous prior burglaries since his arrival in Grand Island, Nebraska, and admitted to same, but had not served any time whatsoever in the penitentiary because of such burglaries. The record also reveals that he had a long history of mental problems consisting of paranoia and schizophrenic tendencies, and had been in several mental institutions. It was Perryman who gave the police information relative to appellant's receiving stolen property from the burglaries in question, although in two prior statements given the police he had not mentioned that fact.

Appellant makes numerous assignments of error which he claims individually and collectively are grounds for reversal of his conviction and sentence, and which he claims deprived him of a fair trial. We shall discuss only two of these assignments, which we believe are sufficient to dispose of this appeal.

Appellant's first assignment of error is that there was no probable cause for the issuance of the search warrant involved in this case because of an unreasonable and excessive length of time which elapsed between the occurrence of the events in question and the issuance of the search warrant. Perryman testified that he took the box of loose coins obtained in the burglary of the Sportman's Bar to appellant Kallos and traded them for bills. He further testified that he rolled the loose coins into wrappers in the basement of Nick's Lounge and Restaurant, disregarding a considerable number of

bent coins, some with fingernail polish on them, and also a nickel with a hole in it. He tossed these coins, according to his testimony, into a corner of the basement. On the basis of this information, the Grand Island police on December 19, 1973, obtained a search warrant for those premises from the District Judge on an affidavit for a search warrant dated the same date, and the premises were searched on that date and return of search warrant made.

After an extensive and intensive search of the basement area by numerous police officers, they were able to locate only five coins, none of which were in the corner and none with fingernail polish on them, although they found one coin with a hole in it. Two of the coins were found in boxes on a shelf, one on the back part of a desk, and another one below the desk. Neither the owner of the Sportsman's Bar, the burglarized premises, nor Perryman, the burglar, were able to positively identify the coins as those obtained in the burglary. We also point out that the evidence discloses the appellant, himself, had coin machines of various kinds on the premises, and had been counting coins in the basement for over 20 years. He had, in fact, accumulated many bent coins during the operation of his business during that period. We add that even the discovery of a coin with a hole in it would not seem to be so unusual in the operation of coin-operated machines as to amount, per se, to a positive identification of the origin of any such coin.

As previously stated, the burglary of the Sportsman's Bar occurred on March 25, 1973, and the issuance of the search warrant, and the search itself, occurred on December 19, 1973. The lapse of time involved was 269 days, or practically 9 months between the occurrence of the event and the issuance of the search warrant. It is true the affidavit for the search warrant contains the conclusional statement that according to informant's information, the coins were discarded in the basement of

said premises in an area unlikely to be occupied or disturbed, but the affidavit does not contain any information as to how the requesting police officer might have known the area was unlikely to be occupied or disturbed. There is no showing that either the informant or the affiant had any personal knowledge the area had remained undisturbed.

It is a general and well-established rule that the proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time, and whether the proof meets this test must be determined by the circumstances of each case. Generally, it may be said that no more than a "reasonable" time may have elapsed, and the recital must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at the time. See, 68 Am. Jur. 2d, Searches and Seizures, § 70, p. 724; 79 C. J. S., Searches and Seizures, § 73 d, p. 857. Innumerable court decisions in this country have considered and decided the question here presented as to whether the period of time elapsing between the occurrence of the event and the issuance of the search warrant was reasonable. These cases are collected and discussed in an annotation of recent vintage appearing in 100 A. L. R. 2d 526, and supplements thereto.

In the instant case we deem it highly unlikely and improbable that stolen coins, allegedly thrown on the floor in a corner of appellant's office in his business establishment, would remain there undisturbed for a period of almost 9 months. In fact, the record reveals that other persons were frequently in that office. We must therefore conclude that at the time the search warrant was issued the police requesting the warrant did not have probable cause to believe that the coins would still be there. There being no probable cause ex-

isting for the issuance of the search warrant, it was invalid.

Appellant also assigns as error the action of the trial judge in receiving into evidence the coins discovered during the aforesaid search of the premises, claiming that there was no adequate identification of such coins. In view of our ruling on the invalidity of the search warrant, it is unnecessary for us to consider this assignment.

Appellant also contends that the court erred in allowing improper cross-examination of appellant's witness, Orin Schultz. Appellee claims that the collateral area of witness Schultz' felony convictions was opened by the appellant, following direct examination by the State of its witness, Perryman, who testified as to crimes committed by him since coming to Grand Island. During the course of Perryman's testimony he admitted the burglary of a certain farmhouse and in response to the question as to who, if anyone, was with him on that occasion he replied "Orin Schultz." The question was then asked as to where Mr. Schultz was at that time, and his reply was "he's in the penitentiary at Lincoln." Subsequently in the trial, appellant's counsel, John Mitchell, on direct examination inquired of Schultz with reference to the burglary of that particular farmhouse, and Schultz admitted that he had been involved with Perryman on that occasion. It is apparent that every question asked by Mitchell had previously been asked of Perryman by the prosecutor and that Schultz merely reiterated facts already in the record. The only area of Schultz' testimony which was conceivably open for cross-examination was that relating to the relationship of Schultz and Perryman and the burglary of the farmhouse.

On subsequent cross-examination of Schultz, however, the State went into great detail as to other offenses committed by Schultz. A proper understanding of appellant's assignment of error in this regard requires that

we set forth the specific questions and answers as revealed by the record: "Q. All right, Mr. Schultz, have you ever been convicted of a felony other than the one you have testified to? MR. MITCHELL: To which we would object, Your Honor, being incompetent, irrelevant and immaterial, and not proper cross-examination. THE COURT: That's overruled; it goes to his credibility. A. Yes. Q. All right now, have you been convicted of more than one felony? A. Yes. MR. MITCHELL: To which we again renew our objection, being incompetent, irrelevant and immaterial. THE COURT: Overruled. Q. Your answer was? A. Yes. Q. I'm going to direct your attention back to the month of September of 1949. MR. MITCHELL: To which we object, Your Honor, and move for mistrial at this time. THE COURT: It's overruled. MR. GRIMMINGER: I want the record to show, Your Honor, he opened up the man's record. THE COURT: The objection is overruled. You may proceed. Q. I'm going to direct your attention back to September 1949 and ask you, were you convicted of felonious assault? MR. MITCHELL: To which defendant objects and renews its motion for mistrial and asks that the motion for mistrial be continuing so I do not have to continue making the motion. THE COURT: The objection is overruled. You may continue. A. Yes. Q. I'm going to direct your attention to the year 1952 and ask you if you were convicted of escaping from prison? A. 1952? Q. Yes. A. You have some wrong dates somewhere. Q. Is that on or about the time it would have occurred? A. No. Q. When did it happen? A. 1950. Q. 1950. What about in 1960, were you again convicted of attempted, this time attempted escape from prison? A. You better get your dates or something straightened out. You're mixed up. Q. You help us. A. I never escaped from prison in no 1960. Q. What about 1962? A. No. Q. No, directing your attention—MR. MITCHELL: May I approach

the bench, Your Honor? THE COURT: Yes. MR. MITCHELL: At this time, Your Honor, we move that the questioning, that is, just been made by Mr. Grimminger be striken and that the jury be properly instructed; that it does not constitute any evidence and further move for mistrial on these. THE COURT: The motion is overruled. Q. All right, Mr. Schultz, directing your attention to the year 1967, I will ask you if you had occasion to be convicted of robbery that particular year? A. I believe that's right. Q. Pardon? A. I believe you are correct; it was 1967, yes. MR. Grimminger. I believe that's all."

The applicable statute involved is section 25-1214, R. R. S. 1943, which provides as follows: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." We have previously held that the above statute proscribes and limits the scope of any inquiry initiated by the State that may be made on cross-examination of a defendant, or any witness, in a criminal case. It permits inquiry of the defendant, or any witness, when he is a witness, if he was previously convicted of a felony. If the answer is in the affirmative, he may be asked the number of such convictions, and if the answer is correctly given, the inquiry must end there. The purpose of the restricted inquiry permitted by the statute is for whatever effect the facts of a previous conviction may have on the credibility of the defendant, or witness, as a witness and not for the purpose of tending to show he is prone to engage in criminal actions. See, for example, Latham v. State, 152 Neb. 113, 40 N. W. 2d 522 (1949); Bosteder v. Duling, 115 Neb. 557, 213 N. W. 809 (1927). Also in Latham v. State, *supra,* we stated: "The inquiry made by authority of this statute (§ 25-1214, R. R. S. 1943) should be confined to a question or questions in proper form, and the witness should be required to answer specifically

and directly. Neither the cross-examiner nor the witness should be allowed to wander or explain, but should be confined to the narrow limits fixed by the statute. Vanderpool v. State, 115 Neb. 94, 211 N. W. 605; Bosteder v. Duling, *supra;* Sulley v. State, 119 Neb. 783, 230 N. W. 846." The cases above cited also hold that where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry on the subject or permit the record of the conviction to be introduced. See, also, Vanderpool v. State, 115 Neb. 94, 211 N. W. 605 (1926).

It appears from the cross-examination of witness Schultz, as above set out, that he admitted having been convicted of more than one felony. Under the foregoing statute and decisions it would have been entirely proper for the State to have inquired as to the number of his prior convictions, but the inquiry would have had to stop at that point. Had the witness denied prior convictions or testified as to the incorrect number, it would have been incumbent upon the State at that point to bring in records to impeach him. In this case, however, the trial court permitted extensive cross-examination about his prior felony convictions, including the identity and dates thereof. This line of inquiry, was, we believe, in excess of that permitted under the foregoing statute and the case law of this state, and undoubtedly was highly prejudicial to the appellant, as Orin Schultz was his principal and most important witness. Schultz specifically and catagorically denied any involvement with Perryman in the burglary of Schimmer's Steak House, and in other respects refuted the testimony of the witness for the State. His credibility was, therefore, of the utmost importance to the appellant, and we conclude that it was error for the court to permit the cross-examination of Schultz to the extent discussed above.

We have concluded therefore, that the defendant in this case did not receive a fair trial, and the judgment

should be reversed and the cause remanded to the District Court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE DUSSAULT, APPELLANT.

225 N. W. 2d 558

Filed February 6, 1975. No. 39606.

1. **Searches and Seizures: Arrest: Probable Cause: Constitutional Law.** Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same.
2. **Searches and Seizures: Probable Cause: Constitutional Law.** Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.
3. **Searches and Seizures: Probable Cause: Evidence: Affidavits.** Upon a hearing on a motion to suppress where the sufficiency of the affidavit is challenged, its contents supporting probable cause may be supplemented by additional information proved to have been known to the officers at the time the affidavit was made and the warrant issued.
4. **Searches and Seizures: Arrest: Probable Cause: Evidence: Controlled Substances.** Where the police were advised by an informant that a certain individual, identified by name and address, was departing by a specified airline flight for a California destination and was in possession of a large sum of money for the purpose of purchasing a specified quantity and type of drugs and would be returning on one or the other of two specified days on the same airline with the drugs in his luggage; and the police pursuant to this tip verify by their own personal observation and that of other law enforcement officers the departure, return, and identity of the individual and observe him pick up his luggage, probable cause for arrest and search without warrant may be said to exist.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

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

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

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

CLINTON, J.

Defendant was charged with the unlawful possession of a controlled substance with intent to deliver. He waived a trial by jury and pursuant to stipulation of the parties was tried by the court on the record of the evidence received during a pretrial suppression hearing and a report of the chemical analysis of the seized substance. The judge found the defendant guilty and sentenced him to a term of 1 to 2 years in the Nebraska Penal and Correctional Complex. The error claimed on appeal is the wrongful denial of the motion to suppress the evidence consisting of approximately 28,000 bagged capsules of amphetamines. It is argued that the affidavit for the search warrant under which the luggage of the defendant was searched is insufficient because it is based upon information of an informant and does not contain sufficient statement of the underlying circumstances to permit the issuing magistrate to properly judge the credibility of the informant and the reliability of his information.

The evidence adduced at the suppression hearing indicated that on September 7, 1973, Richard W. Larsen, a narcotics investigator for the Nebraska State Patrol, did, at the request of a deputy county attorney of Lancaster County, meet with an informant who advised him that the defendant, whom the informant identified by name and by place of residence, would fly on that day by United Air Lines from Omaha to a California destination with the sum of $2,000 on his person for the purpose of purchasing 50,000 tabs or capsules of amphetamines,

known in the illegal drug traffic as white crosses; and that the defendant would return from California to Omaha on the 8th or 9th carrying the drugs in his luggage and would deliver the white crosses to three or four persons. The informant also at that time gave Larsen information concerning the activities of two other drug traffic suspects in Lincoln. Larsen knew from other information he had that this latter information was accurate. He had had no previous acquaintance with the informant.

As a result of the conference the informant agreed to obtain the flight number on which Dussault would leave Omaha. The informant later called Larsen and informed him that the flight would leave Omaha at about 4:30 p.m. In the meantime Larsen had relayed the information first received to the Nebraska State Patrol narcotics investigator in Omaha. He in turn solicited the assistance of the Omaha police department. The Omaha investigator and an Omaha police officer confirmed that a person fitting Dussault's description did board the flight at the time indicated. The Omaha police department advised Larsen that, according to their information, Dussault was engaged in the drug traffic.

The Nebraska State Patrol investigator in Omaha then advised representatives of the Federal Bureau of Narcotics and Dangerous Drugs of the information he had received. That agent in turn informed bureau agents in California who observed Dussault deplane from the flight in California and attempted to keep him under surveillance. At about 9:30 p.m. on September 9, 1973, Larsen was informed by the narcotics investigator in Omaha that the agents in California had advised him that Dussault had boarded a certain United Air Lines flight for Omaha. Larsen, Sergeant Charlie Parker of the Omaha police department drug and vice squad, and other officers, at least one of whom was personally acquainted with Dussault, went to Eppley Field, Omaha, and met the flight in question. Dussault was observed

leaving the plane and picking up two items of luggage. When he started toward the terminal exit Dussault was placed under arrest and his luggage seized. The defendant was then taken to the Omaha police station. The luggage was not opened until after Larsen and Parker had made an affidavit and obtained a warrant to search the luggage. When they searched, the drugs were found.

The affidavit sworn to by Larsen and Parker described the luggage to be searched and the material to be seized, to wit, the amphetamines. The substance of the supporting information set forth in the affidavit was that Larsen had been informed that Lawrence J. Dussault, a Caucasian male, 21 years of age, would arrive in Omaha at about 10:25 p.m. on Sunday, September 9, 1973, by air arriving at Eppley air terminal; that in his luggage he would have 50,000 white crosses, amphetamines; that Dussault had, in fact, arrived at the time specified and had in his possession two suitcases; and that the information that Larsen and Parker had received was from a reliable source whose truthfulness was proved by the fact that other information which he had given had been verified by the officers and was accurate.

It is apparent from the recital of the evidence we have set forth that the officers had considerably more information than was set forth in the affidavit upon which the warrant was issued. Why more or all the information was not incorporated in the affidavit is not apparent for, with its inclusion, the defendant's position would not even be arguable.

To support his claim, the defendant relies primarily upon Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637; and Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306.

The State relies upon State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21, for its claim of the sufficiency of the affidavit. It further contends that irrespective of the

affidavit and warrant, probable cause existed for a warrantless arrest and search. The State cites section 29-404.02, R. S. Supp., 1974; State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595; Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327; United States v. Murray, 492 F. 2d 178; and White v. United States, 448 F. 2d 250.

We hold that the State is correct in both aspects of its contentions. The Fourth Amendment to the Constitution of the United States makes no distinction in the standards applicable to a determination of probable cause for arrest and probable cause for search and seizure. State v. Rice, 188 Neb. 728, 199 N. W. 2d 480; Draper v. United States, *supra*; Spinelli v. United States, *supra*.

In Brinegar v. United States, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879, the Supreme Court said: "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162."

In Spinelli v. United States, *supra*, the United States Supreme Court cited Draper v. United States, *supra*, as an appropriate example of probable cause. It there said: "The detail provided by the informant in Draper v. United States, 358 U. S. 307 (1959), provides a suitable benchmark. While Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover,

Hereford went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way. . . . Once again, Draper provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant. There, the police, upon meeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly' clear that probable cause had been established."

In Draper the informant identified the suspect by description, attire, luggage, and time and place of arrival. In the case at hand, the informant identified the suspect by name, time and place of arrival, and that he would have luggage; the affidavit discloses this, plus the fact that the officers had verified that specific information before seeking the warrant; it also recited that other information given to them in connection with unrelated matters was proved accurate.

The affidavit was sufficient under the standards of both Draper and Spinelli. It is also similar in content to the affidavit approved by the United States Supreme Court in Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, 78 A. L. R. 2d 233, cited with approval in Aguilar v. Texas, *supra.*

We discussed what we believe to be the import of Aguilar and Spinelli in State v. Rice, *supra,* and will not repeat it here. Moreover, we indicated in that case that the contents of the affidavit may, at a suppression hearing, be supplemented by other evidence known to

the police and if in toto probable cause may be said to have existed at the time of the search, the motion to suppress shall be denied. We there cited Draper v. United States, *supra,* and Whiteley v. Warden, *supra,* as supporting the position we there took. We now expressly hold that at a hearing on a motion to suppress, the contents of the affidavit for arrest or search may be supplemented by additional information proved to have been known by the police at the time the affidavit was made and the warrant issued, but not set forth in the affidavit. See State v. Rice, *supra,* at p. 755, opinion of McCown, J., concurring in result. Such a principle we deem proper in view of the fact that the United States Supreme Court has not resolved the controversy as to whether the police must always get a warrant when it is reasonably possible to do so, or whether a test of reasonableness applied after the fact of the search is sufficient to protect constitutional rights. See our discussion in State v. Patterson, 192 Neb. 308, 220 N. W. 2d 235.

The State's position that the evidence justified arrest and search without warrant is well taken. All the information given by the informant save the actual possession by the suspect of the drugs had been verified by the officers. It is far more detailed and the indicia of reliability is more substantial than in Draper v. United States, *supra* (arrest without warrant on information from an informant, drugs found in search of a person, syringe in a hand-carried zipper bag). The facts in the case at hand are remarkably similar to those in United States v. Murray, *supra* (9th Cir.), (arrest as the defendant deplaned, search of a garment bag). The court in that case cited Draper v. United States, *supra.* In White v. United States, *supra,* the information upon which the search was founded and the corroboration of the informant's information was similar to that here involved. However, the factual situation there was somewhat different and involved the search of an automobile. The court again cites Draper v. United States, *supra.*

What we have said in this paragraph should not, of course, be taken as a departure from the principles we enunciated in State v. Patterson, *supra,* when the search of a residence is involved.

The judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES R. NEWTON, APPELLANT.

225 N. W. 2d 562

Filed February 6, 1975. No. 39608.

1. **Criminal Law: Time: Continuances.** A motion for continuance or for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion.
2. **Time: Continuances: Affidavits.** An affidavit in support of a motion to continue a trial indefinitely until a witness can be found is insufficient where there is no information as to the witness' whereabouts nor any showing that either the witness' personal attendance or testimony will probably be obtained.

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

Tony L. Fugit, for appellant.

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

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

MCCOWN, J.

This is a prosecution for the crime of statutory rape. The defendant was found guilty by a jury and sentenced to imprisonment for a term of 10 to 15 years. The defendant has appealed.

The victim here was a 16-year-old girl who lived in

LaVista, Sarpy County, Nebraska. On the evening of September 3, 1973, one Dorothy Lewis, who lived 2 or 3 blocks away, engaged the girl to babysit at the Lewis home that evening. When the girl arrived at the Lewis house at about 8 p.m., she assumed her babysitting duties, and Dorothy Lewis left her in the home in charge of the children. The evidence for the prosecution showed that the girl called her mother during the evening to advise her that she would be home around 11 p.m. At approximately 2:40 a.m., Dorothy Lewis returned home with the defendant and another man. The defendant told the girl he was to take her home and the girl left with him. Instead of taking her home, the defendant drove in the opposite direction and along a gravel road, where he stopped the car and by force and threats had intercourse with her. The defendant then drove to the victim's home.

Meanwhile, the girl's mother had awakened and discovered that the girl was not yet home. She waited until 2:50 a.m., and then called the Lewis residence. Dorothy Lewis told her that the defendant and her daughter had left earlier but they might have gone to a nearby restaurant for something to eat. The girl's mother called Ms. Lewis again almost immediately and obtained a description and the license number of the car. She awoke her husband and then called the local police department.

At approximately 3:05 a.m., the car drove up to the parents' house, and the girl was let out. She was screaming and hysterical. Her parents were outside. When she got out of the car the defendant immediately drove off. The girl's father followed in his car until he obtained the license number of the car. The arriving police noticed the two cars driving away. The police attempted to talk to the girl but she was not coherent. She was taken to the hospital. After administration of a tranquilizer for her hysteria, a doctor conducted an examination, confirmed the presence of spermatozoa,

and testified that there had been intercourse, probably within the preceding 6 hours.

The defendant testified on his own behalf and essentially denied the testimony of all the State's witnesses except to testify that he did drive the girl home from the Lewis residence, with a detour to get cigarettes for himself enroute. He denied that he made any advances toward her and denied that she was screaming or hysterical.

The jury found the defendant guilty after less than 2 hours deliberation. Motion for new trial was denied. Defendant was sentenced to not less than 10 nor more than 15 years imprisonment, and this appeal followed.

Defendant's primary assignment of error centers around the denial of a motion for continuance filed on March 6, 1974, the day set for trial. The continuance was sought to enable the defendant to locate Dorothy Lewis as a witness for the purpose of establishing that the defendant was not with the prosecutrix for a long enough time to commit rape.

The record shows that on November 9, 1973, the defendant and counsel were advised that the case would be set for trial on the next docket call. On December 21, 1973, the case was set for trial. The name of Dorothy Lewis with her LaVista address was endorsed on the complaint as a State's witness in September of 1973. A subpoena was issued for Dorothy Lewis at the instance of the prosecution on February 11, 1974. It was returned unsatisfied on February 19, 1974, with the information that she had moved from the LaVista address. The State had a subpoena issued on March 5, 1974, for an address in Omaha, Nebraska, which was also returned unsatisfied because she could not be found at that address. Neither the affidavit nor the motion for continuance stated where Dorothy Lewis could be found. The defendant had no knowledge as to her whereabouts and did not know where she could be located.

This court has repeatedly said that an application for

postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion. See State v. McClelland, 188 Neb. 699, 199 N. W. 2d 11. A motion to continue a trial indefinitely until a witness can be found where there is no information as to the witness' whereabouts nor any showing that either the witness' personal attendance or testimony will probably be obtained is almost frivolous under the circumstances here. See, Kennedy v. State, 171 Neb. 160, 105 N. W. 2d 710; Hubbard v. State, 65 Neb. 805, 91 N. W. 869. The trial court's denial of the motion for continuance was clearly correct. There was adequate time for preparation for trial and adequate time to locate and subpoena any desired witnesses.

The defendant also complains that an inquiry by the trial court in chambers in the presence of counsel, as to how old the defendant was, improperly called attention to a material element of the crime that had not been established at that time in the trial. A motion for mistrial on that ground was overruled.

The trial judge's duty is to endeavor to do justice to both the State and to the defense. Inquiries of the kind made here, even if made in open court, could only be reasonably construed as carrying out the proper judicial function of the trial judge. See, Eager v. State, 205 Tenn. 156, 325 S. W. 2d 815; State v. Bird, 358 Mo. 284, 214 S. W. 2d 38; People v. Franceschini, 20 Ill. 2d 126, 169 N. E. 2d 244. The inquiry in the case at bar was an incidental question in chambers. It could not possibly have resulted in prejudice to the defendant. Defendant's argument is wholly unsupportable.

Finally, the defendant complains that his sentence was excessive. The potential sentence for the crime of which the defendant stands convicted was 3 to 50 years. The defendant had been convicted of felonies on at least two previous occasions, and had an extensive criminal record involving both felonies and misdemeanors. The evidence

here would have fully supported a conviction for forcible rape. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Haigh, 189 Neb. 316, 202 N. W. 2d 593. There was no abuse of discretion here.

The judgment is affirmed.

AFFIRMED.

GRAZIELLA A. BAKHIT, APPELLEE, V. HARLEY EINER THOMSEN, APPELLANT.

225 N. W. 2d 860

Filed February 13, 1975. No. 39551.

1. **Trial: Damages.** A verdict for damages will not be set aside unless it is so clearly exorbitant as to indicate prejudice or disregard of evidence or controlling rules of law.
2. **Trial: Jury: Evidence: Notice.** The reading by an official court reporter of testimony of a witness examined on trial after the jury has retired for deliberation, when a disagreement arises within the jury as to certain testimony, is proper so long as such action is taken in the presence of or after notice to the parties or their counsel.
3. **Trial.** Ordinarily the trial judge is required to be present at at all stages of the trial, although his absence at a certain stage will not be grounds for reversal on appeal in the absence of a showing of prejudice.
4. **Trial: Jury.** Although the taking of notes by jurors of the testimony of witnesses has been frowned upon and may under certain circumstances constitute prejudicial error, such practice is not absolutely prohibited in this state.
5. ———: ———. The prejudicial effect of juror note-taking depends on the eventual use of such notes.

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

Harold W. Kauffman and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

Frank Matthews of Matthews, Kelley, Cannon & Carpenter and Simon A. Simon, Sr., for appellee.

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

BRODKEY, J.

This appeal involves an action brought by the plaintiff, Graziella (Grace) Bakhit, for injuries sustained in an intersectional automobile collision between the vehicle in which plaintiff was riding as a guest passenger and a vehicle driven by the defendant. The answer was a general denial. The trial court directed a verdict for the plaintiff on the question of liability and submitted to the jury only the issue of the amount of damages and the question of the proximate cause thereof. After more than 6 hours deliberation, the jury returned a 10-to-2 verdict for the plaintiff in the amount of $72,000. Defendant's motion for new trial was overruled, but the court subsequently entered a nunc pro tunc order requiring a remittitur in the sum of $8,958.99 which represented advance payments previously made by the defendant and other sums not related to the accident in question. The defendant thereafter perfected his appeal to this court, assigning numerous errors which he claims prevented the defendant from having a fair trial, and which constituted prejudicial error requiring reversal of the judgment of the trial court. We affirm.

The defendant does not assign as error the action of the trial court in directing the verdict on the liability of the defendant, and we therefore consider only the defendant's assignments of error as they pertain to the trial of the issue of plaintiff's damages. These assignments of error, as set out in defendant's brief, may be summarized as follows: (1) Excessiveness of the verdict; (2) error in the submission of the issue of permanent injuries; (3) error in admitting in evidence answers of Dr. Mark B. Coventry to a hypothetical question propounded by the plaintiff; (4) error in having the court reporter read the deposition of Dr. Mark B. Coventry in its entirety to the jury after it

retired for deliberation in the absence of the parties and their counsel, and without notification to them; (5) error in the reading of said deposition in the absence of the judge from the courtroom; and (6) error of the trial court in holding it was not prejudicial error for jurors to bring into the courtroom from the jury room notes that the jurors had been making during their deliberations and to take notes during the reading of the aforesaid deposition of Dr. Mark B. Coventry. We shall discuss these assignments of error in the order in which they are set forth in defendant's brief.

By way of introduction, we should state the evidence in the record discloses that the plaintiff received various kinds and types of injuries in the accident referred to, including injuries to her back both in the cervical area and in the low back area, and also to her shoulder. At the time of the trial she had substantially recovered from these injuries. However, she also claimed that she suffered an injury to her right knee as a result of the accident, with constant and severe pain and swelling in her knee thereafter, which prevented her from engaging in work and other activities, and as a result of which she was forced to undergo an osteotomy on her right knee by Dr. Mark B. Coventry of the Mayo Clinic, Rochester, Minnesota. That operation was only partially successful, and, as will be hereinafter discussed, Dr. Coventry testified that that operation, performed to correct a valgus, or knock-kneed condition of the plaintiff to relieve her pain, did not completely do so and, according to his opinion, the plaintiff would suffer pain in the future, and that the condition was permanent. He also testified that the pain in her knee was caused by the accident in question. Defendant, however, disputes that there was any injury to the knee, and pain resulting therefrom, caused by the accident in question, or caused by an aggravation of a preexisting condition, and further disputes that there is any evidence sustaining plain-

tiff's claim of the permanency of such injuries to her knee, if any.

There is no dispute, however, that the collision out of which this action arose did occur on January 19, 1971, at the intersection of 38th and Burt Streets, in Omaha; and that at the time plaintiff was riding as a passenger in the right front seat of the vehicle, which was owned and operated by her son. Plaintiff's daughter, Elizabeth Bakhit, was also riding in the middle of the front seat of the automobile, between her brother and her mother. There is also no question as to the fact that the point of impact between the two automobiles occurred on the right front door of the vehicle in which plaintiff was riding, leaving an indentation in the door in close proximity to where Mrs. Bakhit was seated. Mrs. Bakhit was rendered unconscious as a result of the accident and was thereafter taken to the hospital by the police. Additional facts will be commented upon at appropriate places in the following discussion.

With the above as a background, let us now consider, although perhaps not in logical order, defendant's first contention that the verdict returned by the jury in this case was excessive in amount. Defendant argues that the evidence fails to sustain an award of $72,000, and that such award was excessive and unconscionable and was the result of passion and prejudice. The record reveals that Mrs. Bakhit had been steadily employed for a period of over 18 years before the accident and had contributed to the support of her husband and their five children. She was in good health during that period and lost no time from work for any injuries, although there is some evidence in the record that she had at one time had some trouble with her left knee, and also on one occasion to her right knee in her employment from pushing boxes with her knee. However, this did not necessitate an interruption of her work and apparently she either recovered or the condition had become dormant thereafter. In any event both orthopedic surgeons

who treated her, Dr. Michael O'Neil in Omaha, and Dr. Mark B. Coventry, Chairman of the Department of Orthopedics at the Mayo Clinic, testified that she was still disabled as a result of the accident and that she would not improve. The testimony of Dr. Coventry will be subsequently discussed in more detail. Mrs. Bakhit testified that she had no skills and could not type, take shorthand, or operate a switchboard, and that the only work she was equipped to handle was that which she had previously performed all her days in this country, factory labor. Since her accident, she can no longer remain seated for long periods and cannot stand for long periods or walk long distances.

Let us now consider the testimony with reference to her damages as reflected by the record. At the time of the accident Mrs. Bakhit was 44 years old and had a life expectancy of 28.67 years. The evidence reveals that at the time of the accident she was earning $3.04 per hour. Therefore computing her loss of earnings from the date of the accident to the date of the trial, a period of 3 years, on the basis of $3.04 per hour on the basis of a 40-hour week and a period of 52 weeks per year, that loss amounts to $6,323.20 per year, or $18,969.60 for a 3-year period. With respect to her loss of future earnings, in her argument in her brief she asked the jury only for loss of future earnings to age 62, which is a common retirement age, or a period of 18 years, instead of the 28.67 years under the life expectancy tables. On the basis of a yearly wage of $6,323.20 and reduced by a present value (5 percent table) this would amount to an additional sum of $73,915.59. The medical expense incurred is not disputed and amounted to $8,376.91, making a grand total of $82,292.50, which represents special damages only. This figure does not take into account any award for pain and suffering, nor anticipated wage increases, nor provison for work after the age of 62. The rule is well established that a verdict for damages will not be set aside unless it is so

clearly exorbitant as to indicate prejudice or disregard of evidence or controlling rules of law. Pierson v. Cleven, 182 Neb. 816, 152 N. W. 2d 408 (1968); Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329 (1967). In this case, even without an allowance for pain and suffering, and the other elements referred to, it is obvious that the jury verdict of $72,000 was not excessive. The question of damages was submitted to the jurors for their determination as finders of fact, under proper instructions, and we are not inclined to disturb their decision upon this point.

Although defendant contends to the contrary, we conclude there is sufficient evidence in the record to justify the court submitting the issue of permanent injuries to the jury. Dr. O'Neil testified that plaintiff's back injury is "more or less permanent," depending upon the type of activity she engages in, and there is evidence from both Dr. O'Neil and Dr. Coventry that the injury to her knee and pain resulting therefrom is permanent. The jury could and obviously did consider the fact that both doctors agreed her knee disability was caused by the accident and that she would never have a pain-free knee again.

We turn now to a consideration of defendant's claim that the trial court erred in admitting in evidence the answers of Dr. Coventry to the hypothetical question propounded to him. Defendant claims that the hypothetical question contained several material assumptions of fact not supported by, and actually contrary to, the evidence of the case; and that based on the assumptions contained in the hypothetical question, Dr. Coventry found a causal connection between the injury and the plaintiff's knee when he saw it. At the outset, we point out that the record reveals that Dr. Coventry was asked not one, but two, hypothetical questions concerning causation when his deposition was taken at the Mayo Clinic 6 weeks prior to the trial. In his brief, defendant does not specifically complain about the first hypotheti-

cal question, but we feel that it should be commented upon. Dr. Coventry expressed the opinion, based on his examination of Mrs. Bakhit and the reports he received from her referring physician, that the accident caused her disability. The reports referred to were received in evidence during the trial and appear as exhibits 4 and 6, and were before the jury during its deliberations. On direct examination by counsel as to the first hypothetical question Dr. Coventry stated: "Well, we must go by a patient's history, and we have the history of the patient from her, we have the history from the doctor who wrote us before her admission subsequently about her accident, so I must assume that she had an auto accident. She stated to us, both Dr. Reckles, my associate, and to me, that she had many injuries at the time of the accident, that she was shaken up and confused, *but that she doesn't remember specifically her knee until a couple of days afterward,* but that at least since then she has had continued pain and swelling and disability in her knee. So I must take what I hear at face value as a physician in evaluating a patient's situation, and therefore I am assuming that she did have an accident, that she did hurt her right knee, and that because of this injury had a continuing disability in the knee for which I saw and operated on her." (Emphasis supplied.)

However, it is the second hypothetical question propounded to Dr. Coventry to which defendant principally objects. The second hypothetical question was very lengthy and we shall not repeat it here in detail. Suffice it to say that it incorporated as assumptions to be made on the part of the answering doctor almost every conceivable fact in connection with the happening of the accident itself and the resulting injuries to the plaintiff. Defendant claims that the hypothetical question answered by the doctor included many false and incorrect assumptions, particularly that the question asked the doctor to assume that in the accident the plaintiff

was propelled forward against the front passenger compartment of the car "and as indicated by the report of the investigating police officer," her knees were bruised. The question also asked the doctor to assume that when the plaintiff left the hospital and went home and directly to bed, she experienced pain in her right knee which began to swell and the plaintiff could not walk because of it. Further the hypothetical question also assumed that the day following the accident the plaintiff's right knee became black and blue. Defendant insists that none of the foregoing assumptions are supported by evidence in the record, and therefore is in violation of the rule in this state that the material facts on which a hypothetical question is predicated must be supported by and must not be at variance with the evidence. Jacobson v. Skinner Packing Co., 118 Neb. 711, 226 N. W. 321 (1929). See, also, Nebraska Bar Association Evidence Manual (1966), p. 21-5, and cases therein cited.

In answer to the hypothetical question propounded, Dr. Coventry expressed his opinion with reasonable medical certainty that there was a causal relationship between the state of her knee when he saw it and the injury and gave his reasons for such opinion as follows: "Well, first of all the history that she gave me that she had no real disability in her knee prior to her accident, and secondly that the x-rays which I took would fit in with changes that would take place in the knee from the time of the alleged injury until I saw her." He also expressed the opinion that the pain would be permanent, notwithstanding the corrective osteotomy he performed, stating that if Mrs. Bakhit was going to get relief from her pain she would have had it by then. On cross-examination, he further expressed the opinion that the accident caused an increase in the valgus condition on the right.

It is true the record in this case contains no direct evidence that the plaintiff bumped her right knee on the dashboard of the car in which she was riding at the time

of the accident, nor that the right knee became black and blue and that she experienced pain and swelling therein immediately after the accident, but there is more than ample circumstantial evidence from which the jury could have found these facts to have been established. The report of the police officer who came to the scene of the accident immediately thereafter, does not contain any reference to any injury to Mrs. Bakhit's knee, but he admitted that it could have very well been an oversight on his part. There were also other matters which occurred at that time which were not included in his report. Mrs. Bakhit was rendered unconscious in the accident and apparently did not notice any pain in the knee until several days later and did not inform any of the doctors of her complaint about the knee until approximately 1 week following the date of the accident. However, the police officer's report did reveal that Elizabeth Bakhit, daughter of the plaintiff, who was riding next to her in the front seat, did bruise her knees in the accident. Defendant argues, however, that Elizabeth Bakhit was not wearing a seat belt at the time, whereas her mother, Mrs. Bakhit was wearing her seat belt and that therefore it would have been impossible for her knee to have struck the dashboard. While we concede that a properly fastened seat belt might make it difficult or impossible for the upper body of a passenger to strike the dashboard, we do not believe we can take judicial notice of the fact that a seat belt would necessarily prevent a passenger's knees from striking the dashboard in such an accident. In addition it might well have been that plaintiff's knee had come in contact with the indentation in the right door of the automobile, which, as previously stated, had received such damage as the result of the impact with the other automobile. While it is true that the plaintiff did not complain of injury to or pain in her knee immediately after the accident in the emergency room of the hospital to which she had been taken, this does not necessarily mean that

she did not receive such injury. In fact, one of her doctors in his testimony at the trial explained it was possible that the cause of the pain in her back and shoulder at that time was foremost in her mind in describing her injuries at the hospital, and that realization of the injury to her right knee might have come upon her at a subsequent time.

There was ample circumstantial evidence presented from which the jury could well have found that plaintiff did injure her knee in the accident with the results previously described. The problem of how close the facts recited in a hypothetical question as basis of assumptions on the part of an expert witness for the expression of an opinion is a most troublesome and vexatious one. Authorities are divided upon this issue. The modern trend is to disregard minor inaccuracies and variances. We point out that under Rule 705 of the recently adopted Federal Rules of Evidence, and also under the same section of the Proposed Nebraska Rules of Evidence (1973), it is provided that: "The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Also in Maddocks v. Bennett, 456 P. 2d 453 (Alas., 1969), the court stated: "Although the rule is often stated that a hypothetical question must not contain unsupported facts, probably a majority of courts recognize that strict adherence to the rule would be impractical and pointless. An important case of this viewpoint is Treadwell v. Nickel, 194 Cal. 243, 228 P. 25, 34 (1924).

"The opinion can have little, if any, value unless the material facts assumed in such question are substantially true, and the court may properly so instruct the jury whenever there is conflicting evidence as to the truth of the assumed facts. Such opinion evidence does not, however, necessarily become wholly valueless be-

cause there is some variance between the facts assumed in the question and the factual facts proven. What weight should be given in such cases to the opinion of the expert witnesses is a question for the jury under proper instructions from the court." Our conclusion is that in the instant case the court properly admitted the answers of Dr. Coventry to the hypothetical questions propounded to him, and that the jury properly considered such evidence.

We now briefly consider defendant's assignment of errors allegedly occurring after the case was submitted to the jury, which was shortly after noon, on February 25, 1974. Before separating for the night, at about 4:30 p.m., the jury requested that the testimony of all the doctors be read back to them. At 9 o'clock the following morning that request was denied by the trial judge, who suggested that a request for any specific testimony from any doctor would be granted. Shortly thereafter, the jury requested that the deposition of Dr. Coventry be read to them and that request was granted. The court reporter, at the direction of the judge, read back to the jury all Dr. Coventry's deposition. This was done in the courtroom with only the jury, the court reporter, and the bailiff being present. The judge was absent from the courtroom. During the reading of the deposition by the court reporter, some of the jurors brought with them the notes they had been making during their deliberations, and also took additional notes during the reading of the deposition. At approximately 12:50 p.m., the jurors requested that Dr. O'Neil's testimony be read to them. This request was denied by the trial judge. He told the jurors to request any specific testimony of Dr. O'Neil that they wished to have read back. At 1:35 p.m., they requested that all Dr. O'Neil's testimony except his qualifications be read to them; but before the arrangements could be made to do so, the jurors' request was withdrawn and the jury foreman advised that

the jurors did not want Dr. O'Neil's testimony read back and indicated they had arrived at a verdict.

The reading by an official court reporter of testimony of a witness examined on trial after the jury has retired for deliberation, when a disagreement arises within the jury as to certain testimony, is proper and has been approved by this court. State v. McCown, 189 Neb. 495, 203 N. W. 2d 445 (1973); Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12 (1960); Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407 (1953); Darner v. Daggett, 35 Neb. 695, 53 N. W. 608 (1892); § 25-1116, R. R. S. 1943. However such action should be taken in the presence of or after notice to the parties or their counsel. Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528 (1930); § 25-1116, R. R. S. 1943. Defendant contends that he was not given notice of the reading of the deposition to the jury, but the record reflects to the contrary. An affidavit of the bailiff, which appears in the record, reveals that the bailiff left calls at the offices of both attorneys late in the afternoon, but that counsel for the defendant did not return his call. It further appears that the following morning counsel walked into the courtroom where the deposition was being read by the court reporter, and saw and heard it being read, but made no objections of any kind thereto at that time. Defendant's contention in this regard is without merit.

With regard to defendant's contention that error was committed because the judge was not present in the courtroom at the reading of the deposition referred to, it is true that as a general rule the judge is required to be present at all stages of the trial. Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523 (1957); 75 Am. Jur. 2d, Trial, § 45, p. 158. In this case, however, the judge had commenced another trial and was not present during the reading of the deposition. The reading of the testimony was purely a mechanical function which involved no discretion on the part of the parties performing it, and the conduct

of the bailiff and court reporter during the reading was above reproach, as substantiated by an affidavit contained in the record. Also at the hearing on defendant's motion for a new trial the court offered to place the court reporter under oath and allow defense counsel to examine him if counsel felt anything improper had transpired. The offer of the court was declined by counsel. It is our conclusion that no prejudice resulted to the defendant because of the absence of the judge during the reading of the deposition in question, and that no reversible error was committed.

With regard to defendant's further claim that the action on the part of certain of the jurors in bringing their consultation notes into the courtroom and taking additional notes during the reading of the deposition constituted error, we note that the taking of notes of the testimony of a witness by jurors has never been prohibited in this state, although it has been held that such practice was frowned upon and *may* constitute prejudicial error. Swift & Co. v. Bleise, 63 Neb. 739, 89 N. W. 310 (1902); Omaha Fire Ins. Co. v. Crighton, 50 Neb. 314, 69 N. W. 766 (1897); 75 Am. Jur. 2d, Trial, § 934, p. 795. The validity of an objection to the taking of such notes by jurors would seem to be based upon the subsequent use of such notes. See Annotation, 14 A. L. R. 3d 831. In this case the defendant's counsel had almost 3 weeks before argument for new trial to obtain evidence regarding the use of such notes after the jury returned to the jury room, but there is no showing in the record that the notes were used, and no showing of prejudice to the defendant. We therefore rule against the defendant on this contention also.

In view of what we have stated above, we have concluded that no reversible error occurred during this trial, and that the verdict of the jury and judgment thereon by the court should be and hereby is affirmed.

AFFIRMED.

CARL CHRISTIAN, APPELLANT, IMPLEADED WITH PAUL LEIF ET AL., APPELLEES, V. PAUL C. GEIS ET AL., APPELLEES.
225 N. W. 2d 868

Filed February 13, 1975. No. 39570.

1. **Schools and School Districts: Estoppel: Administrative Law.** The selection of a site for a new school building in a Class III school district is an administrative determination to be made by the board of education of the district.
2. **Schools and School Districts: Estoppel.** Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. Exceptions are made only where right and justice so demand.
3. ———: ———. Estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice.

Appeal from the District Court for Seward County: JOHN D. ZEILINGER, Judge. Affirmed.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha and Ray L. Svehla, for appellees Geis et al.

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

BOSLAUGH, J.

This was an action to enjoin the members of the board of education of School District No. 67-R in Seward County, Nebraska, from proceeding to acquire a site selected by the board for the construction of a school building for the district. The plaintiffs are residents, electors, and property owners within the district. The action was brought on behalf of all electors and taxpayers of the district.

The trial court found generally for the defendants

and dismissed the action. The plaintiff Christian has appealed.

The school district, which is also known as the Centennial School District, is a Class III district. Its territory includes the communities of Utica, Waco, and Beaver Crossing. It operates grade schools in Waco and Beaver Crossing and a junior-senior high school in Utica.

In 1971 the district submitted a bond issue to the electorate for the construction of a junior-senior high school building to be located upon a tract of land at the southwest edge of Utica, described as the "Utica site." This bond issue was defeated.

In 1972 the district submitted a bond issue to the electorate for the construction of a K-12 facility, all grades from kindergarten through grade 12, upon a tract of land located 1 mile south of the Utica site and described as the "Gillan tract." The proposition submitted to the voters did not include a site designation, but the site had been selected at a meeting of the board in September 1972, and the preelection publicity clearly indicated the building would be constructed upon the Gillan tract if the bond issue passed.

The proposal submitted at the 1972 election received a favorable vote and in January 1973, the district commenced negotiations to acquire the Gillan site. A survey of the land was made and submitted to the architect employed by the board. After receiving the survey the architect recommended against use of the Gillan tract because of drainage problems. The Gillan tract was level ground with gradients so small that it was considered to be "table top flat." The architect explained that it would be possible to grade up at the building site so that water would drain away from the building, but there would be no practical way to provide drainage for the parking areas, drives, and athletic fields on the grounds. The architect predicted there would be months when the

yards and fields at the Gillan site would be unusable for anything.

After receiving the architect's recommendation the board voted to not build the new building on the Gillan tract and to evaluate new sites for the building. A newsletter was sent to the patrons of the district reporting the action of the board and requesting an indication of preference for alternate sites. The returns from this inquiry showed a majority of those responding favored the Utica site which had been considered at the time of the 1971 proposal.

On February 28, 1973, the board selected the Utica site as the location for the new building and commenced negotiations to acquire the property. This action was commenced on July 26, 1973. The evidence indicates the school district has not acquired any site for construction of the new building.

The selection of a site for a new school building in a Class III school district is an administrative determination to be made by the board of education of the district. § 79-801, R. R. S. 1943; Gaddis v. School District, 92 Neb. 701, 139 N. W. 280. The plaintiff does not dispute this proposition of law but contends that the representations made by the board concerning the location of the new school building which were made prior to the election created an estoppel which prevented the board from using the proceeds of the bond issue to build a schoolhouse on any site other than the Gillan tract.

The plaintiff relies upon May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448. The May case involved an election at which the question of acquiring an electric power plant and distribution system was submitted. Prior to the election the officials of the city represented the purchase of the property would be financed by the sale of *revenue* bonds. At a subsequent election a proposal to issue revenue bonds was defeated. This court held the city was estopped from issuing *general obligation* bonds to acquire the property.

The limitations upon the May case have been recognized in many subsequent cases. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. Vakoc Constr. Co. v. City of Wayne, 191 Neb. 45, 213 N. W. 2d 721. Exceptions are made only where right and justice so demand. The doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice.

The doctrine of estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Koop v. City of Omaha, 173 Neb. 633, 114 N. W. 2d 380. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Tighe v. Security Nat. Life Ins. Co., 191 Neb. 271, 214 N. W. 2d 622.

There is an absence of evidence in this case of misrepresentation or inequitable conduct on the part of the defendants and no showing of injury, detriment, or prejudice to the plaintiffs. The evidence establishes the district intended to build the new school building upon the Gillan tract until it received the recommendation from the architect that a new site should be found. The board then solicited advice from the residents of the district as to their preference for alternate sites. The site eventually chosen is within 1 mile of the Gillan tract and on the same highway. There is no evidence to show the plaintiffs were injured in any way by the selection of the Utica site as the location for the new building.

The plaintiff argues the Utica site was rejected by the voters in the 1971 election. This argument overlooks the fact the 1971 proposal was to build a junior-senior high school while the 1972 proposal was to build a K-12 facility for approximately the same amount of money with a smaller gymnasium and no auditorium. The site may have had some influence with some of the vot-

ers at the 1971 election, but there is no basis upon which it can be said it was the controlling consideration. The difference in the two proposals prevents such a conclusion from being drawn.

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

AFFIRMED.

ESTATE OF CHARLES S. TETHEROW, DECEASED, ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

226 N. W. 2d 116

Filed February 13, 1975. No. 39582.

1. **Statutes.** Where one statute refers to another and incorporates it, the subsequent independent repeal of the incorporated statute does not affect the repeal of the incorporated statute insofar as the statute which adopted it is concerned.
2. **Statutes: Eminent Domain: Appeal and Error.** The statutory procedure for appealing from an award of the appraisers in an eminent domain proceeding was not modified by the enactment of L. B. 1032, Laws 1972.
3. **Eminent Domain: Appeal and Error: Pleadings.** In such appeal from the award of the appraisers, the party first appealing has the burden of filing the petition in the District Court.
4. **Eminent Domain: Appeal and Error: Notice.** The filing and serving of notice of appeal as required by section 76-715, R. R. S. 1943, is jurisdictional.
5. **Eminent Domain: Pleadings: Time.** The failure of the party first appealing to timely file a petition in the District Court does not affect or defeat jurisdiction.
6. **Eminent Domain: Appeal and Error: Pleadings: Time.** The failure of the appealing party to plead within the time required may, unless good cause is shown, be grounds in the exercise of sound discretion by the District Court for dismissal of the appeal.

Appeal from the District Court for Cherry County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and John E. Brown, for appellant.

W. Gerald O'Kief and Laurence N. Smith, for appellee.

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

CLINTON, J.

This is an eminent domain proceeding commenced by the State of Nebraska, Department of Roads, as condemner. The condemner was dissatisified with the award by the appraisers and filed and served, as required by the provisions of section 76-715.01, R. R. S. 1943, notice of intention to appeal to the District Court. Later, upon motion by the condemnees and after issues had been made up in the District Court, that court dismissed the condemner's appeal. The condemner then perfected its appeal to this court. We reverse and remand for further proceedings.

The questions for decision in this court pertain to: The manner in which the issues were made up in the District Court and the responsibility of the parties in that respect; determination of what steps are jurisdictional; and the propriety of the exercise of discretion by the District Court in dismissing the appeal. An understanding and the determination of the issues require a summary of the proceedings which took place in the District Court as well as an examination of the contents and history of the pertinent statutes.

The award of the appraisers was returned to the county court on April 25, 1973. The condemner filed and served notice of appeal on May 21, 1973, well within the 30-day period from the filing of the appraisers' award specified by section 76-715.01, R. R. S. 1943. The county judge prepared and delivered to the District Court on June 1, 1973, the transcript of proceedings. This is within the 30-day period from the filing of no-

tice of appeal specified by section 76-717, R. S. Supp., 1974. On July 5, 1973, the condemner filed in the District Court a motion asking the District Court to require the condemnees "to file their Petition as required by law." On July 25, 1973, this motion was heard by the District Court and it entered an order which recited: ". . . Plaintiffs [the condemnees] without contest requested ten (10) days to file the said Petition." The order then directed the filing of the petition within 10 days. Condemnees, pursuant thereto, filed the petition on August 2, 1973. On August 9, 1973, the condemnees filed a motion asking the court to dismiss the condemner's appeal "for the reason that the State of Nebraska failed to file a Petition herein as required by law within the fifty (50) days." On September 10, 1973, the condemner filed its answer to the petition of the condemnees. The cause was then at issue. On September 12, 1973, the condemnees' intervening motion to dismiss was heard by the court and overruled. On April 16, 1974, the day the matter was set for trial, at the time the prospective jurors were to arrive at the courthouse, the condemnees filed another motion to dismiss the condemner's appeal for failure to comply with the statutes, "particularly 76-717 Nebraska Code relative to the manner of taking an Appeal to the District Court." This motion was granted.

The condemnees here contend that it was the duty of the condemner as the appealing party to file the petition, and since it did not do so, the District Court properly dismissed the appeal even though the matter was at issue, the condemnees having filed a petition and the condemner an answer. An examination of the statutes and the prior decisions of this court requires a determination adverse to the condemnees' contentions.

In 1951 the Legislature enacted L. B. 146, now Chapter 76, article 7, R. R. S. 1943, which provided for a uniform procedure of exercising the power of eminent do-

main. Among other things, the act provided that "Either condemner or condemnee may appeal from the assessment of damages by the appraisers," and that the appeal is taken "by filing a notice of appeal with the county judge within thirty days from the date of filing of the report of appraisers." § 76-715, R. R. S. 1943.

As originally enacted the act provided, among other things, that: "The proceeding shall be docketed in the district court, showing the party first appealing as the plaintiff and the other party as the defendant. After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action." Laws 1951, c. 101, § 17, p. 456; § 76-717, R. R. S. 1943.

In 1961 the quoted portion of the statute was amended to provide: "When notice of appeal is filed by both the condemner and the condemnee, such transcript shall be prepared only in response to the first notice of appeal; the transcript prepared in response to the second notice of appeal shall contain only a copy of such notice and the proceedings shall be docketed in the district court as a single cause of action. The proceeding shall in all cases be docketed in the district court, showing the condemnee as the plaintiff and the condemner as the defendant." Laws 1961, c. 369, § 2, p. 1142. In that amendment the sentence which followed, "After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action," was unchanged.

In 1973, the Legislature again amended section 76-717, R. R. S. 1943. The last sentence quoted in the preceding paragraph of this opinion was stricken and the following substituted: "The appeal shall be tried de novo in the district court." § 76-717, R. S. Supp., 1974. The provision as to the manner of docketing the appeal,

that is, "showing the condemnee as the plaintiff and the condemner as the defendant," was not changed.

It now becomes necessary to examine the history of the application of section 76-717, R. S. Supp., 1974. In 1954 we first interpreted that section and in an opinion by Simmons, C. J., meticulously defined the appeal procedure, pointing out that this section of the statutes incorporated sections 24-544, 27-1303, 27-1305, and 27-1306, R. R. S. 1943. City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537. At that time the statute, section 76-717, R. R. S. 1943, still provided: "The proceeding shall be docketed in the district court, showing the party first appealing as the plaintiff and the other party as the defendant." Section 27-1305, R. R. S. 1943, one of the incorporated statutes, provided: "The plaintiff in the court below shall be the plaintiff in the district court . . . ." Section 27-1306, R. R. S. 1943, provided that: "In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment of the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court." In City of Seward v. Gruntorad, *supra,* Gruntorads, the condemnees, were the parties first appealing. The condemnees argued that section 27-1306, R. R. S. 1943, could not be applied because the condemnees were not the plaintiffs below. The court held that section 76-717, R. R. S. 1943, made them the plaintiffs and that it was therefore necessary for the condemnees to file the petition within the time provided by the statute. In that case the question was not so much who was to file the petition, but whether the time within which the petition was to be filed applied. The opinion in that case made crystal clear what the procedural steps were. It further held that the failure to file the petition in the District Court did not affect or defeat jurisdiction.

The legislative history of the 1961 amendment, providing that in docketing the case in the District Court the condemnee shall in all cases be shown as plaintiff and the condemner as defendant and that only one transcript shall be filed even though both parties filed notice of appeal, indicates that it was designed to avoid the docketing of two separate cases and the filing of two sets of pleadings in order to bring the case to issue. It does not necessarily determine the question of which party files the first pleading.

The legislative history of the 1973 amendment to section 76-717.01, R. R. S. 1943, indicates that it was motivated by a concern that L. B. 1032, Laws 1972, may have had the result of incorporating in section 76-717, the new procedure for appeal from the county court to the District Court and that this might result in a contention that in eminent domain cases there could be no trial de novo in the District Court. Such concern from the legal standpoint was wholly without foundation for reasons founded upon principles of statutory construction which we cite later in this opinion and which are related to the principles of incorporation discussed in City of Seward v. Gruntorad, *supra*. L. B. 1032 did not purport to amend section 76-717, R. R. S. 1943, in any way. It does not even mention it. L. B. 1032 did repeal old section 24-544, and sections 27-1303, 27-1305, and 27-1306, R. R. S. 1943. However, that repeal was totally ineffectual insofar as the incorporation of those procedural statutes by section 76-717, R. R. S. 1943, as adopted in 1951 is concerned. The rule is that where one statute refers to another and incorporates it, which incorporated statute is subsequently repealed, the statute repealed, having been incorporated as part of the one referring to it, remains in force so far as the adopting statute is concerned. Hanson v. City of Omaha, 157 Neb. 768, 61 N. W. 2d 556. That principle applies here. The statutes defining the time and method of docketing and framing the issues on the appeal to the District Court from the

award of the appraisers and incorporated in section 76-717, R. S. Supp., 1974, by reference were not, by the repeal in L. B. 1032, under the principles stated in Hanson v. City of Omaha, *supra,* changed insofar as they pertain to the appeal from the award of the appraisers.

It might be argued that the 1973 amendment, by eliminating the sentence pertaining to making up the issues, evidenced a legislative intent to discontinue the incorporation of repealed Chapter 27 into the procedure for appealing an appraiser's award. The change, however, was not intended to have such a result. The amendment provides for an appeal de novo. This is simply a reiteration of the effect of the earlier version of the statute but stated in different language. Any determination otherwise would have the result of leaving the appeal procedure totally undefined. It is apparent that the Legislature had no such intention. The proceeding before the appraisers is not a trial. No evidence is received and no record is made. The hearing is before the appraisers, not the county court. The function of the court in such cases is administrative only. Issues are framed for the first time in the District Court. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591; Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213; Scheer v. Kansas-Nebraska Natural Gas Co., Inc., 158 Neb. 668, 64 N. W. 2d 333; Neumeyer v. Omaha Public Power Dist., 188 Neb. 516, 198 N. W. 2d 80. The Legislature did not intend to make the determination of the appraisers final.

It is true that the 1961 and 1973 amendments do not expressly deal with the problem of which party files the first pleading. The condemnees argue that since they are not the appealing party, they should not have to file the petition in the District Court for this requires them to do the appealing party's work. If this were the case it would not be a new or strange procedure. That is what the literal language of section 27-1306, R. R. S. 1943, required and it was uniformly so applied from the

beginning in appeals from judgments of the county court. The plaintiff was required to file the petition even though the defendant appealed. Beard v. Ringer, 41 Neb. 831, 60 N. W. 95; In re Estate of Lindekugel, 148 Neb. 271, 27 N. W. 2d 169; Satterfield v. Estate of Buell, 175 Neb. 473, 122 N. W. 2d 247. That procedure was followed even when in appeals in certain types of proceedings this court had to make a determination as to who was plaintiff in the county court. In re Estate of Kothe, 131 Neb. 780, 270 N. W. 117. The eminent domain act of 1951 changed the application of section 27-1306, R. R. S. 1943, by making the appealing party or the party first appealing the plaintiff and making it his duty to file the petition. City of Seward v. Gruntorad, *supra,* so held. As we see it, none of the subsequent amendments changed this procedure. The 1961 amendment merely changed the designation of parties and the condemnee became the nominal plaintiff irrespective of who was appealing. As already noted, the legislative history indicates that the purpose of this change was to avoid confusion as to designation of parties in docketing and to eliminate the docketing of two causes and the filing of two sets of pleadings where both parties appealed. It appears not to have been concerned at all with changing procedure as to bringing the cause to issue, that is, the party first appealing continued to have the burden of filing the first pleading in the District Court. This appears to have been the practice even where both parties appealed and each party called his pleading a petition. See 5 Moore Neb. Pract., §§ 3588, 3590, pp. 251, 253. See, also, Neumeyer v. Omaha Public Power Dist., *supra.* Neither did the 1973 amendment bear on this point.

We hold that the procedure laid out by Simmons, C. J., in City of Seward v. Gruntorad, *supra,* still applies. The party first appealing has the burden of filing the petition. The filing of the petition is not a jurisdictional step. City of Seward v. Gruntorad, *supra*; Neumeyer v.

Omaha Public Power Dist., *supra*. However, in the absence of a showing of good cause, failure to file at the time required may, as the two cited cases and others hold, subject the appeal to dismissal in the exercise of sound discretion by the District Judge.

Does the record show an abuse of discretion by the District Judge in this instance? We find that it does. The record shows that the trial court overruled the first motion of the condemnees to dismiss and then the condemnees, in response to the condemner's motion to require them to file a petition, made no objection and did file a petition. The condemner then filed an answer and the case was then at issue, even though because of the initial erroneous ruling by the court the burden of filing the petition had been placed on the wrong party. It was not until the day trial was to commence that the court ruled on the second motion to dismiss and reversed its earlier ruling. We feel that to dismiss for a nonjurisdictional reason after the appealing party's default has in effect been remedied by action of the parties and that action ratified by an order of the court is, in fact, an abuse of discretion especially where, as here, there is no claim of prejudice.

One other contention of the condemnees will be noted. They assert that when the condemner is the appealing party, his failure to file a petition is a jurisdictional defect because it is the duty of the condemner to allege that it has made a bona fide attempt to agree with the owner before commencing the eminent domain proceedings and if it has not done so no cause of action is stated. They cite Prairie View Tel. Co. v. County of Cherry, 179 Neb. 382, 138 N. W. 2d 468. It is true, of course, that the condemner must so allege and also prove the allegation if it is denied. In this case the condemner did so allege in its answer in the District Court as well as in its petition to the county court for appointment of appraisers. However, the issue, if controvered, may be decided only in the District Court. Higgins v. Loup River Public

Power Dist., *supra*; Jensen v. Omaha Public Power Dist., *supra*; Scheer v. Kansas-Nebraska Natural Gas Co., Inc., *supra*. In Prairie View Tel. Co. v. County of Cherry, *supra*, a motion for summary judgment was filed and a showing made thereon. The pleadings were pierced and it was determined that no attempt to agree had been made. If failure to make an attempt to agree is an issue in this case, it may be determined on remand.

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in the result only.

SHEILA WARE, APPELLANT, V. YELLOW CAB, INC., A CORPORATION, APPELLEE.

225 N. W. 2d 565

Filed February 13, 1975. No. 39589.

1. **Carriers: Negligence.** Common carriers of passengers for hire are required to exercise the utmost skill, diligence, and foresight for the protection of their passengers, consistent with the business in which they are engaged. They are liable for the slightest negligence but they are not held to the strict liability of insurers.
2. ———: ———. The mere fact that a collision has occurred does not create a presumption that the common carrier was guilty of negligence.
3. **Negligence: Trial.** Where a presumption of negligence does not arise as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases the cause of action.

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

Donald B. Fiedler of Fiedler & Fiedler, for appellant.

Harold W. Kauffman and William J. Dunn of Gross, Welch, Vinardi, Kauffman & Day, for appellee.

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

MCCOWN, J.

This is an action by plaintiff for personal injuries sustained as a passenger in a taxicab. At the close of plaintiff's evidence on liability, the District Court sustained a motion by the defendant for a directed verdict and dismissed the action. Motion for new trial was overruled and plaintiff has appealed.

In the early afternoon of August 25, 1971, a clear, dry day, the plaintiff was a passenger in one of defendant's taxis enroute to her home on North 40th Street in Omaha, Nebraska. At a point near 40th and Bedford Streets, the driver of a car ahead of the taxi and going in the same direction stopped the car approximately in the middle of the street. The taxicab came up behind the other car and stopped a short distance behind it. The street inclined downwards in the direction from which both vehicles had come. The car in front began to back up. The taxi then backed up and both vehicles proceeded in reverse for a distance of some yards when the rear bumper of the car bumped the front bumper of the taxi. There was no other traffic on the street at the time and no obstacles present. There was no damage to either vehicle. The plaintiff passenger was thrown forward against the rear of the front seat of the cab.

Yellow Cab, Inc., is the sole defendant in this action. Allegations of negligence are that the driver failed to keep a proper lookout; failed to have the taxi under proper control; willfully placed the taxi into a position of danger; and operated the vehicle inattentively and with disregard for the safety of the plaintiff. The only allegation which might be said to relate to any specific act is an allegation that the defendant driver "stopped backing up and caused the other vehicle to strike his taxi cab."

Common carriers of passengers for hire are required to exercise the utmost skill, diligence, and foresight for the protection of their passengers, consistent with the business in which they are engaged. They are liable for the slightest negligence but they are not held to the strict liability of insurers. Lincoln Traction Co. v. Webb, 73 Neb. 136, 102 N. W. 258; Fielding v. Publix Cars, Inc., 133 Neb. 818, 277 N. W. 331. The mere fact that a collision has occurred does not create a presumption that the common carrier was guilty of negligence. See Knight v. Lincoln Traction Co., 127 Neb. 447, 255 N. W. 774.

Where the nature of the accident is such as to fairly raise a presumption of negligence, proof of such accident is sufficient, but where a presumption of negligence does not arise as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases the cause of action. See Lincoln Traction Co. v. Webb, *supra*.

This is not a res ipsa loquitur case. Here, the only specific act of negligence pleaded by the plaintiff was that the driver of the taxicab stopped backing up. In effect plaintiff contends that the driver of a vehicle at rest, who backs up to avoid being struck from the front by another vehicle being negligently operated, is himself negligent if he does not avoid the collision. We can find no case which even remotely supports such a contention.

Prior to the submission of a cause to a jury, there is a preliminary question for the court to decide when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Bohling v. Farm Bureau Ins. Co., 191 Neb. 141, 214 N. W. 2d 381. In this case the sufficiency of the evidence on liability was properly raised by the motion to dismiss. The motion was properly sustained by the trial court and the judgment is affirmed.

AFFIRMED.

JOSEPH DOMONICK CIMINO, APPELLANT, V. E. A. ROSEN ET AL., DOING BUSINESS AS ROSEN NOVAK AUTO COMPANY, APPELLEES.

225 N. W. 2d 567

Filed February 13, 1975. No. 39594.

1. **False Imprisonment: Words and Phrases.** False imprisonment consists of the unlawful restraint against his will of an individual's personal liberty.
2. **Malicious Prosecution: Probable Cause.** Where the process on which an arrest is made is regular and legal in form and issued by a court of competent authority, but is sued out maliciously and without probable cause, the remedy is an action for malicious prosecution.
3. **Malicious Prosecution.** In a malicious prosecution case, the necessary elements for plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action.
4. **Probable Cause: Words and Phrases.** Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty.
5. **Malicious Prosecution: Trial: Evidence: Probable Cause.** To maintain an action for malicious prosecution the plaintiff must prove malice and want of probable cause.
6. **Malicious Prosecution: Probable Cause: Trial.** In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant.
7. **Malicious Prosecution: Probable Cause: Time.** The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts.

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

David Herzog, for appellant.

Emil F. Sodoro and Michael P. Cavel, for appellees.

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

NEWTON, J.

This is an action for false arrest and malicious prosecution. At the close of plaintiff's evidence, his petition was dismissed. We affirm the judgment of dismissal.

Plaintiff was employed by Club America, Inc., an organization, among other things, assisting members in the purchase of automobiles. Plaintiff received a check for $2,350 from a patron and deposited it in the club account. He made a $1,000 payment on the car ordered and when it was delivered, he gave defendants another check for the balance due of $1,350. The check was dishonored as the account then contained only $6.62. Defendants, being unsuccessful in contacting plaintiff by telephone, called at the club office and at plaintiff's apartment but could not locate plaintiff. The check was given on March 21, 1972, returned on March 28, 1972, and defendants' continuous efforts to locate plaintiff having failed, they entered a complaint on March 30, 1972, for issuing an insufficient fund check. A warrant was issued and plaintiff arrested. The complaint was subsequently dismissed when plaintiff redeemed the check.

False imprisonment consists of the unlawful restraint against his will of an individual's personal liberty. See Herbrick v. Samardick & Co., 169 Neb. 833, 101 N. W. 2d 488.

It is usually held that: "* * * where the process on which an arrest is made is regular and legal in form and issued by a court of competent authority, but is sued out maliciously and without probable cause, the remedy is an action for malicious prosecution." 32 Am. Jur. 2d, False Imprisonment, § 4, p. 76.

It is evident that the action for false imprisonment will not lie. The process was regular, legal in form, and

issued by a court of competent authority. Furthermore, the arrest was not unlawful. The plaintiff did issue a no fund check and thus subject himself to a lawful arrest.

"In a malicious prosecution case, the necessary elements for plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action." Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 215 N. W. 2d 105.

In Brumbaugh v. Frontier Refining Co., 173 Neb. 375, 113 N. W. 2d 497, the following rules were laid down: "Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. * * *

"To maintain an action for malicious prosecution the plaintiff must prove malice and want of probable cause. * * *

"In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. * * *

"The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts."

At the time the prosecution was instituted the defendants knew only that they had an insufficient fund check for a considerable amount and that they could not locate the plaintiff. Certainly probable cause existed for them to believe that they had been defrauded and the law violated. There is no indication of malice. Further-

more, the plaintiff procured the dismissal of the charge by paying the check and receiving the benefit of the doubt on the question of fraudulent intent. The termination of the prosecution under such circumstances will not sustain an action for malicious prosecution. See Annotation, 67 A. L. R. 513.

We conclude that the judgment of the District Court is correct.

AFFIRMED.

DIANE NEELD BOTSCH, APPELLANT, V. JOSEPH REISDORFF AND CHRISTIAN MAROHN, APPELLEES.
226 N. W. 2d 121

Filed February 18, 1975. No. 39581.

1. **Motor Vehicles: Negligence: Statutes.** Under our guest statute, section 39-6,191, R. R. S. 1943, the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver because of the gross negligence of the owner or operator in the operation of such motor vehicle.
2. **Constitutional Law: Statutes.** The test, under the Fourteenth Amendment to the Constitution of the United States, when a state statute operates to single out a class of people for special treatment, is whether the suspect classification bears some rational relationship to the legitimate purposes of the legislation.
3. ———: ———. In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution of the United States simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."
4. ———: ———. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.
5. **Contracts: Gratuitous Benefactors.** There is inherent justice in the requirement that one who undertakes to perform a duty

gratuitously should not be under the same obligation as one who enters upon the same undertaking for compensation.

6. ———: ———. A distinction between the duty imposed in the case of gratuitous performance of services and the performance of them for hire is to be found running through many fields of law.

7. **Motor Vehicles: Negligence.** "Gross negligence" within the meaning of the motor vehicle guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.

8. **Negligence.** Where several acts of negligence are supported by the evidence, no one act is to be segregated and weighed separately to determine whether or not it constituted gross negligence, instead the several acts are to be considered as a whole.

9. ———. Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.

10. **Motor Vehicles: Negligence.** It is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.

11. ———: ———. A driver of a motor vehicle should have his automobile under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof are exercising due care.

12. **Motor Vehicles: Negligence: Trial.** In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury we have consistently held that the presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration.

Appeal from the District Court for Butler County: HOWARD V. KANOUFF, Judge. Reversed and remanded with directions.

William A. Wieland of Healey, Healey, Brown, Wieland & Burchard and Fredrick L. Swartz, for appellant.

Ray C. Simmons, for appellee Marohn.

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

WHITE, C. J.

This is an action growing out of a guest passenger automobile accident arising from an automobile-tractor collision in Butler County, Nebraska. Plaintiff and defendant Reisdorff stipulated that judgment be entered in favor of plaintiff against Reisdorff in the sum of $8,500, and such judgment was entered by the District Court. The theory of the plaintiff's case is that the acts of negligence alleged in her petition constituted both ordinary and gross negligence. On appeal, the plaintiff challenges the constitutionality of the guest statute, section 39-6,191, R. R. S. 1943, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the comparable and complementary provisions under the Constitution of the State of Nebraska. The issue is also presented as to the sufficiency of the evidence to submit the issue of gross negligence to the jury. The trial court refused to submit this issue and directed a verdict for the defendant Marohn.

We hold that the guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, nor any provision of the Constitution of the State of Nebraska, and reverse and remand the cause for trial upon the issue of gross negligence.

Our guest statute, section 39-6,191, R. R. S. 1943, provides in parts pertinent to the issues here as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver * * * because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby

defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor * * *."

Motor vehicle guest statutes containing the same essential principles now under constitutional attack, have been adopted in more than one-half of the states, and the principle that automobile owners or operators be relieved from liability to their guests or passengers for ordinary negligent conduct has been judicially imposed in still more states. See Prosser, Torts (4th Ed.), § 34, p. 186. Ever since their inception in the early twentieth century, guest statutes have been under continual attack on both state and federal constitutional grounds similar to those raised in this case. Notwithstanding the attacks, the states and the United States Supreme Court have consistently held statutes such as ours constitutional. See, Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221 (1929); Rogers v. Brown, 129 Neb. 9, 260 N. W. 794 (1935). Almost the total thrust of the plaintiff's attack upon the guest statute is a contention that this court should adopt the reasoning and authority of the California Supreme Court in Brown v. Merlo, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 212 (1973). Rather than rest our decision on the simple proposition that Silver is still the law of the land and that we adhere to it, we examine the contentions of the plaintiff which in turn are based upon the argument that modern conditions, social and economic, demand a reconsideration of the Silver rationale and of the other cases and require us to hold our guest statute unconstitutional.

So far as we can determine, since Brown v. Merlo, *supra,* courts of six states have considered whether their guest statutes violated the Equal Protection Clause of either the federal or their own Constitution. Four states have held that neither state nor federal Constitution was violated by their guest statutes. Justice v. Gatchell, 325 A. 2d 97 (Del., 1974); Keasling v. Thompson, 217 N. W. 2d 687 (Iowa, 1974); Cannon v. Oviatt, 520 P. 2d

883 (Utah, 1974); Tisko v. Harrison, 500 S. W. 2d 565 (Tex. Civ. App., 1973). Two state courts have held their guest statutes unconstitutional, one on grounds that it violated the federal and state Constitutions, Henry v. Bauder, 213 Kan. 751, 518 P. 2d 362 (1974), and the other a North Dakota case on grounds that only the state Constitution was violated under its particular constitutional context. Johnson v. Hassett, 217 N. W. 2d 771 (N. D., 1974).

The test, under the Fourteenth Amendment to the Constitution of the United States, when a state statute operates to single out a class of people for special treatment, is whether the suspect classification bears some rational relationship to the legitimate purposes of the legislation. In Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), a very recent case, the United States Supreme Court said: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality. * * * The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific. * * * A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. * * * But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. * * * It is enough that the State's action be rationally based and free from invidious discrimination." See, also, Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911); McGowan v. Maryland, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); San Antonio Independ-

ent School Dist. v. Rodriguez, 411 U. S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

Stated broadly the contention is that a nonpaying guest is singled out for special treatment in that he is denied the cause of action against his host for negligently inflicted injuries. The contention is, following Brown v. Merlo, *supra,* that there is no legitimate state interest justifying this classification on the basis of the promotion of hospitality, and the prevention of fraud and collusion. The question, therefore, before the court, under the test pronounced above, is whether the denial of a remedy for negligently inflicted injuries to automobile guests is rationally related to the aforementioned state purposes. First, it is contended that the "protection of hospitality" justification cannot be sustained by making a distinction between guests in automobiles and other social guests. This reasoning is inappropriate because the law of the State of Nebraska, contrary to California, does make a distinction between the duty owed a trespasser, a business invitee, and a licensee or social guest. See Casey v. Addison, 190 Neb. 634, 211 N. W. 2d 410 (1973). In other words, the contention of the plaintiff is partially based upon the case of Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561 (1968), and the California statute, which together hold that guests generally can demand from their host liability for ordinary negligence. In other words, the distinctions as to liability that Nebraska law draws in different classes is consistent with the distinctions made as to liability for conduct in other areas and the contention of an invidious or irrational discrimination cannot be applied under current Nebraska law.

The plaintiff next argues, again following Brown v. Merlo, *supra,* that holding a host to a lower standard of care for a nonpaying guest is irrational and not justified by the fact that the guest did not pay consideration. We reject this contention. In the basic and controlling case of Silver v. Silver, 108 Conn. 371, 143 A. 240 (1928),

affirmed by the United States Supreme Court, the court pointed out that a distinction between the duty imposed in the case of grautitous performance of services and the performance of them for hire is to be found running through many fields of law, for example, the higher degree of care required by carriage for hire in the common carrier over other types of carriers, and the common and historic distinction between the business invitee and the ordinary social guest. In Silver v. Silver, 108 Conn. 371, 143 A. 240 (1928), it is stated: "There is inherent justice in the requirement that one who undertakes to perform a duty gratuitously should not be under the same obligation as one who enters upon the same undertaking for pay * * *. * * * It seems to us that the legislature was acting well within the limits of the police power in making a distinction between the degree of care to be exercised by the owner or operator of a motor vehicle toward a guest and that to be exercised toward one who pays for his transportation." The legislative and judicial minds in the past 50 years have consistently held that this distinction between a paying and a gratuitous guest could rationally take precedence in the legislative mind over and above the social engineering notion of shifting liability for negligently inflicted injuries to a guest on to hosts or to the general motoring public's liability insurance. We, therefore, hold that the Legislature could and did act reasonably by differentiating between standards of care owed on the basis of compensation paid, and that no invidious discrimination is present in the enactment of such a standard.

The plaintiff contends, following Brown v. Merlo, *supra,* that the prevalence of automobile liability insurance carried by drivers nowadays has eliminated the notion of ingratitude in a guest suing his host for ordinary negligence. On the contrary, the legislative justification still may well be founded on the ingratitude element for the simple reason that despite insurance it still could be rationally determined that the ingrati-

tude element would tend to inhibit hospitality. A thorough review of these considerations can be found in Casenote, 53 Neb. Law Rev. 267 (1974). We will not review all of them. Many tort personal injury cases have in the past and will continue to result in judgments which exceed the host's liability insurance limits. In Nebraska, statutory required policy limits are relatively low. See § 60-509, R. R. S. 1943. Moreover, the fact that a significant number of drivers do not have any liability insurance is evident by section 60-509.01, R. R. S. 1943, which requires uninsured motorist's coverage to be offered in automobile liability insurance policies. In short, possibilities for the ingratitude which inhibit hospitality still exist despite liability insurance, and the Legislature acted rationally in allowing legislation to stand which cured this evil. There is no merit to this contention.

The plaintiff contends, again pursuant to Brown v. Merlo, *supra,* that the limitation of a guest's redress for negligent injuries cannot be rationally justified by the desire to promote hospitality. We hold that the Nebraska Legislature could reasonably believe that more hospitality results from the guest statute being in force than without it. We realize, of course, in balancing the considerations present in the enactment of the guest statute, that the Legislature may well decide to reevaluate the varying weight of the many considerations and policy determinations present in the enactment thereof. It is not a judicial function to enter that area. We may further observe that the guest statute perhaps is not perfectly designed to accomplish its ends. But such a design need not and could not be met, especially when a law attempts to thread its way and make a balanced decision among the multitude of considerations that are present in the social and economic context of this statute. As we have pointed out the Equal Protection Clause does not require such perfection, nor such a rigorous standard of rationality as is contended for in this case. It is well

settled that even unwise or improvident laws, if based upon some sort of a rational conception, can pass constitutional muster.

We summarize very briefly other considerations that could conceivably be rationally related to the enactment of a guest statute. The regulation of motor vehicle use is a valid legislative occupation, and as we have seen, automobile guests can validly be distinguished from other social guests in the State of Nebraska. We observe that in Nebraska much state money goes into highway construction and state maintenance. Since, as we have held, the guest statute can rationally be conceived to encourage hospitality, it affects both the number of cars and the total cumulative mileage on highways, which directly bears on the state's economic burden. In the same way, the guest statute promotes the conservation of petroleum and other natural resources which are consumed in highway travel. We observe that the financial consequences to a host in a lawsuit against him by a guest are very significant in the automobile context because the degree of potential physical injury is very great, especially in comparison with injuries suffered by guests in the other context of liability law. Whatever the argument may be as to the respective weight of the many considerations which go into making these decisions, it is clear that the Legislature is the proper decision-making forum in which to strike the balance in the matter, and this court will not usurp the legislative function.

Although the foregoing reasons alone are sufficient to sustain the provisions of our guest statute against the contention of constitutionally inviduous discrimination, we deem it necessary to consider the strongly urged contention by the plaintiff, again pursuing Brown v. Merlo, *supra,* that the statute is not rationally related to a legitimate purpose of preventing collusion and fraud. It is said that this is so because a statute eliminating the cause of action for ordinary negligence for *all*

automobile guests when only a small segment of the guest class may file collusive suits was a classic example of impermissible, over-inclusiveness of classification which was contrary to traditional notions of fairness or reasonableness. It is stated paying passengers might often include friends and relatives in various situations and that parties because of their closeness of relation might still be likely to collude in proving ordinary negligence because the guest statute does not reach them. Further, it is stated that the class of nonpaying guests includes hitchhikers with whom the host is unlikely to collude. It is also stated that the statue is ineffective as a remedy for collusion and that the remedy for collusion lies in the integrity of the discovery of truth in our adversary system.

Again, this contention falls because it requires more of the guest statute than the Equal Protection Clause mandates. The notion of impermissible over-inclusiveness has been held to have no place in the equal protection analysis of social and economic regulations not affecting freedoms guaranteed by the Bill of Rights. In Dandridge v. Williams, *supra,* it is stated as follows: "For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' Williamson v. Lee Optical Co., 348 U. S. 483, 488. That era long ago passed into history. Ferguson v. Skrupa, 372 U. S. 726." See, also, Railway Express Agency, Inc. v. New York, 336 U. S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949); Keasling v. Thompson, *supra.* We point out this argument assumes that the majority of guests and hosts are honest, and that only a small number would act collusively. Casenote, 53 Neb. Law Rev. 267 (1974). But it is obvious that this is mere speculation. There is no responsible data available, so far as

this court knows, on whether the majority of automobile guests are honest or not. As in other areas, including the various classes of cases in which separate burdens of proof are judicially required, it is a reasonably conceived ground by the Legislature to determine that the temptation or actual incidence of fraud is very great; or that collusion is especially difficult to detect; or that the judicial system should not be responsible for having to detect fraud. A Legislature or a court is reasonably justified in believing that the alternative of requiring a higher degree of proof in automobile guest cases, for example requiring a standard of clear and conclusive evidence instead of a preponderance of the evidence, is a definite factor in controlling the problem of collusive lawsuits and losses. We fail to see the difference between an acknowledged power by judicial decision or legislation to invoke a higher degree of proof in certain classes of cases and the requirement of the guest statute as to proof of a higher degree of negligence. Whatever the merits may be as a matter of policy under the changing conditions that may be present in society today, we cannot say that the Legislature has acted unreasonably in choosing to deny the ordinary negligence cause of action in a wholesale manner where it felt the greatest potential for collusion existed. We, therefore, hold that the Legislature did not act irrationally in choosing the prevention of collusion and fraud as one of the reasons for the adoption of the guest statute and a different standard for the proof of negligence.

Consequently, we hold that the Nebraska guest statute as presently enacted, is not in violation of the federal or the state Constitution, and that the contentions of the plaintiff as to its unconstitutionality are without merit.

Our decision in this matter is reinforced by the legislative history of attempts to repeal the guest statute. In recent years the matter has been before the Legislature and it has elected not to repeal the guest statute.

In the 1969 session of the Legislature the repeal of the guest statute was presented to the Judiciary Committee in L.B. 555 and reported out for consideration on the floor. The bill was indefinitely postponed by a vote of 22 to 10. In 1971, L.B. 897, which had as its purpose the repealing of the guest statute, was withdrawn by its sponsor. In the 1972 Legislature, L.B. 1461 was introduced for the purpose of repealing the guest statute, but was also withdrawn. At a minimum, the legislative history of the attempts to repeal the guest statute are consistent with the conclusion that the viability and force of the arguments for the retention of the purposes of the guest statute are still very much alive.

Since the guest statute is applicable we now consider the question of whether the evidence under the facts in this case was sufficient to submit the issue of gross negligence to the jury.

The general factual background is that on November 16, 1966, the plaintiff, Diane Neeld Botsch, was a guest in a 1964 Chrysler sedan driven by the defendant, Christian Marohn. At dusk, the Marohn car was proceeding down a hill and had started up the grade of the next slope or hill when it was in collision with the tractor driven by Joseph Reisdorff, both car and tractor being operated in the west and southbound lane of the highway. As the result of the collision, the plaintiff was seriously injured.

The applicable rules that we use to evaluate the evidence have recently been stated in the case of Demont v. Mattson, 188 Neb. 277, 196 N. W. 2d 190 (1972). Therein we said: " 'Gross negligence' within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.' NJI No. 7.51. See, also, Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20. Where several acts of negligence are supported by the evidence 'no one act is to be segregated and weighed separately to de-

termine whether or not it constituted gross negligence. Instead the several acts are to be considered as a whole.' NJI No. 7.51. See, also, Olson v. Shellington, supra; Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184; Carley v. Meinke, 181 Neb. 648, 150 N. W. 2d 256. * * * This court has frequently reiterated in slightly varying language that whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. Boismier v. Maragues, supra."

Under the issues presented, we examine the evidence as to failure of the defendant to keep a proper lookout; failure to keep his automobile under reasonable control; and that he was operating his vehicle at an excessive rate of speed.

Resolving the conflicts and the inferences from the evidence in favor of the plaintiff, as we are required to do, the evidence shows the following facts: As the defendant proceeded down the slope immediately before the collision, his headlights were on. The highway had a painted dividing line and both the defendant's car and the tractor with which he was in collision were on the west and southbound lane of traffic. At the time of the collision the tractor was proceeding south at a rate of about 16 miles per hour. Three witnesses testified that a short time prior to the accident they saw the tractor with a white light at the rear of the tractor. The defendant testified that he did not see the tractor in the beam of his headlights until it was 100 feet from his car. At that time, he had his foot on the accelerator. He applied his brakes, but the impact occurred almost *at the same time* that he saw the tractor in his headlights. The tractor was clean and had yellow wheeled rims. There is also evidence that there was sufficient light to make the tractor visible without the aid of headlights or rear lights. We have consistently held that it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot

stop in time to avoid a collision with an object within the range of his vision. Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870 (1956); Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250 (1952); Pool v. Romatzke, 177 Neb. 870, 131 N. W. 2d 593 (1964); Kehm v. Dumpert, 183 Neb. 568, 162 N. W. 2d 520 (1968). The tractor ahead of the defendant was directly ahead of him in its proper lane of traffic. It was also traveling forward and at an approximate rate of speed of 16 miles per hour. The evidence is overwhelming that it was visible and discernible within his range of vision ahead in his own lane of traffic and discoverable within the beam of his headlights. No excuse or reason appears for his failure to properly observe the tractor. The evidence in this case does not permit a finding that the defendant's actions came within one of the exceptions to the range of vision rule which usually relates to whether the object ahead was visible or discernible. Outside the element of speed, which will be later discussed, we come to the conclusion, under the applicable rule as to the testing of the evidence, that the defendant was guilty of negligence as a matter of law.

We consider the evidence as to the issue of reasonable control of the defendant's vehicle. A driver of a motor vehicle should have his automobile under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof are exercising due care. Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701 (1956); Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767 (1930). There is evidence that when the defendant saw the tractor 100 feet ahead in his headlight beam, the accident occurred almost simultaneously with his application of the brakes. The investigating sheriff did not find any skid marks north of the first gouge mark which marked the impact location. The only inference from this testimony is that the defendant did not or was unable to make any attempt to turn aside or to avoid hitting the tractor which was

traveling ahead and at a reasonable rate of speed in the same lane of traffic as the defendant. Independent of the evidence as to lack of a proper lookout, the evidence is indisputable that after the defendant saw the tractor he was unable to control his automobile so as to avoid colliding with the tractor. It is also readily inferable from the plaintiff's evidence that the tractor was being operated without negligence. It is therefore clear that there was ample evidence on the issue of reasonable control.

We go now to the issue of the defendant's excessive speed and the degree of it. The defendant himself testified that he did not know at what speed he was traveling. One witness, Richard Vlach, testified that while he was traveling in his car at a constant rate of approximately 60 miles per hour and southbound on State Highway No. 15 he was passed by the defendant's car a short distance before the scene of the accident. Distance measurements were made by defendant Reisdorff and introduced in evidence. Plaintiff in her brief calculated the speed at which defendant's automobile was traveling between the time Reisdorff first saw the defendant's car cresting the hill and when the impact finally occurred. Plaintiff argues this evidence indicated that the defendant's car was traveling around 90 miles per hour just before impact. Defendant disputes this argument. Further evidence showed that the impact of the collision broke part of the body of the tractor open, and there was transmission grease and oil on the highway. The investigating sheriff testified that the distance between the northernmost gouge marks on the highway and the tractor indicated the tractor had been pushed a distance of 129 feet. Other evidence as to the size and the weight of the tractor, 5,000 pounds, lead to no other conclusion than that the defendant was traveling at a reckless and dangerous rate of speed under the circumstances. There was additional testimony to the effect that the defendant's mother, riding in the back seat of

the car, had warned the defendant to watch his speed and to drive carefully.

In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury we have consistently held that the presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Zoimen v. Landsman, 192 Neb. 561, 223 N. W. 2d 49 (1974); Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483 (1964); Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622 (1941).

We consider the acts of negligence together. Not only does the evidence, construed most favorably to the plaintiff, indicate a gross failure by defendant to keep a proper lookout, especially in light of the fact that the vehicle ahead of him was traveling forward in his proper lane of traffic, but it also indicates that this failure to keep a proper lookout was combined with a continuous and persistent operation at a reckless and excessive rate of speed up to the point of collision. In addition, the evidence shows that there was ample opportunity to turn aside or otherwise avoid the collision with the moving tractor in front of him. There was a violation of the range of vision rule which we have held to be negligence as a matter of law. We hold that the evidence as to the various issues of negligence, taken together, were amply sufficient for the submission of the issue of the defendant's gross negligence to the jury and that the court was in error in directing a verdict for the defendant.

Other contentions of the parties have been considered and have been found to be without merit.

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

REVERSED AND REMANDED WITH DIRECTIONS.

McCOWN, J., dissenting in part.

I dissent from that portion of the majority opinion which holds the Nebraska guest statute constitutional. The basic reasons are set forth in my dissent in Hale v. Taylor, 192 Neb. 298, 220 N. W. 2d 378.

Rational and logical arguments may be made in support of each of the two divergent judicial views regarding the constitutionality of automobile guest statutes. In weighing the conflicting viewpoints, the unequal justice visited upon thousands of guest passengers in the name of legislative public policy becomes the critical weight which tips the scales of justice in favor of the determination that equal protection of the law is denied by the guest statute.

No one really denies that many of the factual assumptions which gave rise to the basic philosophy of the guest statute have disappeared or changed drastically since the statute was adopted in Nebraska in 1931. In the 1975 Legislature, repeal of the guest statute is pending again. Obviously, the Legislature must now determine, in the light of modern concepts of automobile travel and social policy, whether the factual assumptions which supported the initial adoption of the automobile guest statute in 1931 are still present, and, if so, whether they justify the continuation of the public policy reflected by the Nebraska guest statute.

I concur in the determination that there was sufficient evidence of gross negligence in this case to require submission of the case to the jury.

DEBRA GERTSCH, A MINOR, BY HER NEXT FRIEND AND FATHER, VON GERTSCH, APPELLANT, V. LOUIS G. GERBER, APPELLEE.
226 N. W. 2d 132

Filed February 18, 1975. No. 39562.

1. **Motor Vehicles: Negligence: Statutes.** Section 39-6,191, R. R. S. 1943, the Nebraska guest statute, applies to the owner or

operator of a motor vehicle and relieves both of them from liability for damages to a guest passenger unless such damage is caused by the driver being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle.

2. **Motor Vehicles: Negligence: Minors.** An owner of a motor vehicle who knowingly entrusts it to an under-age unlicensed minor in violation of statute is guilty of negligence.

3. ———: ———: ———. The act of knowingly entrusting a motor vehicle to an under-age unlicensed minor is negligence. It becomes a proximate cause of the injury when it combines with negligent acts of the driver to cause the damage.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Douglas R. Milbourn of Baker, Tessendorf, Milbourn & Fehringer, for appellant.

Barlow, Watson & Johnson, Donald B. Stenberg, and Walter, Albert, Leininger & Grant, for appellee.

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

MCCOWN, J.

This is an action to recover damages for personal injuries sustained by a guest passenger in a one-car accident. The driver was 15 years old and unlicensed. The sole defendant here is the owner of the automobile who entrusted the car to the driver. A demurrer to plaintiff's fourth amended petition upon the ground that it failed to state a cause of action against the defendant was sustained by the District Court. Upon refusal to plead further, the action was dismissed. The plaintiff has appealed.

The petition in issue alleges that on December 19, 1970, the defendant, Louis G. Gerber, entrusted his pick-up truck to his nephew, Dennis Edmison, knowing that his nephew was 15 years old and an inexperienced, unqualified, and unlicensed driver. Under Nebraska statutes then and now in effect, it was unlawful and a mis-

demeanor for any owner to permit any unlicensed person under 16 years of age to operate a motor vehicle. Defendant pleaded guilty to the misdemeanor charge in county court and was fined.

Dennis Edmison and a friend used the defendant's pickup, with no adult supervision, to collect some evergreens for a high school program. The boys drove to the high school, where they invited the plaintiff, Debra Gertsch, to accompany them to collect the greenery, and she did. The petition then alleges that while the pickup was being driven by Edmison on a snow-covered and icy county road, he lost control of the vehicle and it went into a ditch and hit a private driveway before coming to rest. Plaintiff's injuries were the result of the accident.

There are no specific allegations or charges of negligence as to Dennis Edmison, nor is there any allegation that any negligence of Dennis Edmison was the proximate cause of the accident. The only charges of negligence in the petition are those against the defendant, Louis G. Gerber, in entrusting his vehicle to Edmison under the circumstances present, and in failing to supervise Edmison's operation of the pickup.

The District Court found that the Nebraska guest statute applied to the facts alleged in this case. The court also found that the Nebraska guest statute was constitutional. The demurrer of the defendant was sustained and the action dismissed.

The plaintiff contends that the Nebraska guest statute does not apply to an automobile owner's liability for his negligence in the *entrustment* of a vehicle, but only to negligence in the *operation* of the vehicle. The contention is that the violation of the statute making it a misdemeanor to entrust a vehicle to an unlicensed person under 16 years of age is negligence per se, and subjects the violator to common law liability, and that such liability is not governed nor limited by the Nebraska guest statute. Plaintiff's position is that the guest statute applies to a car owner only where he is vicariously

liable for the driver's negligence under the doctrine of respondeat superior, but not where the action is against the car owner for his own negligence in entrusting the vehicle to a driver in violation of statute.

The Nebraska guest statute, section 39-6,191, R. R. S. 1943, applies to "the owner or operator of a motor vehicle" and extends its statutory protection to both of them unless the damage to a guest passenger is caused "because of the gross negligence of the owner or operator in the operation of such motor vehicle." Similar statutes have been interpreted in many states as to an owner's liability for injuries to guests in a vehicle negligently entrusted to an under-age and unqualified driver. See Annotation, 91 A. L. R. 2d 323. The majority of such states have extended the protection of the guest statute to an owner under factual circumstances similar to those here. See Hardwick v. Bublitz, 254 Iowa 1253, 119 N. W. 2d 886 (1963). Representing the opposite view, see, Ware v. State Farm Mut. Auto. Ins. Co., 181 Kan. 291, 311 P. 2d 316.

In some instances, entrustment to an under-age, unqualified, and unlicensed driver has been said to constitute gross negligence within the meaning of the guest statute. In Nebraska, in a case not involving the guest statute, we have held that an owner of a motor vehicle, who knowingly entrusts it to an under-age, unlicensed minor in violation of statute, is guilty of negligence and liable for damages proximately resulting from the negligent operation of the motor vehicle. See Keller v. Wellensiek, 186 Neb. 201, 181 N. W. 2d 854.

In the case before us it is not necessary to reach a determination as to whether or not under the facts here the guest statute did or did not apply. Even assuming that the guest statute did not apply, the facts pleaded are insufficient to constitute a cause of action against the defendant. Even if it be conceded that the defendant's entrustment of the pickup to Edmison was negligence per se, that fact alone does not establish de-

fendant's liability. The plaintiff must also allege and prove that defendant's negligence was the proximate cause of the accident and injury. In order to establish that proximate causation, the plaintiff must allege and prove that the driver operated the automobile negligently, and that his negligence was a proximate cause of the accident. See Mundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 206 S. W. 2d 587. See, also, Restatement, Torts 2d, § 288 B, and comments thereunder.

As the Iowa Supreme Court said: "The act of allowing the driving knowing the driver to be inexperienced or incompetent is negligence. It becomes a proximate cause when it combines with negligent acts of the driver causing the damage." Hardwick v. Bublitz, *supra*. See, also, Carter v. Montgomery, 226 Ark. 989, 296 S. W. 2d 442.

We have found no case which holds that an owner's negligent entrustment standing alone establishes liability in the absence of pleading and proof of the driver's negligence. In the case before us the petition alleges only that the minor driver lost control of the vehicle on a snow-covered and icy road. There is no allegation of negligence on the part of the driver nor any allegation that his negligence was the proximate cause of the accident. The lack of any allegations of negligence on the part of the driver destroys the connecting link between the defendant's negligence in entrustment and the plaintiff's injury. To hold the defendant responsible for any injury to a passenger in the vehicle, regardless of the legal or proximate cause of the injury, would simply transform the defendant from a tort-feasor to an insurer. The action here sounds in tort and the pleadings fail to state a cause of action against the defendant.

This court has currently held the Nebraska guest statute constitutional. See Botsch v. Reisdorff, *ante* p. 165, 226 N. W. 2d 121. That case disposes of the constitutional issues here.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BARBARA GLOUSER, APPELLANT.

226 N. W. 2d 134

Filed February 27, 1975. No. 39440.

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

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

Bernard Walsh, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

CLINTON, J.

This is an appeal from a conviction of forgery upon a plea of guilty. Defendant was sentenced to a term of 10 years in the State Reformatory for Women. The sentence imposed in the forgery charge was ordered to be consecutive to a like term imposed at the same sentencing hearing on a charge of unlawful possession of a controlled substance with an intent to deliver. The issue on appeal is whether the sentence is excessive. We affirm.

The forgery for which defendant was convicted involved the obtaining of funds from a savings association by the use of an apparently stolen savings account

book and the forgery of a withdrawal slip. A similar charge involving another forged withdrawal slip was dismissed following a plea of guilty on the charge upon which sentence was imposed. The conviction on the controlled substance charge grew out of the transportation by defendant of heroin from California to Omaha while a passenger on a commercial airline. Upon the defendant's arrival in Omaha at the conclusion of an admitted second trip, defendant was apprehended. She appears to have no other criminal record. She is the spouse of a convicted felon whose forte is apparently forgery. At time of sentencing she was 32 years of age. She is the mother of two teenage daughters by a prior marriage.

Defendant told the trial judge that she purchased the stolen passbook from a friend. The judge appears to have disbelieved her story as to the source of the passbook and indicated by his remarks that it was stolen, although the reason for this belief is not shown in the record. The judge appears to have considered in imposing sentence her refusal to reveal from whom the passbook was obtained.

The possible penalties for forgery are not less than 1 nor more than 20 years and a fine not exceeding $500. § 28-601, R. S. Supp., 1972. We have ofttimes stated that where the punishment for an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harig, 192 Neb. 49, 218 N. W. 2d 884.

The defendant, in support of the claim of excessiveness of sentence, asserts the use of "uncorroborated and unsubstantiated information concerning the source of the subject pass book" is indicative of an abuse of discretion. The defendant also asserts that abuse of discretion is indicated by the claimed intemperate tone of the sentencing judge's remarks.

The State points out that the sentencing court is not restricted to information obtained through the use of rules of evidence which pertain at trial. The State cites Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337, and quotes as follows: "In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

The State, answering the contention of intemperate remarks by the judge, asserts that the remarks indicate the court's concern for the provisions of section 29-2260(2), R. S. Supp., 1972, as follows: "Whenever a court considers sentence for an offender convicted of

either a misdemeanor or a felony, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:

"(a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;

"(b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or

"(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law."

Our review of the record inclines us to the conclusion that the failure of the trial judge to place in the record the reason for his belief that the passbook was stolen does not deprive defendant of due process of law. In Williams v. New York, *supra,* the issue involved was whether the sentencing judge could use information he had obtained concerning other crimes committed by the defendant but of which he had not been convicted. The Supreme Court of the United States held he could properly do so. The same principle applies here. Acceptance of the defendant's version of having purchased the passbook for use in her forgery scheme from a friend rather than from someone she knew to be the thief would scarcely lessen the seriousness of the offense. The other criticized remarks of the judge do, in our judgment, indicate a concern with the sentencing standards mentioned above.

Although the sentence imposed for the forgery exceeds that usually imposed, we cannot, after reviewing the record and considering that the defendant was apparently guilty of four separate serious felonies, come to the conclusion that the trial judge abused his discretion.

AFFIRMED.

McCOWN, J., dissenting as to sentence.

The defendant here, at a single sentencing hearing, was sentenced to 10 years imprisonment on a forgery charge and 10 years imprisonment on a charge of possession of a controlled substance with intent to deliver, with the sentences to run consecutively rather than concurrently. The minimum sentence allowed by law for each of the two offenses was 1 year. The maximum sentence on the controlled substance charge was 10 years, and on the forgery count, 20 years.

The defendant had no convictions and apparently no criminal record prior to the sentencing here. She was 32 years old and the mother of two teenage daughters. In my opinion a maximum 10-year sentence on one count, and a sentence 9 years more than the minimum on the other, with the sentences to run consecutively, is excessive for a first-time criminal offender under the facts of these cases.

STATE OF NEBRASKA, APPELLEE, V. BARBARA JEAN GLOUSER, APPELLANT.

226 N. W. 2d 328

Filed February 27, 1975. No. 39441.

1. **Searches and Seizures: Affidavits: Controlled Substances.** For an affidavit based upon a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.
2. **Searches and Seizures: Affidavits.** Affidavits for search warrants must be tested in a common sense, realistic fashion.
3. ———: ———. An affidavit for a search warrant may be based on hearsay information and need not reflect direct observations of affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions.

4. **New Trial: Evidence.** The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in the result.
5. ———: ———. Newly discovered evidence must be competent, material, and credible and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. It must appear that the unsuccessful party had no knowledge of the newly discovered evidence at the previous trial and could not have discovered it by the exercise of reasonable diligence.

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

Bernard Walsh, Jr., and William R. Kurtz, for appellant.

Clarence A. H. Meyer, Attorney General, and Michael R. Johnson, for appellee.

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

SPENCER, J.

Defendant appeals her conviction for possession of a controlled substance with intent to deliver. Defendant alleges 13 assignments of error. Essentially there are only three: (1) The trial court erred in overruling defendant's motion to suppress; (2) the trial court overruled defendant's motion for a new trial when it became aware that the State's expert witness had misrepresented his credentials; and (3) the trial court committed an abuse of discretion in imposing a clearly excessive sentence on the defendant. We affirm.

Defendant contends the affidavit in support of the application for the search warrant was not legally sufficient to constitute probable cause for the issuance of the warrant. The affidavit and application for issuance of a search warrant made by an Omaha police officer on June 5, 1973, states, so far as material herein, as follows: "That he has just and reasonable grounds to believe,

and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Opium or its derivatives, Cocaine, Marijuana or its derivatives, or any other illegally possessed drugs, and instruments for administering the afore mentioned drugs, either homemade or manufactured.

"That said property is concealed or kept in, on, or about the following described place or person, to-wit: GLOUSER, Barbara Jean - White female - 33 Years old DOB 6 Jan 1940 - 5 foot 4 in. 110 to 120 pounds. OPD # 70143 also she will have in her possession some suit cases and bags.

"That said property is under the control or custody of GLOUSER, Barbara Jean OPD # 70143.

"That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: On 5 June 1973 Sgt. R. R. Caruso of the narcotic office received a telephone call from a person who has given the Officers in the narcotic office information in the past that has been found to be good reliable information and has resulted in the arrest of several parties on drug charges and also has resulted in the recovery of large amounts of narcotics and drugs. The informant stated that a person was taking flights to and from San Diego, Calif. leaving and coming back on the same day. Also this party was taking these flights just a few days apart. The informant stated the name being used by this party was B. GLOUSER. Officers R. Wiese and K. A. Miller took a police mug photo of a party known to them as GLOUSER, Barbara Jean OPD # 70143 and she was named as the party taking the flights. One of the flights was to San Diego, Calif. on Friday 1 June 1973 and she returned the same night. She then left on a flight to San Diego, Calif. on Monday 4 June 1973 with reservation to return the same night but did not board this flight. She is on a plane now which left San Diego, Calif. on Tuesday morning 5 June 1973 and due to arrive in Omaha, Nebraska at

1335 hours on Tuesday 5 June 1973. The informant further stated she travels with a very small amount of luggage. It is known by Officers R. Wiese and K. A. Miller that GLOUSER, Barbara Jean is married to a GLOUSER, Larry and both parties have police records with the Omaha Police Dept. of past Drug and narcotic arrests. Information from other reliable sources state that Larry GLOUSER is still involved in the narcotic operation within the City of Omaha. It is the Officers opinion that GLOUSER, Barbara Jean is bringing narcotics back to Omaha from the San Diego, Calif. or Mexico area. Officers are requesting this search warrant in order to search the person of GLOUSER, Barbara Jean and any or all of the luggage that she might have."

Defendant contends there is no information presented in the affidavit which shows the underlying circumstances from which the informant drew the conclusions related and that the affidavit does not supply sufficient information to support the reliability of the informant. In State v. LeDent (1970), 185 Neb. 380, 176 N. W. 2d 21, we held: For an affidavit (based upon) a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. The affidavit herein meets these two tests. Sufficient underlying circumstances are set out and sufficient information to support the reliability of the informant is given. We must not lose sight of the principle enunciated in LeDent: "Affidavits for search warrants must be tested in a common sense, realistic fashion."

Defendant also contends that the question of the sufficiency of the affidavit, which is based on hearsay information supplied by an unknown person, requires that every item of the affidavit be subjected to precise judicial scrutiny, separately and independently, to deter-

mine whether the affidavit passes constitutional muster. Additionally, defendant raises several other alleged deficiencies in the affidavit, none of which merit discussion.

This case, on its facts, is not too different from Draper v. United States (1959), 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327, where the question involved was whether the arrest, search, and seizure were lawful where no search warrant was involved. In Draper a federal narcotics agent was told by an informer, whose information the agent had always found to be accurate, that petitioner whom the agent did not know but who was described by the informer, was peddling narcotics and had gone to Chicago to obtain a supply and would return on a certain train on a certain day or the day after. The agent met the train, easily recognized the petitioner from the informer's description, and without a warrant arrested him, searched him, and seized narcotics and a hypodermic syringe found in his possession. These were later admitted in evidence over the objection of petitioner at the trial at which he was convicted of violating a federal narcotics law. The Supreme Court held that even if the information received by the agent from the informer was hearsay, the agent was legally entitled to consider it in determining whether he had probable cause within the meaning of the Fourth Amendment to the United States Constitution, and reasonable grounds within the meaning of 26 U. S. C., section 7607, to believe that petitioner had committed or was committing a violation of the narcotic laws. The information in the possession of the narcotic agent was sufficient to show probable cause as well as reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant. The arrest was lawful and the subsequent search and seizure having been made incident to a lawful arrest were likewise valid.

United States v. Harris (1971), 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723, teaches that an affidavit for a

search warrant may be based on hearsay information and need not reflect direct observations of affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions. In Harris, the affidavit unlike Jones v. United States (1960), 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, did not aver that the informant had previously given "correct information." The court held this was not essential when supported by other information. The instant case is analogous to Jones which did give sufficient information for the magistrate to judge the reliability of the informant.

In Spinelli v. United States (1969), 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637, which is cited extensively by defendant, the court said: "The detail provided by the informant in Draper v. United States * * * provides a suitable benchmark. * * * A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way[5]." Footnote No. 5 reads: "While Draper involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue."

The affidavit herein was sufficient to justify the issuance of the search warrant. It goes to great lengths to outline the underlying circumstances from which the informant concluded the articles were located on the person or in the baggage of the defendant. The flights and the short intervals between departure and return; the very small amount of luggage taken on the flights; and the fact that the flights were to an area of known drug source, as well as the information that the defendant and her husband had a history of association with drugs, would reasonably indicate to a magistrate a drug operation. The underlying circumstances from which the officer concluded the informant was credible

are stated. He had given reliable information in the past, which had resulted in several arrests as well as the recovery of large amounts of narcotics. Testing this affidavit in a common sense, realistic fashion, we can come to but one conclusion: It was amply sufficient to justify the search warrant.

Defendant's next major assignment is that the lower court erred in overruling her motion for new trial based upon newly discovered evidence. Hugh J. McGuire, a chemist, who identified the substance seized as heroin, testified that he held a Bachelor's degree in chemistry and had taken graduate training. In support of her motion for new trial defendant adduced that Mr. McGuire had not received a Bachelor's degree from Creighton University and had not taken graduate training as per his testimony. The court found that neither defendant's counsel nor the Douglas county attorney had reason to believe at the time of the trial that McGuire's testimony as to his academic credentials was inaccurate.

The contention raised by defendant on the motion for new trial is that McGuire's lack of academic credentials renders him incapable of qualifying as an expert witness and giving any opinion as to the result of his analysis of the substance seized. The lower court overruled the motion for new trial, and held: "* * * there is no rational basis to conclude that the discrediting evidence that McGuire did not have a degree or that his training in the various tests were not graduate work, even might have changed the result."

The State agrees that the discovery of Mr. McGuire's falsification of his credentials would constitute newly discovered evidence. The issue is the effect of the falsification of an expert witness' credentials. A motion for new trial for newly discovered evidence will not be granted where the other evidence is sufficient to sustain the verdict. The newly discovered evidence offered in this case is of an impeaching character to discredit the witness.

While the precise issue of the falsification of the credentials of an expert witness has not heretofore been presented to this court, the New Jersey Superior Court considered the precise issue involved in Ginnelly v. Continental Paper Co. (1959), 57 N. J. Super. 480, 155 A. 2d 154. There the witness, who qualified as a construction expert and construction engineer, falsely represented that he had been graduated from Catholic University with a degree in architectural engineering. In overruling the motion for a new trial, the court held: "But more fundamentally, the test is whether the evidence of the plea and conviction, if competent, would probably alter the judgment. In view of the undisputed fact that the witness had four years of preparatory engineering at Stevens, four years of architectural engineering at Catholic University (*without* receiving a degree), and 38 years' experience in the construction and engineering business, we are not prepared to say that the trial judge abused his discretion in ruling that a correct statement of Connolly's qualifications would not probably alter the result."

Did the trial court abuse its discretion in refusing to grant a new trial herein? In Finnern v. Bruner (1960), 170 Neb. 170, 101 N. W. 2d 905, we held: "The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. It must appear that the unsuccessful party had no knowledge of the newly discovered evidence at the previous trial and could not have discovered it by the exercise of reasonable diligence."

In State v. Wycoff (1966), 180 Neb. 799, 146 N. W. 2d 69, we said: "A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified

at the trial." If the probable result of the new evidence would be a different verdict, a new trial should be granted. Such new evidence, therefore, must be of such a character as to render clear and positive that which was before equivocal and uncertain, and be so important to the issues involved as to indicate that upon another trial a different result will probably be reached.

The evidence adduced shows that while McGuire does not have a degree from Creighton University, he has taken 135 hours at that university. He achieved passing grades in 129 hours between 1955 and 1960. His general scholarship was average to below average. Since that time, McGuire has done extensive drug analysis while acting as a chemist and in particular a toxicologist at Luthern Medical Center. He was familiar with and conducted the several tests recognized and available to analyze a sample for the presence or absence of a controlled substance. The principal tests utilized are known as thin layer chromatography, infrared spectral analysis, gas chromatography, and ultra-violet spectral analysis. He took on-the-job training in courses provided by manufacturers of the equipment necessary to conduct these tests.

Both witnesses for the State and the defense, including a qualified chemist at the Lutheran Medical Center laboratory, testified that McGuire was competent to perform the accepted tests utilizing the instruments and equipment in the Lutheran laboratory. In addition, the evidence is very persuasive from several witnesses that while appropriate academic background is relevant, it is considerably less important in the area of toxicology than the ability and competence to perform the tests. The evidence of McGuire's background and training is more than adequate to qualify him as an expert witness notwithstanding his admitted lack of academic credentials.

McGuire's cross-examination at the trial was very limited. The lack of academic credentials, in view of

his extensive background and training in analysis of controlled substances, would not have disqualified him as an expert witness. We agree with the trial judge: "It would be sheer speculation to conclude that the newly discovered evidence would have discredited McGuire to the extent that it probably would have produced a different result or that it even 'might have changed the result' * * *."

Mr. McGuire had been working in the laboratory at Lutheran Medical Center for 13 years. He had done extensive drug analysis while working as a chemist and toxicologist, to the extent of some 500 tests per month between 1971 and 1972. We agree with the trial judge, there is no rational basis to conclude that the discrediting evidence that Mr. McGuire did not have a degree or that his training in various tests was not graduate work would have changed the result. Or, as we phrase it, on this record we cannot say that the new evidence is of so controlling a nature as to probably change the result of the former trial, which is the test we must apply. The trial judge did not abuse his discretion in overruling defendant's motion for a new trial.

Defendant's last assignment of error is that the trial court abused its discretion in imposing a clearly excessive sentence. Defendant was sentenced to 10 years confinement in the State Reformatory for Women. The minimum sentence allowed for the charge of possession of a controlled substance with intent to deliver is 1 year, and the maximum is 10 years. § 28-4,125, R. S. Supp., 1973. Where, as here, the court sets a definite term of years, the minimum sentence becomes the minimum provided by law. § 83-1,105, R. S. Supp., 1972. There is no question the trial judge intended to give defendant the maximum penalty for the offense. Obviously he has not done so.

The sentencing herein was combined with a sentencing on a forgery conviction. The defendant was given the maximum of 10 years on the forgery conviction. This

again being a sentence for a term of years, the minimum is 1 year. The sentence on the forgery conviction was to be consecutive with the sentence imposed herein. Actually, the defendant received two sentences of 1 to 10 years, to be served consecutively and not concurrently. The net effect is the same as a 2 to 20 year sentence. Defendant will be eligible for parole consideration at the expiration of 2 years.

Viewing the situation in the light of the record, we come to the conclusion that the trial judge did not abuse his discretion. The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting as to sentence.

The defendant here, at a single sentencing hearing, was sentenced to 10 years imprisonment on a forgery charge and 10 years imprisonment on a charge of possession of a controlled substance with intent to deliver, with the sentences to run consecutively rather than concurrently. The minimum sentence allowed by law for each of the two offenses was 1 year. The maximum sentence on the controlled substance charge was 10 years, and on the forgery count, 20 years.

The defendant had no convictions and apparently no criminal record prior to the sentencing here. She was 32 years old and the mother of two teenage daughters. In my opinion a maximum 10-year sentence on one count, and a sentence 9 years more than the minimum on the other, with the sentences to run consecutively, is excessive for a first time criminal offender under the facts of these cases.

IN RE ESTATE OF JOSEPH D. CLARKSON, DECEASED. EVELYN BELL CLARKSON, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, SUCCESSOR EXECUTOR OF THE ESTATE OF JOSEPH D. CLARKSON, DECEASED, APPELLANT.

226 N. W. 2d 334

Filed February 27, 1975. No. 39529.

1. **Wills: Estates.** Under our law, the testator's testamentary desires have little or no importance in relation to the best interests of the surviving spouse in electing to take under or against the will.
2. ———: ———. A testator is presumed to know that his widow may lawfully exercise her right under the statute to take against the will, and that such right is paramount to his will.
3. **Wills: Estates: Incompetent Persons.** The statute requires the court to make the election which it deems is in the best interests of the incompetent spouse. This must be made without reference to whether she may be provided for otherwise.
4. ———: ———: ———. A court, in making a choice for an incompetent whether to elect to take under or against the will, must consider only the best interests of the incompetent.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellant.

Erickson, Sederstrom, Johnson & Fortune, for appellee.

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

SPENCER, J.

This is an action under section 30-108(2), R. R. S. 1943. It involves an election on behalf of an incompetent surviving spouse to either take under or against her husband's will. The District Court vacated an order of the county court electing on behalf of the widow to take the provision made for her in her husband's will. The executor prosecutes this appeal. We affirm.

Joseph D. Clarkson, deceased, married Evelyn Bell Clarkson April 16, 1953. Mr. Clarkson had two daughters

from a prior marriage. Mrs. Clarkson had a son and a daughter by a prior marriage. No children were born of the second marriage. Mrs. Clarkson, who is 80 years of age, has been mentally incompetent since June 1965. The record indicates that her chances of recovery were and are nil. The will in question was executed November 18, 1969. The inventory filed in the estate indicates the value of the estate to be $1,229,263.56. The report of the guardian ad litem indicates the net value of the estate is $1,372,224. Only $62,000 is real estate, a Missouri farm valued at $40,000 and the residence property valued at $22,000.

The will makes the following provision for the incompetent: "If my wife, Evelyn Bell Clarkson, survives me, I give, devise and bequeath to the FIRST NATIONAL BANK OF OMAHA, as TRUSTEE for my said wife, an amount equal to one-fourth (¼) of the value of my net estate as finally determined for Federal Estate Tax purposes, unreduced by any taxes." The will directs the trustee to pay all income therefrom to Mrs. Clarkson and in addition provides for such amounts of principal to be paid to her from time to time as the trustee deems necessary or desirable to provide for her proper support and maintenance. The will further provides that upon Mrs. Clarkson's death the trust estate shall terminate and the assets remaining in the trust shall then be distributed and disposed of to such persons in such manner as Mrs. Clarkson by her last will and testament shall direct and appoint. If Mrs. Clarkson fails to exercise the general testamentary power of appointment upon her death, the will provides that the remaining assets shall be distributed as follows: "Twenty-five Thousand Dollars ($25,000) thereof shall be paid to each of my wife's children, JERRY W. MENCK and PEGGY LOU McVEA, with the children of either of them who may be then deceased to take equally the share which the parent would have taken if then living; and the balance of said assets remaining shall be dis-

tributed to my daughters, HELEN E. CLARKSON and RUTH C. BOLLINGER, share and share alike." The will was made at a time when Mrs. Clarkson was incompetent. There is no possibility of her exercising the power of appointment granted in the will because her condition cannot improve.

Pursuant to the provisions of section 30-108(2), R. R. S. 1943, the Douglas county court appointed Jack W. Marer as guardian ad litem to make such investigation as he deemed necessary and to report his recommendation to the court as to whether the court should elect on behalf of Mrs. Clarkson to take the provisions made for her under the last will and testament of Joseph D. Clarkson or to take by descent and distribution as provided by law. The guardian ad litem, after investigation, filed a report recommending that the court renounce the provision made for Evelyn Clarkson under the last will and testament of Joseph D. Clarkson and elect to take by descent and distribution as provided by law. The county judge declined to accept the recommendation. He determined her interests were not better served by renouncing the will but that the equities of the matter dictated that the testamentary plan of Joseph D. Clarkson should be adhered to.

The special guardian of the incompetent prosecuted an appeal to the District Court for Douglas County. The District Judge disagreed with the opinion of the county judge and followed the recommendation made by the guardian ad litem. He found an estate in fee title would be of greater value than a beneficial interest in a trust. He specifically determined that the best interests of the surviving spouse would require renouncing the provisions of the will and taking the estate in fee with full incidence of ownership, notwithstanding that title would vest in her guardian who would have fiduciary limitations on its disposal.

The incompetent, as the second wife of deceased, would receive one-fourth of the estate if she takes under

the statute rather than the will. The parties are in agreement that there is no dollar difference between what Mr. Clarkson left his wife in trust and what she would take by an election. The difference comes about in that a fee title is of much greater value than a beneficial interest in the trust.

While this is a case of first impression in Nebraska, the question has arisen in many other jurisdictions. There is an exhaustive annotation on the subject at page 10 of 3 A. L. R. 3d. As this annotation will illustrate, there is an irreconcilable conflict in the decisions. This conflict arises because of various theories used by the courts in interpreting and defining the meaning of the words "best interests" or similar words which are found in the several statutes under consideration.

Section 30-108(2), R. R. S. 1943, provides as follows: "In the event such surviving husband or wife shall be, at the time of the issuance of letters testamentary, insane or otherwise mentally incompetent to make such election, or shall become insane or mentally incompetent after the time of the issuance of said letters and prior to the expiration of the time limited in subsection (1) of this section for the making of an election, the county court in which the estate of the deceased is being probated shall, by order entered upon the records of said court, either upon its own initiative or upon the petition or application of any person interested in the estate of the deceased, appoint a guardian ad litem whose duty it shall be to make such investigation as shall be necessary and thereupon forthwith report to the court his recommendation as to whether the court should elect on behalf of any such husband or wife to take the provision made for him or her under the will of the deceased, or to take by inheritance and descent and distribution as provided by law. Upon the filing of such report the court shall appoint a time and place of hearing thereon of which notice shall be given to all persons interested in the estate of the deceased as is required to be given

precedent to the admission of a will to probate. All persons interested in said matter may be present and heard at such hearing. The court upon said hearing shall make such election as it deems the best interests of such surviving husband or wife shall require, which election shall be entered upon the records of said court. Any person interested in said estate and affected by such election by the court shall have the right to appeal from said election to the district court of the county in which said county court is located. The procedure on such appeal shall be as provided in sections 30-1601 to 30-1610."

In the so-called minority view, all the decisions in one way or another indicate that the best interests of the incompetent will be served by electing the method which is the most valuable to the surviving spouse. This usually means the one having the greater pecuniary value is the one selected.

The language of the various statutes may differ but essentially most of them will provide that the election should be made which is to the best interests, advantage, welfare, or the like of the incompetent person. Our statute provides that the court should make such election as it deems *the best interests* of the surviving wife or husband shall require. This seems to narrow the range of consideration.

The majority view, as stated in Kinnett v. Hood (1962), 25 Ill. 2d 600, 185 N. E. 2d 888, 3 A. L. R. 3d 1, is that all the surrounding facts and circumstances should be taken into consideration by the court in order to make the election to take under the will or against it. In Kinnett the court says: "It is impractical to delineate the factors which would apply in every case or, in fact, the relative weight to be given each in order to determine what is to the best interest of the incompetent."

The majority rule emphasizes other considerations than monetary. It characterizes the minority cases as placing the election purely on monetary standards or what would result in the larger pecuniary value, to the detri-

ment of other considerations. We concede that in some instances there may be other considerations than monetary which may promote the best interests of the incompetent. What, however, are those other considerations? It is impractical to delineate factors which could apply in every case or to specify the relative weight which should be given to such other possible considerations. If we follow our statutes, the best interests of an incompetent in most instances will require the election which will result in the larger pecuniary value. We cannot agree that the preservation of the decedent's estate plan is a major consideration as found by the county judge and as it appears to be in many cases espousing the majority view. Under our law the testator's testamentary desires have little or no importance in relation to the best interests of the surviving spouse.

In Nebraska we must start with the premise that the testator is presumed to know the law and that his surviving spouse may lawfully exercise her right to take against his will irrespective of his estate plan. In re Estate of Hunter (1935), 129 Neb. 529, 262 N. W. 41. In Hunter we said: "A testator is presumed to know that his widow may lawfully exercise her right under the statute to take against the will, and that such right is paramount to his will." We further held that such election did not render the will inoperative. As to other persons it will be enforced as nearly as may be in accordance with the intention of the testator.

Many of the majority view cases criticize the minority cases, suggesting that they tend to sanction: (1) The interests of the heirs of the incompetent as a consideration; and (2) give too much weight to what the surviving spouse would have done had she made her own election as a consideration. We are in full accord with the view that the interests of possible heirs of the incompetent should play no part in the decision. We would not, however, entirely ignore what the surviving spouse might have done had she made her own election.

We note that while the majority view would not permit a consideration of what the surviving spouse would have done in election, the cases seem to advance the notion that whether the surviving spouse would have wanted to abide by her husband's will should be considered. See Kinnett v. Hood, *supra*. No one can ever say exactly what the incompetent would have done if competent. If, however, we always assume that the surviving spouse would make the election which was in her best interests, there is no problem. If we follow that criteria, we are merely carrying out the intent of our statute.

It seems a little inconsistent under our law to say, as do some of the majority cases, that the election by the court to renounce the will should be made only if necessary to provide for the widow's needs. This would write a restriction into our statute. The statute requires the court to make the election which it deems is in the best interests of the incompetent spouse. This must be made without reference to whether she may be provided for otherwise. We observe that neither section 30-107 nor section 30-108, R. R. S. 1943, which create the right of election and provide the necessary procedural steps, make any mention of or suggest any restrictions under which an election might be made. While a competent surviving spouse may elect to take against the will, even if it would seem obviously against her best interests to do so, a court in making the choice for an incompetent does not have that privilege. It must consider only the best interests of the incompetent.

On the record we find no considerations other than the monetary value of the estate. We find that an estate in fee is of much greater value than a beneficial interest in a trust. We agree with the District Judge that the best interests of the surviving spouse require taking the estate in fee with full incidents of ownership notwithstanding the title would vest in her guardian who would have fiduciary limitations on its disposal.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The testator's will here left to his wife, if she survived him, the exact amount and the specific share of his estate which she would receive if he had no will, but he left it in trust for her proper support and maintenance. The corporate trustee had the power to use all the income and all the principal for those purposes. The wife was given a full power of appointment of all remaining property on her death. At the time he executed the will his wife was incompetent and had been incompetent for some 4 years.

The majority opinion here determines that the best interests of the surviving spouse are better served by renouncing the will because "a fee title is of much greater value than a beneficial interest in the trust." That might well be so if the surviving spouse were competent, but she is not.

While technically an incompetent might be said to have a fee title, in literal practical fact an incompetent during his or her lifetime has no greater beneficial interest in property managed on his or her behalf by a guardian than in property managed by a trustee under the powers granted by the will here.

If there was any reasonable prospect that an incompetent might recover, the basis for the majority opinion might be at least arguably supportable. In this case, however, the evidence is simply undisputed that the surviving spouse is now and always will be incompetent. The entire foundation for the majority opinion here must, and does, therefore, rest on the wholly unsupported conclusion that $343,000 held and used for the maintenance and support of the incompetent surviving spouse during her lifetime has a greater value in the hands of a guardian than it does in the hands of a trustee under the will.

The majority opinion accepts the universal rule that

the interests of possible heirs of an incompetent should play no part in the decision but states that the incompetent's estate must not be ignored. Under our Nebraska statute, the right of a surviving spouse to renounce the will and take a statutory share is personal to the surviving spouse and under no circumstances does it extend to an executor or administrator of the survivor's estate, or to heirs. If a surviving spouse dies before the expiration of the time for exercising the right, the right lapses altogether. The right of election is clearly for the benefit of the surviving spouse alone. Section 30-2315, R. S. Supp., 1974, which does not go into effect until January 1, 1977, makes it very clear that in the case of a protected person, such as the incompetent spouse here, the court shall exercise the election only "after finding that exercise is in the best interests of the protected person *during his probable life expectancy.*" (Emphasis ours.)

The majority opinion here is not only too restrictive as applied in this case, but the impact of the holding upon other cases not presently before us has been largely ignored. It should be noted first that the trust provisions of the will here were obviously drawn to permit the share of the surviving spouse to qualify for the marital deduction under the federal estate tax laws. It must be noted too that thousands of Nebraska citizens have drawn wills which contain similar trust provisions which fully qualify for marital deduction treatment under federal laws. Because of the impact of estate and inheritance taxes, many husbands and wives have drawn and prepared separate wills to fit their joint estate tax plans. The majority opinion, if followed in the future, will now mean that the county court will be required to renounce a will on behalf of an incompetent surviving spouse whenever the will leaves the share of the surviving spouse in trust under marital deduction provisions similar to those here, even though the amount received by the incompetent's guardian will be identically the same.

The holding necessarily poses a critical problem for estate tax planners where incompetence of a surviving spouse is involved.

The rule adopted by the majority of courts offers a much broader and sounder basis for making the appropriate election on behalf of an incompetent surviving spouse. It likewise permits an equitable approach on an individual case basis. The majority rule and the distinctions between it and the minority rule are well set out in the leading case of Kinnett v. Hood, 25 Ill. 2d 600, 185 N. E. 2d 888, 3 A. L. R. 3d 1. We quote from that case: "Courts are in agreement that the primary consideration is the best interest of the incompetent. There is a wide divergence of opinion, however, as to what constitutes the best interest of an incompetent. In reviewing the cases from foreign jurisdictions the real difference seems to be that one school of thought (apparently the minority,) would consider the welfare of the incompetent to mean the greatest amount of property obtainable absolutely or in fee to the exclusion of other considerations. The majority of jurisdictions on the other hand, would consider all the surrounding circumstances, where ample provision is made in the will for the welfare and comfort of the incompetent spouse, including the testamentary design and purpose of the testator and that election which the spouse might have made if he or she were competent. * * * There are strong arguments for each view, * * *.

"We believe that the minority view is too restrictive. By placing the election purely upon monetary consideration, too much emphasis is placed upon the best interest of incompetents' estates (and their heirs after death), with a possible detriment to the personal welfare, comfort and best interest of the incompetent. * * * The majority view that all of the surrounding facts and circumstances should be taken into consideration by a court in order to make the election to take under a will or against it seems to be the more equitable."

Where, as here, the trust provisions in a will for the welfare and comfort of an incompetent surviving spouse during her lifetime are at least equal to, or better than, the statutory provisions which regulate the providing of such welfare and comfort by a guardian, and the amount available is ample and exactly the same in either case, the testator's property should ordinarily be permitted to pass under the will.

Section 30-108(2), R. R. S. 1943, specifically places the responsibility for making the election for an incompetent spouse upon the county court. In this case that court made specific findings of fact, none of which are challenged. The county court then exercised the election to take under the will. The county court properly and correctly found the facts and exercised its judicial discretion under section 30-108(2), R R. S. 1943, and its judgment should be affirmed.

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

CHARLES B. MATZKE ET AL., APPELLANTS AND CROSS-APPELLEES, JAMES S. WAKE ET AL., INTERVENERS-APPELLANTS AND CROSS-APPELLEES, V. CITY OF SEWARD, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

226 N. W. 2d 340

Filed February 27, 1975. No. 39537.

1. **Statutes: Intent.** The legislative intent is the cardinal rule in the construction of statutes. All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.
2. **Statutes: Municipal Corporations: Assessments.** The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed, and every reasonable doubt as to the

extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer.

3. **Statutes: Municipal Corporations.** A water extension district described in section 19-2402, R. R. S. 1943, is an area of land or contiguous tracts of land located apart and outside any area served and benefited by an existing municipal water service system, wherein water extension mains are to be constructed and municipal water service extended.

Appeal from the District Court for Seward County: HOWARD V. KANOUFF, Judge. Affirmed in part, and in part reversed and remanded.

Blevens, Bartu, Blevens & Jacobs, for appellants.

Russell A. Souchek, for appellees.

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

COLWELL, District Judge.

Four separate suits were filed by property owner plaintiffs to enjoin the City of Seward, Nebraska, and its officers, defendants, from levying special assessments for improvements made in water extension districts Nos. 13, 15, 16, and 17 created by ordinance No. 895, pursuant to section 19-2402, R. R. S. 1943. Plaintiff Lutheran Church-Missouri Synod, a corporation, owns property in districts Nos. 13 and 15; plaintiff School District of Seward, Seward County, Nebraska, owns property in district No. 17; more than 50 plaintiffs own properties in either districts Nos. 13, 15, or 16; plaintiff Concordia Teachers College of Seward owns property in districts Nos. 13, 15, and 16; and interveners-plaintiffs Wakes own property in district No. 17. The hearing on the equalization of assessments noticed and set for February 27, 1973, was restrained pending trial. The four cases were consolidated for trial, issues joined, and trial had. The trial court granted an injunction as to districts Nos. 15 and 16, and it denied injunction as to districts Nos. 13 and 17. Separate appeals and cross-appeals were perfected to this

court for trial de novo to enjoin defendants from levying special assessments in districts Nos. 13 and 17, and defendants' cross-appeal in districts Nos. 15 and 16 to declare those districts subject to special assessments.

Defendants do not challenge injunction as a proper remedy to be invoked against an invalid or improperly levied special assessment. Futscher v. City of Rulo, 107 Neb. 521, 186 N. W. 536. All parties agree that section 19-2402, R. R. S. 1943, was the statutory authority relied upon by defendant City of Seward in these proceedings.

Seward, now a city of the first class, had a study made in 1966-67 by its consulting engineers, Henningson, Durham & Richardson, Omaha, Nebraska, reported as "A General Development Plan for Seward, Nebraska." The plan covered all areas of interest to the city projected to 1985, including its water system, with recommendations to improve, expand, and increase its water supply, transmission lines, storage, and area served. Population growth was projected from just under 5,000 to 8,500 persons in 1985. Some of the water system recommendations were completed prior to December 1971.

Furthering the plan, the city enacted ordinance No. 895 on December 7, 1971: "An ordinance creating *Water Extension Districts* Numbers 13, 14, 15, 16 and 17 of the City of Seward, Nebraska, defining the boundaries thereof, directing the construction of the extensions of water mains and providing the cost of the extension be assessed against the property in the district to the extent of special benefits. * * * Section 1. *The mayor and council * * * deem it necessary and advisable to extend the municipal water service to territory beyond the existing system as herein provided.*" (Emphasis supplied.)

The ordinance, in substance, by separate sections creates water extension districts Nos. 13, 14, 15, 16, and 17. The outer boundary of each district is described by metes and bounds; there is a description of the proposed water main construction as to size and location, but not as to material, and reference is made to the plans

and specifications on file with the city clerk and the estimate of cost. The locations of the water mains to be installed are described. The ordinance also provides for the letting of a contract for the work by bids and the assessment of the cost of the improvements in the districts against the properties therein as specially benefited.

District No. 13 is an irregularly shaped area on the east side of the city containing 98 separate tracts. In this district a new water main was constructed and extended by easement agreement across the athletic practice field of plaintiff Concordia Teachers College of Seward, Nebraska, a corporation. With the exception of this new easement line all tracts in district No. 13 were served by the existing city water system. District No. 14 included all territory and area not previously served by the city water system; the formation of that district and the special assessment levy is not a part of this appeal. District No. 15, containing 51 tracts, and district No. 16, containing 8 tracts, are both generally rectangular in shape located on the east side of the city; all the tracts included in both districts were being served by the city water system at the time. District No. 17 containing 26 tracts is an irregularly shaped area on the north and west side of the city; a part was outside the city limits; a part of the area was previously served by city water service; and a part had not been previously served.

The location and boundaries of the several water extension districts were determined by the city's consulting engineers who also prepared the schedule of benefits and special assessments for the several tracts therein.

A contract was let February 15, 1972, for the water improvements described in ordinance No. 895. Generally, the contract provided for two new water wells, one 750,000 gallon elevated storage tank at the north edge of the city, and the replacement of some water mains and the addition of new water mains with larger capac-

ity. A federal grant of $285,600 was obtained, but no part of these funds were used in payment of work in any of the water extension districts. The total bid cost of the work done for all water transmission mains including those in the water extension districts was $241,814.10. Of this amount $99,587 was for water extension districts Nos. 13, 15, 16, and 17.

The main issue presented is the interpretation of section 19-2402, R. R. S. 1943. Plaintiffs contend the land area that can be included in a water extension district is limited to an area outside of and apart from any area already served by the city water system, and that water extension districts Nos. 13, 15, 16, and 17, and the proposed special assessments against their property therein are void for the reason that they include property already served. Defendants argue that the statute provides authority for the city to provide adequate water facilities for both its existing system and those areas beyond which require service, and that the cost of any improvement so made in the district should be paid by the property owners by special assessment to the extent of the benefit.

"The legislative intent is the cardinal rule in the construction of statutes. * * * All statutes relating to the same subject are considered as parts of homogeneous system and later statutes are considered as supplementary to preceding enactments. So, also, statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together." Enyeart v. City of Lincoln, 136 Neb. 146, 285 N. W. 314.

"In construing a statute the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately." Rozgall v. Dorrance, 147 Neb. 260, 23 N. W. 2d 85.

"The general rule in this state in construing applicable statutes is that the legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer." Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753. See, also, Futscher v. City of Rulo, *supra*; Manners v. City of Wahoo, 153 Neb. 437, 45 N. W. 2d 113.

We consider the general statutory authority of a city of the first class to establish, construct, extend, enlarge, use, and pay for its water system.

Sections 16-667 to 16-670, R. R. S. 1943, were first enacted in 1901. Section 16-667, R. R. S. 1943, provides: "The city may, by ordinance, lay off the city into suitable *districts* for the *purpose* of *establishing* therein a *system of* * * * *water service;* to provide such systems and regulate the construction, repair, and use of the same; to compel all proper connections therewith and branches from other streets, avenues, and alleys, and from private property; * * *." (Emphasis supplied.) Sections 16-668 to 16-670, R. R. S. 1943, are implementing procedures for construction, payment, special assessments, and the issuance of bonds for "water mains" in a "water district."

Sections 18-401 to 18-411, R. R. S. 1943, were enacted in 1921. Section 18-401, R. R. S. 1943, provides: "In all cities * * * owning or operating a waterworks system * * * and wherein water * * * is supplied by municipal authority for domestic, mechanical, public or other purposes, * * * the authorities having general charge, supervision, and control of all matters pertaining to the said water * * * supplied by any city * * * shall have the power and authority, whenever they deem it proper and necessary so to do, to create a *water main district* * * * either within or without the corporate limits of the political subdivision involved, and to order and cause to be

made *extensions* or *enlargements* of *water mains* * * * *through said district* * * *." (Emphasis supplied.)

Section 18-403, R. R. S. 1943, requires the city to publish notice of the creation of the water main district, and of the ordering of extension or enlargement of the water main therein; it provides the owners of real estate therein have 30 days to file a written protest. Section 18-404, R. R. S. 1943, provides: "If within said thirty days there be filed * * * a written protest signed by the record owners of a majority of the foot frontage of taxable property in such district, then the filing of such protest shall operate as a repeal or rescission of such ordinance * * *." Section 18-405, R. R. S. 1943, limits the assessments against the real estate in the district to actual cost, "not exceeding the cost of installing a six-inch water main." This latter limitation was deleted by amendment in 1972.

Sections 19-2402 to 19-2407, R. R. S. 1943, were enacted in 1961 as L.B. 142 providing generally for the creation of sanitary sewer and water extension districts, construction of water extension mains, special assessments, equalization, and revenue and general obligation bonds. Section 19-2402, R. R. S. 1943, provides: "Whenever the mayor and council of any city of the first or second class * * * shall deem it necessary and advisable to extend municipal water service * * * *to territory beyond the existing system,* such municipal officials may, by ordinance, create a district or districts to be known as * * * *water extension districts* * * * *for such purposes,* and such district or districts may include properties within the corporate limits of the municipality and one mile beyond the same. * * * Said ordinance shall also state the outer boundaries of the district or districts in which it is proposed to make special assessments. When *such extension* of the utility service involved *is completed,* the municipality *shall compel all proper connections therewith* of occupied properties in such utility district, and may provide a penalty for failure to comply

with regulations of the municipality pertaining to such utility districts." (Emphasis supplied.)

The remarks of Senator Ernest H. Staubitz, the introducer of L.B. 142, as taken from the official Legislature history, provide some background as to the purpose and intent of that legislation: "For some time municipal officials generally have recognized the need to extend water works and sanitary sewer systems to new additions. Cities presently have authority to create water and sewer districts, but there is no authority to issue revenue and/or general obligation bonds to provide funds for the cost of system extensions. LB 142 is intended to provide authority for the creation of needed waterworks * * * extensions, together with assessment of benefits, connection fees, water * * * rates and issuance of bonds for the funding of the costs of the extensions. * * * The bill is extended, the purpose accompanying the bill is * * * to provide means for authority for cities to issue bonds where it becomes necessary to create extensions of both water systems and the sanitary sewer systems. Cities that are having an explosion of population have found that it is necessary, of course, to extend the original system and these extensions are called districts, and have to be created and have to be financed."

The critical language of section 19-2402, R. R. S. 1943, is: "Whenever the mayor and city council of any city * * * shall deem it necessary and advisable to *extend* municipal water service * * * to *territory beyond the existing systems,* such municipal officials may, by ordinance, create a *district* or *districts* to be known as * * * *water extension districts.*" (Emphasis supplied.) From The Random House Dictionary, 1966, the following definitions appear: "*Extend*" is to lengthen, or expand. "*Extension*" is the state of being extended. "*Territory*" is any tract of land. "*Beyond*" is farther on, or away, past. See, also, Northwestern Light & Power Co. v. Town of Grundy Center, 220 Iowa 108, 261 N. W. 604; City of Hamlin v. Brown-Crummer Inv. Co., 93 F. 2d 680.

"In the absence of anything to indicate the contrary, words must be given their ordinary meaning." Mook v. City of Lincoln, 146 Neb. 779, 21 N. W. 2d 743.

It was the limited intention and purpose of the Legislature to provide cities of the first and second class and villages with authority to expand and extend their water systems to municipal additions and to other territory away and apart from their existing water service systems in order to meet the demands and needs of growing cities and villages, and to provide them with authority to create districts wherein water mains and service could be provided, special assessments made, and bonds issued for payment of construction. We conclude that a water extension district as described in section 19-2402, R. R. S. 1943, is an area of land or contiguous tracts of land located apart and outside any area served and benefited by an existing municipal water service system, wherein water extension mains are to be constructed and municipal water service is extended.

It is clear that water extension districts Nos. 13, 15, 16, and 17 in ordinance No. 895 do not meet the tests of a water extension district since the land in each district was either partly served, or wholly served, by the Seward city water system at the time the ordinance was adopted.

Although not argued by the parties, there is the question of the legality of the city's acts under any statutory authority. We find none. The work done in all four districts was in the nature of extending and enlarging the existing water system, which would lend itself to applying sections 18-401 to 18-411, R. R. S. 1943; however, the city did not give the notice required in section 18-403, R. R. S. 1943.

The city had no authority in these proceedings to levy special assessments on the several tracts of land owned by plaintiffs and interveners. The prayer of each petition should be granted. The City of Seward is enjoined from levying special assessments pursuant to its

ordinance No. 895 for improvements made to the city water system against any of the respective tracts of land owned by plaintiffs and interveners in water extension districts Nos. 13, 15, 16, or 17.

It is not necessary to consider the other issues presented by the appeals. The costs are charged to defendant, City of Seward.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

McCOWN, J., participating on briefs.

ORVAL O. JENSEN, APPELLEE, V. HAWKINS CONSTRUCTION COMPANY, APPELLANT, IMPLEADED WITH SCHOOL DISTRICT # 66 OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

226 N. W. 2d 346

Filed February 27, 1975. No. 39552.

1. **Negligence: Proximate Cause.** A party is answerable only for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the dominant cause.
2. **Negligence: Licensees: Property.** A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if (1) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger; (2) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved; and (3) the licensees do not know or have reason to know of the condition and the risk involved.
3. ———: ———: ———. A duty of a possessor of land to warn a licensee may arise even though a defect or condition is in fact open and obvious where the circumstances are such that there is reason to believe the risk of harm involved would not be anticipated or appreciated.

4. **Negligence: Licensees.** To constitute want of due care it is not required that a person should have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that he places himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act.
5. **Negligence: Trial.** The question of the existence of negligence or contributory negligence is for the trier of facts where different minds may reasonably draw different conclusions from the evidence.
6. **Assumption of Risk.** It is essential to the application of the doctrine of assumption of risk that the plaintiff have knowledge of the unreasonable character of the risk.

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

Harry L. Welch and Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

Morsman, Fike, Davis & Polack and David S. Lathrop and Richard L. Swenson of Lathrop, Albracht & Dolan, for appellee Jensen.

Edwin Cassem of Cassem, Tierney, Adams & Henatsch, for appellee School Dist. # 66.

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

MCCOWN, J.

This is an action for personal injuries sustained by the plaintiff, Orval O. Jensen, a licensee, in a fall on a concrete floor in an auditorium then under construction by the defendant, Hawkins Construction Company. The jury returned a verdict against the defendant Hawkins in the sum of $30,000 and the defendant has appealed.

Plaintiff is a counselor at Westside High School in Omaha, Nebraska. On November 5, 1970, at 8:30 a.m., Mr. Urosevich, a parent of one of the students, met with the plaintiff in plaintiff's office in the school building. An auditorium addition to the school building had been

under construction by the defendant, Hawkins Construction Company, for some time, but was not yet fully completed. At the conclusion of plaintiff's conference with Mr. Urosevich, the plaintiff offered to show the new auditorium to Mr. Urosevich and the two men proceeded to the auditorium, which is connected to the main building by a hallway.

At the end of the hallway there are steps straight ahead that go up to the balcony of the auditorium and steps to the left and right which descend to the foyer across the rear of the main floor. Plaintiff and Mr. Urosevich went down the steps leading to the foyer and saw no ropes, sawhorses, signs, or warnings of any kind at the top of the steps. One of four double-door entrances to the auditorium was immediately ahead of them. The right-hand door was open and swung back against the wall. As they approached, they saw no warning signs. There was some illumination but it was not lighted too well. As the plaintiff entered the auditorium, he observed that the concrete floor in the auditorium looked like it was wet. Plaintiff had been in the area previously with other faculty and parents and was acquainted with it.

The plaintiff walked into the auditorium first and Mr. Urosevich was a step or two behind him. The plaintiff took one or two steps into the auditorium and fell, injuring his back. The surface of the floor was extremely slippery and plaintiff slipped at the point where the floor starts to slope down. The substance on the floor was a floor sealer which is placed on the concrete and operates as a hardening agent. The sealer is extremely slippery when wet and has a noxious odor. It was described as "slicker than ice."

The defendant's employees had begun to apply the sealer at 8 a.m. that morning. Prior to commencing the work, the project superintendent had placed a makeshift sign on the outside of each of the four entrances. The sign at the entrance involved was an 8½ x 11-inch

piece of white notepaper taped to the door handle. Handprinted on it were the words "Sealing Floor. Keep Out." There were no locks on the doors and when the door was open and back against the wall, the sign was hidden. There is no evidence in the record as to how the door was opened nor as to how long it had been open before the plaintiff and Mr. Urosevich arrived. Five of defendant's employees were working in the auditorium at the time of the accident.

The plaintiff was treated as a licensee for purposes of submission of the issue of defendant's negligence to the jury and there is no dispute here as to that issue. The jury verdict was for the plaintiff in the sum of $30,000.

The defendant contends it was entitled to a directed verdict upon the ground that there was insufficient evidence of defendant's negligence to go to the jury; that the plaintiff was guilty of contributory negligence as a matter of law; and that the court erred in holding that the plaintiff did not assume the risk of injury under the facts here. The parties concede, for the purpose of this appeal, that the plaintiff was a licensee and that as to a licensee the duty of an occupier is to give notice of traps or concealed dangers. See Von Dollen v. Stulgies, 177 Neb. 5, 128 N. W. 2d 115. The defendant's position is that the warning placed on the door was all the warning that was required, and that because the door was opened by some unknown persons, the action of such unknown persons became an efficient intervening cause, which relieves the defendant from liability to warn. Here the court instructed the jury that the negligence of the defendant had to be the proximate cause of plaintiff's injury and defined proximate cause as "that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury or damages." The defendant did not request any instruction defining efficient intervening cause.

A party is answerable only for the natural, probable, reasonable, and proximate consequences of his acts; and

where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, *and not reasonable in the nature of things to be contemplated or foreseen by him,* and produces the injury, it is the dominant cause.

If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence. See Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

In reality the issue here is not whether the person who opened the door and moved the sign was an intervening cause but, instead, is whether or not the defendant could have reasonably foreseen the possibility that under the factual circumstances present here someone might open the door and hide the sign. Under the evidence here, that issue was for the jury.

It is also argued that the floor sealer here was not the type of hidden danger or trap which required a licensee to be warned but was an open and obvious condition. Section 342, Restatement, Torts 2d, provides: "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

"(a) the prossessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

"(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

"(c) the licensees do not know or have reason to know of the condition and the risk involved."

Comment c to that section states: "The possessor's duty also arises if he has had peculiar experience which

enables him to realize the risk involved in a condition which he should recognize as unlikely to be appreciated by his licensee as an ordinary man or where he knows that his licensee's experience and intelligence is likely to prevent him from appreciating the risk which is appreciable by a man of ordinary experience and judgment."

There is no evidence here that any ordinary man in the position of the plaintiff could or should have known that the liquid on the floor was concrete sealer which was extremely slippery and slick as ice. A duty to warn may arise even though a defect or condition is in fact open and obvious where the circumstances are such that there is reason to believe the risk of harm involved would not be anticipated or appreciated. Although we find no case involving a concrete floor sealer, analogous factual situations support the conclusion that the jury could and did find the floor sealer here created a deceptive condition not apparent to an ordinary individual and as to which the defendant had a duty to warn a licensee. See Touhy v. Owl Drug Co., 6 Cal. App. 2d 64, 44 P. 2d 405.

The defendant also contends that plaintiff was guilty of contributory negligence as a matter of law, and that the issue should not have been submitted to the jury. The defendant argues that plaintiff knew the auditorium was under construction and saw the wet appearance of the floor, and argues from that that the danger was open and obvious and plaintiff was therefore contributorily negligent as a matter of law.

We have held many times that to constitute want of due care it is not required that a person should have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that he places himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act. See Lorence v. Omaha Public Power Dist., 191 Neb. 68, 214 N. W. 2d 238.

The question of the existence of negligence or contributory negligence is for the trier of facts where different minds may reasonably draw different conclusions from the evidence. Niemeyer v. Tichota, 190 Neb. 775, 212 N. W. 2d 557. In this case, reasonable minds might well disagree as to whether the plaintiff knew or should have known of the danger, or appreciated the risk of harm involved.

Finally, the defendant contends that the court erred in failing to submit the issue of assumption of risk to the jury. The defense of assumption of risk presupposes (1) that the plaintiff had some actual knowledge of the danger; (2) that he understood and appreciated the risk therefrom; and (3) that he voluntarily exposed himself to such risk. Therefore, except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk. See 57 Am. Jur. 2d, Negligence, § 281, p. 674. It is essential to the application of the doctrine of assumption of risk that the plaintiff have knowledge of the unreasonable character of the risk. See Knutson v. Arrigoni Bros. Co., 275 Minn. 408, 147 N. W. 2d 561. Here there is no evidence that the plaintiff had knowledge of the dangerous character of the condition nor appreciated the risk of harm involved. The issue of assumption of risk was properly withheld from the jury.

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

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein for the reason that the motion for judgment notwithstanding the verdict should have been sustained. At most, the plaintiff was a mere licensee, subject to the rights and obligations of a licensee so far as Hawkins

Construction Company was concerned. A licensee, who comes upon premises by virtue of the possessor's consent, either by invitation or permission, express or implied, takes the premises as he finds them and the duty of the possessor is not to willfully or wantonly injure the licensee, and in this connection the possessor has a duty to give warnings only of traps or concealed dangers. See Van Dollen v. Stulgies (1964), 177 Neb. 5, 128 N. W. 2d 115.

There was no opportunity for Hawkins' employees to do more than they did in the circumstances herein. They placed a warning sign on the doors and the doors were closed. If the door was open when the plaintiff entered about 9:45 a.m., it was opened by persons unknown to the defendant Hawkins. I cannot believe that Hawkins was required to post a guard on the door to see that it was not opened to keep out curious trespassers.

The slippery floor was in plain sight. In fact, the plaintiff admitted that he saw the wet floor before he entered the auditorium. Under the circumstances I cannot understand why this would not be sufficient to alert plaintiff to the possibility he should not step on the floor. The fact that it was more slippery than he anticipated does not convert it into a trap or concealed danger known to the defendant and unknown to and unobservable by the plaintiff in the exercise of ordinary care. Yet, this is the holding in the majority opinion. In my judgment, the plaintiff failed to establish liability on the part of Hawkins Construction Company.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. KENNETH J. FREEMAN, APPELLANT.

226 N. W. 2d 351

Filed February 27, 1975. No. 39671.

1. **Guilty Plea: Hearings.** A plea of guilty made with full knowl-

edge of the charge and the consequences of the plea will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement.

2. **Guilty Plea: Hearings: Motions, Rules, and Orders.** A motion to withdraw a plea of guilty should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds are established by clear and convincing evidence.

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

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

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

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

BOSLAUGH, J.

After a plea of nolo contendere to robbery, the defendant was sentenced to imprisonment for 5 to 7 years. He has appealed and contends the trial court erred in refusing him permission to withdraw the plea.

The defendant had been placed on probation in December 1972, for larceny from the person. He was on probation on April 7, 1974, the time of this offense. He was originally charged with robbery and use of a firearm in commission of a felony. Pursuant to a plea bargain, the State agreed to drop the second charge and not prosecute for violation of probation.

The defendant was represented by private counsel throughout the proceedings in the District Court. The arraignment in the District Court complied with all constitutional requirements and the record shows the plea was a voluntary and intelligent choice among available alternatives.

On April 23, 1974, four days after the arraignment, the defendant appeared in open court and made an oral

motion to withdraw his plea. The defendant stated he had taken medication the night before the arraignment, was drowsy at the time of the arraignment, and there were a lot of things he didn't understand. The trial court stated the defendant had appeared to be normal at the time of the arraignment and refused to consider the oral motion. The trial court instructed the defendant and his lawyer to file a written motion stating grounds for withdrawal of the plea upon which an evidentiary hearing could be held. No written motion was ever filed and the record does not show what medication the defendant had taken the night before the arraignment.

The defendant appeared for sentencing on May 24, 1974. When asked if he had anything to say before being sentenced the defendant requested the sentencing be delayed. No formal grounds for a continuance were stated. The trial court noted the defendant had been arrested 14 times during his probation and proceeded to impose sentence.

For the purposes of this case, the plea of nolo contendere was equivalent to a plea of guilty. A plea of guilty made with full knowledge of the charge and the consequences of the plea will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Williams, 191 Neb. 57, 213 N. W. 2d 727. A motion to withdraw a plea of guilty should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds are established by clear and convincing evidence. State v. Johnson, 187 Neb. 26, 187 N. W. 2d 99.

There is no showing of a manifest injustice in this case. The defendant had ample opportunity to file a written motion and make a formal showing if any grounds existed to permit a withdrawal of the plea. The record does not sustain the defendant's claim of error in refusing to permit withdrawal of the plea.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. GLENN, APPELLANT.

226 N. W. 2d 137

Filed February 27, 1975. No. 39679.

1. **Escape: Words and Phrases.** "Break such custody" in section 28-736, R. R. S. 1943, does not mean force is required. It is unlawfully leaving a place of confinement which constitutes the breaking of custody and escape.
2. **Escape: Penal Institutions.** An escapee breaks such custody whenever he escapes by subterfuge, force, by walking away, or failing to return from a temporary leave.

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

T. Clement Gaughan, Richard L. Goss, and James E. Glenn, pro se, for appellant.

Clarence A. H. Meyer, Attorney General, and Terry R. Schaaf, for appellee.

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

SPENCER, J.

Defendant appeals his conviction for the offense of escape from custody. Defendant assigns as error: (1) The insufficiency of the evidence; (2) the denial of his motion to permit the jury to inspect the place of the alleged offense; (3) double jeopardy; (4) excessive sentence; and (5) by a supplemental pro se brief, defendant alleges section 28-736, R. R. S. 1943, is unconstitutionally vague. We affirm.

During December 1973, defendant was serving a term of 60 days in the Lincoln city jail. He would have been eligible for release on December 30, 1973. On December

20, 1973, about 11:50 p.m., a jailor was detailed to go to the area where defendant was being confined with other prisoners to bring a prisoner by the name of Richard Rankins to the front desk, since he was to be released at 12 midnight. The jailor went to the area in question and asked an inmate his name. This inmate, who was the defendant, replied, " 'Richard Rankins.' " The defendant came out of the cell when the barred doors were opened. The jailor again asked the defendant his name and was again told it was " 'Richard Rankins.' " Defendant was taken to the front desk where an officer delivered the personal effects of Richard Rankins to him, and told him he would have to sign for his property. The defendant signed the name "Rich Rankins." There was no dispute in the evidence, the inmate released as Richard Rankins was the defendant herein.

Defendant's first contention is that there was not enough evidence to support the verdict. He contends he was not guilty of the offense of escape because the evidence showed conclusively that he was released from jail by the officers. Section 28-736, R. R. S. 1943, so far as material herein, provides: "If any person * * * confined in any jail * * * shall break such custody and escape therefrom, or attempt to do so, * * *." "Escape" is defined in Webster's New International Dictionary (2d Ed.), Unabridged, p. 871, as follows: "To get away * * * to break away, get free, or get clear * * *." When a person intentionally leaves a place of legal confinement by subterfuge, he does so to get away, and this constitutes a breaking of custody and an escape therefrom.

Defendant does not seriously contend that he did not escape. He claims that he did not within the meaning of the statute "break such custody and escape therefrom." We assume defendant is arguing that an element of the crime of escape under this section requires proof that the escapee used force, or actually performed some physical breaking in effecting his escape. This conclu-

sion would be inconsistent with previous holdings of this court. See State v. Mayes (1973), 190 Neb. 837, 212 N. W. 2d 623. "Break such custody" does not mean force is required. It is unlawfully leaving a place of confinement which constitutes the breaking of custody and escape. An escapee breaks such custody whenever he escapes by subterfuge, force, by walking away, or failing to return from a temporary leave.

Defendant's second assignment of error pertains to the rejection of a defense motion to permit the jury to make a tour of the jail area and the cell block areas which were testified about in the case. Exhibit 3 used at the trial was a copy of a detailed professionally planned plat of the area in question. This plat was used by various witnesses as they testified. No one questioned the adequacy and accuracy of the drawing. Section 29-2017, R. R. S. 1943, so far as material herein, provides: "Whenever in the opinion of the court it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of the sheriff, to the place which shall be shown to them by some person appointed by the court." To show the jury the place from which the defendant escaped would have served no useful purpose herein. Considering the possible security problems inherent in a visit by the jury to this area of the jail when no specific issue was involved, we hold the trial court did not abuse his discretion in rejecting the defense motion.

It seems to be defendant's position that he was subjected to double jeopardy because after being extradited from the State of Illinois pending trial, he was confined in a cell by himself rather than in a cell with other inmates. This contention is frivolous on its face.

Defendant, who had two previous felony convictions, contends that his sentence was excessive. He also urges this court to consider the refusal of the trial court to grant him credit for jail time while awaiting conviction

and sentencing. Defendant was sentenced to the Nebraska Penal and Correctional Complex for a period of not less than 1 year nor more than 2 years, said sentence to be consecutive to any sentence being served or to be served by the defendant. The punishment provided by section 28-736, R. R. S. 1943, is a fine of not more than $500 or punishment by confinement in the Nebraska Penal and Correctional Complex for a period of not less than 1 year nor more than 10 years. The record indicates that while the defendant had almost served his time on the previous offense, there were two detainers against him when he escaped. The trial judge advised the defendant that he had taken his previous jail time into consideration in passing sentence. The defendant's sentence is well within the minimum range of the statutory limits. On the record there is no evidence of an abuse of discretion.

Defendant's last assignment of error, by way of a pro se supplemental brief, argues that section 28-736, R. R. S. 1943, is vague and therefore unconstitutional. As we understand defendant's brief, it centers on his contention that the statute does not purport to give an interpretation generally applicable to "break." What we have said heretofore sufficiently answers this contention.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILL HILDERBRAND, APPELLANT.

226 N. W. 2d 353

Filed February 27, 1975. No. 39702.

1. **Criminal Law: Courts: Judges: Trial.** There is no requirement that the arraignment and the sentencing hearing be conducted by the same District Judge.
2. **Criminal Law: Presentence Reports: Sentences.** Unless it is impractical to do so, the court shall not impose sentence upon

an offender convicted of a felony without first ordering a presentence investigation of the offender and giving due consideration to the report of the investigation.

Appeal from the District Court for Grant County: KEITH WINDRUM, Judge. Affirmed.

Wade H. Ellis, for appellant.

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

BOSLAUGH, J.

The defendant was sentenced to imprisonment for 2 to 6 years for possession of a forged check with intent to defraud. He has appealed and contends the sentencing procedure was erroneous and the sentence was excessive.

The check involved in this case was for $20. It was dated August 16, 1971, and drawn on the account of Webb Richard in the Bank of Hyannis. The check was cashed at Ranchland Conoco of Hyannis, Nebraska.

The defendant was originally charged with uttering the forged check. On September 27, 1973, the defendant was arraigned before Judge Stuart. The information was amended at that time to charge possession of a forged check. The defendant entered a plea of guilty and his bond was continued. On November 17, 1973, the defendant was notified to appear for sentencing on December 27, 1973.

On December 26, 1973, the defendant was arrested in Oklahoma for driving while intoxicated. When the defendant failed to appear for sentencing a bench warrant was issued. After completing his sentence in Oklahoma, the defendant waived extradition and was returned to Nebraska. Sentence was imposed on May 22, 1974, by Judge Windrum. There is no requirement that the ar-

raignment and the sentencing hearing be conducted by the same District Judge.

After accepting the defendant's plea of guilty on September 27, 1973, the trial court ordered a presentence report be prepared by the district probation office. A report dated November 9, 1973, was prepared by the chief adult probation officer and a copy of the report was forwarded with the record in this case as provided in Rule 7h of the Rules of the Supreme Court, 1974. The record shows the report was available at the time of the sentencing hearing and was examined by both the trial court and counsel for the defendant. Contrary to the contention of the defendant, the record shows compliance with section 29-2261, R. S. Supp., 1972, and State v. Jackson, 192 Neb. 39, 218 N. W. 2d 430.

Section 28-602, R. R. S. 1943, provides a penalty of imprisonment for 6 months to 10 years and a fine of not to exceed $1,000 for possession of a forged instrument. The defendant has a conviction record of at least 5 felonies and 13 misdemeanors, including some crimes of violence. Under these circumstances the sentence was not excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting as to sentence.

To sentence an alcoholic to 2 to 6 years imprisonment for possession of a forged $20 check, in my opinion, is excessive. It may be appropriate to repeat the comment that the punishment does not fit the crime although it may fit the defendant.

ROBERT E. DEWEY, APPELLEE AND CROSS-APPELLANT, V. M. ELLEN SIM DEWEY, APPELLANT AND CROSS-APPELLEE.
226 N. W. 2d 751

Filed March 6, 1975. No. 39324.

SUPPLEMENTAL OPINION

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed.

Bauer, Galter & Geier, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit and Walter E. Zink, for appellee.

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

CLINTON, J.

On December 12, 1974, we filed our opinion herein. Dewey v. Dewey, 192 Neb. 676, 223 N. W. 2d 826. While our original opinion does not expressly so state, we were in fact ruling upon a motion of the appellee to dismiss. That motion had been filed previous to the filing of briefs and we had reserved ruling thereon. Subsequently briefs were filed and oral argument heard on all issues raised in the briefs. In his brief the appellee asserted a cross-appeal, assigning errors under Rules 1 d and 8 b 3, Revised Rules of the Supreme Court, 1974. This cross-appeal attacked the order of the District Court awarding additional alimony to the appellant.

It is now called to our attention that our ruling on the motion to dismiss did not dispose of the cross-appeal. No mandate has issued and motions by both parties are still pending. We now believe, in the light of the foregoing circumstance, that we should have passed upon the judgment of the lower court rather than merely upon the motion to dismiss. Accordingly our opinion is modified. The portion of the opinion which reads as follows is withdrawn: "The appeal must accordingly be

dismissed. Appeal dismissed." The following is substituted for the part withdrawn:

"The part of the judgment of the lower court denying relief to the defendant is affirmed because the District Court had no power to modify the decree in order to grant the relief requested."

The following is added to the opinion:

The appellee has perfected under Rules 1 d and 8 b 3, Revised Rules of the Supreme Court, 1974, a cross-appeal attacking the part of the decree increasing the alimony awarded defendant. If this award of increased alimony was purportedly made under the provisons of section 42-372, R. R. S. 1943, then it too was void and must be vacated for the reasons already given. An examination of the application to modify and the order of the court affirmatively shows that the award of additional alimony was purportedly made under section 42-372, R. R. S. 1943, and not upon a showing of change of circumstances as authorized by section 42-365, R. R. S. 1943. The trial court specifically found: "That the evidence adduced in support of said motion to modify is cumulative to that adduced prior to November 16, 1972, no new facts or circumstances being shown thereby; . . . that the respondent by said motion seeks only to have the court re-examine the evidence adduced at said trial and arrive at a conclusion opposite and contrary to that contained in said decree of November 16, 1972." The order awarding additional alimony was void and is vacated.

AFFIRMED IN PART, AND IN PART REVERSED.

WESTLAND HOMES CORP., A NEBRASKA CORPORATION, APPELLANT, V. ORIS E. HALL ET AL., APPELLEES.
226 N. W. 2d 622

Filed March 6, 1975. No. 39513.

1. **Liens.** The determination of priority as between a lien held

by the United States and nonfederal liens is governed by federal, not state, law.

2. **Mortgages: Mechanics' Liens.** A recorded federal mortgage takes priority over an inchoate mechanic's lien subsequently filed.
3. **Statutes: Contracts: Mechanics' Liens.** Under section 52-102, R. R. S. 1943, the risk of all payments made to the original contractor is upon the owner until the expiration of the time for filing any subcontractor's lien.
4. **Statutes: Banks and Banking: Mortgages: Liens.** Under section 3-802, U.C.C., unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored, an action may be maintained on either the check or the obligation.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed in part, modified in part, and reversed and remanded with directions.

William G. Cambridge, for appellant.

Edward E. Hannon, William K. Schaphorst, Stephen L. Muehlberg, Thomas D. Thalken, Robert T. Finn, and William W. Griffin, for appellees.

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

MCCOWN, J.

This is an action by plaintiff, Westland Homes Corp., to foreclose a mechanic's lien on real estate owned by the defendants, Oris E. Hall and Carol J. Hall. The District Court found that Farmers Home Administration held a mortgage lien; Otto Sprague a mechanic's second lien; and Clifford L. Hall a mechanic's third lien. The court also found that the lien of Westland Homes Corp. should be denied and entered judgment accordingly. Plaintiff has appealed.

The defendants, Oris E. Hall and Carol J. Hall, contacted Dennis C. Hansen, doing business as Hansen Construction Company, at O'Neill, Nebraska, in the summer of 1970 with reference to constructing a precut home.

Hansen, a contractor, was also a dealer who purchased homes from Westland Homes Corp., which is a component home builder. Hansen purchases the home package from Westland and constructs it on the job site.

On August 15, 1970, negotiations between the Halls and Hansen culminated in a meeting at Hansen's office at which a representative of Westland was also present. At that meeting an order was made out for the purchase of a precut home package to be sold to Hansen Construction Company by Westland for construction on the Hall property. The total price was $7,364.53. The order was marked C.O.D. and showed a $700 deposit. The signatures of both Dennis C. Hansen and Oris E. Hall appeared at the bottom of the order. At the same time a separate order was also made for a furnace in the sum of $177.94.

On October 8, 1970, the Farmers Home Administration approved a loan to the Halls for $16,000. The Halls executed a promissory note and first mortgage to the United States Farmers Home Administration. The mortgage was duly filed with the Holt County register of deeds on October 9, 1970. The $16,000 of funds advanced under the FHA loan was placed in the First National Bank of O'Neill, Nebraska, in a supervised account. The FHA, the bank, and the Halls executed a deposit agreement on an FHA printed form with respect to the supervised account. The agreement provided that no withdrawal was to be permitted by the bank except on the order of the Halls and by a countersignature of a duly authorized representative of the government. The agreement provided however that at any time upon written demand by the State Director of the Farmers Home Administration, the bank was to pay the balance or any part thereof for application to the mortgage debt or other purposes, including "protection of the Government's lien or security or to accomplish the purpose for which such advances were made: * * *." Statements and canceled checks on the

account were to be forwarded to the Farmers Home Administration office at the end of each statement period.

After the FHA financing was obtained by the Halls, the original copy of the Hansen-Westland purchase order of August 15, 1970, was changed. The date of the order was altered to October 10, 1970; the $700 deposit was changed to $500; and the C.O.D. designation was changed to show payment was to be by finance letter. FHA refused to execute Westland's regular credit letter form. Instead, on October 12, 1970, FHA sent a letter to Westland which stated: "At the request of Hansen Construction Company of O'Neill, Nebraska, we wish to advise that the Farmers Home Administration has approved a loan for Oris E. Hall, and funds for payment for materials and labor are available for disbursement within a thirty-day period." On the basis of this letter, Westland changed the financing plan from C.O.D. to letter of credit.

Westland made its first delivery of the housing material package on October 16, 1970, and the remainder of the housing material was delivered on October 24, 1970, except for the furnace, which was delivered on December 12, 1970. Between October 16 and November 16, 1970, a number of checks on the supervised account were issued and paid, including checks payable to Hansen Construction Company individually or jointly with various material suppliers.

Hansen's work was largely completed by November 16, 1970. On that date Mr. Hall, Mr. Hansen, and representatives of the FHA met in the county office of the FHA for the purpose of settling the Hansen account and making payment from the supervised account for amounts due. The county supervisor of the FHA, Mr. Longan, made computations and questioned Hansen to determine the amounts due Hansen, including the Westland house package. Longan knew that Westland had not been paid by Hansen. He issued a check to Hansen Construction Company in the sum of $7,169.26, the full

amount due, including the Westland claim. The check was signed by Mr. Hall and countersigned by Longan for FHA. Longan delivered that check to Hansen and Hansen delivered to Longan a check of Hansen Construction Company, Inc., dated November 14, 1970, payable to Westland Homes Corp., in the sum of $6,926.24, drawn on the First National Bank of O'Neill, Nebraska. Longan prepared a claimant's release form which acknowledged receipt of payment in full for all labor, materials, supplies, or equipment supplied in the construction of the improvements upon the Hall property. It also released and waived any and all claims, liens, and lien rights against the property, the owners, and the contractor. Mr. Longan forwarded the release form and the Hansen check to Westland on November 16, 1970, together with a transmittal letter which read: "Enclosed is a check in the amount of $6,926.24 from Hansen Construction Company in payment for the Oris E. Hall dwelling package.

"Will you please sign the enclosed Release by Claimants and return it to this office. * * *."

The check and release were received by Westland at its office in Hastings, Nebraska, on November 17, 1970. A bookkeeper for Westland deposited the Hansen check in the Westland account at the First National Bank in Hastings, Nebraska, on the same day, and signed the release form and returned it to the FHA office in O'Neill. On November 20, 1970, the Hansen check was returned for insufficient funds. The bookkeeper directed the bank to send the check through a second time, and once again the check failed to clear. Additional investigation and efforts to obtain payment were fruitless. On December 28, 1970, Westland filed its mechanic's lien against the Hall property in the amount of $7,037.82, and on the following day mailed notice of such filing to the Halls by certified mail.

On January 20, 1971, Hansen filed a voluntary petition in bankruptcy and Westland Homes Corp. was listed as

an unsecured creditor in the amount of $7,248.40. Westland unsuccessfully attempted to prevent the debt from being discharged in the bankruptcy proceedings. On March 16, 1971, the present action was instituted by Westland to foreclose its mechanic's lien on the Hall property. Additional mechanic's lien claimants were joined with the United States Farmers Home Administration and the Halls as defendants.

At the conclusion of the trial the District Court found that the Farmers Home Administration held a first mortgage lien for the amount due on its real estate mortgage; and that none of the mechanic's liens involved were perfected prior to the recording of the federal lien on October 9, 1970. The District Court also determined that the lien filed by Westland should be denied; that Otto Sprague had a mechanic's lien for materials and services in the sum of $727.70, which was a second lien; and that Clifford L. Hall had a lien for materials and labor in the sum of $1,900.24, which was a third lien on the real estate described. The court entered judgment accordingly and this appeal followed.

A preliminary issue here involves the priority of the mortgage from the Halls to the Farmers Home Administration. Under state law a mortgage takes priority over any mechanic's liens for material, the furnishing of which was commenced after the mortgage was recorded. See Goodwin v. Cunningham, 54 Neb. 11, 74 N. W. 315. All liens here except that of Otto Sprague were subordinate to the mortgage under that rule. The mechanic's lien of Sprague, which was inchoate at the time the mortgage was recorded, is likewise subordinate to the mortgage. The determination of priority as between a lien held by the United States and nonfederal liens is governed by federal, not state, law, and a recorded federal mortgage takes priority over an inchoate mechanic's lien subsequently filed. See, United States v. Chester Park Apts., 332 F. 2d 1; United States v. First National Bank & Trust Co. of Fargo, 386 F. 2d 646.

The major issue here centers around the effect of the lien release executed by Westland in exchange for the bad check of Hansen. The defendants assert that the check was accepted as absolute payment and that the release is therefore valid and binding. The plaintiff contends that the check was accepted as payment conditional upon its being paid in due course, and that if the check is not paid, the obligation and the right to the lien are not discharged.

Under the facts here, Westland was entitled to a subcontractor's lien under the specific provisions of section 52-102, R. R. S. 1943. That statute specifically provides that the risk of all payments made to the original contractor shall be upon the owner until the expiration of the 3-month period for filing the subcontractor's lien. See Paxton & Vierling Steel Co. v. Barmore, 187 Neb. 54, 187 N. W. 2d 590. The statute also provides that the owner may pay the subcontractor and the amount paid will be deemed a payment to the original contractor.

In addition, section 76-239.01, R. R. S. 1943, requires that any corporation lending money for financing construction to be secured by a mortgage filed of record is required to notify the borrower in writing separate from any other document that it is the responsibility of the borrower, or borrower's contractor, if disbursements are to be made to such contractor, to apply the loan proceeds to the payment of lawful claims for labor and materials furnished for such improvements, to avoid liability for mechanic's liens. That section also provides that it shall be the duty of the contractor to whom such disbursement is made to make such application of the loan proceeds. That particular section was wholly disregarded here, both by Farmers Home Administration and by Hansen Construction Company. Westland was clearly entitled to its lien unless the receipt of the Hansen check and the execution of the release form waived the lien or barred Westland from enforcing it.

Unless otherwise agreed, where a personal check is

taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored an action may be maintained on either the check or the obligation. See § 3-802, U.C.C. The evidence here is undisputed that there was no agreement of any kind and, in fact, establishes that the acceptance of the check was conditional in the sense intended by the Uniform Commercial Code. In order to hold that the release was valid and effective in the absence of reliance, there would have to be some showing of consideration. Under the facts here there was none. See, for example, Giammarino v. J. W. Caldewey Constr. Co., Inc. (Mo. App.), 72 S. W. 2d 159.

If the owner here had relied upon an executed lien waiver by paying Hansen after receipt of the waiver, that situation might well estop Westland from enforcing its lien, but there was no reliance here. The full payment to Hansen was made before the check and release were even mailed to Westland. Neither the Halls nor Farmers Home Administration relied upon the lien release when they paid Hansen. The release was not even executed when FHA delivered the check for $7,169.26 to Hansen, which included Westland's lien claim. It knew at the time that the Westland lien claim had not been paid. The loss here was occasioned by the actions of Hansen and the Farmers Home Administration. The Halls are chargeable with the actions of both of them in an action by Westland to foreclose its lien under the facts in this case. As between Westland and the Halls, the loss therefore rested upon the Halls. The District Court erred in denying the Westland lien claim.

Under the facts here the action of the Farmers Home Administration in paying Hansen as it did was negligence. For that negligence the Farmers Home Administration may be subject to liability to the Halls and may also be subject to liability for breach of an express or implied contractual obligation. Those issues

are not properly before us on this record and we do not pass upon them here.

That part of the judgment of the District Court which determined the mortgage of Farmers Home Administration to be a first lien upon the Hall property is affirmed. That part of the judgment of the District Court which finds that Otto Sprague and Clifford L. Hall are entitled to mechanic's liens is affirmed except any finding or determination of priority of such liens. That part of the judgment of the District Court which denies a mechanic's lien to Westland Homes Corp. is reversed and the cause remanded with directions to enter finding and judgment that Westland Homes Corp. has a lien in the sum of $7,037.82 against the Hall property. The cause is remanded to the District Court for determination of priorities as between the mechanic's liens of Westland Homes Corp., Otto Sprague, and Clifford L. Hall, and entry of decree in accordance with this opinion.

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

CRETE EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. THE SCHOOL DISTRICT OF CRETE, IN THE COUNTY OF SALINE, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

226 N. W. 2d 752

Filed March 6, 1975. No. 39521.

1. **Statutes.** It is a cardinal principle that statutes pertaining to the same subject matter should be construed together as if they were one law, and effect given to every provision.
2. **Statutes: Court of Industrial Relations: Administrative Law: Time.** That provision of section 48-817, R. R. S. 1943, prohibiting a retroactive order is interpreted to mean that the orders of the Court of Industrial Relations cannot apply to a period prior to that embraced within the dispute submitted to it.
3. **Statutes: Court of Industrial Relations: Schools and School Districts.** In selecting school districts for the purpose of comparison pursuant to section 48-818, R. R. S. 1943, the ultimate

question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R. R. S. 1943, and the mere fact that one set of school districts was deemed adequate in one case, does not mean that a different set of school districts would necessarily be inadequate in a different case.

4. **Statutes: Court of Industrial Relations: Administrative Law.** The Court of Industrial Relations, in establishing wage rates is compelled by section 48-818, R. R. S. 1943, to consider the entire situation regarding the fringe benefits made available by the subject employer and those made available by comparable employers.

Appeal from the Court of Industrial Relations. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, William A. Harding, and Gerald J. Hallstead, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

BRODKEY, J.

Appellant School District of Crete appeals to this court from an order entered by the Court of Industrial Relations on February 28, 1974, following protracted litigation between the appellant school district and the appellee, Crete Education Association. The litigation referred to involved the salary schedule and other terms and conditions of employment of all certificated teachers employed by the school district, for the 1972-73 school year. Practically all the school teachers referred to were members of the appellee association which was the bargaining representative for the teachers in this industrial dispute. The salary schedule employed by appellant school district for the 1972-73 school year is reflected on exhibit 6, received in evidence at the trial, and was computed on a base of $6,600, with index increments of 4

percent vertically and 4 percent horizontally. In its order entered February 28, 1974, the Court of Industrial Relations modified the existing schedule and provided that the rates of pay for certificated teachers employed by the School District of Crete "be and they hereby are established in accordance with an index salary schedule having a base of $6,775.00, index increments of 4% vertically and 4% horizontally, and the same number of steps and columns as the schedule recognized at the time of trial of this action" (exhibit 6). In addition to said increase in pay, the court also required that the appellant furnish to each of said teachers such income protection insurance as is currently available at an average cost of $5 per teacher per month. The foregoing were the only changes ordered by the court, although other changes in terms and conditions of employment were requested by the teachers and were issues involved in the trial of this action.

In this appeal, the appellant has limited its assignments of error to the claims that the order of the Court of Industrial Relations, referred to above, was erroneous and was in contravention of the provisions of section 48-817, R. R. S. 1943, prohibiting the issuance of retroactive orders; and also that the Court of Industrial Relations, in reaching its conclusions and decisions in this matter, used as a basis for comparison purposes certain other school districts which were not comparable to the appellant school district, and failed to consider various other school districts which it claimed had distinct similarity to the appellant school district. Although numerous other issues were involved and contested in the trial of this case and were, in fact, discussed in the briefs of both parties, we shall only consider the matters assigned as error by appellant. McClellan v. Dobberstein, 189 Neb. 669, 204 N. W. 2d 559 (1973). We conclude that the contentions of the appellant are without merit and affirm.

On March 30, 1972, the appellee, an unincorporated

association of school teachers, filed a petition in the Court of Industrial Relations under the authority contained in section 48-810, R. R. S. 1943. In its petition it alleged the existence between the appellant and appellee of an "industrial dispute," within the meaning of section 48-801, R. R. S. 1943, concerning the terms, tenure, and conditions of employment, and the association of and representation of the members of the appellee in such industrial dispute. It also alleged the refusal of appellant to negotiate such terms and conditions with the appellee, and the consequent exhaustion of their remedies under the terms of the Nebraska Teachers' Professional Negotiations Act. §§ 79-1287 to 79-1295, R. R. S. 1943. In its petition the association prayed that the court accept jurisdiction of the matter, give such notice as required by law to the school district, make such findings of fact and render such orders as are necessary and appropriate to define industrial dispute existing between the parties and render such orders as are necessary and appropriate "*to resolve the industrial dispute,*" including orders concerning the recognition of the association by the school district as the employee organization representing its members for the purpose of negotiating collectively terms and conditions of employment, and the issuance of such orders as are necessary or appropriate to require the parties to enter into good faith negotiations "*for the purpose of defining and eliminating the industrial dispute*" which presently exists, all as is required by the statutes of the State of Nebraska. (Emphasis supplied.) On January 8, 1973, the Court of Industrial Relations issued a temporary bargaining order by the terms of which the parties were ordered to undertake good faith bargaining concerning the terms, tenure, and conditions of employment of the certificated teachers in the employ of the appellant. The order specifically provided that: "This Temporary Bargaining Order shall not preclude either party from making application to this Court for such additional order or

orders as may be necessary to carry out this Order or to govern the situation pending such bargaining." Appellant continued to resist any efforts by appellee to negotiate the terms and conditions of employment as called for in that order; and therefore on February 15, 1973, the appellee filed an application requesting that the court enter its final orders, pursuant to section 48-818, R. R. S. 1943, establishing the terms and conditions of the employment of the members of the appellee employed by the appellant for the 1972-73 school year. The matter was thereafter set for trial pursuant to the application of the appellee, following which the court entered its order of February 28, 1974, previously referred to, which is the basis of this appeal.

The appellant asserts that the order of February 28, 1974, is in contravention of section 48-817, R. R. S. 1943, in that it applies retroactively to the 1972-73 school year. Section 48-817, R. R. S. 1943, provides in part: "After the hearing and investigation the court shall make its findings and enter its order or orders in writing, which decision and order or orders shall be entered of record. Such order or orders shall be in effect from and after the date therein fixed by the court, but no such order or orders shall be retroactive." Thus, the appellant contends that section 48-817, R. R. S. 1943, must be construed as precluding an order of the Court of Industrial Relations from being retroactive in any way, even in the sense of being retroactive to the date of the filing of the original petition with the court. We do not agree.

It is a cardinal principle that statutes pertaining to the same subject matter should be construed together as if they were one law, and effect given to every provision. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn., 191 Neb. 1, 213 N. W. 2d 443 (1973). We believe that consideration of the entire statutory scheme of Chapter 48, article 8, R. R. S. 1943, pertaining to the Court of Industrial Relations, clearly

establishes that the interpretation of section 48-817, R. R. S. 1943, advanced by the appellant is incorrect. Primarily, we are concerned that the interpretation advanced by the appellant would to a large extent have the effect of depriving the Court of Industrial Relations of the power granted to it by section 48-810, R. R. S. 1943, to carry out the public policy announced in section 48-802, R. R. S. 1943.

Section 48-802, R. R. S. 1943, provides in part: "It is therefore further declared that governmental service including governmental service in a proprietary capacity and the service of . . . public utilities are clothed with a vital public interest and to protect same it is necessary that the relations between the employers and employees in such industries be regulated by the State of Nebraska to the extent and in the manner hereinafter provided; . . . ." The basic grant of power to carry out the public policy expressed in section 48-802, R. R. S. 1943, is contained in section 48-810, R. R. S. 1943, which provides in part: "*All industrial disputes* involving governmental service, service of a public utility, or other disputes as the Legislature may provide *shall be settled* by invoking the jurisdiction of the Court of Industrial Relations. . . ." (Emphasis supplied.)

The import of these two provisions is obvious. The Court of Industrial Relations is empowered, upon acquiring jurisdiction, to enter such orders as are necessary to settle all "industrial disputes" (as that term is defined by sections 48-801 (7) and 48-810, R. R. S. 1943). If we were to agree with appellant's contention that all orders of the Court of Industrial Relations must be prospective in operation, we would be depriving that court of its ability to settle industrial disputes where a retroactive order is required to accomplish that purpose.

That the Court of Industrial Relations was intended by the Legislature to have such power is supported by the language appearing in section 48-816, R. R. S. 1943: "The court shall have power and authority upon its own

initiative to make such temporary findings and orders as may be necessary to preserve and protect the status of the parties, property and public interest involved, pending final determination of the issues." This language clearly indicates that the Legislature intended that the "final determination of the issues" by the Court of Industrial Relations may be made retrospective in the sense of affecting the "status of the parties" at a time prior to the date that such "determination" is made. If that were not so, then there would be no concern for temporary orders to preserve that prior status. It was undoubtedly for the purpose of preserving and protecting the status of the parties to this "industrial dispute" that the order in this case calling for collective bargaining was only a temporary order. The appellant would now have us hold that the temporary order had no such effect. Such a holding would, we believe, be contrary to the Legislative intent embodied in section 48-816, R. R. S. 1943. We cannot so hold.

In addition, appellant's interpretation of "retroactive" might well result in a situation where, during the period between the filing of the petition and the "final determination of the issues" by the Court of Industrial Relations, one side in an "industrial dispute" might be able to prevail in that dispute through nothing more than the exercise of its own superior economic power. We do not believe our Legislature so intended. We believe that the only reasonable interpretation of section 48-817, R. R. S. 1943, is that the prohibition against a retroactive order means that the orders of the Court of Industrial Relations cannot apply to a period prior to that embraced within the dispute submitted to it. In this case the dispute involved the 1972-73 school year. In its temporary order, the court directed the parties to negotiate with respect to the 1972-73 school year. The final order of the court adjusted the salary schedule for the Crete teachers for the school year 1972-73. We cannot say that the order of the court operated retroactively from

the mere fact that it related to antecedent events. See Chicago, B. & Q. R.R. Co. v. State, 47 Neb. 549, 66 N. W. 624 (1896). However, had the court attempted to apply its revised salary scales to the 1971-72 school year, a period not covered by the litigation involved herein, then we think it is clear that the order of the court would have been "retroactive" and in contravention of section 48-817, R. R. S. 1943. We therefore hold that the order of the Court of Industrial Relations of February 28, 1974, was not retroactive, as that term is used in the foregoing statute.

The appellant raises several contentions with regard to the selection by the Court of Industrial Relations of other school districts to be compared with the School District of Crete for the purpose of making the final determination establishing the rates of pay and conditions of employment of the certificated teachers employed by the appellant. Such a comparison is required and controlled by section 48-818, R. R. S. 1943, which provides: "The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are *comparable* to the *prevalent* wage rates paid and of employment maintained for the *same or similar work* of workers exhibiting *like or similar skills* under the *same or similar working conditions.* In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees . . . ." (Emphasis supplied.)

Webster's Third New International Dictionary

(Unabr.), p. 461, defines the word "comparable" as having enough like characteristics or qualities to make comparison appropriate. However section 48-818, R. R. S. 1943, further refines the definition of "comparable" and specifies certain items to be considered in determining comparability under that section. The definition as set forth in the above section is, of course, controlling.

The appellant asserts that in selecting other districts for comparison with the School District of Crete and in actually carrying out that comparison, the Court of Industrial Relations neglected to adhere to the requirements of section 48-818, R. R. S. 1943. We do not agree.

The appellant argues that in declining to compare the School District of Crete with all the other schools in the Central Ten Athletic Conference for the purpose of establishing the rates of pay and conditions of employment in this case, the Court of Industrial Relations abandoned its previous standard for selecting comparable school districts as enunciated in the case of School Dist. of Seward Education Assn. v. School Dist. of Seward, Case No. 34, Findings and Order of August 9, 1971, affirmed 188 Neb. 772, 199 N. W. 2d 752 (1972). It is true that in the Seward case the Court of Industrial Relations, in establishing a scale of wages for teachers in the Seward School District, compared that district with all the other districts in the Central Ten Athletic Conference, at that time consisting of the schools in Albion, Aurora, Central City, Crete, David City, Ord, St. Paul, Schuyler, Seward, and York. In its opinion in that case the Court of Industrial Relations stated: "We find that in determining 'the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions', consideration should be given primarily to other schools in the Central Ten Athletic Conference, and secondarily to any 'comparable' school districts. *This finding is supported by the evidence of each of the parties in this case.*"

(Emphasis supplied.) The italicized words above quoted clearly indicate that the matter of determination of comparability depends on the evidence adduced, and we have no way of knowing what evidence of comparability was in the record in that case. We do know, however, from the record in this case that there has been a change of at least one of the member schools of that conference since that opinion was filed. However, in its opinion in this case, the Court of Industrial Relations specifically stated: "In formulating the preliminary findings relative to an order establishing or withholding establishment under § 48-818, R. R. S. Neb., we follow the guidelines developed in Fremont Education Association v. The School District of Fremont, Case No. 50, Findings and Order entered March 14, 1972, and in Scottsbluff Education Association v. The School District of Scottsbluff, Case No. 70, Findings and Order entered February 15, 1973." Both the aforementioned cases were decided subsequent to the Seward case. In the Fremont case, the court stated: "The Legislature originally intended as a standard of wage rates those which were predominate or at least widely existing throughout the whole state. Then it changed the standard to one of general practice, occurrence, or acceptance but in a very limited area; this Court, under that former standard, felt the area to be one or two counties in extent, and expressly rejected a contention in cases No. 19 and 20 that it might be all the eastern end of the state. Thereafter, in 1969 the Legislature withdrew the mandatory limitation on area, but it did not reexpress a mandatory consideration of either predominance or of existence throughout the whole state. *The standard now is one of general practice, occurrence, or acceptance, but the question of how general is general is left to the good judgment or feeling of the judges.* The requirement of similarity of working conditions helps the judges develop that judgment or a receptivity to the proper connotation of the word 'prevalent'. Similarity tends to de-

crease with increasing distance among what are to be compared and to become more pronounced with increasing proximity." (Emphasis supplied.) In deciding the case now before us, the Court of Industrial Relations expressly relied upon the standards set forth in the Fremont and Scottsbluff cases, and thus expressly adhered to the most clearly delineated standards previously adopted by that court for such purposes.

We cannot agree with the contentions of the appellant that the Court of Industrial Relations committed error in not making exactly the same comparison in this case that it did in the Seward case. The Court of Industrial Relations should not be compelled to compare the same school districts in every case that comes before it involving the same school districts. The ultimate question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R. R. S. 1943, If they are, then there is no room for complaint. We are not prepared to say that merely because one set of school districts was deemed adequate in one case, a different set of school districts would necessarily be inadequate in a different case, particularly where different evidence is adduced.

The appellant suggests that under section 48-818, R. R. S. 1943, the Court of Industrial Relations should have selected comparable school districts from a wider geographical area than that resorted to in this case. As previously indicated, in deciding this case the Court of Industrial Relations adhered strictly to the standard for selecting comparable wage rates and conditions of employment as set forth in Fremont Education Assn. v. School District of Fremont, Case No. 50, March 14, 1972. Thus, in this case the Court of Industrial Relations examined only school districts within 60 miles of Crete and expressly refused to consider the wage rates and conditions of employment in certain other school districts for the reason that they were "too small and too distant."

Although we cannot say, as a matter of fact, that selection of comparable school districts from such a limited geographical area would be proper in every case, we also cannot say, as a matter of law, that it would be improper in this case. Thus, we are unable to agree with the appellant's contention that section 48-818, R. R. S. 1943, should be interpreted to compel the selection of comparable wage rates and conditions of employment from a wider geographical area. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and this court cannot read a meaning into a statute which is unrelated by legislative language, nor can it read plain, direct, and unambiguous language out of a statute. State v. Sabin, 184 Neb. 784, 172 N. W. 2d 89 (1969). Section 48-818, R. R. S. 1943, cannot be said to be ambiguous with respect to the point of interpretation herein raised by the appellant. The words of that statute provide absolutely no support for the interpretation of the appellant calling for comparable wage rates and conditions of employment to be selected from a wider geographical area. Thus, again we are left with the ultimate question of whether, as a matter of fact, the school districts selected for comparison in this case are adequately similar to the subject district to fulfill the requirements of section 48-818, R. R. S. 1943.

In this connection it is also interesting to note that an expert witness, Richard Halma, called by appellee, testified that he was employed by the Nebraska State Education Association to assist affiliated associations in the areas of research and preparation of materials, and that exhibit 8, received in evidence, was prepared by him or under his direction. Exhibit 8 is entitled "1972-73 Salary And Fringe Benefit Data For Crete" and contains the list of schools in other cities he deemed to be comparable to Crete. It is interesting to note that 7 of the 10 schools used for comparison purposes in this litigation by the Court of Industrial Relations, appear on

exhibit 8. Witness Halma, in his testimony, expressed his opinion that the work performed by teachers in the Crete schools was comparable to that performed by teachers in the schools shown on exhibit 8; that the skill required of the Crete teachers was comparable to that required of teachers teaching in schools shown on exhibit 8; and, further, that working conditions for the Crete schools were comparable to the working conditions of teachers employed in the schools shown on exhibit 8. He also testified with regard to exhibit 8 that he had not attempted in the preparation of it to show every school which might meet the necessary criteria.

The appellant suggests that even if the Court of Industrial Relations properly selected the school districts to be compared with the School District of Crete for the purpose of making the final determination regarding the wage rates and conditions of employment in this case, the court nevertheless erred in the method of comparison used. Thus, the appellant points out that the Court of Industrial Relations, after first comparing the base salaries paid by the appellant with that of the other districts, then went on to compare the fringe benefits of the different districts in an item-by-item manner. The appellant maintains that such a manner of comparison is not consistent with the provision of section 48-818, R. R. S. 1943, requiring that: "In establishing wage rates, the court shall take into consideration the *overall compensation* presently received by the employees . . . ." (Emphasis supplied.) In particular, the appellant argues that although it may be found to compare unfavorably with other school districts with respect to some fringe benefits available to its employees, such unfavorable comparison may be offset by a superior comparison with other districts in relation to other benefits that are available.

The appellant is, of course, correct in its contention that the Court of Industrial Relations, in establishing wage rates, is compelled by section 48-818, R. R. S.

1943, to consider the entire situation regarding the fringe benefits made available by the subject school district and those made available by comparable school districts. In other words, the Court of Industrial Relations is required to offset possible unfavorable comparisons between districts with other comparisons which are favorable when reaching its decisions establishing wage rates. However, we believe in this case, the Court of Industrial Relations did make the "overall" consideration called for in section 48-818, R. R. S. 1943.

Having determined that the schools used for comparison purposes by the Court of Industrial Relations were proper, we need only determine whether its adjustments in the base rate to be paid to Crete teachers for the 1972-73 school year were justified by the evidence. As previously stated, that court increased the base pay for the year in question by $175 per annum and also ordered the payment of $5 per month for income protection insurance. We have reviewed the rather voluminous documentary evidence and have also analyzed the reasoning of the court in making such allowances set out in its opinion, and have made an independent conclusion that the modifications ordered by the court were entirely proper and supported by the evidence. It appears from the record that the Court of Industrial Relations in this case established the new salary base for the teachers at the approximate midpoint of the total compensation paid by the schools selected by it for comparison, according to its customary practice. The result reached would appear to be fair, proper, and equitable and in full accord with the discretionary powers vested in that court.

We are aware that section 48-812, R. R. S. 1943, provides that appeals from the Court of Industrial Relations shall be heard and disposed of in the Supreme Court in the manner provided for by law for disposition of equity cases, and further that section 25-1925, R. R. S. 1943, directs that this court shall handle an appeal in

equity as a trial de novo on the record. However we are also cognizant of the language of this court in Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College, 189 Neb. 37, 199 N. W. 2d 747 (1972), wherein we stated: "Before examining the facts upon which this decision is based, it is appropriate to discuss the scope of our review. An appeal from the Court of Industrial Relations is triable de novo in this court. §§ 25-1925 and 48-812, R. R. S. 1943. This does not mean that we are powerless to examine the conclusions of fact in the lower court. Wiese v. Klassen, 177 Neb. 496, 129 N. W. 2d 527. This court has held many times that even when the case is triable de novo, the superior position of the original trier of fact is to be respected and accorded great weight." We affirm the order of the Court of Industrial Relations in this case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY J. GASTON, APPELLANT.
226 N. W. 2d 355

Filed March 6, 1975. No. 39576.

1. **Criminal Law: Double Jeopardy.** The constitutional provisions against double jeopardy protect against both multiple prosecutions and multiple punishments for the same offense.
2. **Criminal Law: Sentences.** Where a sentence not authorized by law has been imposed, an appellate court may remand the cause with directions to impose a lawful sentence even though a part of the invalid sentence has been served.
3. **Criminal Law: Sentences: Double Jeopardy.** If the sentence first imposed was invalid, the sentence imposed after remand does not violate the constitutional prohibition against double jeopardy.

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

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

Paul L. Douglas, Attorney General, and Harold S. Salter, for appellee.

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

PER CURIAM.

This is an appeal from a resentencing. The defendant was originally sentenced to imprisonment for 1 to 2 years for forgery and 20 to 30 years for being an habitual criminal. In State v. Gaston, 191 Neb. 121, 214 N. W. 2d 376, a direct appeal, both sentences were held to be "unauthorized by statute, illegal, and of no force and effect." The sentences were vacated and the cause remanded to the District Court for resentencing.

Upon remand the defendant was sentenced to imprisonment for 20 to 30 years and fined $1. The defendant has again appealed and contends the sentence imposed violated the constitutional provisions against double jeopardy and was excessive.

The constitutional provisions against double jeopardy protect against both multiple prosecutions and multiple punishments for the same offense. North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656; In re Jones, 35 Neb. 499, 53 N. W. 468. But, where a sentence not authorized by law has been imposed, an appellate court may remand the cause with directions to impose a lawful sentence even though a part of the invalid sentence has been served. In McCormick v. State, 71 Neb. 505, 99 N. W. 237, this court held: "Where a prisoner has been found guilty on a criminal charge, and the only error that appears on the record is the failure of the court to pronounce a legal judgment against him, it is the proper practice, and this court has the power, after setting aside the void or erroneous judgment, to remand the case and the accused, if sen-

tence has not been suspended, to the district court, with instructions to render judgment on the verdict in the manner provided by law.

"Confinement in the penitentiary under a void or erroneous sentence, because of the failure of the accused to obtain a suspension of his sentence during the pendency of his proceedings in error, is in no sense a part execution of a legal sentence; and by the rendition and execution of a legal judgment, the accused is not twice punished for the same offense." See, also, Murphy v. Massachusetts, 177 U. S. 155, 20 S. Ct. 639, 44 L. Ed. 711; In re Bonner, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149; Bozza v. United States, 330 U. S. 160, 67 S. Ct. 645, 91 L. Ed. 818; State v. Fountaine, 199 Kan. 434, 430 P. 2d 235; Freeman v. State, 87 Idaho 170, 392 P. 2d 542; State ex rel. Boner v. Boles, 148 W. Va. 802, 137 S. E. 2d 418. If the sentence first imposed was invalid, the sentence imposed after remand does not violate the constitutional prohibition against double jeopardy.

The defendant is now 26 years of age. His record of juvenile misconduct commenced in 1957. In 1962 he was committed to the Boys Training School for attempted robbery involving use of a stolen rifle. Paroled in 1963 his record shows six arrests for burglary, shoplifting, larceny, and similar offenses until he was again committed to the Boys Training School in 1964.

As an adult he has been convicted of burglary, receiving stolen property, and violation of the Dyer Act. The forgery in this case involved use of checks stolen in a burglary. His record shows arrests for a number of offenses for which there was no prosecution.

The habitual criminal act provides for imprisonment for a term of not less than 10 nor more than 60 years. § 29-2221, R. S. Supp., 1972. In view of the defendant's past record the sentence to imprisonment for 20 to 30 years was not excessive. If the defendant's attitude toward society has changed, as suggested by his counsel at the time of resentencing, the proper authorities may

extend leniency when the defendant has demonstrated his interest in rehabilitation.

The judgment of the District Court is affirmed.

AFFIRMED.

SPENCER, J., dissents for the reasons stated in his dissenting opinion in State v. Gaston, 191 Neb. 121, 214 N. W. 2d 376.

WILLIAM H. SHERWOOD, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF FLOYD TILSON BROWN, DECEASED, APPELLEE, V. MERCHANTS MUTUAL BONDING COMPANY, A CORPORATION, APPELLANT.

226 N. W. 2d 761

Filed March 6, 1975. No. 39610.

1. **Bonds: Guardian and Ward: Time.** No action may be maintained on a guardian's bond until the amount due thereon has been ascertained and judgment therefor entered.
2. **Estoppel.** An essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting, to his prejudice.
3. **Limitations of Actions: Time.** The limitation contained in section 25-210, R. R. S. 1943, does not commence to run until the guardian has obtained approval of his final account and been discharged by order of the probate court.

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

William J. Brennan, Jr., and C. L. Robinson for Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

Person, Dier & Person, for appellee.

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

NEWTON, J.

This is an action to recover on the bond of a guardian.

On June 7, 1963, F. Stanton Brown was appointed as guardian of his incompetent father. He posted bond, obtained from defendant, in the sum of $17,000. The estate had assets valued at approximately $370,000. The ward died September 3, 1968, leaving two sons as heirs, F. Stanton Brown, the guardian, and J. Leland Brown. The latter requested, on August 5, 1968, that the guardian be removed and required to account. On appeal to the District Court, judgment was entered on May 19, 1973, against the guardian for $83,244.18. Bond premiums were paid to June 7, 1973. An administrator with the will annexed was appointed on November 29, 1968, for the ward's estate, and he commenced this suit on May 21, 1973.

Two questions are presented: Has the statute of limitations run; and is the defendant estopped to defend on that ground? Judgment was entered for plaintiff. We affirm the decision of the District Court.

We first take up the question of estoppel. It is the rule that no action may be maintained on a guardian's bond until the amount due thereon has been ascertained and judgment therefor entered. See, Finn v. Whitten, 172 Neb. 282, 109 N. W. 2d 376; In re Estate of Montgomery, 133 Neb. 153, 274 N. W. 487. The 4-year-limitation period specified in section 25-210, R. R. S. 1943, as heretofore interpreted, had expired following the ward's death prior to a final determination of the amount due on the guardian's account. An essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting, to his prejudice. See Willan v. Farrar, 176 Neb. 1, 124 N. W. 2d 699. In the present instance there was no representation made which induced plaintiff to delay.

Section 25-210, R. R. S. 1943, provides: "No action shall be maintained against the sureties in any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been

discharged; *Provided,* if at the time of such discharge the person entitled to bring such action shall be out of the state, or under any legal disability to sue, the action may be commenced at any time within five years after the return of such person to the state, or after such disability shall be removed." Plaintiff contends that under the proviso, the administrator of the estate had 5 years from the date of his appointment to bring this action. We cannot agree with this conclusion. The statute confines the extension of time to persons absent from the state or under a legal disability. Section 25-213, R. R. S. 1943, specifies who shall be considered to be under a legal disability. It does not toll the statutes of limitations for the benefit of executors or administrators.

The primary question is the meaning of the term "discharge" as used in the statute. The authorities are not unanimous in its construction. The first Nebraska case on the subject is Goble v. Simeral, 67 Neb. 276, 93 N. W. 235, in which this court followed the rule adopted in Massachusetts, Michigan, and Wisconsin from which our statute was adopted. The case holds that: " 'By the term "discharged," in this statute, is intended any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward to the age of twenty-one, or otherwise.' * * * The objection urged against it by counsel is that, in effect, the former ward may be barred of his action before he is able to maintain it; that if the settlement or final accounting for any reason is delayed or protracted beyond four years, there is no remedy against the sureties. But we think the purpose of the statute was to require the accounts to be settled, so far as the sureties were to be held, with reasonable expedition and within the prescribed period. Undoubtedly, as a general proposition, courts will be loth to construe a statute so as to deprive a person of a cause of action by limitation before he is in

a position to assert it. The ordinary statutes of limitations provide for this by dating the limitation from accrual of the cause of action. But here the provision is special, meant to cover a special case, and governed by special considerations. * * *

" 'This is a special limitation for the benefit of the sureties, and does not affect the right to recover from the guardian. The limitation begins to run "from the time the guardian shall be discharged." ' The purpose is 'to fix a time certain, for the benefit of the sureties, so that they may know definitely when their obligations as sureties will terminate.' Paine v. Jones, supra. No other meaning can be given to the language used. As the court say in the case just cited (p. 76): 'To say the term "discharged" is synonymous with "settlement of the guardian's account with the proper court, or with the ward," would seem to do violence to the language used. * * * We are unable to see wherein a mere settlement of the guardian's account, without actual compliance with the order of the court, operates as a discharge, in any sense.' * * *

" 'The "discharge" can not very well have more than one of two meanings. It must mean either the end of the guardianship office, or the discharge from liability. It can not mean the latter, because that would preclude any occasion for resort to the bond.' Hence courts generally hold, under statutes like our own, that the purpose of the legislature was to require the amount due from the guardian to be ascertained and suit to be brought therefor within the period fixed, and that, as the time allowed is reasonable, negligence or other cause of delay in settling the account can not extend it."

These rules have been in effect since 1903 without legislative change and were followed in Medow v. Riggert, 132 Neb. 429, 272 N. W. 238. It is evident that should the presently prevailing rule be abrogated and the term "discharged" be interpreted to mean an order of discharge entered by the county court following a final

accounting, the failure of the guardian to account and secure such discharge could prolong the period of time elapsing before the statute of limitations commenced to run almost indefinitely.

There are nevertheless compelling reasons for such a change. Ordinarily, statutes of limitations commence to run only from the time of accrual of a cause of action. As above noted, a cause of action cannot be maintained on a guardian's bond until a final accounting has been had in the county court and judgment entered against the guardian. Furthermore, our statutory law has changed since the adoption of the Goble v. Simeral rule. Section 24-618, R. R. S. 1943, now provides that upon entry of an order of distribution, a guardian or other fiduciary "may be discharged, upon compliance with the order or decree." This statute does not recognize that a guardian is discharged upon the occurrence of the events mentioned in Goble v. Simeral, *supra,* but requires an accounting and distribution as a preliminary to discharge. The statute, section 25-210, R. R. S. 1943, is an anomaly. It is noted that with reference to bonds of executors and administrators the statute of limitations is 10 years. See § 25-209, R. R. S. 1943. This statute also applies to guardians and is in apparent conflict with the provisions of section 25-210, R. R. S. 1943, as heretofore interpreted. Again, it would appear that the Goble v. Simeral rule was in conflict with legislative intent. Under section 25-209, R. R. S. 1943, the statute starts to run when the cause of action accrues. See United States Fidelity & Guaranty Co. v. McLaughlin, on rehearing, 76 Neb. 310, 109 N. W. 390. Although not pertinent here, section 38-416, R. R. S. 1943, gives an additional clue to present-day legislative thinking. In regard to guardians of veterans, it requires as a condition precedent to discharge of the guardian and to release of sureties that a final account be approved and the ward's assets delivered.

A number of jurisdictions have refused to follow the

Massachusetts rule. Wisconsin has amended its statute to provide that if an accounting is pending on the expiration of the 4-year-limitation period, the limitation period is extended to 1 year after final determination of the accounting proceedings. See In re Estate of Bocher, 249 Wis. 8, 23 N. W. 2d 615. California has interpreted a statute identical to ours to require an order of discharge or removal by the probate court as a requirement to the running of the statute. It further holds that pending accounting proceedings toll the statute, thus accomplishing by court interpretation what Wisconsin did by statute. See Burns v. Massachusetts Bonding & Ins. Co., 62 Cal. App. 2d 962, 146 P. 2d 24. Oklahoma holds that the statute does not commence to run until the guardian is relieved of office and his accounts are settled by a judgment of the court. See, Brewer v. Perryman, 62 Okla. 176, 162 P. 791; Title Guaranty & Surety Co. v. Cowen, 71 Okla. 299, 177 P. 563. North Dakota likewise holds that a formal order of the court discharging or removing the guardian is necessary to start the statute running. See Gronna v. Goldammer, 26 N. D. 122, 143 N. W. 394. Texas also holds that the statute does not commence to run until the guardian is discharged by an order of the probate court. See Massie v. De Shields (Tex. Civ. App.), 62 S. W. 2d 322.

Various reasons are given by the foregoing courts for the rules adopted. Primarily a refusal to follow the Massachusetts rule as set out in Goble v. Simeral, *supra,* is due to the fact that contrary to the usual statutes of limitations, the right to sue may be barred before the cause of action has accrued. Furthermore, practice in these states contemplates that a guardian must file a final account and obtain its approval before receiving a discharge from the probate court, notwithstanding that his authority may have been terminated by the removal, resignation, or death of the guardian, the marriage of a female ward, or the arrival at the age of majority, or death of a ward. The use of the word

"discharged" generally implies affirmative action, not simply a termination of authority by operation of law. Under Goble v. Simeral, *supra,* the statute of limitations has been enlarged in its operation by judicial construction in a manner to work injustice on occasion. Neither justice nor sound policy requires that the meaning of the statute be enlarged to embrace situations not comprehended by its terms.

In view of the clear import of our other statutes, recognized Nebraska practice, and the inequitable result of our former rule, we deem it necessary to overrule Goble v. Simeral, 67 Neb. 276, 93 N. W. 235, and Medow v. Riggert, 132 Neb. 429, 272 N. W. 238. We hold that the limitation contained in section 25-210, R. R. S. 1943, does not commence to run until the guardian has obtained approval of his final account and been discharged by order of the probate court.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. I discern no sound reason for overturning the long-existing rule. The surety on the bond has no effective way to force the guardian to make a timely accounting. This must be accomplished by the ward. Four years to do that and commence action on the bond is a sufficiently long time. The practical effect of the new rule is, as the opinion points out, to prolong almost indefinitely the period before the statute commences to run.

NORMA J. GODDEN, GUARDIAN AND NEXT FRIEND AND PAYEE FOR PATRICIA A. DORN, A MINOR, APPELLANT, V. DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF NEBRASKA ET AL., APPELLEES.

LAWRENCE IDEUS, GUARDIAN AND NEXT FRIEND AND PAYEE FOR PAMELA SUE DORN, A MINOR, APPELLANT, V. DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF NEBRASKA ET AL., APPELLEES.

226 N. W. 2d 627

Filed March 6, 1975. Nos. 39620, 39628.

1. **Aid for Dependent Children: Administrative Law.** The income and resources attributable to an AFDC applicant consist generally of only such net income as is actually available for current use on a regular basis and only currently available resources.
2. **Public Welfare: Administrative Law.** An administrative agency may not act unreasonably or capriciously. Its judgment must be based on a factual foundation, and the agency or officer must give due consideration to all the essential elements involved. If material elements have not been given due consideration, the decision is void.

Appeals from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

Vard R. Johnson, Terrence J. Ferguson, and Steven Swihart, for appellants.

Clarence A. H. Meyer, Attorney General, E. D. Warnsholz, and Michael J. Rumbaugh, for appellees.

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

SPENCER, J.

Plaintiffs, as guardians and next friends, appeal the judgment of the District Court for Lancaster County affirming rulings of the Department of Public Welfare rejecting their applications for aid for dependent children (AFDC) for their minor wards. The wards are beneficiaries of a trust fund which if presently payable

to them would make them ineligible for public assistance benefits. We reverse.

On July 30, 1965, the county court of Gage County, Nebraska, distributed the proceeds of a wrongful death settlement in a case involving the mother of the wards. So far as material herein, the decree provided: "That all the remainder of the proceeds, after the payment of costs herein ordered to be paid, should be placed in trust or in a guardianship fund for the benefit of the surviving children of Loretta Dorn, decedent, whose names are: Darrell Gene Dorn, Patricia Anne Dorn, Dennis Elmer Dorn, Bruce Allen Dorn and Pamela Sue Dorn, in equal shares, share and share alike, and said funds are to be used by the trustee or the guardian as may be directed by the Court for the direct benefit of the above named children and shall be used for their health, education, nurture, care and welfare in such amount and at such times as may be deemed necessary and proper upon application being made to this Court."

On November 12, 1965, the county court ordered that the proceeds from the wrongful death settlement should be placed in trust at interest with the Beatrice National Bank and Trust Company for the benefit of the Dorn children. The terms of the trust were: "That the best interest of the beneficiaries of the proceeds would be to place said funds in an interest-bearing savings account and to hold said funds for the benefit of the named children until there is a demonstrative need for paying any of said proceeds to any of the beneficiaries or until such funds are needed for their education or the necessities of life which cannot be provided for them by the father of said children or until they reach the age of 21 years." See § 30-810, R. R. S. 1943.

The issue presented in both cases is identical. Both wards had been receiving aid for dependent children. They were terminated when the Department of Public Welfare learned of the proceeds from the wrongful

death settlement which was being held in trust by the Beatrice National Bank and Trust Company.

It was not until January 13, 1971, that a legal guardian was appointed for Pamela Sue Dorn by the county court of Lancaster County. On July 13, 1971, the county court of Douglas County appointed a legal guardian for Patricia A. Dorn.

After welfare benefits were terminated, the guardians made application to the Gage County court for the use and possession of the trust funds. Each of the wards has a one-fifth interest in the fund, which at that time amounted to approximately $17,700. On June 25, 1973, the county judge held that no part of said funds could be used at the present time for the support and maintenance of said wards. No appeal was taken from this order. The guardians then renewed their respective applications for welfare benefits. The Department of Public Welfare considered the order of the county court to be an arbitrary exercise of jurisdiction, and chose to ignore it. In doing so, it held that the funds were a resource which must be considered in determining eligibility for public assistance for the wards.

The primary purpose of allowing recovery for a wrongful death is to compensate the survivors for their pecuniary loss; and to compensate them for the care, maintenance, and support that they could reasonably have expected to receive had the decedent lived. § 30-810, R. S. Supp., 1972. The present use of the funds, however, is not the issue before us. Regardless of how arbitrary the order of the county judge may be, it is binding on all parties affected until it is judicially reversed or modified. This action is not a proper proceeding to accomplish that purpose. It is not within the power of the Department of Public Welfare to second-guess a judicial officer or to ignore his order. Until the order of the county judge, arbitrary or otherwise, is reversed or modified, the money held in trust is unavailable to the wards. It is the present availability of the funds

which is determinative herein. Until the guardians take steps to acquire possession by a further application to the county court, and an appeal if the order is adverse to them, the funds are not available to them.

The AFDC program is designed to provide financial assistance to needy dependent children and the parents who live with and care for them. It is financed in large measure by the federal government on a matching funds basis, and participating states must submit AFDC plans in conformity with the act and the regulations promulgated thereunder by the Department of Health, Education, and Welfare. The program is, however, administered by the states, which are given broad discretion in determining both the standard of need and the level of benefits. Shea v. Vialpando (1974), 416 U. S. 251, 94 S. Ct. 1746, 40 L. Ed. 2d 120. In that case, Mr. Justice Powell said: "The 'income and resources' attributable to an applicant, defined in 45 CFR S. 233.20 (a) (6) (iii-viii), consist generally of 'only such net income as is actually available for current use on a regular basis . . . and only currently available resources.' "

The action of the Department of Public Welfare was arbitrary and capricious in determining that the fund was available when it knew that the requests of the guardians for said funds had been denied. An administrative agency may not act unreasonably or capriciously. Its judgment must be based on a factual foundation, and the agency or officer must give due consideration to all the essential elements involved. If material elements have not been given due consideration, the decision is void. Block v. Lincoln Tel. & Tel. Co. (1960), 170 Neb. 531, 103 N. W. 2d 312.

From a cursory examination of relevant laws and regulations, it does not appear that it was the intention of Congress or the Legislature to exclude proceeds of a wrongful death settlement from "any other income or resources of the child" in determining need for public aid. That, however, is not the issue.

We do not question the right of the Department of Public Welfare, if its practice permits, to enter a conditional order to require the guardians to exhaust their remedies so long as it does not deny assistance to the wards pending such determination. This was the procedure followed in Fitzpatrick v. Illinois Department of Public Aid (1972), 52 Ill. 2d 218, 287 N. E. 2d 666. Until, however, the funds are actually available to the respective guardians, they are not current resources which may be considered in determining eligibility for aid for dependent children.

In view of the result we have reached, there is no need to consider the other questions raised by the guardians. The judgment is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., concurring.

I concur in the result. I cannot agree with the gratuitous suggestions made in two paragraphs toward the end of the opinion. I further disagree with the suggestion that the judgment of the county court which was unappealed from was in some way arbitrary, and disagree with the implication that the law requires that the principal of the small wrongful death benefit must be immediately spent for the day-to-day living expenses of the dependent rather than expended at some future time for the long-range welfare of the child. Such a blind policy would serve neither the dependent nor society.

STATE OF NEBRASKA, APPELLEE, V. DARYL DEAN PINNEY, APPELLANT.

226 N. W. 2d 630

Filed March 6, 1975. No. 39665.

Appeal from the District Court for York County: JOHN D. ZEILINGER, Judge. Affirmed.

George E. Brugh, for appellant.

Clarence A. H. Meyer, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

MCCOWN, J.

In January of 1974, in the District Court for York County, the defendant pleaded guilty to a charge of burglary. On March 22, 1974, the defendant was placed on probation for a period of 2 years under the usual probation conditions. On April 17, 1974, the defendant was convicted and sentenced in the District Court for Platte County to consecutive terms in the county jail for assault and battery and minor in possession. On June 20, 1974, after defendant had waived hearing on a motion to revoke probation, the District Court for York County found that the defendant had violated the terms of the probation order and sentenced him to 1 to 2 years imprisonment on the original burglary conviction. The only issue here is whether or not the sentence was excessive.

The statutory range of sentence for imprisonment in the Nebraska Penal and Correctional Complex in this case was from 1 to 10 years. The record and the presentence report indicate that the original burglary charge on which the defendant was convicted and sentenced here was only one of two counts, one of which was dismissed pursuant to a plea bargain. The record also indicates that before the entry of the original probation order, the defendant was committed to the Division of Corrections for evaluation pursuant to the terms of section 83-1,105(3), R. S. Supp., 1974. That report recommended against probation but the probation here was thereafter granted. Defendant's prior record establishes that as a minor he was found guilty of breaking and entering, as well as numerous misdemeanor violations.

He was also absent without leave from the military service at the time of his violation of the conditions of probation.

A sentence imposed within statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Palmer, 191 Neb. 540, 216 N. W. 2d 178. There was no abuse of discretion here.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JON FLAHERTY, APPELLANT.

226 N. W. 2d 631

Filed March 6, 1975. No. 39673.

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

Richard P. Garden, for appellant.

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

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

MCCOWN, J.

The defendant pleaded guilty to a charge of delivery of a controlled substance, first offense, and was sentenced to 5 years imprisonment. The sole issue on this appeal is whether or not the sentence is excessive.

The defendant was initially charged with delivery of a controlled substance (LSD), second offense. Pursuant to the terms of a plea bargain the information was amended to charge only a first offense. The defendant pleaded guilty to the amended charge.

The record establishes that the defendant was placed on probation on a prior charge of delivery of cocaine

only 9 days before his arrest on the charge here. The prosecution in this case offered to recommend a lesser sentence than 5 years if the defendant would testify as to where he obtained the LSD involved. The defendant refused and the prosecution recommended the 5-year sentence which the court imposed. The statutory range of sentence on this charge is 1 to 10 years.

Under the provisions of sections 28-4,125(2) and 83-1,105(2), R. S. Supp., 1974, the 5-year term imposed here becomes an indeterminate sentence of 1 to 5 years. In the absence of an abuse of discretion a sentence imposed within statutory limits will not be disturbed on appeal. State v. Palmer, 191 Neb. 540, 216 N. W. 2d 178. The record here fully supports the action of the District Court. There was clearly no abuse of discretion.

AFFIRMED.

HI-POINT LAND AND CATTLE COMPANY, INCORPORATED, APPELLANT, V. ELMER SCHLAPHOFF ET AL., APPELLEES.
226 N. W. 2d 926

Filed March 6, 1975. No. 39682.

Appeal from the District Court for Valley County: EARL C. JOHNSON, Judge. Affirmed.

Richard L. Huber, for appellant.

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

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

NEWTON, J.

Plaintiff seeks an injunction restraining defendants from spraying plaintiff's land to control a noxious weed,

specifically musk thistle. Summary judgment was rendered for defendants. We affirm the judgment.

Plaintiff owns hundreds of acres, a portion of which it does not deny is infested with musk thistle. This action was commenced in 1969 and judgment finally entered in June 1974. Chapter 2, article 9, R. R. S. 1943, provides for the eradication and control of noxious weeds. Plaintiff concedes that notices were served upon it pursuant to section 2-955, R. R. S. 1943, of the act. It does not claim that it has eradicated or controlled the thistles; on the contrary, the record discloses that it has made very little effort to do so. Plaintiff's petition is based solely on the theory that aerial spraying by defendants will damage other vegetation, be harmful to livestock, and pollute streams. The record conclusively refutes these charges except that there would be some damage to other vegetation, but also shows that the damage would be less than that sustained by the uncontrolled spread of thistles.

It will be noted that the noxious weed act authorizes weed authorities to enter upon private lands to control the spread of all noxious weeds when the landowner fails or refuses to act. It further provides that the landowner may not hold weed authorities liable for trespass or damages.

The question presented is clearly one of law, not fact. Is the act unconstitutional as plaintiff asserts, or a valid exercise of the police power? In its brief plaintiff appears to have abandoned the contention of unconstitutionality. Only such errors as are assigned in the brief and discussed will ordinarily be considered on appeal. See Christensen v. Rogers, 172 Neb. 31, 108 N. W. 2d 389. In any event, the constitutionality of such acts appears to be well-established. See, 3 Am. Jur. 2d, Agriculture, §§ 45 and 46, pp. 811 and 813; Annotation, 12 A. L. R. 1143.

Plaintiff complains that the affidavits received in evidence were not made on the basis of personal knowledge.

Its objection is not specific but is apparently aimed at the attachment to the affidavits of statements from recognized authorities. They simply buttressed the statements made from personal knowledge by the affiants.

It is objected that two of the affidavits were not submitted until the day of hearing. This appears to contravene the spirit, if not the specific wording, of section 25-1332, R. R. S. 1943. Plaintiff failed to ask for a continuance and, in any event, the affidavits filed late dealt with facts which plaintiff does not dispute. They charged that plaintiff's property was infested with musk thistles, that they remained uncontrolled, and that in some areas they could only be treated by aerial spraying. Error, if any, was harmless.

Plaintiff also asserts that there were issues of fact to be resolved. It fails to specify what these issues were and as above noted, we fail to find verification for this statement in the record before us.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating in the decision of this case.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE SAXON, APPELLANT.

226 N. W. 2d 765

Filed March 6, 1975. No. 39737.

1. **Criminal Law: Sentences.** The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses arising out of the same transaction or the same chain of events is whether the offense charged in one count involves any different elements than an offense charged in another count.
2. **Criminal Law: Double Jeopardy: Sentences.** Constitutional provisions against double jeopardy are not violated by the im-

position of consecutive sentences, one for robbery in violation of section 28-414, R. R. S. 1943, and one for the use of a firearm in the commission of a felony in violation of section 28-1011.21, R. S. Supp., 1974, even though both of the offenses charged arise out of the same transaction or the same chain of events.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Renne Edmunds of Knowles & Edmunds, for appellant.

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

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

MCCOWN, J.

This is a post conviction proceeding in which the defendant seeks to vacate a sentence of 3 to 10 years imprisonment for the use of a firearm in the commission of a felony (robbery). That sentence was in addition and consecutive to a 25-year sentence for the robbery. The defendant contends that the imposition of the additional and consecutive sentence violates constitutional provisions as to double jeopardy and due process.

The defendant was originally charged with kidnapping, robbery, use of a firearm in the commission of a felony, and assault with intent to commit murder. The kidnapping count was dismissed. The defendant pleaded guilty to the other three counts. The defendant was sentenced on the robbery count to 25 years imprisonment; on the count for use of a firearm in the commission of a felony (robbery), 3 to 10 years consecutive to the robbery sentence; and on the assault count, 15 years to be served concurrently with the robbery sentence. The facts are set out in State v. Saxon, 187 Neb. 338, 190 N. W. 2d 854. The facts which are essential in the present case are that the firearm used in the robbery is the firearm which forms the basis of the charge and sen-

tence for using a firearm in the commission of a felony, and the events which form the basis for both charges occurred as part of one continuous chain of events.

It is the defendant's position that the robbery count and the count for the use of a firearm in the commission of that felony are merged, and that a sentence on each of the counts to be served consecutively violates constitutional prohibitions against double jeopardy.

Section 28-414, R. R. S. 1943, provides in part: "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, * * *." The use or carrying of a firearm or oher dangerous weapon is not an essential element of the crime of robbery under our statute. Neither is there any statute in this state creating an aggravated degree of the crime of robbery.

Section 28-1011.21, R. S. Supp., 1974, provides: "Any person who *uses* a firearm, knife, brass or iron knuckles, or any other dangerous weapon to commit any felony which may be prosecuted in a court of this state, or any person who *unlawfully carries* a firearm, knife, brass or iron knuckles, or any other dangerous weapon during the commission of any felony which may be prosecuted in a court of this state, shall be guilty of a separate and distinct felony and shall, upon conviction thereof, be punished by confinement in the Nebraska Penal and Correctional Complex not less than three years nor more than ten years, and such sentence shall be consecutive to any other sentence imposed upon him." (Emphasis ours.) Although the statute specifies that the offense is a separate and distinct felony, it is also apparent that the offense must be connected to an underlying felony, and proof of that underlying felony is essential to conviction under this section. A sentence under this section must be additional and consecutive to the sentence on an underlying felony conviction. A defendant acquitted on the underlying felony charge cannot be convicted of an

offense under this section involving that felony; but a defendant convicted of the underlying felony might still be acquitted on a charge under this section.

The cases relied upon by the defendant to support his position are inapplicable. They involve statutes dealing with aggravated degrees of specific felonies in which the essential elements of the aggravated crimes are identical to those of the dangerous weapons statute, or they involve a dangerous weapons statute which itself becomes an aggravated degree felony statute, and the underlying felony becomes a lesser included offense. None of these fit the pattern of the Nebraska statutes.

It is well settled that the test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. See, United States v. Bauer, 198 F. Supp. 753; Blockburger v. United States, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306.

We think the case of People v. Chambers, 7 Cal. 3d 666, 102 Cal. Rptr. 776, 498 P. 2d 1024, which deals with a statute very similar to section 28-1011.21, R. S. Supp., 1974, appropriately treats the statute as one which provides increased penalties for defendants who are "armed" during the commission of felonies. The California court in that case applied the additional punishment statute even though the basic felony was an aggravated degree of robbery under which the use of a weapon was an essential element of the crime of armed robbery. The court did so in that case because of specific language of the Legislature which stated: "This section shall apply even in those cases where the use of a weapon is an element of the offense." § 12022.5, Cal. Pen. Code. The quoted language arose as a result of People v. Floyd,

71 Cal. 2d 879, 80 Cal. Rptr. 22, 457 P. 2d 862. That case held that where the statute fixed the penalty for armed robbery and the fact of being armed was essential to conviction under that statute, section 12022 of the penal code providing for additional punishment was inapplicable. The Floyd case also pointed out that even under its holding the additional punishment section could clearly be imposed where the use of the weapon was not one of the essential elements of the underlying felony.

At least with respect to the crime of robbery as currently defined by section 28-414, R. R. S. 1943, the use or carrying of a firearm or any other dangerous weapon is not an essential element of the crime. To convict a defendant on a charge of using or carrying a weapon in the commission of a felony under section 28-1011.21, R. S. Supp., 1974, requires a different element and additional evidence to that required for the offense of robbery. Whichever evidentiary tests for resolving double jeopardy issues may be used, the facts here present no constitutional problem in the context presented in this case.

Constitutional provisions against double jeopardy are not violated by the imposition of consecutive sentences, one for robbery in violation of section 28-414, R. R. S. 1943, and one for the use of a firearm in the commission of a felony in violation of section 28-1011.21, R. S. Supp., 1974, even though both of the offenses charged arise out of the same transaction or the same chain of events.

The judgment is affirmed.

AFFIRMED.

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

226 N. W. 2d 765

Filed March 6, 1975. No. 39720.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Walker, Luckey, Whitehead & Sipple and Mark M. Sipple, for appellant.

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

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

CLINTON, J.

The issue involved in this case is substantially identical with that in State v. Saxon, *ante* p. 278, 226 N. W. 2d 765, and the result is governed by that opinion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL GARZA, APPELLANT.

226 N. W. 2d 768

Filed March 13, 1975. No. 39575.

1. **Trial: Instructions.** An instruction which submits an issue not supported by the evidence to the jury is erroneous.
2. **Criminal Law: Instructions.** An erroneous instruction in a criminal case is not ground for reversal unless prejudicial to the defendant.

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

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

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

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

BRODKEY, J.

Appellant, Michael Garza, has appealed his felony conviction under section 28-532, R. R. S. 1943. The specific language of the information charged that he "did willfully, maliciously, and forcibly and with the intent to commit rape on the person of Vida (sic) M. Cernius in the dwelling hereinafter described, break and enter into said dwelling located at 3407 V Street, in the City of Omaha." The jury returned a verdict of guilty, and the trial court sentenced appellant to serve a term of 10 years in the Nebraska Penal and Correctional Complex. The appellant assigns as error the action of the trial court in instructing the jury on the issue of aiding and abetting, asserting that there is no evidence in the record to support such instruction. We affirm.

The facts of this case are that in the early morning hours of September 24, 1973, someone entered the bedroom of Vita Cernius at 3407 V Street in Omaha, Nebraska, awakened her in some manner by putting physical pressure on her chest and a hand over her mouth. At that time the intruder stated " 'Don't scream or I'll kill you.' " He made no attempt to kiss or fondle Vita, and after a struggle lasting approximately 30 seconds he struck her on the mouth and rushed out of the room. The bedroom was dark and Vita could not tell who the intruder was. Vita's father was awakened by the sounds of the struggle and attempted to stop the intruder in the hall, but was unsuccessful. Mr. Cernius did not get a good look at the intruder because of darkness. The intruder exited from the house through a back door, and in order to do so had to break the glass on the door with his foot. Omaha police officers arrived to investi-

gate the matter and discovered blood leading out the back door of the house. They were able to follow a trail of blood, which led them to 3121 T Street. They entered the house and found appellant lying on a couch with a bleeding foot. At the trial evidence was adduced as to an intimate relationship Vita had previously had with an individual who called himself Mike Gonzales, but she was unable to identify appellant as the same person whom she knew as Mike Gonzales. The police officer who interviewed Vita the day of the incident testified she told him that the intruder was possibly a Negro with an afro style haircut. There was also testimony adduced concerning an unidentified black man present at the preliminary hearing held in the case.

Appellant contends that it was error for the court to instruct the jury as to the law of aiding and abetting for the reason there was no testimony that anyone saw two people in the Cernius house during the incident described above. Moreover, the evidence in the record would seem to indicate that the appellant was tried as a principal, and not as an aider, abettor, or procurer.

Instruction No. 13 given by the court to the jury in this case was the standard N.J.I. No. 14.12 as follows:

"To be guilty of the crime charged, it is not necessary that the State prove that the defendant himself committed the unlawful act or acts in question.

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

"*If you find from the evidence* beyond a reasonable doubt that the unlawful act or acts in question were committed by *another* person who was:

"1. Engaged by the defendant to commit the unlawful act or acts, or

"2. Engaged with the defendant in a common, concerted unlawful act or acts, or

"3. Incited or encouraged by defendant to commit the unlawful act or acts,

then the defendant is as guilty as if he himself committed the unlawful act or acts and it is your duty to find the defendant guilty.

"Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

"On the other hand, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving the defendant guilty." (Emphasis supplied.)

It is clear from the above instruction that it is first necessary for the jury to find from the evidence beyond a reasonable doubt that the unlawful act or acts in question were committed by another person, before considering or applying the law of aiding and abetting to this case, as explained in the instruction and in section 28-201, R. R. S. 1943. Thus the jury was obviously required first to make a factual determination from the evidence that two or more persons were involved in the crime. It is the general rule that an instruction which submits an issue to the jury not supported by the evidence is erroneous. See Bell v. State, 159 Neb. 474, 67 N. W. 2d 762 (1954). Appellant contends there was no evidence to support the aiding and abetting instruction. Let us examine that contention.

It appears from the record that the suggestion there may have been more than one person in the house at the time of the incident was first raised by counsel for the appellant himself in the cross-examination of George Cernius, father of Vita. After he testified that he had seen a man 5 feet from Vita's bedroom, counsel for appellant asked him: "Well, you're assuming he came out of there, but there might have been more than one person. Did you see him come out of the bedroom?" The

State's objection to this question was, however, sustained by the court. Later in the trial police officer Pignotti was asked what description Vita Cernius gave him of the person in her room and he replied: "Her description was, 'A male, 20's, possible Negro.'" From this description alone the jury could have concluded that there were two persons in the Cernius house because the defendant was not a Negro but, according to the arresting officer's testimony, was a Mexican male. Further, when Vita Cernius was being cross-examined she was asked about a black man who attended the preliminary hearing. When asked if that black man was the man in her bedroom, Vita Cernius replied, "I don't know." Also, Anna Cernius, mother of Vita, testified that she saw a black male at the preliminary hearing who was seated in the same row she was sitting, and that she saw him get up and walk from the courtroom. She described him as tall and skinny, walked with a limp; and that he called out the name "Mike" a couple of times. It appears the foregoing testimony might well have raised the question in the minds of the jurors as to whether there was more than one intruder in the Cernius home the night of the crime. The trial judge was apparently of the same opinion as he stated during the conference on instructions: "And there's sufficient evidence introduced by the State, as well as Cross Examination, of the potentiality of more than one person." The court also noted after closing arguments that the instructions on aiding and abetting were to be submitted "because of the fact that it was dwelled upon in the opening statements and there was evidence both on Direct and Cross which raised some question," and further stated "Let the record show that, while the closing argument was not reported, the Court made notes, and Mr. Watts argued it with quite deliberation in his closing argument, and his statement was, in all probability, someone else was along with the Defendant and someone else was there. He repeated that several times." It

seems clear that the court in this case was faced with the dilemma as to whether or not to give the instruction on aiding and abetting, and in an abundance of caution, and for the purpose of resolving any doubts the jury may have had and to expedite further proceedings, gave the standard instruction set out above, which made it a question of fact for the decision of the jury as to whether there was more than one person in the home that night, and, if so, then whether the aforesaid instruction should be considered and applied in this case.

However, even assuming, without conceding, that there was no competent evidence to support the giving of the aiding and abetting instruction, we believe that the action of the court in giving such instruction would be erroneous only, and not ground for reversal, in the absence of a showing of prejudice. At the most it would constitute harmless error under section 29-2308, R. R. S. 1943, which provides, among other things: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." In Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880 (1948), the defendant claimed, as did the appellant in this case, that the court committed reversible error in instructing the jury on the issue of aiding and abetting when it responded to no issue in the case. In discussing this contention, the court stated: "The effect of the instruction was to tell the jury that if the defendant aided, abetted, or procured another to commit the offense charged he could be prosecuted and punished as if he were a principal offender.

"An examination of the record discloses that the evidence was in proof of guilt of this defendant as a principal and not as an aider, abettor, or procurer hence

the instruction was upon an issue not presented. It was therefore, as contended, error to give it. The error was however without prejudice and cannot be considered ground for reversal. The giving of it could have in nowise prejudiced any substantial right of the defendant. Unless the error complained of could be considered as prejudicial to the rights of defendant it may not be considered here as ground for reversal. § 29-2308, R. S. 1943; Mason v. State, 132 Neb. 7, 270 N. W. 661; Jackson v. State, 133 Neb. 786, 277 N. W. 92." The same rule was reaffirmed in the recent case of State v. Morgan, 187 Neb. 706, 193 N. W. 2d 742 (1972). See, also, State v. Roan Eagle, 182 Neb. 535, 156 N. W. 2d 131 (1968).

We conclude, therefore, that the instruction given by the court was supported by evidence and was properly given, and, further, even assuming that the giving of the instruction was erroneous, it was clearly harmless error and not ground for reversal. We therefore affirm appellant's conviction.

AFFIRMED.

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

227 N. W. 2d 390

Filed March 13, 1975. No. 39622.

1. **Obscenity.** The Nebraska obscenity statutes are in full compliance with the criteria and standards required by recent Supreme Court decisions, including Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419.
2. ———. The four magazines involved herein depict or describe in a patently offensive way sexual conduct specifically covered by our state law, as authoritatively construed.
3. **Obscenity: Constitutional Law.** A minimum requirement to merit First Amendment protection is that the work in question has serious literary, artistic, political, or scientific value.
4. ———: ———. The "knowingly" language of the statute, and

the construction given by the District Court in this case, satisfies the constitutional requirements of scienter.

5. **Obscenity: Intent.** A seller of magazines is ordinarily presumed to know what he is offering for sale, although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every isolated obscene statement in the hundreds of books which he has for sale. But in a situation, as here, where the magazines are enclosed in plastic and the covers, front and back, are occupied with pictures of nude individuals in various poses, it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials.
6. **Obscenity.** The magazines involved herein are hard core pornography as repeatedly described by the United States Supreme Court. They are obscene whether we use the Miller test or the Roth-Memoirs test.
7. ———. The definition of obscenity is not a question of fact but one of law.
8. **Obscenity: Words and Phrases.** The word "obscene" as used in the statute is not merely a generic or descriptive term, but a legal term of art. It is sufficiently definite in legal meaning to give a defendant notice of a charge against him.
9. **Trial: Instructions.** Error cannot be predicated on an instruction given at the request of the complaining party.

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

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

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

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

SPENCER, J.

Defendant appeals its conviction on four separate counts of selling obscene magazines. Defendant attacks the statute for vagueness and overbreadth; and contends that the requisite element of scienter was not charged nor proven; that the publications are not obscene as a matter of law; and that the trial court erred by im-

properly instructing the jury on the definition of obscenity and the standards by which obscene material is to be judged. We affirm.

On or about March 7 and 9, 1972, officers of the Omaha police department morals squad purchased four magazines which are the basis of the four counts herein. The magazines involved in the respective counts are: Count I, "Switch Hitters"; count II, "World of Love and Sex"; count III, "More than 7 Inches"; and count IV, "Odd Love".

In the magazine in count I, with two exceptions, there is no actual contact with the genitals in the pictures. The magazine, however, is clearly devoted to a lewd display of genitals in apparent preparation for various acts of sodomy. The written material is very descriptive of such acts.

The magazine in count II has photographs of nude men and women engaging in sexual intercourse, cunnilingus, fellatio, and masturbation. The written material, while not specifically descriptive of the photographs, is particularly lewd, vulgar, and obscene.

The magazine in count III consists entirely of pictures of young boys masturbating and committing various acts of sodomy. Some of the written material purports to give crude, lewd, and obscene quotations from 13- to 15-year-old boys.

The magazine in count IV is devoted to lesbianism. It portrays nude women depicting lesbian love scenes, with a majority of the pictures prominently displaying the genitals. The written material contains a description of an episode of sadomasochistic abuse.

Defendant's first assignment of error attacks the statute on the grounds of vagueness and overbreadth. In State v. Jungclaus (1964), 176 Neb. 641, 126 N. W. 2d 858, we defined obscene material as that which deals with nudity, sex, or excretion in a manner appealing to prurient interest. We there said: "The proper standard for judging obscenity is whether to the average person,

applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest." We also defined "prurient interest" as being "such as excite lustful thoughts of a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor."

The question of the constitutional validity of our obscenity statute is no longer in issue. It has been specifically construed to comply with Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. In State v. Little Art Corp. (1974), 191 Neb. 448, 215 N. W. 2d 853, we held: "The Nebraska obscenity statutes are in full compliance with the criteria and standards required by recent Supreme Court decisions including Miller v. California."

Each of the four magazines are clearly embraced within the test delineated in Miller v. California, *supra.* The average person, applying contemporary community standards, would find each magazine taken separately appeals to the prurient interest. Each of them depicts or describes in a patently offensive way sexual conduct specifically covered by our state law, as authoritatively construed. A casual review of each of the magazines is sufficient to indicate that they were not intended to promote, and definitely lack, any serious literary, artistic, political, or scientific value. Actually, each magazine would meet the utterly "without redeeming social value" test of Memoirs if it were still applicable. Each of them is embraced within one of the two suggested standards enunciated in Miller. They either contain patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, or there is a patently offensive representation or description of masturbation, excretory functions, and lewd exhibition of genitals. If there is any serious literary, artistic, political, or scientific value in any of the four magazines, we are unable to find it. This, as we

understand it, is a minimum requirement to merit First Amendment protection.

Defendant further argues that the information did not charge and the State failed to prove the requisite element of scienter. Basically, defendant's argument is that the State is required to set forth precisely the degree of guilty knowledge a defendant is required to defend against. Section 28-921, R. S. Supp., 1971, provided in part: "Whoever knowingly sells or offers for sale * * * or otherwise circulates * * * or causes to be circulated * * * or has in his possession with intent * * * to otherwise circulate * * * or cause to be circulated * * * any obscene, lewd, indecent, or lascivious book * * *." The court in its instructions told the jury that before it could find the defendant guilty it must find that the State had met its burden in showing that the defendant "did through its agents or through its employees willfully and knowingly sell, offer for sale, or to otherwise circulate or publish" obscene material.

The use of the term "knowingly" as showing the requisite element of scienter when accompanied by proper instructions has been approved by the United States Supreme Court in Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590: "We think the 'knowingly' language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U. S. C. § 1461 or by the Constitution."

Here the defendant is a corporation, so the knowledge

must necessarily be that of its officers and employees. The police officers testified that the materials in question were enclosed in clear plastic covers and displayed on the shelves at defendant's place of business. One could not page through the magazines but could see the covers. Anyone looking at the front and back covers of the four magazines in question, in light of the descriptive titles of the magazines, would readily infer that the contents of the magazines were obscene.

We said in State v. Jungclaus (1964), 176 Neb. 641, 126 N. W. 2d 858: "A seller of magazines and phonograph records is ordinarily presumed to know what he is offering for sale, although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every isolated obscene statement in the hundreds of books that he had for sale. But in a situation, as here, where the covers of the magazines, front and back, are occupied with pictures of nude women in various poses, it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials." Though the standard for judging obscene materials has altered somewhat since the ruling in Jungclaus, we feel that the inference with regard to the knowledge of the contents of the material found in the defendant's possession, considering its nature, the manner of its display and sale, is still a proper one.

Defendant's third assignment of error relates to its contention that the magazines in question are not obscene as a matter of law. We have sufficiently discussed this heretofore. Even a cursory examination of the exhibits involved will show that they are hard core pornography as repeatedly described by the United States Supreme Court. They are obscene whether we use the Miller test or the Roth-Memoirs test. Applying the pre-Miller test, they are utterly without redeeming social value.

Defendant's last assignment of error complains that

the trial court erred by improperly instructing the jury on the definition of obscenity and on the standards by which obscene material is to be judged. Defendant argues that because the conduct for which it was prosecuted took place before June 21, 1973, the date of the Miller decision, it is being subjected to an ex post facto law because there was a change in the law, as interpreted, between the date of the offense and the date of the trial. In Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590, the court specifically stated that Miller did not purport to make criminal conduct which had not previously been thought criminal, but had instead added a clarifying gloss to the prior construction and made the meaning of the federal statute more definite. Obviously if the ex post facto argument has any validity, it would have been necessary at the time of Miller to vacate all nonfinal convictions and dismiss all pending actions. The failure of the Supreme Court to require this is a specific refutation of the ex post facto argument.

In Miller the court noted that if the state law regulating obscene material is construed to conform "the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." As suggested heretofore, it makes no difference whether the magazines herein are judged under the Roth-Memoirs standards or the Miller standards. Under either test the magazines are indeed obscene. As stated in Hamling, the definition of obscenity is not a question of fact, but one of law. The word "obscene" as used in the statute is not merely a generic or descriptive term but a legal term of art. The legal definition of obscenity does not change with each indictment. It is a term sufficiently definite in legal meaning to give a defendant notice of a charge against him.

The difficulty with defendant's argument is that de-

fendant specifically requested that the jury be instructed on Miller standards. In the conference on instructions, defendant's counsel objected to some of the instructions because he contended that they contained a standard no longer applicable and because they did not conform to the definition of obscenity in Miller v. California, *supra.* It is clear that defendant not only chose but insisted upon being tried on the Miller standards and in having the jury so instructed. It is in no position to complain because the court followed its wishes. We have long held that error cannot be predicated on an instruction given at the request of the complaining party. Starkweather v. State (1958), 167 Neb. 477, 93 N. W. 2d 619.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

On the constitutional issues involved under the obscenity statutes here, see my dissent in State v. Little Art Corp., 191 Neb. 448, 215 N. W. 2d 853. It should be noted also that the obscenity statutes here have now been repealed and replaced by sections 28-926.11 et seq., R. S. Supp., 1974.

The additional problem involved is one of statutory interpretation in turning a single transaction into multiple offenses. The majority opinion affirms the conviction of the defendant on four counts of selling an obscene magazine, and a maximum fine of $1,000 on each count. The record shows that the four magazines were sold and purchased in just two separate transactions. Each of the two transactions involved two different magazines, both of which were purchased by the same individual at the same time.

Section 28-921, R. S. Supp., 1971, provided: "Whoever knowingly sells * * * any obscene, lewd, indecent, or lascivious book, pamphlet, paper * * * shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars nor less than fifty dollars, or by

imprisonment in the county jail not more than one year, or both; * * *."

It is unclear what the Legislature intended to declare where multiple pieces of obscene literature were sold in one transaction. To say the least, the statutory language is ambiguous in fixing the punishment. In 1955 in a case involving two counts of violating the Mann Act by transporting two women on the same trip in the same vehicle, Mr. Justice Frankfurter, speaking for the United States Supreme Court majority, determined that only one offense had been committed and said: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes." Bell v. United States, 349 U. S. 81, 75 S. Ct. 620, 99 L. Ed. 905.

The principle has been extended to other federal penal statutes by the United States Supreme Court. In Castle v. United States, 368 U. S. 13, 82 S. Ct. 123, 7 L. Ed. 2d 75, the defendant was charged with five counts of knowingly and unlawfully transporting in interstate commerce five separate falsely made and forged money orders. The evidence was that the defendant personally

transported the money orders from Indiana to Texas on the same trip and at the same time. In a per curiam opinion the Supreme Court held that the principles enunciated in Bell v. United States, *supra*, were controlling and remanded the case for resentencing on the basis that the defendant was guilty of only one offense. To the same effect, see, State v. Welch, 264 Ore. 388, 505 P. 2d 910; Commonwealth v. Colonial Stores, Inc., 350 S. W. 2d 465 (Ky. App., 1961).

In the Fifth Circuit in United States v. Carty, 447 F. 2d 965 (1971), the court again followed the Bell rationale and held that a defendant charged on three counts of interstate transportation of stolen firearms arising out of the transportation of three separate firearms at the same time constituted only one offense and that the defendant could not be separately charged simply because three separate firearms were involved. See, also, United States v. Deaton, 468 F. 2d 541, cert. den., 410 U. S. 934, 93 S. Ct. 1386, 35 L. Ed. 2d 597.

In at least one state the principles of Bell have been embodied in a statute. See M. S. A. § 609.035. Under that statute, the Minnesota Supreme Court held that a defendant charged with exhibiting and selling 41 obscene photographs could be sentenced for only one offense. State v. Getman, 293 Minn. 11, 195 N. W. 2d 827, vacated on other grounds, 413 U. S. 912, 93 S. Ct. 3044, 37 L. Ed. 2d 1029.

The defendant in the case now before us was convicted and sentenced on four separate counts of selling an obscene magazine. There were just two separate sales and each involved two magazines. All doubts should be resolved against turning a single transaction into multiple offenses. The convictions and sentences on two counts here may have been proper, but the convictions and sentences on the other two counts were improper and should be vacated and dismissed.

CLINTON, J., responding to the dissenting opinion.

The "single transaction" "multiple offenses" question

dealt with in the dissent of McCown, J., was not raised by defendant either in the trial court or on this appeal. The majority opinion ought not to be interpreted as deciding the question raised by McCown, J., nor as avoiding an issue raised.

AVA RENEE GADEKEN, A MINOR, BY AND THROUGH RICHARD GADEKEN, HER FATHER AND NEXT FRIEND, APPELLANT, V. JOE LANGHORST, APPELLEE.
226 N. W. 2d 632

Filed March 13, 1975. No. 39623.

1. **Negligence: Infants.** Whether negligence may be attributed to a minor 11 years of age is usually a question of fact for the jury.
2. ———: ———. A minor 11 years of age is required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.

Appeal from the District Court for Cuming County: GEORGE W. DITTRICK, Judge. Reversed and remanded.

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

Ray C. Simmons, for appellee.

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

BOSLAUGH, J.

This was an action by Richard Gadeken as father and next friend of the plaintiff, Ava Renee Gadeken, to recover damages for the injuries she sustained in an automobile accident. The plaintiff appeals from an order dismissing the action at the close of the plaintiff's evidence.

The accident happened on August 6, 1971, at about 11:35 a.m., at the intersection of Bridge Street and Mill

Street in West Point, Nebraska. The plaintiff was injured when her bicycle struck the side of an automobile operated by the defendant, Joe Langhorst.

Bridge Street is a two-lane paved street, approximately 40 feet wide, which runs east and west. Mill Street is 28 feet wide, is surfaced with gravel, and runs north and south. Bridge Street is protected by stop signs erected at the southeast and northwest corners of the intersection.

Railroad tracks run parallel to Mill Street and cross Bridge Street approximately 19 feet east of the intersection. The railroad crossing is about 4 feet higher than the intersection so Bridge Street slopes down to the west from the railroad crossing to the intersection.

The plaintiff was on her way to a picnic at the time the accident happened. She testified that she approached the intersection from the east and stopped near the north curb of Bridge Street about halfway between the railroad tracks and the intersection. At this time there were two girls on the sidewalk on the north side of Bridge Street near the railroad crossing. One of these girls testified that the plaintiff stopped near the railroad crossing before proceeding west on Bridge Street.

There was a gravel truck proceeding south on Mill Street and the plaintiff waited until the truck had cleared the intersection before proceeding west. After the truck had crossed the intersection, the plaintiff proceeded west on Bridge Street but did not see the defendant's automobile until just before the impact. Her testimony indicates the front of the defendant's automobile was about one-third of the way across the intersection when she saw it for the first time. At that time she was just "starting out" or starting to pedal the bicycle. The plaintiff attempted to stop but was unable to do so and the bicycle struck the right side of the defendant's automobile behind the rear wheel. At the time of the impact the front of the defendant's automobile was north of the intersection.

The defendant testified that he stopped at the stop sign on the south side of the intersection and waited to see whether the gravel truck coming from the north would make a left turn. After the gravel truck had entered the intersection and it was apparent that it was not going to turn, the defendant proceeded into the intersection and the front ends of the two vehicles reached the center of Bridge Street at about the same time. At about this time the defendant noticed the two girls on the sidewalk north of Bridge Street. The defendant slowed down anticipating that the girls might run in front of him. While watching the girls on the sidewalk, the defendant glanced back and saw the plaintiff who was then east of the railroad tracks and coming west at a "terrific speed." The defendant looked toward the girls on the sidewalk and then back toward the plaintiff and the impact occurred.

The petition alleged the defendant failed to keep his car under reasonable control, failed to keep a proper lookout, failed to yield the right-of-way to the plaintiff, and failed to stop at the stop sign. Of these specifications only the allegations relating to lookout and right-of-way were supported by the evidence.

When the evidence is considered in the light most favorable to the plaintiff, the defendant's failure to see the plaintiff when she was stopped just east of the intersection was evidence of negligence on the part of the defendant that would create a jury question unless the plaintiff was barred by contributory negligence or her negligence was the sole proximate cause of the accident.

The plaintiff was 11 years of age at the time of the accident. Whether negligence may be attributed to a minor 11 years of age is usually a question of fact for the jury. Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559. The plaintiff was required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in

the same situation. Sacca v. Marshall, 180 Neb. 855, 146 N. W. 2d 375.

The plaintiff's failure to see the defendant's automobile until it was one-third of the way across the intersection was evidence of contributory negligence. When the plaintiff stopped east of the intersection to allow the gravel truck to cross Bridge Street she was in a place of safety so far as traffic crossing Bridge Street was concerned. When she proceeded west on Bridge Street while the defendant's automobile was crossing the intersection she entered an area of danger. Her inability to stop or turn aside to avoid colliding with the side of the defendant's automobile was further evidence of contributory negligence. However, under all the circumstances of the case, we believe it was a question for the jury whether the plaintiff was guilty of negligence sufficient to bar her recovery.

With regard to proximate cause, we do not believe the evidence established as a matter of law that the plaintiff's negligence was the sole proximate cause of the accident. The plaintiff was on an arterial street and, ordinarily, would have the right-of-way as against traffic entering the intersection from a side street. The evidence does not establish with certainty when the plaintiff began to proceed west on Bridge Street after stopping for the gravel truck. If her conduct was such that a reasonable person would have concluded that she intended to yield the right-of-way to both the gravel truck and the defendant, then the jury could find that her attempt to cross the intersection after the defendant had entered the intersection was the sole proximate cause of the accident. This is a conclusion that might be drawn after a consideration of all the facts and circumstances but it is a matter about which reasonable minds might differ.

We conclude that the judgment should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

I dissent from the conclusion reached in this case. In my judgment the sole proximate cause of the accident was the action of the injured minor.

STATE OF NEBRASKA, APPELLEE, V. JOHN CUTRIGHT, APPELLANT.

226 N. W. 2d 771

Filed March 13, 1975. No. 39660.

1. **Statutes: Constitutional Law.** The general rule is that the Legislature may not delegate legislative powers to an administrative agency.
2. **Statutes: Constitutional Law: Administrative Law.** To declare what shall constitute a crime and how it shall be punished is a power vested solely and exclusively in the Legislature and may not be delegated to an administrative agency.
3. ———: ———: ———. The exercise of a legislatively delegated authority to make rules and regulations to carry out an express legislative purpose, or for the complete operation or enforcement of a law with clearly designated limitations and standards, is not an exercise of legislative power.
4. ———: ———: ———. There is no unconstitutional delegation of legislative authority where the Legislature by statute defines a crime and provides a penalty therefor, but delegates to administrative or executive authority the implementation of the details thereof.

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

John Cutright, pro se.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

BRODKEY, J.

Appellant, John Cutright, was convicted on April 8,

1974, in the county court of Dodge County, Nebraska, of unlawfully swimming "in a restricted area at the Fremont State Lakes, in an area not authorized for swimming by the Game and Parks Commission," contrary to the provisions of section 81-805(5) and (9), R. S. Supp., 1972, and was fined $50 and costs. He appealed that conviction to the District Court for Dodge County, Nebraska, which court, on June 21, 1974, affirmed the judgment and fine of the county court. He now appeals to this court. We affirm.

In the stipulation of facts entered into for the purpose of the trial of this case, appellant admits that he has been an inveterate swimmer all his life, and that as a regular practice he swims in complete disregard of and through, and beyond and over the lines laid out by the Game and Parks Commission of the State of Nebraska in the form of buoys or floats on cables for confinement of swimming to certain areas so designated, and further admits to swimming willfully in the restricted area of the Fremont State Lakes in an area not authorized for swimming by the Game and Parks Commission on the 6th day of August 1972 in Dodge County, Nebraska.

The sole issue in this case is as to the constitutionality of the statute under which he was charged and convicted. Appellant contends that the grant of power by the Legislature to the Game and Parks Commission to promulgate rules and regulations prohibiting swimming and other water activities in the lakes in state parks under its ownership and control, except where the commission shall have given permission for such activity in the specified area or portion thereof and further providing that a violation thereof would be a criminal offense, was an unconstitutional delegation of Legislative power to an administrative agency. He further claims that a citizen has a constitutional right to engage in any activity, including swimming, and that the statute under which he was convicted is unconstitutional because, under the guise of police power and for

the ostensible purpose of promoting public health, safety, and welfare, it tends to stifle or prohibit such activities altogether in violation of his legal rights as an individual. In support of his contentions, appellant relies solely and exclusively upon the decision of this court in Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227 (1960). In that case this court held that an attempted delegation of powers by the Legislature to the Director of the Department of Agriculture and Inspection, under the facts of that case, was unconstitutional. In that case the act involved provided that: "The director is hereby authorized to adopt, by regulation, minimum standards for the sanitary quality, production, processing, distribution, and sale of Grade A milk and Grade A milk products, and for labeling of the same. Such regulations shall comply generally with the Milk Ordinance and Code—1953 recommendations of the Public Health Service, of the Department of Health, Education and Welfare of the United States." It was further provided in another part of the act that any person or persons violating the rules or regulations issued therein shall be guilty of a misdemeanor and shall, upon conviction, be fined not less than $25 nor more than $100 for the first violation, and not less than $100 nor more than $500 for a subsequent violation. The court held that the Legislature could not delegate its power to create criminal offenses and prescribe penalties to an administrative or executive authority; that such powers are exclusively legislative and may not be delegated to the executive branch of the government under the doctrine of division of powers contained in the state Constitution; and, further, that the grant of power by the Legislature to the Director of the Department of Agriculture and Inspection to promulgate rules and regulations in general compliance with a model code, in accordance with his judgment or whim, the violation of which are made crimes subject to punishment, is an unconstitutional delegation of legislative power to an

administrative authority. This court found that under that statute, the Director, and not the Legislature, defined what should be criminal offenses.

We think that the foregoing statute is readily distinguishable from the statute involved in this case. Section 81-805(5), R. S. Supp., 1972, under which appellant was charged, does authorize the Game and Parks Commission to enact regulations permitting swimming and other water sports, but in addition specifically provides ". . . that any person who shall swim, bathe, boat, wade, water ski, or use any floatation device on all or any portion of any area under the ownership or control of the commission, *unless the commission shall have given permission for such activity in the specific area or portion thereof,* shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished as provided in subdivision (9) of this section; . . . ." (Emphasis supplied.) Subdivision (9) above referred to provides, among other things: "Any person guilty of a misdemeanor as set forth in . . . *this section* shall, upon conviction thereof, be punished by a fine of not less than ten dollars, nor more than one hundred dollars, or by imprisonment in the county jail not to exceed thirty days, or both such fine and imprisonment." (Emphasis supplied.) It is clear, therefore, that in the statute involved in the instant case, the Legislature itself actually established the crime and the penalty for violation of the statute. To paraphrase the language of the Legislature, it is provided that any person who shall swim in any area under the ownership or control of the commission, without permission from the commission, shall be guilty of a misdemeanor, and punished accordingly. The only thing that is left to the decision or discretion of the commission is the designation of the appropriate areas where swimming may be permitted, and the posting of the proper notices for such areas. Obviously the filling in of the minor details relative to the implementation of the statute would have to be delegated by the

Legislature, as it is not to be expected and, in fact, would be a physical impossibility for the Legislature to visit all the state lakes personally, and make its own determination of where swimming should be permitted.

On the other hand, the act involved in Lincoln Dairy Co. v. Finigan, *supra,* did not contain a legislative definition of the crime itself, as did the statute in this case. It merely provided that the Director should have the power to make rules and regulations, and if he did so the Legislature provided that a violation of such regulations would be a misdemeanor, and punishable as such. In other words, the Director, under that act, was given the absolute power to determine what conduct would be punishable under the regulations that he drew. This clearly would be an unconstitutional delegation of its power by the Legislature to an administrative agency or an executive of the government; and this court so held. The statute involved in this case is totally unlike the act involved in the Lincoln Dairy Co. case for the reasons previously stated; and we conclude that there is no unconstitutional delegation of legislative power involved in the statute in this case.

We wish to point out, in passing, that the situation involved herein, where the Game and Parks Commission is permitted by law to designate and post the areas where swimming is permitted, is similar and analogous to certain traffic laws of this state, which variously provide that the Department of Roads, county boards, Game and Parks Commission, and local authorities may establish or modify existing speed limits for motor vehicles, after a determination of the desirability of necessity for so doing, and the posting of the new speed limits. See, for example, §§ 39-665 and 39-697, R. R. S. 1943, and §§ 39-662 and 39-666, R. S. Supp., 1974.

Furthermore, we conclude that appellant's claim he had a constitutional right to swim wherever he wished, and that the statute involved herein prohibiting him from doing so is unconstitutional, is likewise without

merit. There is no question that the statute involved is a proper exercise of the police power. While we can appreciate and understand the desire of the appellant, a life-time swimmer, to swim out beyond the area designated by the Game and Parks Commission, and with full recognition of his right to swim in state owned and controlled lakes, we think it is clear that that right may be restricted in order to protect the public health, safety, and welfare. The state has a legitimate interest in averting the confusion and disaster which might well result from the unrestricted intermingling of countless water skiers, fishermen, swimmers, etc., in controlled recreation areas. The rules and regulations of the commission, adopted pursuant to section 81-805(5), R. S. Supp., 1972, are reasonably related to the purpose of providing the public with safe and orderly recreation areas; and the restraint on appellant's personal "freedom" is outweighed by the collective benefits to the public. We conclude, therefore, that the statute under which the appellant was charged and convicted, and which he, admittedly, willfully violated, is in all respects constitutional; and his conviction, must, therefore, be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEITH ALLEN RUSS, APPELLANT.

226 N. W. 2d 775

Filed March 13, 1975. No. 39669.

1. **Post Conviction: Pleadings.** In a proceeding under the Post Conviction Act, the appellant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and alleging mere conclusions of fact or of law are not sufficient to require the court to grant an evidentiary hearing.
2. **Criminal Law: Arrest: Probable Cause.** The applicable stand-

ard for an arrest without warrant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense. This standard, under our statutory and case law, is the same standard as that of the Fourth Amendment to the Constitution of the United States protecting persons against unreasonable seizures.

3. ———: ———: ———. When authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance. The constitutional exercise of such authority is subject to the condition that the officer has probable cause to believe the person sought is within the building. No search warrant is required in this circumstance.
4. **Post Conviction: Searches and Seizures: Arrest.** An illegal search and seizure or arrest issue cannot be considered in a post conviction review where the circumstances of the search and seizure or arrest were fully known to the defendant at the time of the trial resulting in his conviction.
5. **Post Conviction.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

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

Keith Allen Russ, pro se.

Paul L. Douglas, Attorney General, and Harold S. Salter, for appellee.

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

CLINTON, J.

This is a post conviction proceeding under the provisions of section 29-3001, R. S. Supp., 1974. The defendant had been found guilty by a jury of murder in the first degree and was sentenced to life imprisonment. He appealed. We affirmed the judgment. State v. Russ, 191 Neb. 300, 214 N. W. 2d 924.

The motion to vacate the sentence alleges as grounds

for relief that: "Omaha police officers first entered into a premeditated criminal conspiracy which resulted in a prejudiced, warrantless, illegal arrest of KEITH A. RUSS, which subjected him to a . . . violation of his civil rights under the color of police authority; . . . arresting officers forcefully and at gunpoint entered the home of Miss Jayne Terry and proceeded to subject the Defendant to a . . . warrantless, illegal, unlawful arrest." The District Court denied an evidentiary hearing on the motion. Defendant appeals. We affirm.

A review under the Post Conviction Act is provided for where it is alleged that there has been a "denial or infringement of the rights of the prisoner as to render the judgment void or voidable" under the state or federal Constitutions. The act provides: "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisioner is entitled to no relief," it shall grant an evidentiary hearing and make findings of fact and determinations of law. § 29-3001, R. S. Supp., 1974.

In construing this act we have held that although the petition or motion to vacate the judgment need not be in any particular form, it must plead facts which, if true, would entitle the prisoner to the relief requested. The pleading of mere conclusions of fact or of law are insufficient. State v. Johnson, 189 Neb. 824, 205 N. W. 2d 548; Harris v. Sigler, 185 Neb. 483, 176 N. W. 2d 733; State v. Erving, 180 Neb. 680, 144 N. W. 2d 424; State v. Losieau, 180 Neb. 671, 144 N. W. 2d 406.

The allegations that the Omaha police officers entered into a conspiracy to illegally arrest the defendant are mere conclusions and under the above holding were not sufficient to require a hearing. Also insufficient is the conclusion that defendant was subjected to a violation of his civil rights under color of police authority. In the quoted portion of the motion above set forth, only two allegations of fact are made: (1) That the officers forcibly entered the home of Miss Jayne Terry,

and (2) that they there arrested the defendant without a warrant.

For reasons which we set forth at the end of this opinion, the defendant was not entitled to an evidentiary hearing on his motion. However, because the defendant appears pro se we examine the files and bill of exceptions to determine if they affirmatively show constitutional violations related to the two facts pled.

The mere allegation that the arrest was made without warrant without more does not state a constitutional violation; neither does the added fact that the arrest was made in the residence of a third party following forcible entry of that residence.

In Nebraska and most other states, there has long been applied the common law doctrine, now codified by statute, that a police officer may arrest without a warrant when it appears that a felony has been committed and there are reasonable grounds to believe that the person arrested is guilty of the offense. § 29-404.02, R. S. Supp., 1974; State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211; 6 C. J. S., Arrest, § 6, p. 586.

Section 29-411, R. S. Supp., 1974, further provides: ". . . when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance." The annotation at 23 Stan. L. Rev. 995, indicates that this common law rule is codified in 29 states and that up until the time of the preparation of the annotation no court had ever held the doctrine unconstitutional. See footnotes 5, 6, and 7, op. cit. Our research discloses no more recent authority.

It is, however, a condition of the application of the doctrine that the officer must have reasonable grounds to believe that the person he seeks is within. No search warrant is required in that circumstance. Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726; United States v. McKinney, 379 F. 2d 259; Fisher v.

Volz, 496 F. 2d 333 (civil rights action growing out of general search); United States v. Brown, 467 F. 2d 419.

In State v. O'Kelly, *supra,* we said: "The Supreme Court of the United States in a long line of decisions, the latest being Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, has held that the lawfulness of arrest is to be determined by reference to state law insofar as it is not violative of the Constitution of the United States. In the Ker case, supra, it was said as follows: 'This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrest for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. Miller v. United States, supra; United States v. Di Re, 332 U. S. 581 (1948); Johnson v. United States, 333 U. S. 10, 15, n. 5 (1948). A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law.' Turning now to the standard set out in our statute and case law that there must be '* * * reasonable ground to believe the person arrested is guilty of such offense,' it is clear that this is also the same standard of the Fourth Amendment to the United States Constitution protecting persons against unreasonable seizures. Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134. That the standards are the same is conceded by the defendant.

"The applicable rule in applying these standards to a particular case is stated in the latest pronouncement of the Supreme Court of the United States in Ker v. California, supra, wherein it is stated: '* * * "there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." Ibid.; see United States v. Rabinowitz, 339 U. S. 56, 63 (1950); Rios v. United States, 364 U. S. 253, 255 (1960). * * * This Court's long-established recognization that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions

are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. * * * The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists "where 'the facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense had been or is being committed." Brinegar v. United States, 338 U. S. 160, 175-176 (1949), quoting from Carroll v. United States, 267 U. S. 132, 162 (1925) * * *.'"

We now examine the record of the original proceedings to determine whether it affimatively discloses a constitutional violation making the judgment void or voidable. The record establishes that prior to entry of the Terry home, the officers knew that the victim, Johnson, had been murdered by stabbing during the course of a burglary of his home. The connection of the defendant with the crime had been established by information from one Willie Nevels to whom the defendant had admitted his participation and whom the defendant had taken to the murder scene while the victim's body still lay there before the discovery of the crime. The defendant had at that time disclosed to

Nevels that the victim was not at home when the burglary commenced and that the defendant and a companion armed themselves with knives awaiting Johnson's return so they might rob his person. The defendant told Nevels that even before Johnson's return home they had considered that it might be necessary to kill him.

Nevels had been arrested on another charge and the information had been obtained from him as a result of his interrogation by the police concerning the Johnson murder. Nevels' automobile had been reported near the scene prior to the discovery of the crime but after its commission. This observation having been made when Nevels went to the scene with the defendant. The information the officers had from their investigation corroborated Nevels' story.

All the above established without any doubt the murder of Johnson and strong probable cause to believe the defendant was guilty.

The officers, after receiving the information from Nevels, induced Nevels to make a telephone call to the Jayne Terry (defendant's sister) home and by this call it was ascertained the defendant was then in the home. Four officers then went to the Terry home. They identified themselves as police officers, requested admittance at the front door, and displayed their badges at the door's peephole. A female voice responded with abusive language and a refusal to admit them unless the police had a warrant. While this was occurring at the front door, two of the officers had gone to the rear door, saw it opened partly, and observed a person whom they testified was the defendant. The door was then slammed shut. One of the officers at the rear then reported to the officers at the front door what they had just observed. After a short delay the officers forced the front door open, entered, and admitted the other officers at the rear door. The defendant was found and arrested in an upstairs bathroom. The foregoing recital shows no violation of constitutional standards in the making of

the arrest. If we assume arguendo that the arrest of the defendant was unlawful, there is still a further hurdle before we could declare the judgment void or voidable. It would have to be shown that some fruit of that arrest resulted or aided in his conviction. No physical evidence of any kind was taken as a result of the arrest, nor was any such evidence offered or received. Following his arrest the defendant made a tape recorded confession which was received in evidence. This confession was made after the defendant had listened to the tape recorded statement which Nevels had given to the police and in which he had informed them of all the facts concerning the defendant's involvement which we have previously outlined. Before trial, the defendant moved to suppress the confession because it was allegedly given involuntarily. A Miranda hearing was held and the court found beyond a reasonable doubt that the confession was voluntary, and that the defendant had intelligently and knowingly waived his rights in respect of self-incrimination.

At trial the defense before the jury was that the confession was involuntary. All the defendant's evidence was related to that issue. The jury was properly instructed with reference thereto.

The clear inference from the record is that all the facts concerning the arrest were known and available to the defendant and his counsel at the time of the suppression hearing and at trial. The inference again is unmistakable. They chose to rest their case for suppression of the confession on the ground of involuntariness rather than on a claim that it was the fruit of an unconstitutional arrest. That possible ground for suppression was not raised on the original appeal. The claim presented in the motion is but an alternate ground for suppression of the confession. Suppression of the confession was an issue raised in the trial court. In State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110, we held: "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."

In State v. Losieau, 182 Neb. 367, 154 N. W. 2d 762, in a situation comparable to that which we have before us, we said. "The unlawful search and seizure issue was not raised on the appeal. Under the comparable federal statute, it has been almost universally held that ordinarily an alleged illegal search and seizure issue may not be successfully raised in a proceeding which constitutes a collateral attack on the sentence, but must be presented in the appeal from the conviction. In Cox v. United States, 351 F. 2d 280 (8th Cir.) 1965, the court affirmed dismissal of a motion to vacate without an evidentiary hearing and stated: 'Likewise, the illegal search and seizure issue cannot be considered on a § 2255 motion where, as here, the circumstances of the search and seizure were fully known to the defendant at the time of his trial resulting in his conviction.' See, also, Springer v. United States, 340 F. 2d 950 (8th Cir.) 1965. . . .

"We hold that an illegal search and seizure issue cannot be considered in a post conviction review where the circumstances of the search and seizure were fully known to the defendant at the time of the trial resulting in his conviction." The same principle is applicable here where the claim is an unlawful arrest or seizure of the person.

The trial court was correct in denying an evidentiary hearing because: (1) The motion does not allege facts which show a violation of constitutional rights which makes the judgment void or voidable; (2) the alleged illegal arrest issue need not be considered because the facts and circumstances were fully known to the defendant at the time of trial and were not raised there or on direct appeal; (3) suppression of the confession was an issue determined at the trial level and defendant failed to raise an additional possible ground for sup-

pression even though all the facts on which it might have been based were known to him; and (4) despite the insufficiency of the pleading we have examined the record of the suppression hearing and the trial to determine if it discloses constitutional violation making the judgment void or voidable and we find none.

AFFIRMED.

HENRY RIFFEY, APPELLANT, V. JON SCHULKE, APPELLEE, NEBRASKA STATE BANK, INTERVENER-APPELLEE.

227 N. W. 2d 4

Filed March 20, 1975. No. 39600.

1. **Foreclosure: Contracts: Vendor and Purchaser.** A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity.
2. ———: ———: ———. Applications for strict foreclosure of land contracts are addressed to the sound legal discretion of the court, and will be granted where it would be inequitable and unjust to refuse them.
3. ———: ———: ———. Strict foreclosure will be decreed only under peculiar and special circumstances where the purchaser does not have a substantial equity in the property.
4. ———: ———: ———. Where strict foreclosure is granted, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract.
5. **Contracts: Assignments: Vendor and Purchaser.** A provision in a contract for the sale of land prohibiting an assignment of the contract without the consent of the other party is usually considered to be a provision to safeguard performance of the contract. Where the contract has been performed, or performance has been tendered, the provision is usually considered unenforceable.

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

Curtiss & Curtiss, for appellant.

Ryan, Scoville & Uhlir, for intervener-appellee.

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

BOSLAUGH, J.

This case arose out of an installment contract for the sale of a tract of land in Dixon County, Nebraska. On February 16, 1970, the plaintiff, Henry A. Riffey, entered into a contract to sell the land in question to the defendant, Jon Schulke. The contract price was $34,400 payable in annual installments of $3,000 each commencing July 1, 1970, together with interest at 7 percent from January 15, 1969. The contract provided that: "Neither party shall have the right to sell or assign this contract without the written consent of the other party." The purchaser was to pay the taxes for 1969 and subsequent years. In the event the purchaser failed to pay any installment of principal or interest within 30 days of its due date, or any taxes when due, the entire balance due under the contract became due and payable without further notice and the seller was entitled possession of the premises and all payments by the purchaser were forfeited.

The defendant went into possession and made interest payments to July 1, 1972. No installments of the principal were ever paid. Taxes for 1972 and 1973 were paid by the plaintiff. On May 7, 1971, the defendant mortgaged his interest in the property to the Nebraska State Bank for $19,800. Proceeds of the mortgage were used to improve the property and make interest payments on the contract.

This action was commenced on November 21, 1973, to declare a forfeiture of the contract and eject the defendant from the property. The defendant's answer alleged the property had increased in value and strict foreclosure would be inequitable. The answer prayed

for foreclosure by sale. The Nebraska State Bank intervened in the action alleging the defendant had mortgaged his interest in the property to the intervener and offering to pay the balance due the plaintiff on the contract.

The plaintiff moved for summary judgment against the intervener alleging the mortgage was void under the provision of the contract prohibiting assignment without the written consent of the other party. The intervener moved to dismiss the action alleging it had deposited $46,538.95 in court, which was more than the amount due the plaintiff on the contract. The trial court overruled the plaintiff's motion for summary judgment; found that the plaintiff was not entitled to declare a forfeiture of the contract; found that the plaintiff was entitled to $39,445.98 from the money deposited by the intervener; and retained jurisdiction to dispose of other issues and claims of other parties. The plaintiff has appealed.

An important issue in the case is whether the plaintiff was entitled to strict foreclosure. A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity. Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217. Applications for strict foreclosure of land contracts are addressed to the sound legal discretion of the court, and will be granted where it would be inequitable and unjust to refuse them. Ruhl v. Johnson, 154 Neb. 810, 49 N. W. 2d 687. Strict foreclosure will be decreed only under peculiar and special circumstances where the purchaser does not have a substantial equity in the property. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N. W. 2d 845. Where strict foreclosure is granted, the defaulting party is entitled to a reasonable time to avoid

its consequences by performing the contract. Swanson v. Madsen, *supra.*

The intervener produced evidence, by way of affidavits, that the property had been improved, its value had increased, and it had a value in excess of $125,000 for use as a golf course. This is an amount far in excess of the balance due on the contract and there is no evidence to the contrary. The affidavits were not marked as exhibits and offered at the time of the hearing but were attached to a showing in resistance to the plaintiff's motion for summary judgment filed by the intervener. The bill of exceptions was amended to include the affidavits and the record clearly shows they were considered by the trial court at the consolidated hearing on the motion to dismiss and the motion for summary judgment. See Peterson v. Skiles, 173 Neb. 223, 113 N. W. 2d 105.

A second issue of importance is the effect of the provision in the contract prohibiting assignment of the contract by one party without the consent of the other. The plaintiff contends the defendant had no interest capable of being transferred and the mortgage to the intervener was void.

A provision in a contract for the sale of land prohibiting an assignment of the contract without the consent of the other party is usually considered to be a provision to safeguard performance of the contract. Where the contract has been performed, or performance has been tendered as in this case, the provision is usually considered unenforceable. Wagner v. Cheney, 16 Neb. 202, 20 N. W. 222. See, also, Gwynne v. Goldware, 102 Neb. 260, 166 N. W. 625; Handzel v. Bassi, 343 Ill. App. 281, 99 N. E. 2d 23; Gunsch v. Gunsch (N. D.), 71 N. W. 2d 623; Lambert, Inc. v. Starbrand Sales Corp., 422 F. 2d 621; Annotation, 138 A. L. R. 205.

The entire amount due the plaintiff was tendered to him by payment of more than that amount into court by the intervener. Under these circumstances, the pro-

vision in the contract against assignment did not furnish a defense to the plaintiff against performance.

The plaintiff further argues he will not be made whole by payment of the amount due under the contract in a lump sum because the income tax consequences of the transaction will then be less advantageous to him than installment payments in accordance with the original terms of the contract. The answer to this contention lies in the terms of the contract which provided for automatic escalation of all installments upon default by the purchaser. The entire amount due under the contract has become due and payable and has been paid into court by the intervener.

The judgment of the District Court directing the plaintiff to convey the property to the defendant, directing the clerk to pay to the plaintiff the amount due under the contract upon receipt of the deed and abstract, and granting a lien to the intervener in that amount, was correct. The judgment of the District Court is in all respects affirmed.

AFFIRMED.

HOWARD F. SIMON, APPELLEE, V. ABE LIEBERMAN, APPELLANT.

226 N. W. 2d 781

Filed March 20, 1975. No. 39607.

1. **Constitutional Law: Due Process: Right to Counsel.** In both civil and criminal cases the right to a hearing includes the right to appear by counsel, and the arbitrary refusal of such right constitutes a deprivation of due process.
2. **Constitutional Law: Due Process: Right to Counsel: Courts.** The Legislature can create a small claims court where informal hearings may be held without the assistance of counsel, so long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceedings.
3. **Appeal and Error: Right to Counsel: Courts.** In an appeal to the District Court from a judgment of the small claims court

under section 24-527, R. S. Supp., 1974, a party has the right to provide his own counsel and appear by such counsel in the District Court.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded.

Olsson & Olsson, for appellant.

Stephen K. Yungblut, for appellee.

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

McCOWN, J.

This is an action for a money judgment originally filed in the small claims court of Scotts Bluff County, Nebraska. The action involved the lending and loss of certain moving equipment blocks. Plaintiff sought recovery of $288. The small claims court entered judgment in favor of the plaintiff in the sum of $145 and costs. The defendant appealed to the District Court. At the time set for trial de novo in the District Court, the defendant appeared in person and by counsel. The District Court ordered that the case be tried without counsel because it was a small claims appeal. The case proceeded to trial without counsel over objection. The District Court made no findings of fact but entered judgment after trial in favor of the plaintiff in the sum of $140, together with interest and costs. The defendant has appealed. The sole issue on appeal is whether or not the defendant had a right to be represented by counsel in the trial de novo in the District Court.

The statutory scheme establishing the small claims court in Nebraska is set out in sections 24-521 to 24-527, R. S. Supp., 1974. Essentially those sections provide that each county court and each municipal court shall have a small claims department which shall be designated as the small claims court. Jurisdiction of the small claims court extends to all civil actions of any type where the amount claimed does not exceed $500,

exclusive of interest and costs. All matters in the small claims court are to be tried to the court without a jury, and "No party shall be represented by an attorney in the Small Claims Court."

The statutes authorize two procedures to transfer an action out of the small claims court. If the defendant files a setoff or counterclaim which exceeds the $500 jurisdictional limits of the small claims court, "the court shall cause the entire matter to be transferred to the regular county or municipal court docket and set for trial." If the defendant in any action in the small claims court desires trial to a jury and gives notice to the court prior to the time set for hearing "the case shall be transferred to the regular docket of the county or municipal court and shall thereafter be subject to all provisions of law and rules of court applicable to proceedings in the county or municipal court."

The final section of the statutes dealing with the small claims court provides: "If either party is dissatisfied with the judgment of the Small Claims Court, he may appeal to the district court of the county where the judgment was rendered. Any such appeal shall be tried de novo without a jury." § 24-527, R. S. Supp., 1974.

The parties tacitly agree that the right to appear by counsel somewhere in the proceedings must be guaranteed in order to meet the requirements of constitutional due process. The defendant contends that to refuse a small claims defendant the right to appear by counsel at the trial de novo on appeal in the District Court constitutes a denial of due process, and that hearing in the District Court is the last hearing in a small claims case at which the right to appear by counsel can be exercised. The plaintiff argues that the statutory provisions which direct the transfer of an action out of the small claims court and into the county or municipal court whenever a request for a jury trial is filed or whenever a setoff or counterclaim exceeds the juris-

dictional limit, provide procedures which can be exercised by a defendant to remove a case from the small claims court and thus obtain a right to appear by counsel. Inferentially the argument is that such provisions are a sufficient guaranty of the right to appear by counsel to satisfy constitutional requirements, and that the failure to exercise that right in the small claims court, in effect, constitutes a waiver of the right.

The creation of small claims courts is clearly in accord with sound public policy. To provide a forum in which small claims may be prosecuted without the delay, expense, or procedural difficulties incident to normal litigation is a commendable accomplishment for the public benefit. In construing the statutes here, we are subject to the rule that where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid. Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322.

The leading case on the issue now before us is Prudential Ins. Co. v. Small Claims Court, 76 Cal. App. 2d 379, 173 P. 2d 38, 167 A. L. R. 820. That case has been consistently followed by other courts and we deem it appropriate to quote relevant portions of that opinion. "It is urged that depriving a litigant of the right of counsel is a violation of due process. There can be little doubt but that in both civil and criminal cases the right to a hearing includes the right to appear by counsel, and that the arbitrary refusal of such right constitutes a deprivation of due process. * * * But that does not mean that the Legislature cannot create a small claims court where informal hearings may be held without the assistance of counsel, *as long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceeding.* * * * The defendant has no legal cause for complaint because if he is dissatisfied with the judg-

ment of the small claims court he has a right of appeal to the superior court where he is entitled to a trial de novo. * * * In that court he and the plaintiff can, of course, appear by counsel. This satisfies the due process requirement." (Emphasis ours.)

The Idaho Supreme Court has also held that where a defendant on appeal from the small claims court to the District Court may avail himself of a right to obtain a trial de novo with assistance of counsel therein, the requirement of due process is satisfied, and a statute permitting such small claims court proceedings is not unconstitutional, even though it prohibits attorney representation in the small claims court. Foster v. Walus, 81 Idaho 452, 347 P. 2d 120.

Two other cases involving the California small claims court are helpful on the issues involved here. In Mendoza v. Small Claims Court of Los Angeles J. D., 49 Cal. 2d 668, 321 P. 2d 9, the court held that unless public necessity demands it, due process requires that no person shall be deprived of a substantial right without notice and hearing, and the right to a hearing includes the right to appear by counsel. The court quoted from Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158: " 'What, then, does a hearing include? Historically and in practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. * * * If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.' "

After citing the Prudential case, the court held that a legislative amendment which gave jurisdiction to the small claims court in unlawful detainer cases was unconstitutional because a stay of proceedings on appeal was discretionary with the trial judge. The court

pointed out that under the appeal provisions of ordinary small claims cases treated in Prudential, an automatic stay precluded a deprivation of property until the appeal was determined and said: "In the present case the right to counsel on appeal cannot save the amendment, for there is no automatic stay and the defendant may be dispossessed prior to the trial de novo."

The same principle was enunciated again in Brooks v. Small Claims Court, Downey J. D., 8 Cal. 3d 661, 105 Cal. Rptr. 785, 504 P. 2d 1249. The court held that a statutory requirement that a party desiring to appeal from a judgment entered in the small claims court must furnish a bond, or cash deposit in lieu of a bond, constituted an unconstitutional taking of property without due process because it was required prior to a due process hearing with a right to appear by counsel. The court cited both Prudential and Mendoza and with reference to the latter case said: "Although a statute permitted the trial judge to stay proceedings upon the judgment pending appeal, the stay was merely discretionary. Thus the defendant was not guaranteed a hearing with right to counsel prior to being dispossessed."

It is wholly unrealistic to assume that a defendant in the small claims court should be expected to know that if he wishes to appear by counsel, he must file a request for trial by jury. It is even more unrealistic to assume that a failure to request a jury trial constitutes some sort of voluntary waiver of his right to a constitutional due process hearing, which includes the right to appear by counsel. Plaintiff's argument on these issues is wholly unsupportable.

In an appeal to the District Court from a judgment of the small claims court under section 24-527, R. S. Supp., 1974, a party has the right to provide his own counsel and appear by such counsel in the District Court. The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

AMERICAN TELEPHONE & TELEGRAPH CORPORATION, A CORPORATION, APPELLANT, V. EDDIE G. THOMPSON, DOING BUSINESS AS THOMPSON CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.

227 N. W. 2d 7

Filed March 20, 1975. No. 39611.

1. **Damages: Trial: Evidence.** In cases where reasonable value of loss of use of personal property is a measure of damages, rental value is not necessarily the "measure" of damages, but proof of what the item whose use has been lost would have rented for is admitted as evidence of the value of loss of use.
2. ———: ———: ———. The question of determining the amount of damages is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damages proved.

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

Edward F. Barnicle, Jr., and Casey & Elworth, for appellant.

Michael F. Kinney and Theodore J. Stouffer of Cassem, Tierney, Adams & Henatsch, for appellee.

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

CLINTON, J.

American Telephone and Telegraph Corporation brought this action against Thompson Construction Company to recover for damages which occurred when the defendant, in the process of excavating for a gas line, cut a communications cable carrying 397 voice grade circuits belonging to the plaintiff. As a consequence of the cutting, the plaintiff was unable to use 98 miles of cable during the approximately 9 hours required to make the repairs. During that time plaintiff rerouted over other facilities owned by it communications which would normally have been transmitted over this 98-mile route.

The plaintiff claimed damages for repair of the cable in the sum of $1,490.49, and the value of the loss of use of the cable route measured by the reasonable cost of rental cable in the amount of $13,760.02. The trial judge directed a verdict for the plaintiff on the issue of liability and submitted to the jury only the issue of damages. The jury rendered a verdict for the sum of $2,769, and the plaintiff appeals. It seeks a new trial on the ground that the verdict is insufficient and made in disregard of uncontradicted evidence as to the amount of damages. We affirm.

No issue is raised or argued as to what constitutes the proper measure of damages. The theory of damages upon which the case is submitted is not challenged. The sole question is whether the jury was required to accept the plaintiff's evidence as to the amount of damages. The defendant offered no contradicting evidence.

The parties apparently agree, even though the verdict for damages was a lump sum, that the verdict was an award of $1,490 for the cost of repair, and that the difference of $1,279 was for the loss of use. The arguments of the parties are therefore focused upon the question of whether the plaintiff's evidence of the rental value of substituted facilities during the 9-hour period of loss of use had to be accepted by the jury.

To support the claimed rental value the plaintiff offered and there was received in evidence a contract between the plaintiff and Western Union Telegraph Company. The charge made to Western Union by plaintiff under this contract for the use of similar facilities for a short period of time was the rental value claimed as damages. The calculation of such charges as they would have been applicable to the cable in question was made in the following manner:

1. One voice grade circuit for 98 miles per month:
   (a) first 20 miles at $1.50 per mile equals $30.00
   (b) next 55 miles at $.75 per mile equals 41.25

(c) next 23 miles at $.45 per mile equals	$10.35
	$81.60
2. Section charge	15.00
Sub-total	$96.60
3. One day or less: 10 percent of monthly charge equals	9.66
4. Set up charge	25.00
Total	$34.66
5. 397 circuits multiplied by $34.66 equals	$13,760.02

The plaintiff argues that since the jury apparently allowed the cost of repairs in the amount of $1,490, and awarded only $1,279 for loss of use, there is no logical way in which such a figure can be supported by the evidence. It asserts that the verdict therefore must be the result of mistake or some other means not appearing in the record, and is therefore inadequate and contrary to the evidence. On cross-examination the witness for the plaintiff who furnished the foundational testimony for the contract and the calculations testified: "Q Do you know whether there is any justification for charging a person 10% of a monthly rental when, in fact, he may use it for as little as one-tenth of one per cent of a month? A I can't answer that . . . . Q Now, in addition to the 10% of a monthly rental, I understand that there is a setting-up fee of $25.00, which we discussed. Would you tell me what the purpose is of the $25.00 setting up fee? . . . A That I can't answer."

The defendant argues that it is quite possible the jury could have arrived at the verdict by the following calculation which is a reasonable one: $9.66 ÷ 3 x 397 = $1,278.34 for loss of use. This calculation disregards the $25 set up charge per circuit which the witness could not justify except for the fact that it was provided for in the contract between plaintiff and Western Union. This possible calculation also would indicate the use of a daily

charge at one-thirtieth of the monthly charge rather than the one-tenth provided in the contract.

Even though in a particular case evidence of damages in a tort action has not been contradicted, it is, at least ordinarily, for the jury to judge the evidence and determine the reliability thereof and find the damages. This is the general rule even upon a default either where the evidence is controverted or where the introduction of evidence is necessary to prove damages. 25A C. J. S., Damages, § 168, p. 128. For an interesting historical insight on the jury's role in determining damages, see McCormick, Damages, §§ 5, 16, pp. 21, 62. Rental value is not necessarily the "measure" of damages, rather, proof of what the item whose use has been lost would have rented for is admitted as evidence of value. McCormick, Damages, § 124, cases cited in note 48, p. 473.

We have stated or applied these principles in a variety of situations. Cullinane v. Milder Oil Co., 174 Neb. 162, 116 N. W. 2d 25 (personal injuries—medical expense—loss of time); Burney v. Ehlers, 185 Neb. 51, 173 N. W. 2d 398 (cost of repairs of an automobile); Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739 (damage to land by seepage—jury verdict less than that which the defendant had offered to confess judgment—trial court set verdict aside—we reinstated jury verdict).

In Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281 (a personal injury action), we set forth the general rule in the following language: "The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved." We reiterated the above language in Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 137 N. W. 2d 701, an action for conspiracy to unlawfully take over a business.

AFFIRMED.

ALMA M. HALLIGAN, APPELLANT, v. WALTER T. COTTON, APPELLEE.

227 N. W. 2d 10

Filed March 20, 1975. No. 39626.

1. **Physicians and Surgeons: Malpractice: Negligence.** In performing professional services a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care.
2. **Physicians and Surgeons: Malpractice: Negligence: Witnesses.** Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony.
3. **Witnesses: Evidence: Trial: Negligence.** One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen.
4. **Witnesses: Evidence: Trial: Malpractice: Negligence.** Where, in the course of surgery, it was necessary to ligate bleeding blood vessels on the dome of the bladder and about 10 days later a perforation of the bladder resulted, expert opinion testimony is required before the trier of fact is permitted to infer that the hole was the result of a lack of or the failure to exercise the required degree of skill or care.

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

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

David A. Johnson, Ronald H. Stave, and Emil F. Sodoro, for appellee.

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

CLINTON, J.

This is an action for medical malpractice against the defendant doctor. After the plaintiff rested her case-

in-chief, the defendant moved for a directed verdict which the trial judge granted. Plaintiff appeals. We affirm.

The specific issue on appeal is whether, considering the facts shown by the evidence and the reasonable inferences which might be drawn therefrom, it was nonetheless necessary for the plaintiff to have presented expert testimony to prove that a hole in the plaintiff's bladder, described as a vesical-vaginal fistula, which arose as a consequence of an abdominal hysterectomy performed by the defendant upon the plaintiff, was the result of either a lack of the requisite skill or a negligent failure to exercise that skill.

The plaintiff called the defendant, Dr. Cotton, a specialist in obstetrics and gynecology, as her witness and relied upon that testimony, plus her own, to establish a prima facie case of liability. Dr. Malashock, a urologist who performed remedial surgery, also was called and testified. He, however, was not called upon to give any opinion as to the standard of care nor its exercise in this case.

The record discloses the following. The plaintiff was admitted to the hospital on March 9, 1969, and the hysterectomy was performed. She was discharged from the hospital on March 18, 1969. On the following day she called Dr. Cotton to complain of a vaginal discharge. He asked her if the discharge was urine. She said no. Two days later he examined her in his office and indicated his opinion that the discharge was not urine. He prescribed medication which contained a dye which would show up in the urine. On the day following the discharge was determined to be urine. Dr. Cotton then assumed that there must be a hole in the bladder, caused the plaintiff to be hospitalized and, with her consent, referred her to Dr. Malashock. After confirming Dr. Cotton's tentative diagnosis, Dr. Malashock decided that an attempt should be made to close the hole by a medical procedure called fulguration, which did not involve

opening the abdomen. This, however, did not succeed. It was then determined that surgery requiring the opening of the abdomen was necessary. It was also decided that it was advisable to postpone that operation until all the inflammatory reaction from the original surgery subsided. In the meantime the discharge continued. On June 9, 1969, Dr. Malashock successfully repaired the fistula by a procedure described as a transvesical suprapubic repair.

Following the plaintiff's hospitalization of March 22, 1969, during which the existence of the fistula was confirmed, Dr. Cotton made the following statement in his hospital discharge summary. " 'Because of the excessive bleeding that resulted, it was necessary to ligate bleeding points; and in the process of tying off these bleeding areas, a suture evidently went into the bladder and has eroded through'." Dr. Cotton acknowledged that Dr. Malashock had independently arrived at a similar conclusion. Dr. Cotton testified: "Q. And that is that a suture involved the bladder wall with subsequent erosion through the mucosa? A. Yes, that was one of our opinions. Q. Well, that's the only one that is in either of those reports, isn't it? A. At that time, yes. . . . Q. 'Eroded through' means, does it not, that the original impingement by the suture got worse after a while and made a hole? A. For various reasons." The foregoing admissions by Dr. Cotton would be sufficient to make a prima facie case that the use of a suture in tying off the bleeding area ultimately resulted in the fistula. However, it does not answer the question whether that result was caused by negligence.

Dr. Cotton testified that, upon opening the plaintiff's abdomen at the original surgery, he found that the bladder had adhered to the uterus, the removal of which latter organ was the purpose of the surgery. He stated that normally a separation of the two organs could be made with the fingers or with the use of a sponge and the fingers, but in this case he had to use scissors. The

operative report prepared by Dr. Cotton contained this statement: "The tissue was extremely brittle and friable and the operation was a little more difficult than we usually encounter." His testimony further indicated that the placement of the ligating sutures on the bladder was a necessary procedure. Dr. Cotton described that necessity in answers on cross-examination as follows: "A. The bleeding comes from primarily—the bladder, now, has been displaced, it's down here (indicating); and so all of these blood vessels and the blood vessels to the uterus and to the bladder are common blood vessels, and so the uterus we are going to remove, so the bleeding isn't any problem here because we have clamped the blood supply coming into it. But the bladder is now down here (indicating), and over the dome of the bladder there are many bleeding points that must be ligated. . . . No, I think you have to make a cleavage plane of your own because a normal cleavage plane of the bladder to the uterus has been completely distorted, and so this has to be removed by sharp dissection. In the process of sharp dissection you don't have the normal layer here, and so you have a large—and by 'large' I would say an area like this (indicating) of denuded tissue with blood vessels running all over the surface of it, and these must be ligated."

To support her contention that the defendant did not in placing the sutures exercise the required degree of skill and care the plaintiff relies upon certain parts of Dr. Cotton's testimony on direct examination. After eliciting from Dr. Cotton statements that he had special skills not possessed by the average doctor and obtaining a general description of the surgical procedure used, plaintiff's counsel drew an affirmative response to the following question: "Q. And when you operate on someone for removal of the uterus, a cervix, and part of the vagina, it is a part of your function to not invade any other organ unnecessarily, is it not?" He then elicited information relative to the doctor's expertise in the

placement of sutures and then brought forth the following: "Q. But, of course, yours has gone to quite a higher degree of skill than that that you can exercise if you wish; isn't that so? A. Yes, sir. Q. And in the process of exercising that skill, your function is, with regard to the tying of bleeding blood vessels, is to tie a piece of string, you might say, around the blood vessel and squeeze it shut; is that correct? A. Yes, sir. Q. That does not involve, though, the piercing of any tissue other than going around the blood vessel, does it? A. *Usually, no.* Q. And with the exercise of reasonable care, you have all your life been doing that successfully, haven't you? A. That's right. Q. You can do that successfully without poking holes in things, can't you? A. Yes, sir. Q. And with regard to the placement of organs, it isn't anything beyond your skill if it is applied properly *to suture organs into place* without invading the places you don't want to be? A. I would certainly attempt not to. Q. And you would succeed in that attempt if you were careful, wouldn't you. A. Yes." (Emphasis supplied.)

The plaintiff testified to an admission made to her by Dr. Cotton that the sutures caused the perforation.

It is the rule that in performing professional services a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care. See, NJI No. 12.01, and authorities there cited. It is also the rule that whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony. Winters v. Rance, 125 Neb. 577, 251 N. W. 167; Tady v. Warta, 111 Neb. 521, 196 N. W. 901. One of the exceptions to the requirement of expert testimony is the situation where

the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen. Tady v. Warta, *supra.*

The plaintiff asserts that this is a case which comes within the exceptions. She also claims that the requirements of proof of negligence and causation by expert testimony are not required in cases where healthy parts of the body requiring no treatment are injured during surgery and that under the evidence in this case the jury could infer negligence without the aid of expert opinion.

The plaintiff places reliance upon the following authorities: Tady v. Warta, *supra*; Goodwin v. Hertzberg, 201 F. 2d 204; Tomei v. Henning, 67 Cal. 2d 319, 62 Cal. Rptr. 9, 431 P. 2d 633; Pry v. Jones, 253 Ark. 534, 487 S. W. 2d 606; Higdon v. Carlebach, 348 Mich. 363, 83 N. W. 2d 296; Richardson v. Schlosser, 54 Mich. App. 1, 219 N. W. 2d 790; Stickleman v. Synhorst, 243 Iowa 872, 52 N. W. 2d 504.

In Tady v. Warta, *supra,* this court cites some clear-cut and patently outrageous examples of exceptions to the usual rule such as the removal of a healthy organ instead of the diseased one, the placing of a needle in the patient's eye in the course of stitching a wound in the cheek, and cutting off an ear while excising a tumor from the scalp. In Goodwin v. Hertzberg, *supra,* the recital of the evidence is sketchy, but the appellate court apparently interpreted the record as containing an admission by the defendant doctor that his conduct was negligent. In Tomei v. Henning, *supra,* the surgeon, in the course of performing a hysterectomy, sutured the ureter in two places and as a consequence the patient ultimately lost a kidney. In that case the verdict was supported by expert testimony that the failure of the surgeon to locate and determine the condition of the ureter before closing the abdomen was negligent. The opinion points out that the testimony of the expert need not be in any particular language so long as it affords

reasonable support for the inference that the conduct was negligent. In Pry v. Jones, *supra,* the surgeon severed the ureter in the course of surgery for the removal of an ovary. The hospital record in that case showed that after removal of the ovary the doctor looked for the left ureter and could not find it. He then discovered that it was abnormally placed and that he had severed and ligated it. He called in another doctor to make repairs. The defendant's testimony was that the left ureter was inadvertently damaged. There was in that case no expert testimony save that of the defendant surgeon. The Arkansas court held that none was necessary because the determination of negligence lay within the comprehension of a layman. A dissent points out the various areas related to the abnormality and the surgery about which a layman has no knowledge. In Stickleman v. Synhorst, *supra,* the defendant doctor attempted to inject a substance into the plaintiff's trachea to facilitate X-rays. He missed the trachea on his first attempt and injured the plaintiff's throat and neck. The defendant doctor admitted he had made a "mess" of the plaintiff and told her that he would not charge her for his services. There was no expert testimony and the court held that under the circumstances it was not required. In Richardson v. Schlosser, *supra,* the surgeon lacerated the patient's heart and the patient died. The opinion recites almost none of the evidence and it is not helpful as a precedent. In Goodwin v. Hertzberg, *supra,* the defendant doctor perforated the urethra unintentionally. On the stand he said: " 'I must have made the opening myself in the process of operation. I am only human.' " The court said that under the circumstances expert opinion was not required to make the case a submissible one. In Higdon v. Carlebach, *supra,* a dentist badly cut the patient's tongue while using a separator disk. The recital of the evidence in that case indicates that the factual controversy was whether the patient moved unexpectedly causing

the cutting, or whether the doctor handled the disk badly and this caused the injury. After a jury verdict for the plaintiff there was an appeal on the ground there was an absence of testimony on the standard of care and exercise of the required skill. The court held that such expert opinion was not necessary under the evidence.

As we have already noted, Dr. Cotton's admissions made a prima facie case on the causation issue, but the same is not true of that portion of his testimony upon which the plaintiff relies to obviate the usual necessity for expert testimony on the standard of care and skill and its exercise. The testimony to which we refer is contained in the paragraph of this opinion in which the last quotation from Dr. Cotton's testimony is set forth. All the questions there put were placed by the plaintiff's counsel in the abstract and the answers were given in the abstract, for example: ". . . when you operate on someone . . . it is a part of your function to not invade any other organ unnecessarily, is it not?" And then there is the question about placing the sutures, which is immediately preceded by another question in the abstract: "Q. That does not involve, though, the piercing of any tissue other than going around the blood vessel, does it? A. *Usually no.*" (Emphasis supplied.) And, ". . . it isn't anything beyond your skill if it is applied properly *to suture organs into place* without invading the places you don't want to be?" (Emphasis supplied.)

None of these questions and their responses had reference to the particular surgery in question and its special circumstances. These questions were put even before the details of the operation were testified to.

The evidence here shows without dispute that the placement of the sutures on the dome of the bladder was necessary and required. The doctor intended to place them there. He had to. For reasons which we will elaborate later we cannot infer and the jury should not be permitted to infer without the aid of some expert

opinion that the manner of their placement was unskillful or negligent. We cannot say that some impingement of the bladder might not sometimes occur even in the exercise of the required skill and care.

Most of the authorities cited by the plaintiff are distinguishable. In Tady v. Warta, *supra,* a steel surgical chisel broke, leaving the point in a bone. The plaintiff claimed the defendant doctor twisted it unnecessarily. The court held that expert testimony was necessary to make a prima facie case. Goodwin v. Hertzberg, *supra,* is not applicable. In the present case we have no admission by Dr. Cotton that his conduct was negligent. Such an admission does not follow from his testimony even by inference. In Tomei v. Henning, *supra,* there was expert testimony of negligence. We would agree that such testimony would not always necessarily have to appear in any special language or form of words. Under the evidence recited in Pry v. Jones, *supra,* we would have decided differently than did that court. In Goodwin v. Hertzberg, *supra,* the doctor made factual admissions which could reasonably be interpreted as admitting a lack of skill and care. In Higdon v. Carlebach, *supra,* the evidence is subject to the reasonable construction that if the injury occurred as the plaintiff claimed, it was the result of negligence. In that case the defendant doctor merely contended it did not happen in the manner claimed by the plaintiff.

We do not overlook that portion of Dr. Cotton's testimony which has been called to our attention and in which he gives an explanation for the hole in the bladder which essentially eliminates a "suture . . . into the bladder" as the cause of the perforation and attributes it simply to a localized deficiency of blood supply caused by the ligation. This contradicts his entry into the hospital record to which we earlier referred. At most this would have raised a question of the defendant's credibility which would have been for the jury to decide had the plaintiff been able to make a prima facie case.

Opinion testimony of an expert witness may be either necessary or merely useful to the determination of issues by the trier of fact, either the jury or the judge. The necessity or utility of such testimony arises from the fact that the judicial system is called upon to make determinations which require specialized knowledge in fields in which the trier of fact is ignorant or relatively so. It would seem to follow, as a corollary to the foregoing premise, that when an appellate court is called upon to decide whether in a specific evidentiary context expert opinion testimony is necessary, it is making a judgment about its own ignorance or knowledge concerning the matter involved. An analysis and comparison of the cases cited by the plaintiff with those cited by the defendant indicate rather clearly that the difference in the result in closely comparable evidentiary situations lies almost wholly in the assumptions the appellate courts were willing to make about their own knowledge or lack of it. The assumptions we make about our own ignorance concerning the subject matter involved in this particular litigation is evident. Plaintiff has not pursuaded us otherwise.

If precedent is necessary the authorities which support in similar factual and evidentiary situations the position we take are the following: Dazet v. Bass (Miss.), 254 S. 2d 183; Modrzynski v. Lust, 55 Ohio L. Abs. 106, 88 N. E. 2d 76; Perin v. Hayne (Iowa), 210 N. W. 2d 609; Brear v. Sweet, 155 Wash. 474, 284 P. 803; Hart v. Steele (Mo.), 416 S. W. 2d 927, 37 A. L. R. 3d 456; and Tady v. Warta, *supra.*

AFFIRMED.

CLINTON, J., Personal Addendum.

I wish to supplement what I have said in the opinion written by me for the court with the following personal view not approved by the court.

I am not unmindful of the fact that a meritorious case may sometimes fail for lack of expert testimony or opinion and that likewise nonmeritorious cases are some-

times unnecessarily brought for the same reason. The remedy for the problem must necessarily be a legislative one involving cooperation of the medical and legal professions. Testimony by a panel of experts impartially chosen, or some other appropriate method, would seem to be much preferable to the hired expert or fruitless attempts to prove a prima facie case by a defendant's own testimony. I cannot help but believe that the patient, the medical profession, the legal profession, and even perhaps the insurance industry would in the long run be better served by solutions which have long been talked about but never implemented. Efforts in that direction should perhaps be renewed.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. CLAIRE, APPELLANT.

227 N. W. 2d 15

Filed March 20, 1975. No. 39678.

1. **Controlled Substances: Words and Phrases.** The term "cannabis sativa L" as used in section 28-4,115 (14), R. S. Supp., 1974, includes all species of the genus cannabis.
2. **Trial: Instructions.** If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining.
3. **Trial: Witnesses: Evidence.** Ordinarily if a witness is examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination.
4. ———: ———: ———. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.

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

T. Clement Gaughan, Richard L. Goos, and Dennis R. Keefe, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

NEWTON, J.

Defendant was convicted on two counts of delivering a controlled substance, to wit, marijuana. He assigns as error the failure of the State to prove the substances were cannabis sativa L; the failure to expand on instruction on entrapment; and the rejection of certain collateral evidence. We affirm the judgment of conviction.

Defendant introduced evidence to the effect that there are at least two other species of the genus cannabis in addition to cannabis sativa L. The Nebraska statute, section 28-4,115 (14), R. S. Supp., 1974, defines marijuana as Cannabis sativa L. In this respect it is similar to the federal statute and to the statutes of a number of other states. The question presented is not new. In United States v. Rothberg, 480 F. 2d 534 (2d Cir., 1973), cert. den. 414 U. S. 856, in rejecting a similar defense, the court stated: "At the time of the enactment and amendment of the statutes in 1937 and 1956 and up to the time of the offense, there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana so that this Afghan hemp was included within the statutory definition. * * * Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellant's actions.

"To be sure, the use of a term in a criminal statute by a legislature under a misapprehension as to the ob-

ject described by it could not be corrected by a criminal court's amendment of the statute, but that is not the case here. There was no misapprehension by the Congress as to the generally accepted meaning of the term when used, and no showing under the offer of proof of any change in the generally accepted meaning up to the time of the offense. The statute as written must be read to cover the offense charged."

Other courts have arrived at similar conclusions. See, United States v. Gaines, 489 F. 2d 690 (5th Cir., 1974); United States v. Moore, 446 F. 2d 448 (3d Cir., 1971), cert. den. 406 U. S. 909; United States v. Walton (D. C Cir., 1-23-75); United States v. Honneus (D. C. Cir., 12-24-74); State v. Romero, 74 N. M. 642, 397 P. 2d 26; State v. Parker, 9 Wash. App. 970, 515 P. 2d 1307; Cassady v. Wheeler (Iowa), 224 N. W. 2d 649; Sizemore v. State (Ind. App.), 308 N. E. 2d 400. Although it would be well for legislative bodies to restrict the meaning of marijuana to the broader term "cannabis" encompassing all varieties of the plant, we agree with the foregoing decisions. The legislative intent was to include all species of marijuana and that intent was sufficiently clear to give defendant warning of the illegality of his acts.

The defendant testified that one Uphoff, an undercover agent for the police, supplied him with the marijuana and requested that he sell it to Ball, another undercover police investigator. With reference to count II, the defendant said he hid the marijuana under a building block adjacent to a tavern after receiving it from Uphoff, talked with Uphoff and Ball in their car, then went and got the marijuana. Uphoff and Ball both testified the defendant never left the car but had the marijuana when he first got in. There was also evidence that the place where it was alleged to have been hidden was too small to contain it, especially with reference to the packet referred to in count I which defendant claimed he also had hidden in the same spot for

a time. This evidence gave rise to the NJI on entrapment which defendant claims was not sufficiently specific. Defendant's requested instruction on the subject was ingenious but it was not a proper statement of the law. "If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining." State v. Ford, 186 Neb. 109, 180 N. W. 2d 922.

Defendant sought to show that Uphoff had supplied controlled substances to others. He was permitted to go into it when he called Uphoff as his own witness. Uphoff denied the charge. Defendant was permitted to question Uphoff about giving controlled substances to one John Scott. Uphoff denied doing so. Defendant then sought to prove by John Scott and his sister that Uphoff had given them controlled substances. Objections to this line of questioning were sustained. The evidence had no bearing on, and was not pertinent to, the issues. It was offered with a view to impeaching Uphoff on a collateral matter. Ordinarily if a witness is examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. See, Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701; Latham v. State, 152 Neb. 113, 40 N. W. 2d 522. "Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded." State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH C. RICHARDS, APPELLANT.

227 N. W. 2d 18

Filed March 20, 1975. No. 39730.

1. **Criminal Law: Rape: Words and Phrases.** A woman who is chaste is one who has never had sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity.
2. **Criminal Law: Evidence: Prosecuting Attorneys.** While substantial, the prosecutor's duty of candor i.e., to disclose material evidence favorable to accused, is not all-encompassing; it neither requires full disclosure nor permits a combing of the prosecutor's files in search of evidence possibly useful to the accused.
3. ———: ———: ———. A prosecutor's failure to disclose a report does not violate due process when there is no significant chance that the report, which could have been used solely for impeachment purposes, would induce a reasonable doubt in the jurors' minds or is inherently unfair.
4. **Criminal Law: Evidence.** A defendant who has ready access to a report mentioned in the court files cannot logically claim it was suppressed.
5. **Criminal Law: Trial: Evidence: Verdicts.** In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.

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

Mark V. Meierhenry, for appellant.

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

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

NEWTON, J.

Defendant was convicted of statutory rape on Ruth Mesteth, a 15-year-old girl. On appeal defendant con-

tends that since Ruth had had intercourse with another man a few minutes before defendant had intercourse with her, she was unchaste; that material evidence was withheld from the defense; and that the evidence is insufficient to sustain the conviction. We affirm the judgment of the District Court.

Ruth Mesteth was picked up by the defendant and others in Pine Ridge, South Dakota, and driven to Rushville, Nebraska, where the parties stayed overnight at a hotel. During the night she had intercourse with one of the other men and thereafter with the defendant. The other man was previously convicted on an identical charge. The evidence was sufficient to enable a jury to properly find that the intercourse in each instance was without her consent and against her will.

"A woman who is chaste is one who has never had unlawful sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity." State v. Brionez, 188 Neb. 488, 197 N. W. 2d 639.

Defendant's first contention is without merit.

It is urged that the failure of the prosecution to reveal a previous statement given to an investigator for the Nebraska State Patrol by Ruth Mesteth was prejudicial. The statement contained some items pertaining to two attempts at escape and other items that were not mentioned at the trial but which did not deal with the material elements of the offense. The omissions and slight discrepancies from or with her testimony constituting variations from the statement given were not sufficiently serious to have sustained a challenge to her testimony or veracity. At best it could only have served to impeach Ruth Mesteth on matters not dealing with any essential element of the offense. The fact that the statement had been given was the basis upon which the affidavit for a warrant was made. The affidavit is a part of the record and doubtless served to apprise both the

defendant and his attorney of the existence of the report, yet no request was ever made for its production. Under the circumstances there was no suppression or hiding of evidence.

In Giglio v. United States, 405 U. S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104, it is stated: "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict * * *.' * * * A finding of materiality of the evidence is required * * *."

In Evans v. Janing, 489 F. 2d 470 (8th Cir., 1973), it was ruled: "While substantial, the prosecutor's duty of candor i.e., to disclose material evidence favorable to accused, is not all-encompassing; it neither requires full disclosure as in civil cases nor permits a combing of the prosecutor's files in search of evidence possibly useful to the accused. U.S.C.A. Const. Amend. 14. * * *

"Prosecution's suppression, by knowing nondisclosure, of police sergeant's report stating that, although defendant's picture appeared twice in display of four color photographs, one of the eyewitnesses did not point out defendant but that witness did pick defendant's picture from black and white photographic display did not violate due process since there was no significant chance that report, which could have been used solely to impeach testimony of such eyewitness, would induce a reasonable doubt in the jurors' minds or was of such inherent significance as to represent fundamental unfairness, in view of positive in-court identification of defendant by second eyewitness, who had not been shown photographs. U.S.C.A. Const. Amend. 14."

In United States v. Akin, 464 F. 2d 7 (8th Cir., 1972), cert. den. 409 U. S. 981, it was held: "Evidence of favorable comment from a salesman employed by defendants and from three satisfied customers of defendants was not beyond the easy reach of defendants so that defendants, convicted of mail frauds, could not claim that

prosecution, which allegedly interviewed salesman and the customers but which at pretrial represented that it had no exculpatory evidence in its possession, had suppressed such evidence."

In this case the defendant having access to the court files and the affidavit for warrant based on the statement in question cannot logically claim it was suppressed. Neither can he reasonably contend that it was sufficiently material to have given him a "significant chance" to create a reasonable doubt in the jurors' minds.

Defendant asserts the evidence is insufficient to sustain the conviction. The defendant failed to introduce any evidence contradicting that of the State. A perusal of the record indicates the State submitted evidence which was sufficient to support the verdict. "In a criminal case this court will not interferé with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt." State v. Bayless, 186 Neb. 530, 184 N. W. 2d 634, cert. den. 404 U. S. 844.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN DIGILIO, APPELLANT.
227 N. W. 2d 575

Filed March 20, 1975. Nos. 39749, 39750.

Criminal Law: Trial: Evidence: Verdicts. In a criminal case where the sufficiency of the evidence is challenged on appeal, the Supreme Court will not interfere with a verdict of guilty or a finding of guilty by the court where a jury is waived, or not required, unless the evidence is so lacking in probative force that this court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.

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

James E. McBride, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellee.

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

CLINTON, J.

The defendant was charged in the municipal court of the city of Omaha on two separate charges of purposely or knowingly having gambled, offered to gamble, or provided facilities for gambling. Both offenses are alleged to have occurred at 1515 Dodge Street, the first on August 31, 1973, and the second on November 19, 1973. The cases were tried separately. Defendant was found guilty in the municipal court and sentenced. He appealed to the District Court, was again found guilty, and concurrent terms of 15 days and 30 days in the county jail were imposed. The two cases were argued together here.

The issue raised by the defendant on appeal to this court is the sufficiency of the evidence to sustain the conviction. We affirm.

The sole question argued by the defendant is whether certain physical evidence in No. 39749, which the record shows was delivered to undercover police officers by the defendant, and certain other physical evidence in No. 39750, seized in a raid upon the defendant's place of business, constitute "facilities for gambling" as defined by the ordinance under which the defendant was prosecuted. We need not decide that question because the evidence is sufficient to support a finding of an offer to gamble in No. 39749 and a finding of gambling in No. 39750.

In No. 39749 the evidence shows that an officer of the vice squad, who was apparently operating under cover,

had a conversation with one Joseph Digilio and, as a consequence of this conversation, placed a telephone call to the defendant's place of business at 1515 Dodge Street, identified himself by an alias, talked to a person who identified himself as John, and told this person that he had talked to Joe about getting some football sheets and some telephone numbers where he "could place some action on some football games." On the day following, apparently as a result of the previous call, the officer again called John at the same number and inquired whether he had talked to Joe. John at that time stated he had and that everything was all right, and that the caller could come down to pick up the sheets and the phone numbers at John's place of business. The officer, who believed himself known to John by sight, then had another undercover officer, who also appeared as a witness at trial, go to the defendant's place of business. The officer there picked up some material in an envelope from a man identified as the defendant who appeared to be the bartender at the time at the establishment in question. This material consisted of a schedule of football games on which "point spreads" had been marked and a separate piece of paper on which two telephone numbers were written. The first officer testified as an expert to the significance of "placing action" and the "point spread." No attempt was made to place any bets. The above evidence is sufficient to support a finding beyond a reasonable doubt that defendant at least aided and abetted an offer to gamble.

In No. 39750, the record shows that the defendant's place of business was raided on November 19, 1973, pursuant to a search warrant. Among the items seized were football schedules with point spreads marked thereon, bet slips, and a football parlay board. On the front of the parlay board are 100 squares arranged in rows of 10 to form a larger square. Along the left and top sides of the large square opposite the rows are numbers 1, 2, etc., through 9 and 0, all arranged in irregular or-

der. At the top above the numbers appears the word Nebraska. At the left side adjacent to the numbers is the word Oklahoma. Within each square are what appear to be signatures. Most of these appear only once, but some two or more times. Printed on the back side of the board is the following:

Score

	N	O
1		
2		
3		
F		

$2.00 PER SQUARE - $40.00
payoff on each 1st 3 Quarters
$80.00 payoff on final score

An officer experienced in the enforcement of gambling laws testified as to the significance of all the above items. Also seized at the time of the raid from the same box in which the bet slips were found was a quantity of currency. The defendant, who appeared to be in charge of the establishment at the time, was arrested. In his pocket was found one of the football schedules with the point spreads marked thereon. The above evidence is sufficient to support beyond a reasonable doubt a finding of guilty of the gambling charge.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID J. MORENO, APPELLANT.

227 N. W. 2d 398

Filed March 27, 1975. No. 39546.

1. **Probation and Parole: Hearings: Due Process.** An uninvolved hearing officer, who has had no direct connection with the case,

should determine whether probable cause exists for revocation of probation in order to meet due process requirements.

2. **Constitutional Law: Appeal and Error.** For a question of constitutionality to be considered by this court it must be previously raised in the trial court.
3. **Constitutional Law: Due Process: Waiver.** No procedural principle is more familiar than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

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

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

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

WHITE, C. J.

The District Court, after holding a full hearing, revoked the defendant's probation on one count of robbery and one count of using a knife in the commission of a felony. No issue is presented as to the sufficiency of the evidence to sustain the judgment of revocation or as to the excessiveness of the sentence. The sole question presented is whether the defendant was granted a preliminary "Morrissey" hearing before an independent decision maker. We affirm the judgment and the order of revocation entered by the District Court.

The record shows that a preliminary hearing on the complaint of the defendant's mother was held before the chief adult probation officer of Douglas County, Nebraska, on January 3, 1974. The hearing officer filed a report finding probable cause for violation of the terms of the probation and referred the matter to the District Court for final hearing or trial. On January 7, 1974, the county attorney filed a motion for the re-

vocation of the probation, setting forth the reasons therefor. At the time of the trial or the final hearing before the District Court on January 29, 1974, the defendant appeared with counsel and on his lawyer's request was given an opportunity to file a formal response to the motion. The court at that time also gave permission to file a later written response, if the defendant's counsel so desired. None was filed. The record shows that the defendant was given a full and complete opportunity to file any objections or contentions that he had with reference to the preliminary hearing at this time. In fact, the defendant's counsel admitted paragraphs 1, 2, and 3 of the motion for revocation and denied the allegations of violation contained in paragraph 4. Paragraph 5 of the State's motion for revocation stated as follows: "That the defendant has been afforded notice of a 'Morrissey' preliminary hearing, receipted for notice of same, has attended said hearing and hearing officer, Patrick Krell, Chief Adult Probation Officer, has filed a written report of same. That said notice, receipt and written report are labeled Exhibits 'A', 'B', and 'C'; attached hereto and by reference made a part hereof." Responding to paragraph 5, the defendant admitted the notice of the "Morrissey" hearing. He further admitted all the other allegations contained in paragraph 5, "but with the understanding we're not admitting the truth of the contents of any of the documents referred to." At the end of this response the court inquired of the defendant's counsel as follows: "Are you ready to proceed with the evidence, Mr. Levy?" The defendant, through counsel, responded, "I am ready, Your Honor."

It is almost redundant to state that the defendant, through counsel, with full awareness of the nature of a "Morrissey" hearing, and being fully advised of who the hearing officer was, and the nature and the contents of the report finding probable cause, and although denying the truth of the factual allegations of the re-

port, stated no procedural objections to the hearing and affirmatively stated that he was ready to proceed with the trial on the issues as to violation of the defendant's probation. The record also reveals the defendant had been informed, when notified of the preliminary hearing, that he had a right to an attorney; and that he appeared at the hearing and never objected to the chief probation officer acting as the preliminary hearing officer. Neither at the preliminary hearing nor at the subsequent hearing, represented by counsel, was any request ever made for another preliminary hearing before a different hearing officer. The defendant's counsel was the same counsel who had represented him in the original trial. Further, it is inferable from the record that another and different probation officer had the supervision and control of the defendant's probation. It does *not* appear that the hearing officer, Krell, was in actual charge of the supervision and control of the defendant on probation. The direction of the court in the probation proceedings, was to Krell, "and whoever he assigns to you."

It further appears that at no time during the course of the proceedings in District Court did the defendant or counsel raise any objections to the preliminary hearing or the disqualification of the hearing officer. The defendant now first complains, through different counsel, of this alleged defect in his assignment of error in his brief in this court.

It is not disputed that an uninvolved hearing officer, who has had no direct connection with the case, should determine whether probable cause exists for revocation of probation in order to meet due process requirements. Gagnon v. Scarpelli, 411 U. S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656; Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484. For a question of constitutionality to be considered by this court it must be previously raised in the trial court. State v. Knowles, 192 Neb. 281, 220 N. W. 2d 30. Such a right may be waived by

failure to timely and properly assert the defect, under controlling United States Supreme Court decisions. In Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834, the court stated that no procedural principle is more familiar than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. See, also, Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124; Henry v. Mississippi, 379 U. S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408. In Pacheco v. People of Puerto Rico, 300 F. 2d 759, the circuit court held that a defendant waived his constitutional objection to the fact the same judge who had presided at his trial and heard the witnesses on whose testimony the criminal information was based. The issue was first raised on appeal to the Puerto Rico Supreme Court. The court stated, citing Yakus v. United States, *supra,* as follows: "The facts upon which the appellant bases his claim of deprivation of constitutional right are of record, and even without reference to the record, certainly must have been known by him and his counsel at the time of the trial. Yet he did not raise the constitutional question upon which he now relies at his trial or even in his notice of appeal to the Supreme Court of Puerto Rico. * * * It seems to us that by waiting until that late stage of the proceeding to raise his constituional question the appellant waived whatever right he might possibly have had."

It becomes clear, therefore, that the defendant has waived whatever right he may have had, and has failed to properly raise the question for consideration on appeal to this court. The contention is without merit.

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

AFFIRMED.

LARRY G. KORBELIK, AS FATHER AND NEXT FRIEND OF JAMIE L. KORBELIK, A MINOR, APPELLANT, V. JULIE E. JOHNSON, ET AL., APPELLEES.

227 N. W. 2d 21

Filed March 27, 1975. No. 39550.

1. **Motor Vehicles: Negligence: Infants.** Until the driver of an automobile has notice of the presence or the likelihood of the presence of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume others will do likewise; and until he has such notice, the rule is the same as respects adults and children.
2. ———: ———: ———. Where a driver observes near his line of travel a child in the apparent control of an adult and the child quickly and unexpectedly moves into the street, it will normally be for the jury to determine under all the circumstances of the case whether the driver's duty of care was violated.
3. **Motor Vehicles: Negligence: Infants: Instructions.** The instruction that "a person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears" should not be given where the only inference that could be adduced from the evidence is that the driver ought to have seen or anticipated the presence, in the street or near his line of travel, of a child not under the apparent control of an adult.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Ronald D. Lahners, for appellant.

Healey, Healey, Brown, Wieland & Burchard, for appellees.

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

CLINTON, J.

Larry G. Korbelik brought this personal injury action on behalf of his 5-year-old daughter, Jamie, alleging that the defendant, Julie E. Johnson, had negligently driven an auto into Jamie while she was crossing a

school walk traversing Holdrege Street at 61st Street in Lincoln, Nebraska. The action was tried to a jury, a verdict being returned for the defendants. Plaintiff appeals, urging that the instructions given the jury by the trial court contain reversible error. We affirm.

The petition of plaintiff upon which the action was tried alleged that Julie Johnson, while driving east on Holdrege Street, struck Jamie while she was within a school crosswalk. The negligence of defendant was predicated on allegations that she failed to maintain a proper lookout; failed to keep her vehicle under reasonable control; failed to yield the right-of-way to a child within a school crosswalk, violating section 10.32.010(c)(1) of the ordinances of Lincoln, Nebraska; and failed to operate her vehicle at a speed reasonable in view of the circumstances, violating section 10.32.200(b) of the Lincoln ordinances. The defendants answered this petition, admitting the occurrence of the accident, but denying all the other allegations of the petition. Defendants specifically alleged that the proximate cause of the injury to Jamie was her sudden darting into the street at a place other than a crosswalk.

The testimony at trial was conflicting. The plaintiff adduced evidence showing that Jamie, along with her mother and brother, were in the school crosswalk 3 feet from the south curb waiting for an opportunity to cross, and that the defendant, Julie Johnson, should have seen them but failed to stop to permit pedestrians to cross; that Jamie stepped forward from her mother's side at a fast walk and was struck by the right front fender of the defendants' car. The defendants introduced evidence indicating that Jamie, her mother, and brother were walking west on the sidewalk south of Holdrege Street as the defendant approached the crosswalk from the west. Jamie, her mother, and brother left the sidewalk before coming to the crosswalk and either stopped at the curb, or were stepping into the street and at that time the defendant observed Jamie's

mother and brother but not Jamie who was on her mother's right out of defendant's view. Thereupon Jamie began running, making the accident unavoidable on the part of the defendant who was then too close (20 feet) to stop in time despite a quick application of the brakes. There is no direct evidence of the defendant's speed when she first saw the pedestrian but there is evidence from which the jury could have concluded that the automobile came to a stop within about 45 feet from the time defendant observed the child move from her mother's side. Defendant did testify that as she approached the scene she was traveling 20 to 25 miles per hour. The evidence does not indicate at what point this was.

It was shown at trial that the accident occurred at a time when children are normally walking to school and that along the route traveled by defendant there existed three signs warning of the existence of the school crosswalk ahead and the necessity of stopping for children in the crosswalk.

The instructions given the jury which are relevant to this appeal are:

"INSTRUCTION NO. 8

"The Ordinances of the City of Lincoln, Nebraska, in effect at the time of the accident involved herein, provided in substance as follows:

> "When automatic traffic signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk.
>
> "No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.
>
> "No pedestrian shall cross a roadway at any place other than by a route at right angles to the curb or

by the shortest routes to the opposite curb except in a crosswalk.

"Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"The maximum speed limit at the location of this accident was 35 miles per hour, but no person shall drive a vehicle on any street within the city at a rate of speed greater than is reasonable and prudent under the conditions then existing.

"Violation of any of the above ordinances on the part of the defendants, if any such you find, is not of itself negligence but is evidence of negligence which may be taken into consideration with all other facts and circumstances in determining whether or not negligence on the part of the defendants is established thereby. It is for you to determine whether any of the foregoing ordinances have been violated by the defendants, and if so, whether such violation was negligence which was the proximate cause of the accident.

"However, if you find that the acts of Jamie L. Korbelik were contrary to any of the foregoing ordinances, because of her age you may not find that this was either negligence or evidence of negligence on her part, but the appropriate ordinances relating to pedestrians are set forth in full to aid you in determining the question of right of way as alleged in plaintiff's petition.

"INSTRUCTION NO. 9

"A person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears.

"INSTRUCTION NO. 10

"A motorist who observes or should reasonably anticipate the presence of children in the street is obliged to use reasonable care in view of all the circumstances. Such a motorist should realize that not all children ex-

ercise the same prudence and judgment of experienced persons and that some of them might do impetuous or thoughtless acts. He is not required to insure the safety of a child or to prevent the injury to a child at all costs. It is for you to determine the amount of care which a reasonable prudent person should have exercised under the circumstances and in view of the amount of danger which should have been then anticipated. The failure to use such amount of care, if such you find, constitutes negligence.

"INSTRUCTION NO. 11

"One of the issues in this case is whether the accident was caused by the conduct of Jamie L. Korbelik. If you find the sole proximate cause of the accident was the conduct of Jamie L. Korbelik, then your verdict should be for the defendants. However, if the plaintiff has proved by a preponderance of the evidence, that some negligence of the defendants as set forth in Instruction No. 2 was the proximate cause or a proximately contributing cause of the accident, then the conduct of Jamie L. Korbelik could not be the sole proximate cause thereof.

"INSTRUCTION NO. 12

"The court has determined as a matter of law that Jamie L. Korbelik, because of her age at the time of the accident, cannot be charged with negligence or contributory negligence. However, if you find that her act was the sole proximate cause of the accident and her injury, then you must be governed by Instruction No. 11."

The plaintiff argues three grounds for reversal: (1) It was error to instruct the jury to find for the defendants if it considered the sole proximate cause of the accident to be Jamie's conduct. (2) It was error to instruct the jury that a person may assume that others will use reasonable care and obey the law when a motorist knows or should know that children may be cross-

ing a street. (3) The instructions were prejudicially conflicting.

There is no merit to plaintiff's first contention. Even if a child is not capable of contributory negligence, if such child's conduct can be considered the sole proximate cause of his injury, there can be no recovery. De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235. This is but another way of stating that even a child's recovery must be based upon actionable negligence of the defendant motorist. The jury was clearly and unequivocally instructed that if the defendant was in any way negligent and that negligence contributed to the accident, then whatever the child did could not be the *sole* proximate cause of the injuries.

The second and third contentions raised by plaintiff will be considered together. The first facet of this portion of plaintiff's argument urges that the portion of instruction No. 8, which embodies the duty to yield imposed upon a pedestrian by ordinance, prejudicially conflicts with instruction No. 10 which correctly states the duty of a motorist toward children. Plaintiff's petition alleged the right-of-way ordinance as being evidence of defendant's negligence. The jury could not decide whether defendant had violated ordinances of the city of Lincoln without a complete understanding of the rights and duties of both drivers and pedestrians under the Lincoln ordinances. There is no prejudicial conflict between this instruction and instruction No. 10 which would allow plaintiff to recover irrespective of an ordinance if the duty of care outlined in this latter instruction was not observed by the defendant.

Plaintiff's next argument presents a more complex problem. It is urged that instruction No. 9 in this case was improper: "A person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears." Plaintiff maintains that this conflicts with and negates the effect of instruction No. 10 which outlines the duty of a motorist

in a situation where the presence of children should be reasonably anticipated. Defendants defend the trial court's instruction No. 9 by noting that there is a question of fact as to whether the defendant should have seen Jamie. If the defendant's testimony was accepted by the jury, it could have found that until the time Jamie left her mother's side, defendant ought to have seen only a child in the apparent control of an adult person.

The courts that have had occasion to consider the question of how the duty of a driver is affected by the fact that the child known to be present is in the apparent control of an adult have sometimes stated that nonetheless there is a duty to exercise a high degree of care and in other cases have stated that under such circumstances the driver is not required to exercise the same high degree of care as in the case when the child is unattended. Peperone v. Lee (La. App.), 160 S. 467; Wise v. Eubanks (La. App.), 159 S. 161. The mere presence of an adult and a child or children where control by the adult is not apparent does not affect the standard of care to be exercised as to the child. Matulich v. Crockett (La. App.), 184 S. 748. Still another court has indicated that it is for the jury to determine under all the circumstances what conduct of a child in the apparent control of an adult should be anticipated by the driver. Bouley v. Miller, 322 Mass. 369, 77 N. W. 2d 397. We have said in cases not involving a child attended by an adult that until the driver of an automobile has notice of the presence or the likelihood of the presence of children near his line of travel he is bound only to the exercise of reasonable care, and has the right to assume others will do likewise; and until he has such notice the rule is the same as respects children and adults. De Griselles v. Gans, *supra.*

Under the evidence in this case, we are of the opinion that the giving of instruction No. 9 was not erroneous. It was for the jury to determine whether the defendant

failed in a duty to anticipate an impetuous act on the part of a child in the apparent control of an adult. It would, of course, have no application where the evidence adduced could support only an inference that the driver ought to have seen or anticipated the presence in the street of an unattended child.

Under the defendant's version of the evidence, despite her admission that she did not notice the signs warning of the crosswalk, she nonetheless did observe the presence of the mother and child under the adult's apparent control when both were in a place of safety. Thus was presented a jury question and instruction No. 9 could be applicable. Under the plaintiff's version of the evidence the defendant failed to yield the right-of-way and failed to observe the presence of the parent and a walking (not running) child already in the street. Instruction No. 10 was then applicable. We do not feel that the jury could have been misled as to how instructions Nos. 9 and 10 were to be applied. It is apparent that the jury must have accepted the defendants' version of the evidence and concluded that under the circumstances the defendant was not negligent in not anticipating the action of the child and did not fail to observe something that she should have observed, and she was not traveling at an excessive rate of speed.

There was no prejudicial error in the instructions.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY J. ROBERTS, APPELLANT.

227 N. W. 2d 577

Filed March 27, 1975. No. 39584.

Criminal Law: Courts: Sentences. An action by the District Court in denying probation and imposing a sentence to confinement will not be disturbed on appeal unless an abuse of discretion can be found in the record.

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

Zweiback & Laughlin and Robert F. Peterson, for appellant.

Clarence A. H. Meyer, Attorney General, and Steven C. Smith, for appellee.

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

WHITE, C. J.

This is an appeal from a conviction of the appellant for possession of a controlled substance, cocaine. The District Court sentenced the appellant to 1 year in the Nebraska Penal and Correctional Complex. The appellant appeals from this judgment. We affirm the judgment and sentence of the District Court.

This case arises out of the same circumstances as State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670. The appellant, Billy J. Roberts, was originally charged with possession of a controlled substance with intent to deliver. As a result of plea bargaining the charge was reduced to simple possession in return for a nolo contendere plea. The appellant was arrested with another person, Holzapfel. After obtaining a search warrant, the police found cocaine and other controlled substances in the appellant's residence. The appellant has no prior record. No objection was made about the validity of the warrant or the conduct of the trial.

The only issue presented is whether the District Court abused its discretion in sentencing the appellant to 1 year in the Nebraska Penal and Correctional Complex rather than placing him on probation.

We said in State v. Holzapfel, *supra,* that the action by the District Court in denying probation and imposing a sentence to confinement will not be disturbed on appeal unless an abuse of discretion can be found in the record. Prior to sentencing, a lengthy presentence in-

vestigation was made. The report clearly shows that the appellant was involved in a large scale drug marketing operation. There is no doubt that the appellant was dealing in drugs in order to make a profit. As we said in State v. Holzapfel, *supra*: "Considering the designed purpose of the statute to prohibit the trafficking of controlled substances and their possession and use thereof, and the comparative propriety of probation for this particular type of offense, we can find no abuse of discretion on the part of the District Court in imposing the minimum sentence on a reduced charge as it did." This statement also applies here. Consequently, we can find no abuse of discretion.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD WADE, APPELLANT.

227 N. W. 2d 400

Filed March 27, 1975. No. 39627.

Criminal Law: Sentences: Presentence Reports. If a sentence imposed is within the statutory limits it will not be disturbed by this court on appeal in the absence of an abuse of judicial discretion. The trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the sentencing judge's observation as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant.

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

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

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

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

WHITE, C. J.

In a prosecution for forcible rape the defendant was sentenced to an indeterminate period of 7 to 10 years. The sole question presented here is the excessiveness of the sentence. We affirm the judgment and sentence of the District Court.

If the sentence imposed is within the statutory limits it will not be disturbed by this court on appeal in the absence of an abuse of judicial discretion. State v. Merrick, 192 Neb. 157, 219 N. W. 2d 232. The statutory penalty, fixed at 3 to 50 years imprisonment, indicates a legislative determination of the very serious nature of this type of violent crime. The facts in this case present no picture of an isolated attack by an individual under any mitigating circumstances. It presents a deliberate and premeditated attack by the defendant in concert with two other individuals continued over a time span that would indicate punishment in the higher ranges of the permissible 50-year sentence provided by statute. Two girls, each 16 years of age, were peaceably driving an automobile upon a public street in the City of Omaha, Nebraska, at approximately 2:30 a.m. A van, occupied by the defendant and two companions, commenced following the girls. Shortly thereafter, the van forced the car over to the side of the road where it was compelled to stop in order to avoid collision with a parked vehicle. Thereupon the other girl grabbed the car keys, jumped from the car, and fled. One of defendant's companions pursued, caught the girl, pushed her down, and pointed a shotgun at her, thereby retrieving the keys. In the meanwhile, during the chase the other two men had forced the victim of this rape into the van; and when the third man returned with the keys and entered the vehicle the group drove to a secluded area of the city and parked. At that time the

defendant made it known that they intended to engage in sexual relations with the victim. She was directed to remove her jeans, but she refused. Thereupon, she was forced into the rear of the vehicle. At this point one of the trio of men renewed the order for the victim to remove her jeans and announced that her jaw would be broken if she refused. Following the threat, the victim complied; and each of the three men then engaged in a completed act of sexual intercourse with the girl. The defendant entered a plea of guilty. The facts above set forth are taken from the presentence investigation report, and no effort is made by the defendant to utilize the provisions of section 29-2261 (5), R. S. Supp., 1974, for the purpose of rectifying any inaccuracy in the report.

It also appears that the defendant has a record of numerous misdemeanor convictions, has been charged with felonious assault, and that at the time of the filing of the presentence report an auto theft charge was pending against the defendant. We observe that the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the sentencing judge's observation as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. Some of these factors were recently reviewed in State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498, and will not be repeated here. We come to the conclusion that the record shows no abuse of discretion by the trial judge in imposing the sentence that he did and that the sentence should be affirmed.

The defendant seriously urges that our reduction of a sentence in State v. Thunder Hawk, 188 Neb. 294, 196 N. W. 2d 194, dictates a reduction of the sentence in this case. As we have pointed out, mathematical equality of sentences cannot be achieved in the context of the necessity for individualized sentencing required under Nebraska law. The fundamental difference be-

tween State v. Thunder Hawk, *supra,* and this case is that in the former the defendant was convicted only of assault to commit rape. The penalty for assault with intent to commit rape has been fixed by the Legislature at only 2 to 15 years imprisonment. § 28-409, R. R. S. 1943. Considering that factor and the further one involved in this case of a concerted and brutal attack by the defendant in concert with two other individuals, it would appear that the sentence of 7 to 10 years is not in conflict with the Thunder Hawk reduction of sentence.

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

AFFIRMED.

MARCELLA PAASCH, APPELLANT, V. JULIA BROWN, APPELLEE.
227 N. W. 2d 402

Filed March 27, 1975. No. 39633.

1. **Outrageous Conduct: Torts: Damages.** One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
2. ———: ———: ———. Liability exists only where the severe emotional distress is inflicted intentionally or recklessly and only where the conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency.
3. **Outrageous Conduct: Torts.** A mere failure to comply with a court judgment or decree does not give rise to a separate tort liability for outrageous conduct in favor of the person for whose benefit the original court judgment or decree was entered.

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

H. 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, McCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

McCOWN, J.

This is a tort action in the District Court for Cuming County to recover damages for mental distress of the plaintiff allegedly caused by defendant's refusal to comply with a judgment of the District Court for Dodge County, Nebraska, which enjoined the defendant from obstructing the flow of surface waters in a natural drainway. The District Court sustained a demurrer by the defendant and dismissed the action. The plaintiff has appealed.

Plaintiff's second amended petition alleges that on June 29, 1973, the Supreme Court of Nebraska entered an order reversing a judgment of the District Court for Dodge County, Nebraska, and directing that defendant should be enjoined from obstructing drainage of certain surface waters from plaintiff's land. On August 23, 1973, plaintiff filed a motion in the District Court for Dodge County, Nebraska, requesting that judgment be entered on the Supreme Court mandate, and on the 10th day of October 1973, the District Court for Dodge County, Nebraska, entered judgment on the Supreme Court mandate.

The critical portions of the petition allege that defendant has deliberately, willfully, and in bad faith refused to comply with the judgment of the District Court for Dodge County, Nebraska, entered on the Supreme Court mandate (1) in failing to pay costs from October 10 until November 20, 1973, and (2) in permitting obstructions to remain in the drainage ditch on her land. The petition then alleges: "That such outrageous conduct on the part of the defendant has caused and continues to cause plaintiff severe mental distress."

The sole question on this appeal is whether or not the

second amended petition states facts sufficient to constitute a cause of action against the defendant. The plaintiff contends that the facts alleged are sufficient to constitute a cause of action for outrageous conduct causing severe emotional distress. Although the allegations of the petition must be taken as admitted, including all proper and reasonable inferences from them, nevertheless the petition must state facts which entitle the plaintiff to relief in order to withstand the demurrer. Higgs v. Hall County, 184 Neb. 508, 168 N. W. 2d 920. In at least one case this court has affirmed a judgment for intentional infliction of severe emotional distress. See LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424, 91 A. L. R. 1491.

Restatement, Torts 2d, section 46, states the basic rule as follows: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

The reporter's comments to that section state that the section is concerned only with emotional distress which is inflicted intentionally or recklessly, and that cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. Liability has been found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. There is no occasion for the law to intervene in every case where some one's feelings are hurt. A defendant is never liable where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

The conduct of the defendant here consisted of a failure to promptly perform actions which she was directed to perform by a court decree. There are ample means

of enforcing compliance with the judgments and decrees of courts, but a mere failure to comply, or to comply promptly, does not give rise to a separate tort liability for outrageous conduct in favor of the person for whose benefit the original court judgment or decree was entered. We have found no case anywhere which even intimates that facts such as those alleged here are sufficient to constitute a cause of action for outrageous conduct which intentionally inflicts emotional distress on another.

It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. The facts alleged here, with the benefit of all proper and reasonable inferences from them, are insufficient to constitute a cause of action for outrageous conduct intentionally causing severe emotional distress.

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

AFFIRMED.

DAVID LUBASH, APPELLANT, V. BRIAN L. LANGEMEIER ET AL., APPELLEES.

RODNEY NEWILL, A MINOR, BY AND THROUGH MRS. HELEN NEWILL, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. BRIAN L. LANGEMEIER ET AL., APPELLEES.

227 N. W. 2d 405

Filed March 27, 1975. Nos. 39648, 39649.

Constitutional Law: Motor Vehicles: Statutes: Negligence. The guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States nor any provision of the Constitution of the State of Nebraska.

Appeals from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Ronald H. Stave, David A. Johnson, and Emil F. Sodoro, for appellants.

Ray C. Simmons, for appellees.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., HAMILTON, District Judge, and KUNS, Retired District Judge.

SPENCER, J.

Plaintiffs brought these actions for the recovery of damages for personal injuries sustained while riding as guests in a truck owned by defendant Leon E. Langemeier and operated by his son Brian L. Langemeier. The petitions of the plaintiffs contained one cause of action alleging ordinary negligence against both defendants, raising the constitutionality of the guest statute, section 39-740, R. R. S. 1943. The sole issue presented in this appeal is the refusal of the trial court to submit the issue of ordinary negligence of the defendants to the jury and to instruct the jury accordingly. We affirm.

In Botsch v. Reisdorff, *ante* p. 165, 226 N. W. 2d 121, filed February 18, 1975, we reiterated our previous holding that the guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, nor any provision of the Constitution of the State of Nebraska. That case is decisive of the issue raised herein.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. EDWARD MARION CIALKOWSKI, ALSO KNOWN AS EDWARD MARION HALL, APPELLEE.

227 N. W. 2d 406

Filed March 27, 1975. No. 39691.

Constitutional Law: Statutes: Contributing to Delinquency: In-

fants. Section 28-477, R. S. Supp., 1974, is not unconstitutional on the ground that it is vague and indefinite.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Reversed and remanded.

Raymond Baker and Douglas R. Milbourn, for appellant.

William G. Line of Kerrigan, Line, Martin & Hanson, for appellee.

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

NEWTON, J.

Defendant was charged with contributing to the delinquency of two minor girls. He persuaded them to enter a dancing contest in a place akin to a roadhouse and during the dances to bare breasts and/or buttocks. Following conviction, a motion for new trial was sustained and the case dismissed on the ground that the statutes violated were void because they were vague and indefinite. We reverse the judgment of the District Court.

Section 28-477, R. S. Supp., 1974, provides: "Any person who by any act, encourages, causes, or contributes to the delinquency, neglect, or need for special supervision, of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent or neglected child, or a child in need of special supervision as defined by section 43-201, shall be deemed guilty of a misdemeanor." Section 43-201, R. R. S. 1943, provided: "(5) A child in need of special supervision shall mean any child under the age of eighteen years * * * (c) who deports himself so as to injure or endanger seriously the morals or health of himself or others; * * *."

These statutes are intended for the protection of children. Being children they are not yet capable of mature judgment and require the protection of society.

It is true that the terms of the statutes are somewhat broad, yet it is practically impossible to draw them with greater specificity and still adequately protect the young. The ways in which a child may be influenced to become delinquent or immoral are multitudinous and often difficult to anticipate. In Commonwealth v. Randall, 183 Pa. Super. 603, 133 A. 2d 276, may be found appropriate language. "The comprehensive words of the statute, 'Whoever, being of the age of twenty-one years and upwards, by any act corrupts or tends to corrupt the morals of any child under the age of eighteen years' certainly convey concrete impressions to the ordinary person. The common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.

"It is obvious that the mandates of the statute are salutary measures designed to protect children. 'The ways and means by which the venal mind may corrupt and debauch the youth of our land, both male and female, are so multitudinous that to compel a complete enumeration in any statute designed for protection of the young before giving it validity would be to confess the inability of modern society to cope with the problem of juvenile delinquency.' * * *

"The highest court in the land has recognized that the 'Use of common experience as a glossary is necessary to meet the practical demands of legislation' and that the 'requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.' Sproles v. Binford, 286 U. S. 374, 393, 52 S. Ct. 581, 587, 76 L. Ed. 1167."

Statutes practically identical with ours were upheld against similar attacks in Brockmueller v. State, 86 Ariz. 82, 340 P. 2d 992; State v. McKinley, 53 N. M. 106, 202 P. 2d 964; Jung v. State, 55 Wis. 2d 714, 201 N. W.

2d 58. In numerous instances statutes which simply forbid acts tending to cause child delinquency have been upheld as sufficiently specific. See, State v. Coterel, 97 Ohio App. 48, 123 N. E. 2d 438; State v. Sparrow, 276 N. C. 499, 173 S. E. 2d 897, which states: "Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. United States v. Petrillo, 332 U. S. 1, 91 L. ed. 1877, 67 S. Ct. 1538."; McDonald v. Kentucky (Ky. App.), 331 S. W. 2d 716; State v. Barone (Fla.), 124 So. 2d 490; State v. Montalbo, 33 N. J. Super. 462, 110 A. 2d 572; and People v. Bergerson, 17 N. Y. 2d 398, 271 N. Y. Supp. 236, 218 N. E. 2d 288, wherein it is stated: "The test to be applied was recently stated by this court: 'The test is whether a reasonable man subject to the statute would be informed of the nature of the offense prohibited and what is required of him. Such warning must be unequivocal but this requirement does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.' "

We are unable to agree that the statutes are unconstitutional. See State v. Simants, 182 Neb. 491, 155 N. W. 2d 788. The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

The memorandum opinion of the District Court states that "The State did not maintain in County Court or on appeal that the defendant was guilty of such conduct as would tend to encourage a child to commit a crime. * * * Counsel have failed to point out to me any criminal activity the child would have engaged in and they concede there was none." The opinion also states

that the statutes involved are subsections (3)(e) and (5)(c) of section 43-201, R. R. S. 1943. Subsection (3)(e) defines a neglected child as one "who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child;". Subsection (5)(c) defines a child in need of special supervision as one "who deports himself so as to injure or endanger seriously the morals or health of himself or others;".

No question of health is involved and the statutes must be interpreted and applied to acts which are not criminal under any other law of the state or any city or village ordinance. The acts here can only be said to be criminal because they are either injurious to the morals of the child involved or injure or endanger seriously the morals of the child or others. Only concepts of morality are involved, and the statutes apply them to completely undefined and unspecified acts and conduct.

The District Court relied upon the authority of Gesicki v. Oswald, 336 F. Supp. 371 (So. Dist. N. Y., 1971), affirmed 406 U. S. 913, 92 S. Ct. 1773, 32 L. Ed. 2d 113 (1972). In that case the New York "wayward minor" law was involved. The particular language defined a wayward minor as one who "is morally depraved or is in danger of becoming morally depraved." Judge Kaufman, speaking for a three-judge federal court, found the statute unconstitutional for vagueness. Quotation from that opinion is appropriate here. The court said: "It is clear to us that the terms 'morally depraved' and 'in danger of becoming morally depraved' fall far beyond the bounds of permissible ambiguity in a standard defining a criminal act. Indeed, a penal statute purporting to outlaw 'evil,' as these criteria essentially do, is a paradigm of a statute 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' Connally v. General Constr. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed.

322 (1926). The concept of morality has occupied men of extraordinary intelligence for centuries, without notable progress (among even philosophers and theologians) toward a common understanding. * * *."

The court in Gesicki quoted from Musser v. Utah, 333 U. S. 95, 68 S. Ct. 397, 92 L. Ed. 562. In that case the defendants had been charged under a Utah statute which made it a crime to conspire to commit any act "injurious to public morals." In construing that phrase, Mr. Justice Jackson, speaking for the Supreme Court, said: "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. In some States the phrase 'injurious to public morals' would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, United States v. Cohen Grocery Co., 255 U. S. 81. Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

In 1974, the West Virginia Supreme Court of Appeals held a West Virginia statute unconstitutional which had a provision almost identical to the Nebraska statute. The particular language involved in the West Virginia statute was: "Deports himself so as to wilfully injure or endanger the morals or health of himself or others." The court said: "We might, under the mandate to construe a statute to be constitutional, if possi-

ble, superimpose on subsections 7 and 9 of Code, 49-1-4, standards of reasonable certainty by judicial interpretation. However, the language of subsection 7, 'immoral or vicious persons', is so broad and subjective in nature that there is an inherent danger that a trial court could not keep purely subjective standards out of the consideration of juries. Likewise, the language of subsection 9, 'injure or endanger the morals or health of himself or others', is so utterly subjective that an attempt to make it certain would strain the interpretative process." State v. Flinn, 208 S. E. 2d 538 (W. Va. App., 1974).

The cases cited in the majority opinion in support of the conclusion that statutes similar to ours are constitutional, with only one exception, involved conduct which was clearly illegal and criminal under specific state statutes. It should be noted too that they are largely older cases, and all but one of them are long before the Supreme Court's affirmance in the Gesicki case.

For a period of over 70 years this court has consistently followed the rule stated in State v. De Wolfe, 67 Neb. 321, 93 N. W. 746: "In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law."

Time after time this court has struck down statutes as unconstitutional because of indefiniteness. In State v. Adams, 180 Neb. 542, 143 N. W. 2d 920, this court said: "It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. * * * A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and

unlawful cannot be left to conjecture. * * * A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law." See, also, Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772.

It is indisputable that a legislature can draw statutes defining the crime of contributing to the delinquency of a minor with sufficient specificity to pass constitutional muster before any court. In the face of that fact, it is wholly unrealistic to hold, as this court now does, that any unspecified conduct becomes criminal simply because it offends the sense of decency, propriety, and morality of any particular jury or judge. That conclusion discards a consistent rule of the criminal law of this state for almost 100 years. It does so on the assumption that all persons agree on what conduct is immoral and what conduct is not, and that no citizen needs to be told what conduct will make him not only a sinner but also a criminal. Neither justice nor morality support that result.

The District Court thoroughly analyzed the issues and the determination reached was correct in all respects. The overwhelming weight of current legal authority, as well as the controlling voice of the United States Supreme Court, require that the judgment of the District Court should be affirmed.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. MICEK, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. GROVER C. ROBINSON, APPELLANT.

227 N. W. 2d 409

Filed March 27, 1975. Nos. 39695, 39699.

1. **Appeal and Error.** Errors assigned but not argued will not be considered by this court.

2. **Criminal Law: Trial: Indictments and Informations.** The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment, information, or complaint will not be disturbed on appeal, in the absence of an abuse of discretion.
3. **Probable Cause: Criminal Law.** The existence of probable cause must be determined by a practical and not any technical standard.
4. **Probable Cause: Arrest: Criminal Law.** The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.
5. **Criminal Law: Habitual Criminals: Evidence.** At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.
6. **Criminal Law: Habitual Criminals: Evidence: Trial: Records.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.
7. **Records: Trial: Evidence.** A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one.
8. ———: ———: ———. A judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law.

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

J. William Gallup, for appellants.

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

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

SPENCER, J.

Both Grover C. Robinson and William E. Micek appeal their convictions for burglary and for possession of burglary tools. The defendants assign as error: (1) The refusal to sever their trials; (2) overruling their motions to suppress evidence; (3) overruling their motions for mistrials; (4) allowing the testimony of expert witnesses where they had not been furnished reports concerning scientific tests and results; (5) giving instruction No. 17; (6) overruling their motion to dismiss; (7) receiving certified copies of judgments of conviction in evidence at a hearing on the charges of being habitual criminals without proper identification; and (8) overruling their motion to dismiss the habitual criminal charges. We affirm.

Defendants have not argued assignments (3), (4), or (5) in their brief, and (6) is only argued so far as it is incidental to the sustaining of defendants' motions to suppress evidence. Errors assigned but not argued will not be considered by this court. Linder v. State (1953), 156 Neb. 504, 56 N. W. 2d 734.

About 1:14 a.m., on the morning of February 4, 1974, deputy sheriff Wintle, who was in charge of the night shift, received a call to go to a home in Irvington, Nebraska. He arrived there about 1:17 a.m. The complainant pointed out a Dodge automobile parked just south of his home which he had never seen in the vicinity before. The car was unoccupied. On investigation the deputy sheriff determined that the grill was warm, indicating that the car had been driven recently. He checked the registration and determined that it was

registered to a Shirley M. Micek, 4741 South 78th Avenue. He had recently been given the name of William Micek as a possible burglary suspect, because of his association with a William O'Kelly, a known burglar. He left the car and checked the Irvington area, but did not discover anything unusual.

Wintle was called back to the complainant's residence about 2:05 a.m. He was given the description of a man who had been around the car which was now gone. He was told that it appeared as though the man had taken off the rear license plate. Wintle immediately called the sheriff's office and suggested that the car be stopped and a routine check be made on the occupants. Another deputy sheriff, Tramp, observed and stopped the car at 79th and L Streets in Omaha at 2:18 a.m. He notified Wintle, who immediately started for that point and arrived at 2:33 a.m.

As Tramp was walking up to the car he observed there were three occupants and that one of them, who was in the back seat, threw his leg over a white cloth. He noticed this cloth had a red spot or stain. There appeared to be something under it, with a plastic cover. The defendant Micek, in the presence of the other two occupants, told Tramp they had been playing cards at 33rd and Burt Streets, which is 8 to 10 miles from Irvington. All three of the occupants produced driver's licenses which appeared to be in order. Tramp gave their names to the radio operator to check to see if there were any warrants outstanding on any of the individuals, and proceeded to make out field cards. He was completing the cards when Wintle arrived.

Wintle first visited with Micek at his cruiser. Micek told him they had been playing cards at 33rd and Burt Streets, which was Robinson's home. He said he had not been at Irvington, and claimed that the car had been at 33rd and Burt Streets all night. Wintle then went to the Dodge and asked Robinson, who had gotten in behind the wheel, to step out so he could visit with him

away from the others. When the door was opened he could see a parcel of meat wrapped in clear plastic. It appeared to be covered by a white cloth, or butcher's apron, with a red stain on it. Robinson's story to Wintle was the same as Micek's.

When Wintle observed the Dodge at 79th and L Streets, it appeared to be riding lower than when he first observed it in Irvington. The license on the Dodge was the same as the one he observed at Irvington. At 2:42 a.m., he radioed back for two cars in the north area to check breakins in the Irvington area, specifically checking businesses handling large cuts of meat. At 2:44 a.m., he was advised that the Steam Shed, a restaurant in Irvington, had been broken into. He then advised the three occupants of the car that they were under arrest. This was approximately 2:45 a.m. The occupants were searched and handcuffed. There were three cuts of meat under the cloth. When the trunk was opened it was found to be full of various cuts of meat on racks similar to racks on which it would be stored in a place of business.

Defendants argue that when one attorney represents two codefendants, conflict of interest which denies one or both defendants effective assistance of counsel is a distinct possibility and when such a conflict exists a conviction cannot stand. Both Micek and Robinson had alibi defenses supported by different witnesses. Shortly before the trial, Micek's alibi vanished when his witness became unavailable or refused to testify. Defendants then argue that after Micek lost his alibi defense, Robinson's defense then centered on accusing Micek of performing the burglary since the stolen goods were found in Micek's car. This created an obvious conflict. Quoting defendants' brief: "How could defense counsel argue to the jury that his one client was an innocent victim of accepting a ride home with a man who had just committed a burglary and who just happened to be his other client? Such an argument would certainly have

deprived appellant, Micek, of effective assistance of counsel. By the same token, failure to make such an argument would have deprived Robinson of the effective assistance of counsel."

Defendants had several weeks to prepare for trial. The jury had been empaneled and sworn April 19, 1974. The motion for severance was made before trial began on the morning of April 22, 1974. Even though defendants were to waive their defense of double jeopardy, it would require a very strong showing of probable prejudice to show an abuse of discretion in refusing severance at that stage. The charges against the two defendants were properly joinable and the record discloses no factors on which an allegation of abuse of discretion can be based. The trial court did not abuse its discretion in denying severance herein.

The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment, information, or complaint will not be disturbed on appeal in the absence of an abuse of discretion. State v. Bazer (1973), 189 Neb. 711, 204 N. W. 2d 799.

Defendants' main defense is predicated on their contention that the stopping of the Micek car at 79th and L Streets constituted an illegal arrest because no probable cause existed for their arrest at the time of their original detention. We find that probable cause existed for the stopping, temporary detention, and subsequent arrest of the defendants. A private citizen had reported the parking of a strange vehicle in his neighborhood at an early hour in the morning. The vehicle was warm, indicating that it had been driven recently. It was unoccupied and appeared to be in operable condition. Further, the same private citizen reporting that he had observed a stranger doing something at the back of the car, possibly changing a license plate, was an additional suspicious circumstance. We have no question but that on the facts known to officer Wintle he was fully justified in requesting that the car be stopped and the oc-

cupants identified. As we said in State v. Carpenter (1967), 181 Neb. 639, 150 N. W. 2d 129: "It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible.

"The existence of probable cause must be determined by a practical and not any technical standard." See, also, Adams v. Williams (1972), 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612, wherein Mr. Justice Rehnquist said: "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. See id., at 23. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

When officer Tramp stopped the car at 2:18 a.m., he immediately advised his superior, officer Wintle. As Tramp approached the car, he observed defendant Robinson throw his leg over a white cloth as though to cover it. He noticed that the white cloth had a red stain which conceivably could be a blood stain. There appeared to be something under it with a plastic cover.

Officer Wintle arrived on the scene before Tramp had completed his investigation. He immediately recognized the car as the one he had observed an hour earlier in Irvington. Micek, the car's driver, denied that he had been anywhere near the Irvington area. When Robinson was asked to get out of the car so that Wintle could check his story apart from the others, a parcel of meat was observed wrapped in clear plastic under the white cloth with the stain. The circumstances were sufficient for a temporary detention. Within 2 minutes officer Wintle had the information that a business hand-

ling meats in the Irvington area had been burglarized. The interference with defendants' freedom of movement was lawful and the officers geared their action to the state of their knowledge. As we stated in State v. Carpenter, *supra*: "It is not possible to ignore the fact that police officers are charged with the duty to prevent crime as well as to detect it. Often an immediate inquiry is an indispensable attribute to the prevention and discovery of crime." We find probable cause existed for the temporary detention of the defendants and that the 27 minutes delay between the initial stopping and the actual arrest of the defendants was not unreasonable under the circumstances herein.

Defendants' last assignment of error is that the State did not properly identify the defendants as the same persons who had been previously convicted and sentenced, as attested by the copies of judgments in evidence. Section 29-2222, R. R. S. 1943, provides: "At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the parties so charged, shall be competent and prima facie evidence of such former judgment and commitment."

In State v. Roan Eagle (1968), 182 Neb. 535, 156 N. W. 2d 131, we held: "An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto."

Objection was made by the defendant Micek to two certified copies of judgments, one from Douglas County, the other from Platte County, Nebraska, because they were not properly authenticated. Section 25-1285, R. R. S. 1943, provides: "A judicial record of this state, or

of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one." Both of the exhibits introduced against the defendant Micek meet this test.

Where, however, the record was from a sister state, as it is in the case of the defendant Robinson, it is covered by section 25-1286, R. R. S. 1943, which provides: "That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law." The exhibits presented in the case of defendant Robinson are properly authenticated as required by section 25-1286, R. R. S. 1943. Additionally, the defendant Robinson testified to and confirmed his previous convictions.

For the reasons given, we find no merit in the various assignments of error. The judgment of the trial court is affirmed.

AFFIRMED.

McCOWN, J., caveat.

Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, has been extended by the majority opinion to what might be said to be its ultimate limits. The Eighth Circuit Court of Appeals in Carpenter v. Sigler, 419 F. 2d 169, held that a reviewing court must objectively evaluate the specific and articulable facts, together with rational inferences from those facts, "and determine: (1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related 'to the circumstances which justified the interference in the first place.' " See, also, People v. Grace, 32 Cal. App. 3d 447, 108 Cal. Rptr. 66; Keener v. State, 290 So. 2d 513 (Fla. App.).

The majority opinion here should not be taken to

authorize the continuation of an investigative stop beyond the time reasonably necessary to determine the identity of the individual or individuals and to obtain the information, the absence of which justified the initial stop. There should be no discouragement of good police work, but there should be no encouragement of unreasonable detention of citizens beyond the time necessary for reasonable verification of critical information. Terry v. Ohio, *supra,* authorizes only a brief or momentary stop.

STATE OF NEBRASKA, APPELLEE, v. RICHARD LEE TAYLOR, APPELLANT.

227 N. W. 2d 26

Filed March 27, 1975. No. 39700.

1. **Post Conviction: Sentences.** Matters relating to sentences within statutory limits are not a basis for post conviction relief.
2. **Appeal and Error.** Assignments of error on grounds available to the defendant in the District Court must first have been presented to the District Court.
3. **Post Conviction: Right to Counsel.** The denial of request for court-appointed counsel on appeal of a post conviction proceeding is properly refused when the record and files show the defendant is not entitled to relief.

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

Richard Lee Taylor, pro se.

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

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

NEWTON, J.

This is a post conviction action. Defendant, on a plea

of guilty, was convicted of burglary. Pursuant to a plea bargain the State's attorney recommended probation. Sentence was deferred pending a presentence investigation. During this period the defendant committed another felony. The original plea bargain was withdrawn but another one entered into. The State agreed to drop charges on the most recent felony if defendant adhered to his plea of guilty to the burglary charge. This he did and he received a flat 10-year sentence. Defendant was represented by counsel on both occasions.

Defendant assigns as error the failure to grant an evidentiary hearing, denial of a direct appeal, failure to appoint counsel in this proceeding, failure to include the presentence report in the record on appeal, that the report was incomplete and biased, and excessiveness of the sentence. We affirm the judgment of the District Court.

Defendant's motion to vacate the judgment set out only two purported grounds, excessiveness of the sentence and an incomplete presentence-investigation report. It is evident that no grounds were presented to the District Court which would require an evidentiary hearing. It is well established that matters relating to sentences within statutory limits are not a basis for post conviction relief. See State v. Birdwell, 188 Neb. 116, 195 N. W. 2d 502. The complaint regarding the presentence report could only affect the sentence imposed and falls in the same category. Furthermore, it is not alleged that access to the report was denied to defendant. He could have availed himself of the opportunity to amplify it or submit additional evidence. See § 29-2261 (5), R. S. Supp., 1974.

Assignments of error on grounds available to the defendant in the District Court must first have been presented to the District Court. See, § 29-3001, R. S. Supp., 1974; State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

The denial of request for court-appointed counsel on

appeal of a post conviction proceeding is properly refused when the record and files show the defendant is not entitled to relief. See State v. Gero, 186 Neb. 379, 183 N. W. 2d 274.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM R. O'KELLY, APPELLANT.

227 N. W. 2d 415

Filed March 27, 1975. No. 39717.

1. **Trial: Instructions.** When the jury is admonished to disregard objectionable questions and answers, a mistrial ordinarily will not be granted.
2. **Appeal and Error.** Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal.
3. **Criminal Law: Sentences.** It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.
4. ———: ———. It is frivolous to suggest that the refusal of a District Court to make a Nebraska sentence concurrent with a sentence in another jurisdiction is an abuse of discretion.

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

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

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and HASTINGS and CLARK, District Judges.

SPENCER, J.

Defendant, William R. O'Kelly, prosecutes this appeal

from a conviction of burglary and possession of burglary tools. Defendant was tried jointly with Grover C. Robinson and William E. Micek but prosecuted a separate appeal.

The facts are set out in State v. Micek and Robinson, *ante* p. 379, 227 N. W. 2d 409, and will not be repeated herein except as necessary. Defendant alleges six assignments of error: (1) Failure of the trial court to sustain his motion to suppress physical evidence; (2) failure to sustain his motion for a mistrial for prejudicial questions; (3) failure to sustain his motion for a mistrial on the ground that the prosecution failed to comply with a mutual order for discovery; (4) the giving of an aider and abettor instruction; (5) imposition of a sentence of 7 years for the possession of burglary tools; and (6) in not making defendant's sentence concurrent with a sentence previously imposed by the District Court for Pottawattamie County, Iowa. We affirm as modified.

The motion to suppress has been adequately answered in State v. Micek and Robinson, *supra,* and will not be further discussed herein.

Defendant's second assignment of error is directed to prosecution questions attempting to show that his wife Elizabeth O'Kelly was present at the Micek residence at approximately 5 a.m. the same morning as the burglary. Many objections were posed to this line of questioning. The court then held a hearing outside the presence of the jury and determined that this line of questioning should not be continued. When the jurors were called back the trial court admonished them to disregard the objectionable questions and answers. Other than defendant's statement that the questions were prejudicial, there is not a scintilla of evidence that they were so. When the jury is admonished to disregard objectionable questions and answers a mistrial ordinarily will not be granted. State v. Schumacher (1972), 189 Neb. 138, 201 N. W. 2d 249. The court's

admonition sufficiently cured any possible prejudice, certainly in the absence of some proof otherwise.

O'Kelly's third assignment of error argues that the prosecutor did not comply with a reciprocal discovery order. The facts as evidenced in the bill of exceptions and in the prosecutor's affidavit indicate any delay was brought about by defense counsel's conduct. The prosecutor's affidavit explains that he had informed counsel for defendant that a tool and some rubber boots removed from the car defendant occupied, as well as some pieces of plasterboard removed from the burglary site, had been sent to the F.B.I. for testing and that the agents would testify to similarities they found between the plasterboard and articles of plaster found on the tool and rubber boots. The affidavit further states that after the trial was underway, the prosecutor learned that appellant intended to rely on an alibi defense. To meet this, the prosecutor asked an F.B.I. agent to run new tests which were intended to determine whether or not there were plasterboard particles on the defendant's clothing. These tests were made at a local hospital after 7 p.m. The witness was called to testify the next morning within a very few hours after the tests were completed. The prosecutor cannot be faulted under the circumstances. He proceeded with due diligence when he learned new tests were necessary. A discovery order is a two-way street. The trial court did not abuse its discretion in overruling defendant's motion for a mistrial on the facts herein.

There was sufficient evidence to give the aider and abettor instruction about which defendant complains. Defendant, with Robinson and Micek, was found riding in a car which contained stolen meat and burglary tools. The initial explanation of their whereabouts was totally inconsistent with other facts known to the police officers. Subsequently, Robinson and O'Kelly asserted an alibi defense. When the deputy sheriff was approaching the car after it was stopped, he observed

Robinson throw his leg over a cloth covering the stolen meat in the back seat. These few factors, which represent only a part of the evidence, are sufficient to warrant an aiding and abetting instruction.

Defendant's second attack upon the instruction concerns its form. The instruction does not include the entire instruction as it is set out in NJI No. 14.12. Unless an error can be considered prejudicial to the rights of a defendant it may not be considered as ground for reversal. Defendant has failed to show how he was in fact prejudiced by the instruction as given. Other than the mere statement that the instruction was prejudicial, defendant has adduced no proof of prejudice that could be a ground for reversal.

O'Kelly's fifth assignment of error has merit. He was sentenced to 7 years for possession of burglary tools. Section 28-534, R. R. S. 1943, provides that a person so convicted shall be punished by confinement in the Nebraska Penal and Correctional Complex for not less than 1 year nor more than 5 years. The sentence imposed therefore was erroneous. The sentence imposed was to run concurrently with the 10-year sentence imposed on the burglary count. Under the circumstances, we reduce the sentence for possession of burglary tools to the statutory sentence of not less than 1 year nor more than 5 years, and direct that it be concurrent to the sentence for burglary.

In defendant's last assignment of error, he argues that his sentences should run concurrently with a sentence imposed upon him in Iowa. In State v. Rodman (1974), 192 Neb. 403, 222 N. W. 2d 109, we said: "It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively." In State v. Cannady (1974), 192 Neb. 404, 222 N. W. 2d 110, the defendant contended that the District Court for Lancaster County, Nebraska, should make a sentence concurrent to one defendant was required to serve in Ohio. We there said: "* * * if this court

were to make the Nebraska sentence concurrent to the Ohio sentence, it would in effect amount to no sentence at all and defendant would go unpunished for the crime he committed in this state. It is frivolous to suggest that the refusal of the trial court to adopt such position was an abuse of discretion." That opinion is controlling on this point.

For the reasons given, there is no merit to any of the defendant's assignments of error except the fifth. We modify the sentence for possession of burglary tools from 7 years to 1 to 5 years, to run concurrently with the sentence imposed for burglary. In all other respects the judgment is affirmed.

AFFIRMED AS MODIFIED.

STEVEN W. YOUNGBERG, APPELLEE, V. COLLEEN MARIE YOUNGBERG, APPELLANT.
227 N. W. 2d 396

Filed March 27, 1975. No. 39735.

1. **Divorce: Parent and Child: Judgments.** A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.
2. **Divorce: Parent and Child: Evidence: Adultery.** Whether or not a mother's meretricious relationship requires a change in child custody depends upon the circumstances in each case.
3. **Divorce: Parent and Child: Evidence: Time.** A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded.

Stephen Greenberg, for appellant.

John J. Respeliers, for appellee.

Heard before WHITE, C. J., MCCOWN, and NEWTON, JJ., COLWELL, District Judge, and KUNS, Retired District Judge.

NEWTON, J.

This proceeding deals with the custody of a 4-year-old daughter of the parties. On entry of a decree dissolving the marriage of petitioner and respondent, custody was awarded to the latter. Pursuant to a subsequent application by petitioner, custody was awarded to him. We reverse the judgment of the District Court.

Respondent had illicit sexual relations with one Jesus Espejo. She immediately and contritely made this known to her husband and the elders of her church. The divorce ensued. At that time petitioner husband testified to her abilities as a mother and recommended that custody of the child be awarded to respondent. Thereafter the respondent's relationship continued. Before Espejo's divorce was final, she and Espejo went through a marriage ceremony. Respondent was then pregnant with Espejo's child and she stated she wished to give the child a name and a father. The record discloses that when they can legally do so, it is the intention of Espejo and respondent to legitimatize the marriage by means of a second ceremony.

Prior to hearing on the present application petitioner had remarried and respondent had become pregnant. No other change of circumstances appears. Has there been such a change in respondent's conduct as would warrant a change in custody? Petitioner was at all times aware of the relationship with Espejo. The pregnancy was a natural result of this relationship and not in itself a change of circumstances but an inherent part of the relationship. The only change then is petitioner's remarriage. If, as petitioner had testified

and the court held, respondent was a good mother and a fit person to have the custody of her daughter, nothing has occurred since to require a change of custody in the best interests of the child. "A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children." Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542. Her conscientious application of her duties as a mother and her excellent ability in that regard were testified to by numerous witnesses.

Whether or not a mother's meretricious relationship requires a change in child custody depends upon the circumstances in each case. In this case respondent's actions were not promiscuous; she frankly admitted her error; she is endeavoring to stabilize and legalize the relationship; and she is an excellent mother. See, Boyer v. Boyer, 183 Neb. 226, 159 N. W. 2d 546; Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667; Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647.

At the hearing in the District Court respondent offered to prove that prior to the dissolution of the marriage petitioner had seduced her 17-year-old sister. The court rejected this testimony. We call attention to Bartlett v. Bartlett, *ante* p. 76, 225 N. W. 2d 413, wherein we held: "A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree."

The judgment of the District Court is reversed and the cause remanded. An attorney's fee in the sum of

$750 is allowed respondent for attorney's services in the District Court and on appeal.

REVERSED AND REMANDED.

JAMES P. TUTTLE, APPELLEE, V. CAROL M. TUTTLE, APPELLANT.
227 N. W. 2d 27

Filed March 27, 1975. No. 39773.

Divorce: Alimony. Among matters to be considered in making an allowance of alimony are the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment.

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

James W. Moriarty, for appellant.

E. Dean Hascall, for appellee.

Heard before SPENCER, BOSLAUGH, CLINTON, and BRODKEY, JJ., and RONIN, District Judge.

BOSLAUGH, J.

This was an action for dissolution of a marriage. The trial court dissolved the marriage; awarded custody of the minor child of the parties to the petitioner with visiting rights in the respondent; divided the property and awarded alimony to the respondent in the amount of $75 per month for 30 months. The respondent has appealed and contends the award of alimony was inadequate.

The parties were married for the first time in 1958. They were divorced in 1963 and remarried in February 1967. They separated 5 months later, but were reconciled in December 1968, or January 1969. They separated again in January 1972, and a divorce action was

commenced in Louisiana. The Louisiana proceeding was dismissed and this action commenced in 1974.

The parties in this action accumulated very little property during the marriage. The property division which was made is of no importance in determining this appeal.

Among matters to be considered in making an allowance of alimony are the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. § 42-365, R. S. Supp., 1974.

The respondent is approximately 45 years of age. She was employed as a clerk-stenographer in civil service in 1952 or 1953 with GS-4 and GS-5 ratings and earned approximately $4,800 per year. She has a congenital heart defect and suffered a paralysis on August 1, 1970, which has interfered with her typing and shorthand. She has been receiving medical treatment for this condition, and is participating in a rehabilitation program in Massachusetts. She hopes to be able to return to full-time employment.

The respondent has been living with her mother and receiving disability payments amounting to $132 per month from the Commonwealth of Massachusetts. She earned approximately $700 last year from domestic work and baby-sitting.

The petitioner has an annual income of slightly over $25,000. Of this amount, approximately $6,000 is military retirement pay.

The alimony award which was made amounts to less than one-tenth of the petitioner's income for one year. In view of the health problems which the respondent has and her limited ability at the present time to engage in gainful employment, we believe the alimony award was inadequate.

The judgment of the District Court is modified to increase the monthly payments to $200 per month for 30

months. The judgment as modified is affirmed. The respondent is allowed $350 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

PETER PREVENAS, APPELLANT, V. CATHERINE PREVENAS, APPELLEE.
227 N. W. 2d 29

Filed March 27, 1975. No. 39856.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. On motion to dismiss appeal. Motion to dismiss conditionally sustained.

Qualley & Nelson and Thomas A. Vakulskas, for appellant.

Philip M. Bowen and Riedmann & Welsh, for appellee.

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

PER CURIAM.

This is an action for dissolution of a marriage. The petitioner, Peter Prevenas, has appealed from a judgment of the District Court awarding custody of the parties' minor child to the appellee, together with child support in the amount of $150 per month and alimony consisting of a lump sum payment of $2,000, monthly payments of $200 for 11 months, and payments of $150 per month for the following 24-month period. Although the judgment of the District Court was not superseded, the appellant has failed to comply with that part of the judgment requiring monthly child support payments.

The appellee has moved to dismiss the appeal. This court has previously held that an appeal may be dismissed for contumacious violation of an order of the District Court. An appellant who fails to comply with

an order of the court is not in a position to seek judicial assistance. Kartman v. Cook, 189 Neb. 159, 201 N. W. 2d 705. Numerous other courts have reached a similar result when confronted with this problem. See, Annotation, 49 A. L. R. 2d 1425; Stewart v. Stewart, 91 Ariz. 356, 372 P. 2d 697; Hopp v. James, 470 S. W. 2d 716 (Tex. Civ. App.); Rude v. Rude, 153 Cal. App. 2d 243, 314 P. 2d 226.

Upon failure of the appellant to comply with the order of the trial court and make a proper showing of such compliance in this court within 20 days from the date this opinion is filed, the appeal shall stand dismissed.

MOTION TO DISMISS CONDITIONALLY SUSTAINED.

LINDA KARLENE LOCKARD, APPELLEE, V. LYSLE LELAND LOCKARD, APPELLANT.

227 N. W. 2d 581

Filed April 3, 1975. No. 39577.

1. **Divorce: Parent and Child.** In determining who shall receive custody of the minor children of the parties to an action for the dissolution of marriage the controlling consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Adultery.** The fact that one of the parties to an action for the dissolution of marriage has committed adultery, although a relevant consideration, will not necessarily be determinative of who shall be awarded custody of the minor children of those parties.
3. **Divorce: Costs: Adultery.** The fact that one of the parties to an action for the dissolution of marriage has committed adultery will not as a matter of law prevent an award of attorney's fees or affect the payment of costs under sections 42-351 and 42-367, R. R. S. 1943.

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

Wagoner & Wagoner, for appellant.

Higgins & Huber, for appellee.

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

BRODKEY, J.

This is an appeal from a decree in an action for the dissolution of marriage. The District Court ordered the dissolution of the marriage in question and awarded custody of the two minor children adopted by the parties, to the wife. The District Court further ordered the husband to pay all costs of the action, together with attorney's fees for the wife in the amount of $250. In this appeal the husband argues that the adultery of the wife was conclusively established by the evidence; and therefore as a matter of law, she would not be entitled to an award of custody or of attorney's fees, and should be required to pay the costs of the action. We affirm.

The appellant in this case relies almost exclusively upon the case of Wolpa v. Wolpa, 182 Neb. 178, 153 N. W. 2d 746 (1967), wherein this court held that where a wife is conclusively found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged. The court also held in that case that where adultery of a wife is established, she is not entitled to an award of alimony or attorney's fees, and the costs of the action in such case are ordinarily taxable to the wife. The same rules have also been expressed, in slightly varied forms, in other cases decided by this court. See, Yost v. Yost, 161 Neb. 164, 72 N. W 2d 689 (1955); Baker v. Baker, 166 Neb. 306, 89 N. W. 2d 35 (1958); Beck v. Beck, 175 Neb. 108, 120 N. W. 2d 585 (1963); Houghton v. Houghton, 179 Neb. 275, 137 N. W. 2d 861 (1965); Covault v. Covault, 182 Neb. 119, 153 N. W. 2d 292 (1967); and Morrissey v. Morrissey, 182 Neb. 268, 154 N. W. 2d 66 (1967). However, in Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667 (1970), this court expressly modified the rule in the earlier cases relating to the effect of the wife's adultery upon

the matter of child custody, although the effect of such conduct upon the issues of costs and attorney's fees was not discussed. The appellant now asserts that under our prior decisions we are compelled to hold in the case now before us that the District Court erred in its disposition relating to child custody, attorney's fees, and costs. We do not agree.

We believe that whatever the former rules regarding the effect of a wife's adultery upon such matters may have been, those rules can no longer be regarded as controlling under Nebraska's current no-fault divorce law. Barnes v. Barnes, 192 Neb. 295, 220 N. W. 2d 22 (1974). See Henderson, Practice and Problems Under Nebraska's New Divorce Laws, 52 Neb. L. Rev. 1, 16 (1972). The matters now before us must necessarily be resolved upon the basis of the language and legislative policy of the statutes presently applicable.

Child custody is now controlled by section 42-364, R. R. S. 1943, which provides, among other things: "Custody and visitation of minor children shall be determined on the basis of their best interests." The statute has been expanded since its original enactment, although the "best interests" requirement has not been changed. It is now clear that in determining who shall receive custody of the minor children of the parties to an action for the dissolution of marriage the controlling consideration is the best interests and welfare of the children. Schott v. Schott, 190 Neb. 84, 206 N. W. 2d 39 (1973). It would be contrary to the plain meaning of section 42-364, R. R. S. 1943, for us to hold, assuming equal fitness of the parents, that custody should be denied to a parent guilty of adultery, and to disregard the issue of where the best interests of the children lie. Since we cannot say as a matter of fact that it would always be in the best interests of the children for custody to be denied to an adulterous parent, we are also unable to hold that custody should be denied to an adulterous parent as a matter of law. The fact that one

of the parties to an action for the dissolution of marriage has committed adultery, although a relevant consideration, will not necessarily be determinative of who shall be awarded custody of the minor children of those parties.

We have reviewed the record in this case and have determined that the best interests of the children involved herein require that the appellee be awarded custody of those children. Although the trial court made no findings of adultery on the part of the wife, it is true that the record does establish the appellee had, at least once, been involved in an adulterous relationship during the marriage. It does not appear from the record, however, that such relationship was a continuing one, or ever caused her to neglect her children. In fact, the record clearly reflects that the children are very well taken care of by the appellee, that they are clean, well fed, well dressed, and receive excellent love and care from her. It also appears that she is now employed in a hospital as a nurses aide, and is living near the residence of her parents. She indicated she will actively seek their aid and support in raising the children, and they have indicated that they are willing to provide such aid and support. Appellant is a First Class Petty Officer in the United States Navy; and, being a member of the armed services, lives a somewhat more uncertain style of life, although he indicates he could be assigned to shore duty. The wife testified, and he has acknowledged, that he is an alcoholic. She further testified that he has twice attempted to commit suicide. He denied one such incident, but was compelled to admit that the second suicide attempt described by the wife did in fact take place, indicating a lack of stability on his part. On the strength of the record before us we are convinced that the custody of the minor children in this case should be awarded to the appellee.

In Fisher v. Fisher, *supra,* this court stated: "The

decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and the witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining the best interests of the children in custody proceedings."

Appellant has also assigned as error those portions of the order of the District Court requiring him to pay all costs of the action and attorney's fees for the wife in the amount of $250. The appellant argues that those determinations were improper under our prior authority in light of the adultery of the appellee. See Wolpa v. Wolpa, *supra*. We now hold the fact that one of the parties to an action for the dissolution of marriage has committed adultery will not as a matter of law prevent an award of attorney's fees or affect the payment of costs under sections 42-351 and 42-367, R. R. S. 1943. Upon review, we have determined the District Court was correct in its determination in this case that the appellee should be awarded attorney's fees and the appellant should be compelled to pay the costs of the action. The judgment of the District Court is, in all respects, affirmed.

AFFIRMED.

BEVERLY REYNEK, APPELLANT, V. ROBERT REYNEK, APPELLEE.
227 N. W. 2d 578

Filed April 3, 1975. No. 39564.

1. **Divorce: Appeal and Error: Waiver: Parent and Child.** The action of a party to an action for the dissolution of marriage in accepting the benefits of a decree in respect to his or her own interests should not be permitted to affect adversely the interests of the children of the parties, and will not preclude

consideration of an appeal to the extent such interests are involved.

2. **Divorce: Parent and Child.** In determining who shall receive custody of the minor children of the parties in an action for the dissolution of marriage, the controlling consideration is the best interests and welfare of the children.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed as modified.

Daniel G. Dolan of Lathrop, Albracht & Dolan, for appellant.

Steven J. Lustgarten of Gitnick & Lustgarten, for appellee.

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

BRODKEY, J.

Beverly Reynek appeals to this court from a decree entered by the District Court dissolving her marriage to the appellee, Robert Reynek. The decree also awarded custody of their four minor children to Robert Reynek and required him to make monthly payments of $200 pursuant to a property settlement between the parties. The only issue raised by appellant in her appeal is whether the trial court erred in awarding the custody of the children to the husband. However also presented for our disposition is a motion filed by appellee, Robert Reynek, during the pendency of this appeal, to dismiss the appeal because Beverly had accepted certain benefits of the decree and had thus recognized the validity of that decree. We overrule the motion to dismiss, and modify and affirm the decree of the District Court.

In support of his motion to dismiss, appellee has filed with this court a supplemental transcript indicating that Beverly has accepted eight of the $200 property settlement payments made by Robert pursuant to the decree of the District Court. He now contends because of that

fact this appeal must be dismissed under the rule enunciated by this court in Larabee v. Larabee, 128 Neb. 560, 259 N. W. 520 (1935). In the decree in that case the District Court denied the wife permanent alimony, but ordered the husband to pay to the wife (1) certain amounts already expended by her for the upkeep of her home and for clothing for herself and her minor child, (2) certain unpaid temporary alimony that had been previously allowed by the court, and (3) a fee for the wife's attorney. The husband paid the entire amount of the judgment against him into court and the wife voluntarily accepted from the court payment of that amount and entered a satisfaction of record. The husband filed a motion to dismiss a subsequent appeal to this court, which sustained the motion and dismissed the wife's appeal. In its opinion the court stated the basis for its holding as follows: "The case falls directly within the oft-repeated rule that a litigant cannot voluntarily accept payment of that part of a judgment in his favor and afterward prosecute an appeal from that part of the judgment against him."

The rule stated in Larabee v. Larabee, *supra,* is a general rule which appears to be widely accepted in other jurisdictions, and has been applied to a variety of fact situations. See 29 A. L. R. 3d 1184. However, this rule, as is frequently true of general rules, is subject to exceptions, and one of the common exceptions recognized by the courts is that the action of a party in accepting benefits of a decree in respect to his or her own interests should not be permitted to affect adversely the interests of the children. This rule and reasoning in support thereof, is well expressed in Wilson v. Wilson, 242 Ore. 201, 407 P. 2d 898 (1965), where that court stated: "Since a custodial award affects primarily, not the rights of the parents, but the welfare of the child . . . it would be carrying too far the rule of waiver by acceptance of benefits were it to be held that the appellant has lost her right to question by appeal the de-

cree as to the minor children because she accepted the property settlement." To the same effect, see, Jackson v. Jackson, 248 Iowa 1365, 85 N. W. 2d 590 (1957); Fried v. Fried, 209 Ga. 854, 76 S. E. 2d 395 (1953); 29 A. L. R. 3d 1184, § 10 at 1203 and § 11(c) at 1209. While we do not abandon the rule expressed in Larabee v. Larabee, *supra,* we believe the exception to that rule as above expressed where the interests of minor children are involved, is logical and persuasive, and particularly applicable to the facts of this case. We do not believe the fact that the wife in this case accepted certain payments from the husband under the decree of the District Court approving a property settlement, should in any way prevent this court from considering on appeal the question of child custody, and where the best interests of the children lie. The motion to dismiss must be overruled.

Having determined that the appeal herein must be considered on its merits, we now turn to the question of whether the District Court was correct in awarding custody of the four minor children of the parties to the husband. In determining who shall receive custody of the minor children of the parties to an action for the dissolution of marriage, the controlling consideration is the best interests and welfare of the children. Lockard v. Lockard, *ante* p. 400, 227 N. W. 2d 581. Upon de novo review of the facts of this case, as revealed by the record, we have concluded that it would be to the best interests of the children involved herein that their custody be awarded to the father, and that the action of the trial court in awarding their custody to him should be affirmed, subject to the modification hereinafter referred to.

It is fairly inferable that the turning point in the marriage of these parties occurred in the spring of 1973 when Beverly met a man in whose company she subsequently spent a great deal of her time. Her relationship with this man continued through all 1973 and

into 1974, and still was of a continuing nature at the time of the trial. She admits that her relationship with the man in question involved adulterous conduct on her part. We have held the fact that one of the parties to an action for the dissolution of marriage has committed adultery, although a relevant consideration, will not necessarily be determinative of who shall be awarded custody of the minor children of those parties. See Lockard v. Lockard, *supra*. In this case, however, there is evidence from which we have concluded that the adulterous conduct of the appellant adversely affected the best interests of the children. It appears that there was a noticable change in the behavior of the appellant beginning in the spring of 1973 and that she seemed to neglect the house and prepare less substantial meals for the family. In addition, she was, on many occasions, absent from the home for long periods of time. This latter fact was verified by a private investigator retained by the husband. According to his testimony, he began his surveillance of Beverly on September 20, 1973, and described for the court numerous occasions during which he observed the appellant leaving the home, meeting her paramour, and then returning to the home at very late hours of the night. During those occasions, it appears that the children were being cared for by the husband to the best of his ability under the circumstances. While appellee is employed as a traveling salesman and is absent from the home a number of days each week, he has indicated that he has arranged to have his widowed mother assist him in caring for the children whenever necessary. The mother, although elderly, is in good health, and testified that she is willing to render such assistance. While the personal habits of the husband leave something to be desired, we believe that he is sincerely interested in the welfare of the children, and has exhibited his concern for them by his actions. All these factors, when considered with the fact that the trial judge, who saw the parties and the

witnesses and heard them testify, decided to award custody to the husband, leads us to the conclusion that the best interests of the children would be served if their custody was to remain with the appellee. However, we believe that it is advisable that the decree of the District Court be modified to provide that the custody of the children shall be under the supervision of the Douglas County welfare department, or such other agency or person as the District Court shall direct. Lewis v. Lewis, 192 Neb. 266, 219 N. W. 2d 910 (1974).

As thus modified, the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

CAREN DULING, ADMINISTRATRIX OF THE ESTATE OF DALE N. DULING, DECEASED, APPELLANT, V. EDWIN F. BERRYMAN, APPELLEE.

227 N. W. 2d 584

Filed April 3, 1975. No. 39621.

1. **Trial: Instructions.** Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available.
2. **Motor Vehicles: Negligence.** Generally it is negligence for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision.
3. **Trial: Witnesses.** An expert witness testifying from observation or personal knowledge must ordinarily testify to the facts upon which his opinion is based.
4. ———:———. Rulings on questions calling for expert testimony will not ordinarily be reversed on review unless plainly prejudicial to the rights of the complaining party.

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

Douglas McArthur, for appellant.

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

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

WHITE, C. J.

This is an appeal from a jury verdict and judgment for the defendant in a wrongful death action brought by the plaintiff as administratrix of the estate of the decedent, Dale N. Duling, arising from an automobile accident on Cornhusker Highway in Lincoln, Nebraska, in June 1970. The plaintiff contends that there was error in the admission of expert testimony, error in the submission of the issues and the instructions thereon as to negligence, and error in the submission of the sudden emergency doctrine. We affirm the judgment of the District Court.

The plaintiff contends that while the decedent's car was moving eastward at approximately 25 miles per hour in the outside lane of Cornhusker Highway the defendant's car passed on the inside lane, cut in front of the decedent's car, and stopped abruptly. The plaintiff's theory is that the actions of the defendant forced the decedent to swerve to avoid the defendant's car and, being unable to avoid collision, hit the left rear of the defendant's vehicle, ricocheted off the defendant's car, and proceeded across the median strip of the Cornhusker Highway where it was hit again by a third car which was traveling westbound on the highway.

The theories as to how the accident happened factually are directly conflicting. The defendant testified that he had been driving east on Cornhusker Highway at approximately 25 miles per hour and was in the inside lane of the highway. His testimony is that the traffic was light and that he *did not* overtake any cars prior to the time of the accident. His testimony is that one of his tires was low and he decided to change it. He

engaged his right turn signal, looked to the right and to the rear, and on seeing that the way was clear proceeded moving to the outside lane and began slowing down. As he started to slow down his vehicle was struck from the rear and knocked off the roadway by the vehicle of the plaintiff's decedent. The defendant's brother, a passenger, testified that prior to moving to the outside lane he personally looked out the passenger's side window and found no headlights or any vehicle in the outside lane. It was raining heavily on the night of the accident and evidence was introduced that the blood alcohol level of the decedent was .15 after the accident.

The plaintiff complains that the court erred in submitting the issue of negligence on the part of the plaintiff's decedent in driving an automobile on the highway in such a manner that he was unable to stop in time to avoid a collision with an object within his range of vision. As we have recited, the defendant's theory of the case and his testimony supports the proposition that he was driving properly in the outside lane of Cornhusker Highway and was slowing down at the time of the collision and that the plaintiff's decedent, coming directly from the rear, drove into the defendant's vehicle. Generally it is negligence as a matter of law for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision. Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870. Rain, snow, or ordinary hazards of visibility are not intervening conditions or hazards constituting an exception to the application of the rule. Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. The District Court, in submitting the instruction on the range of vision doctrine acted properly. It was not the duty or the function or the power of the District Court to decide between the directly contrasting factual theories of this accident. An examination of the instructions in this case reveals that the trial court properly instructed on

both the plaintiff's theory of the case and the defendant's theory about how the accident happened. Where the testimony is conflicting as to whether the range of vision rule is applicable or whether another factual version of how the accident occurred is supported by the evidence, then it becomes the duty of the court to submit both factual issues to the jury. Guerin v. Forburger, *supra*; Brazier v. English, 177 Neb. 889, 131 N. W. 2d 601. Instructions must be taken as a whole and so long as the law on each specific issue is correctly stated, the case fairly submitted to the jury, and the jury not misled by the instructions as a whole, prejudicial error may not be asserted. The plaintiff contends that the range of vision rule does not apply when the "cone of vision" is penetrated from the side. Again the plaintiff asks us to accept her version of the accident. We know of no authority to support such a distinction, but in any event the defendant's evidence is unequivocally to the effect that his vehicle was directly in front of the decedent's vehicle, proceeding in the same direction and in the same lane of traffic, at the time when he was struck from behind by the plaintiff's decedent. There is no merit to the plaintiff's contention.

The plaintiff next contends that there was error in the admission of the opinion testimony of the defendant's expert, Professor James W. Harper. The vehicle of the plaintiff's decedent was towed to a parking lot and examined there by Professor Harper on June 30, 1970. We have difficulty in determining precisely what the plaintiff's contention is in this respect. Giving it maximum thrust, she apparently contends that the District Court erroneously permitted the witness to testify over foundational objection that the braking system appeared to be in the same condition as when towed from the accident scene and that he was allowed to give expert opinion without sufficient factual basis.

This witness' examination of the vehicle in the parking lot included the four wheels, the action of the brake

pedal, and the right rear brake drum. Based upon this examination he gave his opinion that the parts examined were not damaged by the accident, towing, or storage. He gave detailed testimony as to the condition of the tires and the braking system on the date of his examination. He stated that the brake pedal had to be depressed at least three times in quick succession for the brake shoes to contact the brake drum; that the brake shoes were out of adjustment which necessitated the pumping action; that it was a reproducible result; and that in his opinion the condition could not be the result of the car sitting in the lot or the passage of time after the accident but before his examination. He was of the further opinion that the condition of the brake system which he found could only occur over a period of time and of sufficient use to cause the wear which he actually found.

The plaintiff's contention as to lack of foundation for this testimony is based on the statement during the expert's preliminary examination as to foundation that "the car appeared to be as it was towed from the accident site to the yard," and later on when queried as to whether he noticed any damage as occurring during the moving of the vehicle, that he stated, "I saw no evidence of this damage." The thrust of the plaintiff's argument, as we gather from her lengthy analysis, is that since it is undisputed he did not observe the vehicle before the accident of June 10, 1970; that he did not observe the accident; and that he did not observe the vehicle as it was towed from the accident site or during the 20-day period it was sitting in the lot, then his testimony is inadmissible and his opinion based thereupon should have been rejected. The answer to this proposition is two-fold: (1) Both answers, in the context of his whole testimony, are opinion answers based upon the actual examination of the particular parts of the car which he examined on June 30, 1970. It is clear that the trial court's ruling admitting this expert's

testimony was not based upon an erroneous conclusion from the unresponsive answers given, that the expert had either examined the vehicle before the accident, at the time of the accident, during the towing-in period, or at the lot during the period of time before he actually examined it. His answers, in fact, support the plaintiff's contention that he did not personally observe the vehicle during the time period inquired about, and that, therefore, if these facts were a condition precedent to giving his testimony, it would be inadmissible. Immediately following this inconclusive testimony in the record, this witness unequivocally and clearly testified as to the nature of his examination, and that the bases of the opinions he gave, hereinbefore recited, rested entirely upon his examination of June 30, 1970, and (2) the contention seems to be quite semantical, that is, that there was no sufficient foundation because the expert was trying to use his opinion to supply necessary foundational facts. Harper had not seen the precise parts he examined on June 30, 1970, at any prior date. It is true that the lack of such an examination would preclude him from testifying as to the *fact* there was no accident, towing, or storage-related damage to the braking system. Just as truly, such lack of examination does not preclude his rendering an *opinion* based upon his post-accident examination. To adopt the contention of the plaintiff, it would logically follow that an expert witness testifying as to the braking condition of an automobile after an accident could not give his opinion unless he observed the vehicle before the accident, observed the accident, and he observed the vehicle as it was being towed from the accident site, and maintained a constant surveillance of the vehicle during the period in the parking lot. Such a position is untenable.

We agree with the plaintiff's contention that under current Nebraska law an expert witness testifying from observation or personal knowledge must ordinarily disclose and testify to the facts upon which his opinion is

based. Torske v. State, 123 Neb. 161, 242 N. W. 408. In this case it is conclusive that the opinion testimony of the defendant's expert was based wholly upon his disclosed observations and examinations of the precise parts in question which he examined on June 30, 1970. The argument the plaintiff makes relates only to the weight and credibility of his testimony, and not to its competency. It is true that some, if not all, of the testimony as to the examination by Harper and the factual basis for his opinion, came into evidence after the alleged erroneously admitted questions and answers were received into evidence. The same situation was true in Torske v. State, *supra*. In that case it was contended there was insufficient foundational testimony for medical experts to testify that the defendant was sane in a criminal case. The court stated: "*Thereafter* they were subjected to a vigorous cross-examination by the defendant *which disclosed the facts* upon which they *based* their opinion of the defendant's sanity." (Emphasis supplied.) We find no error in the admission of this testimony, but even if we did, it is clear that it was without prejudicial error to the plaintiff. Rulings on questions calling for expert testimony will not ordinarily be reversed on review unless plainly prejudicial to the rights of the complaining party. Fowler v. Bachus, 179 Neb. 558, 139 N. W. 2d 213. The contention of the plaintiff as to the inadmissiblility of this testimony is without merit.

Lastly, the plaintiff claims error in the court's failure to limit the standard instruction on sudden emergency to only the situation confronting the decedent. The submission of, and the manner of, submitting a sudden emergency issue to a jury rests within the sound discretion of the trial judge. The difficulty with submitting an instruction applicable to only one party is that it may be prejudicial error because of constituting a comment on the evidence. It directs attention and gives special emphasis to a particular portion of the evidence

and the particular theory of one party. Sudden emergency instructions are often argued quite strongly to the jury. It requires no imagination to see the thrust of an argument in which counsel can accurately state that the trial judge is only submitting the issue of an emergency with reference to his client. It implies that there is no emergency rule applicable to the adverse party and, therefore, arguendo, that such party had the opportunity to avoid the accident. No contention is made that the court did not accurately instruct as to the sudden emergency rule. In arguing for the limitation of the instruction, the plaintiff asks us to accept unqualifiedly her version of the accident. It is true there are two completely conflicting theories of how the accident occurred, but the trial court actually submitted the issues of negligence and contributory negligence as to both parties. The jury may very well have accepted a version of the accident somewhere in between the conflicting theories of the parties and applied the comparative negligence doctrine. Consequently, the applicability of the sudden emergency doctrine to either or both parties and the weight that it gave it in reaching its verdict, was entirely within the jury's province. The plaintiff submits only one case, Lydick v. Gill, 68 Neb. 273, 94 N. W. 109, an early 1903 Nebraska case that apparently supports her contention. But in that case this court held there was prejudicial error in not restricting the instruction because on the facts it could apply to only one defendant, when there were multiple defendants who were defending on distinct and separate grounds, and that consequently under the particular facts in the case that the giving of an instruction could prejudice the other defendants who were not involved. In this case, with only one party defendant and the issue so clearly drawn as to lookout, control, and speed, we can see nothing misleading, confusing, or prejudicial to the party in the submission of the general instruction applicable to both of them.

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

AFFIRMED.

JOYCE HASTINGS, APPELLANT AND CROSS-APPELLEE, V. FIREMAN'S FUND AMERICAN INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

227 N. W. 2d 418

Filed April 3, 1975. No. 39647.

Motor Vehicles: Insurance: Contracts: Waiver. Execution of a covenant not to levy in favor of an uninsured motorist bars recovery under uninsured motorist coverage where the policy provides the insured will hold all rights of recovery in trust for the benefit of the insurer and do nothing after loss to prejudice such rights.

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

Person, Dier & Person and Terry E. Savage, for appellant.

Cronin, Shamberg & Wolf, for appellee.

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

BOSLAUGH, J.

This is an action to recover under the uninsured motorist coverage of an automobile insurance policy. The plaintiff was injured in an accident on December 29, 1966, when the automobile in which she was riding was struck by an automobile owned and operated by Gene Mills, who was uninsured. At the time of the accident the plaintiff was insured under a policy issued by the defendant which provided coverage against uninsured motorists.

On December 28, 1970, the plaintiff commenced an

action against Mills to recover damages for the injuries she had sustained in the accident on December 29, 1966. On September 3, 1971, the plaintiff and her husband executed a "covenant not to levy" in favor of Mills. A consideration for the covenant was an agreement by Mills to forego active defense of the action pending against him. The covenant provided that the plaintiff and her husband would not "attach, levy, execute or commence garnishment proceedings" on any judgment against Mills as a result of the accident on December 29, 1966. On September 23, 1971, after the covenant not to levy had been filed in the District Court, judgment was entered in favor of the plaintiff and against Mills in the amount of $5,673.64.

After discussion and negotiation between the parties, the defendant agreed to pay $5,500 in settlement of the plaintiff's claim under the policy upon execution of a proof of claim and an uninsured motorist trust agreement. The policy provided that in the event of payment under the uninsured motorist coverage, the defendant was entitled to the proceeds of any settlement or judgment to the extent of the payment, that all rights of recovery should be held in trust for the benefit of the defendant, and nothing should be done after loss to prejudice the rights of recovery. It also excluded coverage if a settlement was made without the consent of the defendant. The uninsured motorist trust agreement tendered to the plaintiff contained an agreement to take action against parties legally liable for the loss and to reimburse the defendant out of any recovery against the uninsured motorist.

The plaintiff refused to execute the uninsured motorist trust agreement, but tendered a release to the defendant which was unacceptable to it. After further negotiation and discussion between the parties, the defendant offered to accept an assignment of the judgment against Mills. The assignment tendered to the plaintiff authorized the defendant to collect and enforce

payment of the judgment in the plaintiff's name. It also contained a covenant that the full amount of the judgment was unpaid and the plaintiff had done nothing to hinder the defendant from enforcing the judgment.

The plaintiff refused to execute the assignment tendered to her, but tendered a different assignment containing no covenants or recitals concerning enforcement. At about this time, the defendant's lawyers discovered the covenant not to levy had been executed and the offer of settlement was withdrawn.

The controlling issue in this case is whether the covenant not to levy, executed by the plaintiff, bars her recovery from the defendant under the policy. The trial court found that it was a valid defense.

Under the terms of the policy, the defendant was entitled to the proceeds of the judgment against Mills and the plaintiff was bound to do nothing to prejudice any right of recovery against Mills. The effect of the covenant not to levy was to render valueless the judgment against Mills in favor of the plaintiff. By the covenant not to levy the plaintiff made it impossible for her to perform the contract. The finding of the trial court that this was a valid defense to a suit under the policy was correct. See, Griffin v. Aetna Cas. & Sur. Co. (La. App.), 189 So. 2d 324; Annotation, 25 A. L. R. 3d 1275. See, also, Wells v. Hartford Acc. & Ind. Co. (Mo.), 459 S. W. 2d 253; Dairyland County Mut. Ins. Co. of Texas v. Roman (Tex.), 498 S. W. 2d 154; Kisling v. M. F. A. Mut. Ins. Co. (Mo. App.), 399 S. W. 2d 245; Charest v. Union Mut. Ins. Co. of Providence (N. H.), 313 A. 2d 407; State Farm Fire & Cas. Co. v. Rossini, 107 Ariz. 561, 490 P. 2d 567.

The plaintiff argues that breach of the policy should not be a defense because there was no showing of prejudice to the defendant. There were some statements by plaintiff's counsel in the correspondence between the parties that Mills appeared to be "judgment proof."

There is no evidence which would sustain a finding that a judgment against Mills would be worthless or that the defendant was not prejudiced by the covenant not to levy. See, Charest v. Union Mut. Ins. Co. of Providence, *supra*; Annotation, 25 A. L. R. 3d 1275. Mills was represented by able counsel in the District Court and, apparently, was unwilling to have judgment entered against him until after the covenant not to levy had been executed and filed in the District Court.

The plaintiff further argues that the defendant is barred by waiver or estoppel from relying upon breach of the policy as a defense in this action. We find nothing in the record to support a finding of waiver or estoppel as against the defendant. See Kisling v. M. F. A. Mut. Ins. Co., *supra*. Although the defendant had some notice from counsel for Mills that the plaintiff might execute a "covenant" in the suit against Mills, the defendant did nothing to encourage or suggest approval of that action.

It is unnecessary to consider the cross-appeal.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD E. FOWLER, APPELLANT.

227 N. W. 2d 589

Filed April 3, 1975. No. 39662.

1. **Trial: Verdicts: Evidence.** The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.
2. **New Trial: Evidence.** A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed.

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

Dean E. Erickson, for appellant.

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

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

BRODKEY, J.

In the amended information filed in this action, the defendant, Richard E. Fowler, was charged in count I thereof with embezzling on or about January 25, 1974, certain money in excess of $100 belonging to Steak-O-Rama, a corporation; and in count II was charged with being a habitual criminal. He pleaded not guilty to both charges and was tried to a jury, which returned a verdict finding him guilty of the offense of embezzlement. A separate hearing was thereafter held before the District Judge, as provided by law, to determine whether defendant was a habitual criminal; and the court found upon the evidence presented that he was. Subsequent thereto, defendant filed a motion for a new trial, based primarily upon the ground of newly discovered evidence, which consisted of letters received by the trial judge and a part-time public defender of Lancaster County from an individual who signed the name "Mike Conrad," allegedly confessing to the commission of the crime and asserting that the defendant was innocent. At the conclusion of the hearing on the motion, at which evidence was taken, the court overruled defendant's motion for a new trial. The court then sentenced the defendant to a term of 10 to 15 years in the Nebraska Penal and Correctional Complex. Defendant appeals to this court from that judgment and sentence. We affirm.

In his brief on appeal, the defendant makes the following assignments of error as grounds for reversal: (1) That the evidence was insufficient to sustain the verdict of the jury, and was hearsay and circumstantial evi-

dence; (2) that the court erred in not granting a new trial on the ground of newly discovered evidence; (3) that reversible error was committed by the prosecution in failing to notify the defendant or his counsel of the purported confessions; and (4) that the habitual criminal statute is unconstitutional, and the sentencing of the defendant thereunder violated his constitutional rights to due process and equal protection of the laws.

It appears from the record that Steak-O-Rama is a corporation with its principal place of business in Des Moines, Iowa, and operates a chain of 15 self-service restaurants in Iowa and Nebraska. One of its restaurants is located at 244 North 12th Street, Lincoln, Nebraska. The defendant, Richard E. Fowler was manager of the Lincoln branch, having been appointed as acting manager on December 23, 1973, and as manager on December 31, 1973.

Paul Consiglio, who testified at the trial, was the area manager or supervisor for Steak-O-Rama, including the Lincoln unit. He testified generally as to the method of operating and supervising the Steak-O-Rama units, and the method of accounting for receipts in the daily operation of the Lincoln Steak-O-Rama. The defendant complains that much of Consiglio's testimony at the trial was hearsay evidence and should have been excluded because the actual records of Steak-O-Rama, material to the issues, were not introduced in evidence by the State. While it is probably true that some of his testimony might well have been objected to on the ground it was hearsay evidence, yet we do not find from a search of the record in this case that defendant's counsel ever objected to the receiving of such evidence on that ground. His testimony is properly in the record and may be considered by us.

Consiglio testified that a daily operations report is filled out at the close of each day's business which includes the beginning and ending cash register reading each day, the difference being the daily receipts. A

deposit slip for the daily receipts would be made out at the close of the day and receipts placed in a locked deposit bag and deposited in the night depository of the National Bank of Commerce in Lincoln. The daily operations report, including the record of deposit of the day's receipts, would be mailed daily to the home office in Des Moines. Consiglio also testified that at the end of each month the home office at Des Moines receives a bank statement from the National Bank of Commerce and this statement is reconciled three different ways against the daily ledger, made up from data submitted daily by the store manager, to verify that the deposits had been made. He further testified that on January 25, 1974, he was in Lincoln and had a meeting with the defendant and with the assistant manager, Kevin Knapp, after the close of business. The meeting lasted from about midnight until 5 a.m. on January 26th. During this meeting he prepared the daily report for the defendant, counted the receipts, prepared the deposit, and gave it to the defendant to recount and verify as correct. The defendant filled out the total column, verified the deposit, and then all the parties left. At that time Fowler took Knapp home in his automobile. Consiglio returned to the Lincoln Steak-O-Rama about 1 in the afternoon on Saturday, January 26th, but was informed by the help that Fowler had gone down to pick up a new car he had purchased. Fowler did not show up while Consiglio was in the restaurant on January 26th. Consiglio further testified that when the next bank statement arrived in the home office in Des Moines, a comparison of the ledger sheet with the bank statement revealed that no deposits were made on two particular dates, January 22, when $278.34 should have been deposited, and January 25, when $433.79 should have been deposited. The latter is the deposit which Consiglio prepared and gave to the defendant to verify and complete, and which was the

basis for the charge of embezzlement in the amended information.

Consiglio returned to Lincoln about February 14, 1974, and had a conversation with Fowler in the presence of Captain Sellmeyer of the Lincoln police department. Fowler at that time told them that he had left the restaurant with the money and had taken Knapp, the assistant manager, home and then returned to the store and placed both bags of money back in the restaurant in a locked cabinet. On the other hand, Donald Buckner, a police officer of the City of Lincoln, testified that Fowler had told him about the meeting which lasted until 4 or 5 o'clock in the morning and told him that he had taken the money to his car, that he decided it was too early in the morning to make a deposit, and that he was tired. He then went back inside the restaurant, put the money in the cupboard which is underneath the cash register, and left the money there. That was the last he saw it. He stated all that occurred *before* he had taken Knapp home in his car. Knapp also testified at the trial, and verified the fact that Consiglio had made up the deposit and the daily record during the meeting held on January 25th, and that Fowler gave him a ride home afterward. He doesn't recall whether they had the deposit with them, but stated they did not stop anywhere or deposit the money. It was the claim of the defendant during the trial that it was not possible for him to make the deposit that evening because they had previously lost the key to the night depository in the bank, and that the key had been missing for a period of approximately 2 weeks during the month of January, prior to the meeting on January 25th. However, Consiglio testified, as did also the Lincoln police officer, that Fowler had never informed him or the company that there was any missing depository key or that there were any shortages in the deposits supposedly made in the bank on January 22nd and January 25th. Another employee of Steak-

O-Rama testified that during the month of January, prior to January 25th, he had ridden home in the evening regularly with Fowler and Knapp and that they had regularly stopped after work to make deposits in the night depository before going home. This would tend to discredit defendant's contention that it was impossible to make a deposit because of a missing or misplaced depository key during January. There was evidence, however, that another key was obtained from the bank sometime during the early part of February. The record also contains other discrepancies in the testimony of the defendant, particularly with reference to a missing deposit bag. This was later found, according to the defendant's story, behind a refrigerator in the kitchen of the restaurant. Other testimony, however, was to the effect that the bag was not found behind a refrigerator but was in fact found under papers on a table or desk in the kitchen. There was also testimony that the refrigerator was placed against the wall on two sides in the kitchen and it would not have been possible to place a bag behind it.

Robert C. Scheinost, an employee of Vanice Pontiac-Cadillac Company, testified that on January 25th, Fowler signed a purchase agreement for a Pontiac Catalina on which he made a $350 cash downpayment. He described the cash downpayment as being made up of a "large hand-full of bills * * * probably $5.00s, $10.00s and $20.00s," which Scheinost stated "was a good handfull of money to carry around." Fowler had traded in a prior car, also purchased from Vanice, and he apparently had made a downpayment for that car also with $175 in cash.

Witnesses testified that there were others who had keys to the restaurant, and the drawers and cabinets; and that the defendant was very careless in leaving his keys lying around, and almost anyone could have had access to them. Defendant therefore claims that the evidence against him is almost wholly circumstantial

and there is no showing that the defendant was the specific one who committed the crime, but on the contrary shows that others could have committed the crime.

Although there was no eyewitness to the crime, except as to the money which should have been deposited on January 25th, there was ample circumstantial evidence upon which the jury could base a verdict of guilty. The evidence, although in some respects conflicting, was all presented to the jury for its determination under proper instructions of the court, including an instruction with regard to direct and circumstantial evidence, that being NJI No. 14.50. We find no fault with its decision. In State v. Lowrey, 187 Neb. 451, 191 N. W. 2d 600 (1971), we stated: "The activities of a thief ordinarily are secretive and are not usually carried out in the presence of witnesses. When the commission of the offense is carried out in such a manner, circumstantial evidence is necessarily the only evidence available and where there are many circumstances pointing to the guilt of the defendant the question is for the jury under proper instructions safeguarding the rights of the defendant." We think the same rule is applicable to the crime of embezzlement with which the defendant was charged and convicted. Also, in Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340 (1958), we stated: "'"Where in a criminal case the evidence is circumstantial, the circumstances established, must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of the defendant's guilt. But this rule merely requires exclusion of such hypotheses as are based on circumstances established by the evidence. It does not require the jury to acquit because of evidence which, if believed, would establish facts consistent with innocence, but which evidence the jury is justified in disbelieving."'"

The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State to support it. Glasser v. United States, 315 U. S.

60, 62 S. Ct. 457, 86 L. Ed. 680 (1942); Hamling v. United States, 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974). We think the evidence in this case amply sustains the verdict of the jury under the rule above stated.

We now consider defendant's claim that the court erred in not granting a new trial on the ground of newly discovered evidence. The jury returned its verdict of guilty in this case on April 8, 1974, and the court found the defendant guilty of being a habitual criminal at a hearing held on April 29, 1974. The hearing on the motion for a new trial was commenced on May 17, 1974, and after a partial hearing was continued to May 27, 1974, for the purpose of attaining additional witnesses. It appears from the evidence adduced at that hearing that a Mr. Toney Redman, who was a part-time public defender in Lincoln, but not counsel for the defendant, received a phone call from a person who identified himself as "Mike Conrad," apparently confessing to the commission of the crime involved in this case. A week or two later Redman received a letter signed "Mike Conrad," postmarked May 23, 1974, admitted in evidence as exhibit A, apparently to the effect that the defendant was not guilty of the crime, but that he, the writer, was the guilty party. Also received in evidence at the trial was a letter dated April 29, 1974, from a "Mike Conrad," addressed to the trial judge, asking him to help Dick Fowler. In the letter Conrad states he had had a talk with Toney Redman, the public defender, and had written him confessing to the crime; and that he believed that Mr. Lahners, the county attorney, had suppressed the confession. He also stated that his attorney would get in touch with the judge shortly, which, however, did not occur. It was on the basis of these two letters that defendant filed his motion for a new trial on the ground of newly discovered evidence. Redman testified at the hearing that he had never seen the party who called himself "Mike Conrad," but had suggested to Conrad that he come to the office. He stated Conrad

was very vague and hesitant, and, in fact, would not meet with him. Redman later saw Mr. Lahners of the county attorney's office in the hall and discussed the matter. On cross-examination Redman was asked the question: "As a matter of fact, you do not know if it was the defendant himself who called you and used the name of Mike Conrad? Isn't that also true?" And the answer he gave was: "That is true." At that hearing the defendant, Richard Fowler, also testified. He was asked: "Do you know a Mike Conrad?" He answered: "It has been some time since I have been working with Steak-O-Rama; names just don't—I don't have any memory for names at all. Except for close friends." He further testified that he wasn't even certain there was such a person. It is interesting to note that notwithstanding Fowler's denials of knowing Mike Conrad, in the letter to Redman written by Conrad he makes reference to the fact that he and the defendant were in Omaha "doing our thing." Evidence was also adduced relative to the efforts of police and others to identify and locate the writer of the letter, Mike Conrad, but all parties were unsuccessful in doing so even after a rather extensive investigation. Of particular interest was the testimony of the witness Kevin Graham, who testified that after the trial of Richard Fowler was over he had occasion on the following Saturday to have a conversation with Fowler, who called him at his home. Fowler asked him if he had ever thought about taking a couple months vacation and Graham stated that he wouldn't mind taking a vacation. Fowler asked him if he ever heard of Kearney and told him that Kearney was "kinda like Boys Town" and that if Graham would do him a favor, the most that could happen was that Graham would get 6 months at Kearney. Fowler asked him to go down to the police station and confess that he took the money from Steak-O-Rama and "said they would probably give me like six months in Kearney or maybe lengthen my probation," and also told him that

while he was in Kearney, Fowler would file a lawsuit against Steak-O-Rama. He would sue for $300,000 and would settle out of court for $50,000 and give Graham half of it. Graham told him he would have to think about it because he was getting ready to make his final restitution payment, as he was on probation at that time. Fowler then told him that if he wanted to do it he should do it the next day about 8 o'clock, down at the jail and "just tell somebody that I wanted to confess to the crime." Graham did not tell his probation officer about it at the time. He denied calling Toney Redman about it and also denied writing the letters referred to, exhibits A and C.

We conclude that the trial judge was eminently correct in denying a new trial on the basis of the evidence adduced. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed. Rains v. State, 173 Neb. 586, 114 N. W. 2d 399 (1962); State v. Evans, 187 Neb. 474, 192 N. W. 2d 145 (1971); State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69 (1966). There was clearly no abuse of discretion on the part of the trial judge. In addition, it is interesting to note that the proffered evidence would not have been admissible if presented during the trial of the case. In Barr v. State, 114 Neb. 853, 211 N. W. 188 (1926), this court ruled that in the trial of the defendant in a criminal action, a letter, written by a third person, in which he states that the writer, and not the defendant, committed the offense, is not competent as evidence in behalf of the defendant. Also in Mays v. State, 72 Neb. 723, 101 N. W. 979 (1904), the court held that an ordinary written statement of a third person that he was guilty of a crime of which the defendant was accused is hearsay evidence and therefore not admissible; and further held that an ordinary written statement of such third person that he committed the crime in question, which is

not sworn to, and is not preserved in the form of a deposition, is not competent, and should not be received as a defense to the prosecution. While the letters in this case were presented in support of a motion for a new trial, their value as evidence is extremely poor, and their validity subject to great scrutiny. The trial judge came to the correct conclusion.

We may deal rather summarily with the two remaining assignments of error made by the defendant. His claim that there is reversible error in the record because of the alleged fact the prosecution did not inform the defendant or his counsel of the purported confessions is without merit for two reasons. In the first place, the letters were received after the trial was over, and not during the trial. Secondly, defendant was obviously well aware of their existence, as it was defendant's own counsel, Mr. Erickson, who filed the motion for a new trial based on newly discovered evidence, upon which the extended hearing was subsequently held.

Defendant's last assignment attacks the constitutionality of the Habitual Criminal Act. This court has on numerous occasions upheld the validity of that act, both under the United States Constitution and under the Nebraska Constitution. See State v. Losieau, 184 Neb. 178, 166 N. W. 2d 406 (1969), and cases therein cited.

Finding no error, the judgment and sentence of the District Court is affirmed.

AFFIRMED.

CONNIE FANNING, AS ADMINISTRATRIX OF THE ESTATE OF LARRY FANNING, DECEASED, APPELLEE, V. EUGENE L. RICHARDS, ET AL., APPELLANTS.

CONNIE FANNING, APPELLEE, V. EUGENE L. RICHARDS ET AL., APPELLANTS.

227 N. W. 2d 595

Filed April 3, 1975. Nos. 39685, 39686.

1. **Judgments.** A District Court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with.
2. **Judgments: Evidence: Trial.** This court will require a stronger showing of abuse of discretion where the motion to vacate is allowed than in cases where a trial on the merits is denied.
3. **Rules of Court: Evidence: Appeal and Error.** This court will not take judicial notice of the rules of practice of the District Court.

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

David A. Johnson, Ronald H. Stave, and Emil F. Sodoro, for appellants.

Owens & Owens and Peter E. Marchetti, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and LYNCH and BURKE, District Judges.

PER CURIAM.

The defendants appeal from orders of the trial court vacating orders of dismissal without prejudice. The orders vacating the orders of dismissal and reinstating the cases on the trial docket were made during the same term of court in which the earlier orders of dismissal were made.

The only issue is whether the trial court abused its discretion in vacating the orders of dismissal and reinstating the cases on the trial docket.

A District Court has inherent power to vacate or mod-

ify its own judgment at any time during the term at which it is rendered; such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. Buchanan v. Buchanan, 186 Neb. 89, 180 N. W. 2d 886.

A much stronger showing is required to substantiate an abuse of discretion when the judgment is vacated than when it is not. Beliveau v. Goodrich, 185 Neb. 98, 173 N. W. 2d 877; Coates v. O'Connor, 102 Neb. 602, 168 N. W. 102; Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026.

Trial courts, faced with growing case loads, must be free to adopt rules and procedures designed to move a case from filing to disposition, whether that disposition be by settlement, guilty plea, dismissal, trial, or other method. Because of the individualized nature of the administration of justice, trial courts must necessarily be given wide discretion to ensure that the goal of timely disposition of cases is reached in a manner consistent with fairness to all parties. Assurance of quality in the judicial process is as important as speedy disposition.

We find no abuse of discretion.

Plaintiffs' counsel resided 350 miles from Douglas County and was not familiar with the rules of court of the Fourth Judicial District. The cases were at issue and plaintiffs' counsel mistakenly believed that a certificate of readiness for trial had been filed with the court administrator.

The court rule under which the orders of dismissal were entered was not offered in evidence and is not included in the bill of exceptions. While this court may not take judicial notice of District Court rules, Simmons v. Murray, 189 Neb. 695, 204 N. W. 2d 800, it is apparent that the orders of dismissal were entered under the common procedure that allows the court under court rule to dismiss cases for lack of progress after a specified time interval. See § 25-1149, R. R. S. 1943.

These dismissal procedures entail no supervision of intermediate stages of case progress and no sanctions are

imposed until the "no progress" time interval is exceeded. If dismissal action is taken by the court, the court knows that litigants may be punished through no fault of theirs. Consequently, the court may hesitate to impose the sanction or, if it does impose the sanction, the court may later reinstate the case in the "interests of justice." As a result, the sanction loses credibility and the procedure loses its effectiveness.

The American Bar Association Commission on Standards of Judicial Administration recently concluded a study that covered among other matters the precise "no progress" procedure involved in this appeal and made this interesting observation: "A caseflow management system incorporating time standards and case monitoring eliminates the need for a periodic 'no-progress' review of old cases which should have been disposed of by encouraging cases to move in an orderly and timely fashion. Proper caseflow monitoring keeps track of the progress of each case through each stage of litigation. Thus, a case does not get lost in a void only to come to the court's attention late in the life of the case when dismissal is imminent." A.B.A. Commission on Standards of Judicial Administration, Supporting Studies - 2, Caseflow Management in the Trial Court, p. 52 (1973).

Costs of this appeal are taxed to the appellees.

AFFIRMED.

BETTY WILSON ET AL., APPELLANTS, V. BLANCHE SMITH ET AL., APPELLEES.

227 N. W. 2d 597

Filed April 3, 1975. No. 39690.

Motor Vehicles: Negligence: Process. Strict compliance with the provisions of the nonresident motorists statute relating to use of the postal service to notify a defendant that he has been sued is mandatory and jurisdictional.

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

Don A. Fitch, for appellants.

Paul J. Yaneff of Yaneff & Cosgrove and Neil R. McCluhan of Kindig, Beebe, McCluhan, Rawlings and Nieland, for appellees.

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

WARREN, District Judge.

This is an appeal by plaintiffs Betty Wilson and Ervin Modlin from an order of the District Court sustaining the special appearance of the nonresident defendants Blanche Smith, Warren Vavra, and Linda Vavra.

The facts are not in dispute. Plaintiffs filed this action on July 10, 1973, alleging damages arising out of a one car accident in rural Thurston County on July 15, 1969, and requested substituted service on the Secretary of State as agent for the nonresident defendants. Proceeding under section 25-530.01, R. R. S. 1943, the clerk of the District Court issued summons on July 10, 1973, showing a return day of July 23, 1973, and an answer day of August 13, 1973. Service was regularly made on the Secretary of State as agent for each of the defendants on July 11, 1973, and the original summons with the return properly endorsed thereon was filed in the District Court for Thurston County on July 26, 1973. Plaintiffs' attorney at some subsequent date requested copies of the summons from the clerk and was furnished "copies" bearing a date issued of August 21, 1973, a return day of September 3, 1973, and an answer day of September 24, 1973. These "copies" of the summons, together with copies of the plaintiffs' petition, were then mailed by the attorney for plaintiffs to the last-known address of each defendant by registered return receipt mail on August 22, 1973, and the statutory affidavit of mailing was filed on August 27, 1973. The defendants

Vavra each signed return receipts on August 23, 1973, and the defendant Blanche Smith did so on August 28, 1973.

The defendants filed their special appearance challenging the court's jurisdiction over the persons of the defendants, alleging that the attempted service of process was defective in two respects: (1) A copy of the process was not mailed to each defendant within 10 days after service on the Secretary of State; and (2) the copies of process mailed to defendants were not true copies of the summons served on the Secretary of State.

Section 25-530(7), R. S. Supp., 1974, provides in part: "(7) Service of such process shall be made by serving a copy thereof upon the Secretary of State, personally * * * the process thus served shall indicate on the face of the document that it is served on the Secretary of State as agent for a nonresident defendant in an action for damages resulting from the use or operation of a motor vehicle, and such service shall be sufficient service upon the said nonresident; Provided, that notice of such service and a copy of the process shall, within ten days after the date of service, be sent by the plaintiff to the defendant by either registered or certified mail addressed to the defendant's last-known address, and it shall be the duty of the plaintiff to file, with the clerk of the court in which the action is brought, an affidavit that he has complied with such requirement."

It is obvious that the plaintiffs did not strictly comply with the requirements of the foregoing statute providing for substituted service on nonresident motorists. The copies of the process were not mailed to defendants until 42 days after summons was served on the Secretary of State; and the "copies" of process which were belatedly mailed were not true copies of the summons served on the Secretary of State.

Plaintiffs argue that service was complete when summons was served on the Secretary of State, and that thereafter substantial compliance with the provisions re-

lating to mailing is all that is required. We do not agree. The plain requirements of the statute cannot be fragmented. Both (1) substituted service upon the Secretary of State, and (2) the proper and timely mailing to a defendant of notice of such service and a copy of the process are definitely required, and no jurisdiction can be acquired until both requirements have been met.

"It is well settled in this state that the nonresident motorists' law is to be strictly construed and held to apply only to those persons specifically named in the statute." Rose v. Gisi, 139 Neb. 593, 298 N. W. 333 (1941).

This court held in Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738 (1956): "A statute which authorizes the use of the postal service to notify a defendant that he has been sued in court is strictly construed and it must be specifically observed."

As recently as Erdman v. National Indemnity Co., 180 Neb. 133, 141 N. W. 2d 753 (1966), the rule was stated: "Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued."

It is not necessary to determine whether or not the plaintiffs' actions constituted substantial compliance with the statute. We hold that strict compliance with the provisions of the nonresident motorists statute relating to use of the postal service to notify a defendant that he has been sued is mandatory and jurisdictional.

Personal jurisdiction over the defendants was not acquired. The special appearance of the respective defendants was properly sustained by the trial court, and its action is affirmed.

AFFIRMED.

IN RE ESTATE OF ELIZABETH K. EVANS, DECEASED. ALVINA AVERY ET AL., APPELLANTS, V. ROBERT LEROY EVANS, ET AL., APPELLEES.

227 N. W. 2d 603

Filed April 3, 1975. No. 39694.

1. **Wills: Descent and Distribution.** Section 30-228.03, R. R. S. 1943, directs that where a devisee, being a child or other relation of the testator, dies before the testator, such issue if any surviving the testator take the estate devised to the ancestor unless a different disposition shall be made or directed by the will.
2. ———: ———. Where a testator makes a devise to four of his children by name and further provides: "Should any of my said children die before my decease I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children, share and share alike," and where, at the time of the execution of the will, all the named children were parents of children then living, and also at that time the testator had another grandchild then living, the child of a daughter of the testator who had died years before the will was executed and for whom he made no provision in the will, it can be said with certainty that the testator has made a disposition so that the issue of one of the named children who predeceased the testator do not take the share of the parent under the terms of section 30-228.03, R. R. S. 1943.

Appeal from the District Court for Grant County: KEITH WINDRUM, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellants.

Reddish & Curtiss and A. James Moravek, for appellees.

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

CLINTON, J.

The question in this case is whether section 30-228.03, R. R. S. 1943, usually referred to as the antilapse statute, applies to the last will of Elizabeth K. Evans, so that certain grandchildren of the testatrix take the share of

Zena Clyde, a daughter of the testatrix who predeceased her, or whether the entire devise and bequest passes wholly to the children of Elizabeth K. Evans who survived her.

The will provision involved is as follows: "Second: I do hereby give, will, devise and bequeath unto my beloved sons and daughter, Zena Clyde, daughter, of Moorcraft, Wyoming, Tyndall Evans, son of West Concord, Minnesota, Emmerson Evans, son, of Whitman, Nebraska, and Darwin Evans, son, of Johnstown, Nebraska, share and share alike, all of the rest, residue and remainder of my estate and property, real, personal or mixed, of which I may die seized or possessed, ... Should any of my said children die before my decease I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children, share and share alike."

The testatrix executed her will on October 29, 1953. At that time her heirs-at-law would have been the four children named in the will and Nedra Higgins, a granddaughter, the child of Alta Dykes, a daughter of the testatrix who had died in 1946 before the will was executed. Zena Clyde died in March 1965. The testatrix died August 6, 1972. Zena Clyde was survived by five children. These children, the appellants here, claim the share of Zena Clyde.

We affirm the judgment of the District Court which affirmed the judgment of the county court which had found that the antilapse statute did not apply.

Section 30-228.03, R. R. S. 1943, provides: "When a devise or any legacy shall be made to any child or other relation of the testator, either by name or by designation of such relationship singly or as one of a class, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had

survived the testator, unless a different disposition should be made or directed by the will;. . . . "

The precise question to be answered is, does the previously mentioned provision of the will, "Should any of my said children die before my decease I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children share and share alike," prevent the application of section 30-228.03, R. R. S. 1943, because those words constitute a different disposition or direction within the meaning of the statutory language, "unless a different disposition should be made or directed by the will."

Neither party has cited any opinion of this court in point and we have found none. The appellants rely principally upon an opinion of the Supreme Court of Illinois in the case of Schneller v. Schneller, 356 Ill. 89, 190 N. E. 121, 92 A. L. R. 838. In that case the testator devised property to his three children by name, followed by the provision, " 'or to the survivors or survivor of them, to be distributed equally share and share alike, for their sole and exclusive property forever.' " One of the named children predeceased the testator and that child's issue claimed the parent's share by virtue of the provisions of the Illinois statute which provided that the issue should take in such a case where "no provision shall be made for such contingency" by the will. The contingency referred to by the statute was the death of the child before the death of the testator. The Illinois court in that case held that the quoted language of the will was not a sufficiently clear indication of intent to provide for the contingency and that therefore the statute applied. The evidence in that case was that at the time the will was executed the three children named in the will were the testator's only children and that they were all unmarried. The will was executed in 1919. The testator died in 1931. In the interim one of his children had died, leaving children. The court said: "There is nothing beyond the bare use of the

technical words of survivorship to indicate that he had in mind the disinheritance of one of his grandchildren who had lost its parent before the death of the testator. It cannot be said that he intended to cut off Christian's children because Christian had no children when the will was made. Such an intention could be discovered only from a finding that he intended to cut off any grandchildren whose parent or parents predeceased him." We do not think the holding of the Illinois court is applicable to the facts before us and the language of the Evans will.

In this case the evidence is that when the testatrix executed her will in 1953 her living children were the four named in the will. All had children then living. It shows, as we have already stated, that the testatrix was the mother of another child, Alta Dykes, who had died in 1946 and that this child was survived by a daughter, Nedra Higgins, who was living at the time the testatrix made her will. The language of the will is quite specific: "Should any of my said children die before my decease I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children, share and share alike." The literal language of this provision contemplates specifically the possible death of one or more of her named children and that in such contingency the share of any deceased child should pass to the survivor or survivors of her children. When she made her will, her granddaughter, Nedra Higgins, was living, yet she made no provision for her. This fact is added evidence of the testatrix' intention that the provision she made was not the result of mere oversight and a failure to consider the contingency.

We hold that under the facts of this case and the clear and literal language of the will, the testatrix has made and directed by her will a different disposition than that provided for by section 30-228.03, R. R. S.

1943, and therefore the provisions of that statute do not apply.

Most courts which have had similar questions before them have not laid down any flat rules applicable as a matter of law to any given testamentary language. They have considered each case on its own merits, taking into consideration the factual situation, the language of the will, and the varying language of the different antilapse statutes. This we believe is wise policy. Even in Illinois that court in Vollmer v. McGowan, 409 Ill. 306, 99 N. E. 2d 337, arrived at a result different from that in Schneller v. Schneller, *supra,* in a case where the language was not far different from that in the latter case, but where the factual situation was different.

In an annotation at 54 A. L. R. 3d 301, are collated the cases which consider the question of the effect of the antilapse statute where a devise or bequest is made to several designated individuals comprising a group or class, with a gift over to the "survivors." Most of the cases there cited reach a result consistent with ours under language and evidence similar to that before us in this case. On the broad general question of what language or circumstances are or are not indicative of an intention on the part of the testator to defeat the operation of the antilapse statute, see 63 A. L. R. 2d 1172 and 92 A. L. R. 846.

AFFIRMED.

IN RE ESTATE OF ELIZABETH K. EVANS, DECEASED. IRENE PAGE ET AL., APPELLANTS, V. TYNDALL EVANS ET AL., APPELLEES.

227 N. W. 2d 606

Filed April 3, 1975. No. 39693.

Appeal from the District Court for Grant County: KEITH WINDRUM, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellants.

Reddish & Curtiss and A. James Moravek, for appellees.

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

CLINTON, J.

This is a companion case to Avery v. Evans, *ante* p. 437, 227 N. W. 2d 603. The appellants are the same persons as in the companion case. The issue in this case involves the right of the appellants to object to the accounting of the administrator. The result in that case governs the result here because the appellants have no standing to object to the accounting.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. WALTER C. LINDSEY, APPELLANT.

227 N. W. 2d 599

Filed April 3, 1975. No. 39705.

1. **Criminal Law: Venue.** Under section 29-1305, R. R. S. 1943, where an offense is committed on a county line, the trial of such offense may be had in either county divided by such line.
2. ———: ———. Section 29-1301.01, R. R. S. 1943, permits the trial court to proceed either in the county where the offense is committed or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense.

Appeal from the District Court for Sarpy County: BETTY PETERSON SHARP, Judge. Affirmed.

Richard C. King, for appellant.

Paul L. Douglas, Attorney General, and Harold S. Salter, for appellee.

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

BRODKEY, J.

The appellant, Walter C. Lindsey, was tried and convicted in the county court of Sarpy County of the crime of resisting a police officer in the execution of his office. He appealed to the District Court for Sarpy County, which affirmed the judgment and the sentence of 30 days imposed upon the appellant by the lower court. On appeal to this court, appellant's sole assignment of error is the contention that Sarpy County was not the proper venue for the trial of the charge against him in this case. We affirm.

It appears that on February 13, 1974, at approximately 7 a.m., one Raymond Neubauer, a police officer of the City of LaVista, in Sarpy County, Nebraska, was occupying a police vehicle parked along a street located in Sarpy County. The officer observed a pickup truck driven by appellant traveling at a rate of speed in excess of that legally permissible for that particular area. Officer Neubauer set out in pursuit of the truck and switched on the flashing red light of his vehicle in order to signal the truck to stop. The truck turned east on Harrison Street at 74th Street, with Officer Neubauer in pursuit. Harrison Street runs in an easterly-westerly direction, and there is evidence in the record that it is the dividing or boundary line between Sarpy County and Douglas County. Also, we may and do take judicial notice of the fact that the boundary line between the two counties runs down the center of Harrison Street. 29 Am. Jur. 2d, Evidence, § 64, p. 95; 31 C. J. S., Evidence, § 33(2) b, 942, 943; Nebraska State Bar Association, Evidence, p. 3-3. This being so, a motor vehicle driving in an easterly direction on Harrison Street would necessarily be in Sarpy County, and not in Douglas County, and there is evidence in the record that this was so in this case.

The record reveals that Officer Neubauer pursued the pickup truck driven by appellant, with both his flashing red light and his siren operating, down Harrison Street

but was unable to stop the truck until it reached 58th and Harrison Streets, at which place appellant decided to stop his vehicle or was forced to do so because of other traffic. Officer Neubauer was asked whether the pickup was in Sarpy County when he finally got it stopped, and his answer was: "We were on the line actually, part of the pickup was actually in Douglas County and part was in Sarpy County." He also testified that his cruiser car was entirely "in the Sarpy line." At that point the officer approached the truck and appellant jumped out of his vehicle. They met approximately halfway in the middle of the truck. Officer Neubauer asked appellant for his driver's license and registration and also advised him that he had clocked appellant on radar at 35 m.p.h. in a 25 m.p.h. zone and that appellant had failed to stop or yield to his red light and siren. Appellant then became very upset and abusive and used profane language, whereupon Officer Neubauer advised appellant that he was under arrest. Appellant then got back into his truck which was still running; and the officer, fearing that he was going to drive off, requested that appellant shut his truck off. Appellant just sat there, so the officer reached in the cab and was turning the key off, when the appellant grabbed him around the throat and began choking him. At that time the officer was on the left of the cab, and the door to the cab was open. The altercation continued out in the street. The officer was unable to get appellant's arm off his neck and was forced to use a can of mace to break the hold. Officer Neubauer testified that the struggle began at the site of the pickup truck, approximately halfway in the truck all the way back, and finally broke between both vehicles. Officer Neubauer was ultimately able to subdue the appellant and place him under arrest; and he was subsequently charged, tried, and convicted, as previously stated.

The only contention of the appellant is that the proper

venue for trial of the charges against him was in Douglas County, Nebraska, rather than in Sarpy County, his theory apparently being that since the truck, according to the evidence, was straddling the dividing line between the two counties, and the parties apparently exited from the driver's side of the truck, the offense necessarily occurred in Douglas County.

We note that the question of jurisdiction and venue was not raised either in the original trial in county court, nor on appeal in the District Court, and appellant in his brief concedes this fact. In State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421 (1964), the general rule is stated as follows: "Ordinarily objections not presented to the trial court are not available on review and to make such error available for reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on record for review. It is fundamental that error may not be predicated on a ground not preserved by a proper objection." (Citing cases.) See also 24 C. J. S., Criminal Law, § 1675, at p. 1156. Appellant contends, however, that this court has the discretion to review this alleged error, and should do so in this case. We shall do so.

Although the evidence would seem to indicate that the altercation took place principally within Douglas County, it is clear that the initial contact between the parties occurred while the officer had his body at least partially inside the cab of the truck, where appellant choked him as the officer was attempting to turn off the ignition and prevent appellant from leaving the scene. As previously stated, the truck was partially in both counties, and there is obviously no way to determine precisely how much of the truck was in each county, or where the county dividing line ran down the length of the truck. Also we are not able to determine with exactitude how much of the officer's body was inside the cab of the truck at the time he was choked, or whether any part of the officer's body crossed the boundary line

and was actually in Sarpy County. Also it is not possible from the record to accurately determine whether in the scuffle which occurred outside the truck following the choking episode, the parties may not have crossed the boundary line between the truck and the police cruiser, so that it could be said with absolute certainty that the fight occurred on both sides of the boundary line, although this is entirely possible. It is appellant's contention that the fight occurred entirely within Douglas County, and therefore the proper venue for his trial should have been in Douglas County. See § 29-1301, R. R. S. 1943. We do not agree. Appellant apparently overlooked certain other statutes which are sufficient to supply venue for trial in Sarpy County under the facts of this case. Section 29-1305, R. R. S. 1943, provides as follows: "When an offense shall be committed on a county line, the trial may be in either county divided by such line, and where any offense shall be committed against the person of another, and the person committing the offense shall be in one county, and the person receiving the injury shall be in another county, the trial may be had in either of such counties." We think the foregoing statute is applicable to the facts of this case, particularly in view of the altercation within the cab of the truck, as previously related. We believe that this was an offense which occurred on a county line, since the truck itself was apparently in both counties. While it is not shown with precision exactly on which side of the county line the choking within the cab occurred, we do not believe that fact is determinative in this case. It was exactly this type of situation that the foregoing statute was intended to cover. The reasoning urged by appellant would defeat the clear intent of the statute, and we need not carry this reasoning to the extent of being absurd.

Moreover, section 29-1301.01, R. R. S. 1943, provides: "If any person shall commit an offense against the person of another, such accused person may be tried in the

county in which the offense is committed, or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense, or in aiding, abetting, or procuring another to commit such offense." If we consider the events that transpired prior to the actual assault, it is clear that the entire matter grew out of the officer's attempt to arrest the appellant for speeding and disregarding his instructions after a chase between the vehicles, all of which occurred in Sarpy County, Nebraska. The acts of the appellant were, we believe, under the facts of this case, acts "done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense." This statute, also, would clearly authorize trying the appellant in Sarpy County. We need not consider or rule on the applicability of section 29-1301.02, R. R. S. 1943, cited by appellee, in view of our conclusions that both of the foregoing statutes are sufficient to dispose of the matter of venue raised in this case.

Under the circumstances, we conclude that Sarpy County must be regarded as a proper venue for the trial of the charges arising from the assault on Officer Neubauer, and the judgment of the District Court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICCARDO SILVACARVALHO, APPELLANT.

227 N. W. 2d 602

Filed April 3, 1975. No. 39714.

1. **Appeal and Error.** 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. **Habitual Criminals: Indictments and Informations: Time.** The exact time of the commission of an alleged prior felony is not of the essence of a charge under the Habitual Criminal Act and the failure of the information to accurately state the time of a prior felony does not render the information insufficient.

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

T. Clement Gaughan, Richard L. Goos, and Robert I. Eberly, for appellant.

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

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and KELLY, District Judge.

NEWTON, J.

Defendant was convicted of burglary and being an habitual criminal. On appeal he assigns as error insufficiency of the evidence and erroneous amendment of the information in regard to the date of a prior conviction. We affirm the conviction.

The evidence reflects that the Consolidated Supply Company building in Lincoln was entered in the early morning hours on February 15, 1974. Two vending machines were broken into and the small change taken. A pocketknife was also missing. Defendant had worked there 2 or 3 hours a few weeks before. He was seen in the vicinity at a late hour on February 14 and again early on the morning of February 15. When arrested the defendant had $4.30 in small change and a knife similar to the one taken. His shoes contained glass particles identified as similar to the glass in a window broken in gaining entry. Defendant's defense was an alibi. He had been staying at the City Mission and had signed in that night. It was possible for him to leave after signing in. One inmate testified the defendant was in bed every night during February but had no specific

recollection of the night in question or of other nights. The evidence was sufficient to sustain the conviction if believed. It presented a jury question. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. See State v. Hiatt, 190 Neb. 315, 207 N. W. 2d 678.

The information charged defendant with being an habitual criminal. An error was made in the date of one conviction. On May 29, 1974, subsequent to trial, an amendment was permitted to correct the date. A 12-day continuance was granted to file briefs. The amendment was permitted on June 11 and the hearing on the habitual criminal charge was held on July 8. The exact time of the commission of an alleged prior felony is not of the essence of a charge under the Habitual Criminal Act and the failure of the information to accurately state the time of a prior felony does not render the information insufficient. See State v. Harig, 192 Neb. 49, 218 N. W. 2d 884. In this instance the defendant had ample time and opportunity to meet any situation presented by the amendment and was not prejudiced.

Defendant further stated that he was represented by incompetent counsel at the time of one of the prior convictions. The record fails to sustain this allegation.

Defendant received a sentence of 12 to 15 years. Although not an assignment of error, he urges the sentence is excessive. The sentence is well within the 10 to 60 years provided by section 29-2221, R. S. Supp., 1974, and the complaint is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

LOST CREEK DRAINAGE DISTRICT OF KEARNEY COUNTY, NEBRASKA, A PUBLIC CORPORATION, ET AL., APPELLANTS. V. DEAN KRING, ET AL., APPELLEES.
227 N. W. 2d 421

Filed April 3, 1975. No. 39728.

1. **Statutes: Constitutional Law.** When the Legislature has adopted a revision of the statutes, reference to or consideration of the original title will not be made in a determination of constitutionality.
2. **Statutes.** An amendatory statute is germane to the original statute when it is alike, closely allied, or related to such original statute.

Appeal from the District Court for Kearney County: NORRIS CHADDERDON, Judge. Affirmed.

Meier & Adkins, for appellants.

Nye, Wolf & Hervert, for appellees.

Heard before WHITE, C. J., BOSLAUGH, NEWTON, CLINTON, and BRODKEY, JJ., HASTINGS, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

The Lost Creek Drainage District of Kearney County, Nebraska, hereinafter referred to as the "District," and the individual members of its board of supervisors filed an action against various individuals and members of a class of landowners within said District. The petition alleged that appellees had filed a petition for a special election of all members of the board of supervisors of said District under section 31-306, R. R. S. 1943; that said statute was unconstitutional; and prayed for a declaratory judgment of unconstitutionality and a denial of the special election. Upon trial, the District Court for Kearney County entered judgment holding the act constitutional and ordered that a special election be held thereunder. This appeal follows.

The following statutory provisions are involved:

"Within thirty days after the district court shall have

declared any drainage district organized, the clerk of the court shall, upon fifteen days' notice, call a meeting of the owners of the real estate situated in the district, at the day and hour specified, in some public place in the county in which the district was organized, for the purpose of electing a board of five supervisors to be composed of owners of real estate in the district and a majority of whom shall be residents of the county or counties in which such district is situated. At such election every acre of land shall represent one share and each owner shall be entitled to one vote for every acre of land owned by him in such district. The five persons receiving the highest number of votes shall be declared elected as supervisors, and they shall immediately, by lot, determine their terms of office, which shall be respectively, one, two, three, four and five years, and until their successors are elected and qualified; *Provided, however,* at any time thereafter not oftener than once in twelve months, upon the petition of the owners of at least twenty percent of the land acreage within the drainage district, an election shall be called for the selection of a new board, and upon the filing of such petitions with the secretary of the board, notice of such election shall be given by the secretary in the same manner and for the same time as is provided for at the original election under the notice given by the clerk of the district court. Special elections shall in all respects be governed by the provisions applicable to the regular election herein provided for." § 31-306, R. R. S. 1943.

"Every year after the election of the first board of supervisors, at such time and place in the county in which the district was organized as the board of supervisors may designate, and upon not less than fifteen days' notice, unless waived in writing, such owners shall meet and elect one supervisor in the same manner as provided in section 31-306, who shall hold his office for five years and until his successor is elected and quali-

fied. Notice may be given by personal service or by publication for two weeks in a newspaper in each county in the district and of general circulation therein, which notice shall be sufficient if it notifies the landowners of the district without naming them individually of the time, place, and purpose of the meeting. The secretary of the board shall mail to the last-known post-office address of each owner of land in the district a copy of a published notice. In case of a vacancy in any office of supervisor, the remaining supervisors may fill such vacancy until the next annual election when a successor shall be elected for the unexpired term." § 31-307, R. R. S. 1943.

Appellants contend that the portion of section 31-306, R. R. S. 1943, beginning with the words "*Provided, however,*" and continuing to the end of the section, inserted therein by Laws 1911, c. 144, § 1, p. 476, is unconstitutional in two respects: (1) The subject of the amendment is not properly referred to in the title of the act; and (2) the amendment is not germane to the original section. The statute has not been amended since 1911; it appears in R. S. 1913, as section 1801, and in R. S. 1943, as section 31-306. The original title was not reenacted in either revision. Appellants argue that the provisions of Article III, section 14, Constitution of Nebraska, were not met and that the title of the amendatory act did not refer to both of the sections above quoted. It is immaterial whether the title of the amendatory act was proper, since the provision has been reenacted by legislative revision. Reference to or consideration of the title of the original bill will not be made in a present determination of the constitutionality of the act. McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N. W. 2d 608; Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420.

Appellants next contend that the 1911 amendment was not germane to the original section, arguing that a recall by special election is entirely distinct from the initial

election of supervisors. In Wayne County v. Steele, 121 Neb. 438, 237 N. W. 288, it is stated: "The test of the propriety of the substance of amendments is whether they are germane to the provisions sought to be amended. 'Germane' is defined by Webster's New International Dictionary as 'Near akin; closely allied; appropriate; relevant.' "

The original section set forth the procedure for the election of a full board of supervisors at the time of the organization of the District. The amendment involves the utilization of the same procedure when the voters determine to replace the entire board. Section 31-307, R. R. S. 1943, on the other hand, provides for the election of successors to individual supervisors, whose terms are expiring or who have been appointed to fill vacancies. If the amendment had been appended to section 31-307, R. R. S. 1943, numerous cross-references to section 31-306, R. R. S. 1943, would have been required to express the same legislative plan, e.g., as to the notice of election, the casting of votes, and the allocation of terms of office to the newly elected supervisors. The relationship between the original section 31-306, R. R. S. 1943, and the provision inserted by amendment is entirely germane when these aspects are considered.

The determination by the trial court that the 1911 amendment to section 31-306, R. R. S. 1943, was constitutional is correct.

AFFIRMED.

LEO W. CONNOT ET AL., APPELLANTS, V. LOUIS MONROE ET AL., APPELLEES.
227 N. W. 2d 827

Filed April 10, 1975. No. 39476.

Mandamus. To warrant the issuance of a writ of mandamus, the duty must be imposed upon the officer by law, the duty must

exist at the time the writ is applied for, and the duty to act must be clear.

Appeal from the District Court for Cherry County: WILLIAM C. SMITH, Jr., Judge. Affirmed.

Kirby, Duggan & McConnell, for appellants.

John C. Coupland and Wagoner & Wagoner, for appellees.

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

WHITE, C. J.

In this action against the members of the Board of Education of School District No. 4 of Cherry County, Nebraska, the District Court refused to issue a writ of mandamus to compel the Board to provide pupil bus transportation and dismissed the action. We affirm the judgment of the District Court.

School District No. 4 is a Class I district and had five board members. Its powers, since the 1949 general revision of the school laws, are specifically defined in section 79-443, R. R. S. 1943, as follows: "The district school boards and boards of education shall have the general care and upkeep of the schools, shall provide the necessary supplies and equipment, * * *. *They shall make such rules and regulations as they may think necessary for the government and health of the pupils, and devise such means as may seem best to secure the regular attendance and progress of children at school.*" (Emphasis supplied.)

Sections 79-487 to 79-491, R. R. S. 1943, specifically set out detailed rules as to the powers and duties of the Board whether transportation is by bus or mileage allowance. The power to determine which method is used is indisputably in the board of education alone. School boards and school districts are creatures of the Legislature. And, in the statutory scheme, no power is conferred on the electors either in the first instance, or by

veto, as to the selection of the methods of providing or "securing" the attendance of pupils.

With these principles in mind the significance of the rather chaotic factual sequence of meetings becomes clear.

On June 21, 1973, the Board met and deadlocked on the issue of bussing. The Board itself summoned an informal or "advisory" meeting on June 27, 1973, of the electors by telephone and voice notice, and by a close vote, approved bussing. It is not contended this meeting had any statutory authorization or could exercise any legal power over the Board. No notice was posted as required by section 79-502, R. R. S. 1943.

The Board held its statutorily required annual meeting on July 9, 1973, and approved its required annual budget. No question exists as to the validity of this annual meeting or the budget adopted. Item 3 of the budget (exhibit 14) appropriates $9,504 for "Other School Services." No reference is made to bussing or transportation allowance. The other budgeted items are general administration, instruction, operation of plant, maintenance of plant, fixed charges, and capital outlay. The minutes reflect no discussion or determination of the transportation issue. The official printed budget form contained open lines for specific appropriations and there is none. Consequently the contention that a "bussing appropriation and decision" was made at the annual meeting and that therefore it was mandatory on the Board to provide bussing must fall. Moreover, under the statutes and the broad grant of power to the Board, we know of no authority to require the Board to make such a "bussing" decision at any specific time. The only mandatory requirement is that in the event bussing is not provided, that appropriate mileage payments be made to the parents.

The Board met again on July 24, 1973, and voted against bussing. After that, one of the Board members attempted to convene a special meeting of the district

electors on August 7, 1973. At this meeting a majority of those present, but only about one-third of the electors of the district, favored bussing. In any event, the meeting was advisory only. The powers of a *school district* to act are statutory and, except as granted by statute, a school district is *without power to act.* Galston v. School Dist. of City of Omaha, 177 Neb. 319, 128 N. W. 2d 790. The powers of the patrons and electors meeting in an annual or special meeting are specifically enumerated by statute. The sole power to determine pupil transportation is in section 79-486, R. R. S. 1943, restricting the Board's power to contract for the transportation of pupils to an *adjoining district,* unless approved by the district. As mentioned before, the general powers to govern the district are vested by section 79-443, R. R. S. 1943, in the board of education alone and the specific power to regulate the transportation and to secure attendance is delegated to the board in the several statutes.

It is settled law that to warrant the issue of mandamus, the duty must be imposed upon the officer by law, the duty must exist at the time the writ is applied for, and *the duty to act must be clear.* State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N. W. 2d 721.

The power to determine the means of providing transportation for school attendance is discretionary with the Board of Education of School District No. 4. It is not contended that the Board has entirely failed to act, only that it was required to perform the duty by providing for bussing. The contention is without merit.

The judgment of the District Court in refusing mandamus and dismissing the action is correct.

AFFIRMED.

TONIA MECHAM, APPELLANT, V. JOHN MCLEAY, M. D., ET AL., APPELLEES.

227 N. W. 2d 829

Filed April 10, 1975. No. 39523.

1. **Malpractice: Physicians and Surgeons.** In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients.
2. **Trial: Evidence: Waiver.** Ordinarily when an objection to proper evidence is not timely made, such objection is waived.
3. **Trial: Evidence.** In determining the sufficiency of the evidence to support the submission of an issue to the jury, the asserting party is entitled to have all the conflicts in the evidence and all reasonable inferences therefrom resolved in his favor.

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

John J. Hanley, for appellant.

Joseph P. Cashen, William M. Lamson, Jr., and Charles M. Caldwell of Kennedy, Holland, DeLacy & Svoboda, Emil F. Sodoro, Michael P. Cavel, and Joseph S. Daly, for appellees.

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

WHITE, C. J.

In this malpractice action against the defendants, Doctors McLeay and Danneel, alleging failure to make a prompt diagnosis of pernicious anemia, the District Court dismissed the action against Danneel, the consulting neurologist, at the close of the plaintiff's evidence, and a jury verdict was returned in favor of the defendant McLeay, the original treatment doctor, on the issue of his negligence and the plaintiff's contributory negligence. Judgment was entered accordingly. We affirm the judgment of the District Court.

In 1970, the plaintiff, Mrs. Tonia Mecham, began experiencing general symptoms of fatigue, weakness, stomach distress, and numbness and tingling in her arms and legs. In spite of treatment for these generalized subjective symptoms, the plaintiff's symptoms worsened, and the numbness and tingling in her hands and feet spread and she began to have difficulty walking properly. McLeay decided to bring the defendant Danneel, a consulting neurologist, into the case for examination and diagnosis, and for that purpose she was admitted to Bergan Mercy Hospital in Omaha, Nebraska, on Thursday, March 25, 1971. The examination by Danneel was commenced on Friday, March 26, 1971, and blood tests were taken. On Monday, March 29, 1971, the plaintiff left the hospital without authorization and without the knowledge of Dr. Danneel. There is directly conflicting testimony as to whether she departed with or without McLeay's authorization. She did leave the hospital before Danneel had completed his examination, however. At the point of her departure from the hospital Danneel had provisionally diagnosed Mrs. Mecham's neurological symptoms as due to "peripheral neuritis" and McLeay at that time believed her stomach complaints were caused by an abdominal diaphragm or "hiatal" hernia. After discovering that Mrs. Mecham had left the hospital without his authorization, Dr. Danneel's nurse made an office appointment for her. After the making of the appointment, Mrs. Mecham called and canceled the appointment, saying that she was too sick to come in. She did not ask for or suggest a subsequent appointment. About 5 weeks later, on May 3, 1971, the plaintiff visited McLeay at his office and her symptoms were worsening. At this time, perhaps due to the difficulty involved in her leaving the hospital while under Danneel's care, McLeay referred her to two other specialists who examined her and arranged for further hospitalization and tests at the St. Joseph Hospital in Omaha, Nebraska. After extensive and very

specialized tests, involving consecutive blood examinations, the disease was finally diagnosed as pernicious anemia. Pernicious anemia is a special type of anemia, and is, for our purposes here, a blood disease whose general symptoms are weakness and shortness of breath. If pernicious anemia is untreated, however, a certain percentage of patients develop neurological symptoms related to the peripheral and central nervous system, including trouble with walking and with their hands. It is undisputed that the proper course of treatment is vitamin B12 injections, which are not a cure but only arrest the progress of the disease. In the plaintiff's case, the administered B12 injections which she received from Doctors Stoner and Connor arrested the further worsening of her symptoms, but did not return her to normalcy. The evidence shows that at the time of the trial the plaintiff suffered from a 15 to 25 percent impairment of the leg functions and a 5 to 10 percent impairment of arm functions, including some spinal damage due to the pernicious anemia.

The plaintiff contends there was sufficient evidence to submit to the jury the issue of Danneel's negligence from failure to properly diagnose pernicious anemia considering the standards of medical practice in the community. We examine the facts more precisely as to this specific issue. Danneel was called in on the plaintiff's case as a neurologist consultant by Dr. McLeay and first saw her on Friday, March 26, 1971, at Bergan Mercy Hospital. Danneel examined her, performed certain tests, and blood samples were taken. It is undisputed that Danneel expected to return to the hospital on Monday and make an examination of the results of the blood tests. From the record it could not be reasonably disputed that she was under the care and supervision of Danneel and that she knew the purpose of her being in Bergan Mercy Hospital was for consultation with Danneel, for the taking and completion of a series of tests, with the objective of reaching a further, more defini-

tive, or a final diagnosis of her general symptoms which were worsening. She left the hospital on the afternoon of Monday, March 29, 1971, on her own volition. She did not notify Danneel or receive his permission to leave. From her own testimony her only explanation is that no one told her *not* to leave until dismissed by Dr. Danneel. There is no testimony that she made inquiry of the nurse or hospital personnel or anyone else as to the propriety of her leaving. It is undisputed that Danneel set up an office appointment some time in April in order to *complete* his examination of her, and to advise her of his diagnosis, if any. She canceled this appointment and she testified that she waited until May 3, 1971, to see McLeay again *because she was too sick to come in sooner*. When she did come in on May 3, 1971, to McLeay she was then referred to Drs. Stoner and Connor, the proper tests were made and completed, and a diagnosis of pernicious anemia was made. The necessity for hospitalization, the careful control and supervision of the patient during hospitalization, the necessity for consecutive and refined scientific tests, all requiring the cooperation of the patient, is illustrated by the testimony that Dr. Stoner gave as to his examination. On admission to St. Joseph Hospital, a routine admission blood count was taken. This blood test report showed microcyticnomochromic anemia. This is a preliminary test. Results of the blood test give the specialists further clues regarding evidence to pursue in making a number of other tests which ultimately diagnose pernicious anemia. The final "the re-assuring test" is a Shilling test, which points up the lack of vitamin B12 in the body. This continuous and progressive medical procedure is the one accepted by the medical profession for diagnosing pernicious anemia and usually requires approximately *9 days* of hospitalization.

The gist of the testimony of plaintiff's expert, Dr. Culiner of San Francisco, is that the *Bergan Mercy* Hospital blood count, which was taken about the time of

the plaintiff's initial admission, showed a number of variations from the normal and that the standard of care in view of the plaintiff's history, physical condition, and blood count should have indicated further investigation. At the same time he also stated that the blood count report at Bergan Mercy Hospital, as subsequently revealed, is not of itself diagnostic of pernicious anemia but only should lead to other tests which can in turn lead to the diagnosis. Almost all Culiner's testimony is directed to Danneel's preparation of the consultation report and his examination of the blood samples taken at that time indicating a requirement of further tests. As we have pointed out it is undisputed that the normal period of time for the completion of this diagnosis is about 9 days.

In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients. Meyer v. Moell, 186 Neb. 397, 183 N. W. 2d 480; Restatement, Torts 2d, § 299A, p. 73. There is no direct evidence that Danneel's examination or actions, during the period of time the plaintiff was in the hospital and before her unauthorized departure, was in any way defective or inadequate. It is further clear from the testimony of plaintiff's own expert that the preliminary or first results of the blood samples Danneel ordered in the hospital indicated only that further tests and blood samples would have to be taken which indisputedly required the presence of the plaintiff. He could not have arrived at a diagnoisis of pernicious anemia on the basis of the only examinations he was permitted to perform while the plaintiff was present in the hospital. We do not explore any possible area of a doctor's duty to pursue a patient who has voluntarily and without notice left the hospital and then further cancels an

appointment to continue the examination and tests. No cases are cited which indicate negligence in this area and there is no evidence that there were any violations of the standard of care in the Omaha community with respect to any improper act on the part of the doctor in taking steps over and beyond making an appointment and the plaintiff's refusal to keep it. The record shows that the plaintiff failed on two separate occasions to present herself to Danneel for treatment. It further shows, as hereinbefore recited, that her only explanation was that she was too ill to keep or make such appointments and that was the reason she did not do anything further until reporting to Dr. McLeay on May 3, 1971. Ignoring the question of contributory negligence, reasonable minds could not say there is affirmative evidence showing that Danneel was negligent under the circumstances of this case. It is obvious that to hold Danneel negligent on the record and the facts here we would be required to say that Danneel had a duty, in some indefinable method by coercion, threats, or pressure to prevail upon the plaintiff to report back to him and the hospital for the further necessary tests to complete the diagnosis. There is no evidence in the record to the effect that doctors in similar localities or the vicinity of Omaha would have done more to apprise themselves of the plaintiff's condition than Danneel did. The contention that there was sufficient evidence to submit to the jury the issue of negligence of Danneel is without merit.

Error is asserted with reference to the jury verdict in favor of McLeay, in that the issue of contributory negligence should not have been given to the jury. It is asserted that as a matter of law, the evidence of Mrs. Mecham's conduct as to McLeay was not sufficient to constitute negligence, and, second, that the plaintiff's allegedly contributorily negligent conduct was not the proximate cause of her injuries and that any negligent conduct on her part was not concurrent but subsequent

to that of McLeay's, and therefore could not be the proximate cause of the failure to promptly diagnose pernicious anemia. We test the evidence in the light most favorable to the defendant, under the prevailing rule as to the reasonable inferences that could be drawn therefrom to support the jury verdict. Schmidt v. Johnson, 184 Neb. 643, 171 N. W. 2d 64; Cook v. Nordahl, 191 Neb. 424, 215 N. W. 2d 643. The acts and conduct of the plaintiff as they relate to the alleged failure of Danneel to make a proper diagnosis have heretofore been considered. Many of them relate to the issue of contributory negligence with reference to McLeay's conduct. Reasonable minds could conclude that the plaintiff had been negligent in three different respects. First, she disobeyed McLeay's instructions in not making an office appointment to see him professionally about her illness before March 3, 1971. McLeay testified that he saw Mrs. Mecham only socially from December 1970 to March 1971; that she complained of tiredness during that time, and that he exhorted her to make an appointment for a professional examination which she failed to do. A closely similar case is Somma v. United States, 180 F. Supp. 519 (E. D. Pa., 1960). In that case a Navy employee sued the United States for negligence in failure to detect and warn the plaintiff of tuberculosis which showed up on X-rays taken in 1954, 1955, and 1956. The Navy notified the plaintiff's family physician of irregularities in 1952 at which time the doctor pronounced him free of TB. The plaintiff had been singled out for a special Navy X-ray in 1954, 1955, and 1956 and felt ill in 1956. Yet he failed to see his family physician professionally during that time. The trial court held that plaintiff's failure to see his physician, knowing that he felt ill and had been singled out for a special X-ray (and plaintiff's failure to furnish his doctor's name on his last Navy X-ray) constituted contributory negligence. Further, plaintiff's contributory negligence was held to be the proximate cause of the damages because his negli-

gence prevented early diagnosis of tuberculosis, and recovery was barred. In the instant case, the jury could conclude that Mrs. Mecham failed to seek professional help before March 3, 1971, violated the standard of care which she was obliged to exercise for her own safety and well-being, and negligently contributed to the delayed diagnosis of pernicious anemia. Accordingly, the trial court properly submitted to the jury the question of whether the plaintiff was contributorily negligent in failing to follow Dr. McLeay's instructions to seek professional help when she was ill.

We point out that the jury could reasonably have found the plaintiff contributorily negligent in leaving Bergan Mercy Hospital before her tests were completed. With reference to *McLeay* this evidence is disputed but taken most favorably to McLeay it shows that the plaintiff left the hospital against McLeay's wishes and before she had seen Dr. Danneel on that day. We pointed out before, as to *Danneel*, that she left the hospital without permission, and that she failed to make or keep subsequent appointments. But as to McLeay she testified that she left the hospital with his consent or approval, and the District Court, therefore, submitted the conflicting testimony on this issue as to McLeay to the jury. There was not only sufficient evidence to submit this issue, but when considered in connection with her conduct with reference to Danneel's examination, the jury's finding on this issue is supported by something more than a minimum of evidence. In Gentile v. DeVirgilis, 290 Pa. 50, 138 A. 540, where the plaintiff failed to return to her dentist for further treatment as requested, the court wrote: " 'It is the duty of the patient to cooperate with his professional advisor, * * * but if he will not, or under the pressure of pain cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible': McCandless v. McWha, 22 Pa. 261, 268." See, generally, Annotation, Contributory Negligence or Assumption of Risk as a Defense in

Action Against Physician or Surgeon for Malpractice, 50 A. L. R. 2d 1043 (1956). See, also, Brown v. Dark, 196 Ark. 724, 119 S. W. 2d 529.

Summing up, the jury could reasonably conclude she was contributorily negligent with reference to her conduct and actions as to Danneel, the consulting doctor, and that such conduct was a proximate and contributing cause to the failure of a prompt diagnosis and any damages that she may have suffered. Consequently, we come to the conclusion that the court did not err in the submission of the issue of contributory negligence of the plaintiff in her action against the defendant McLeay.

Lastly, the plaintiff claims error in the admission of certain testimony concerning her actions in leaving Bergan Mercy Hospital on Monday, March 29, 1971, before her tests were completed. An examination of this claimed error reveals that the testimony was competent and admissible, and that it was received by the court without objection by the plaintiff. It is fundamental that when an objection to evidence is not timely made, such objection is waived. Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435. The contention is without merit.

The judgment of the District Court in dismissing the action against the defendant Danneel and in overruling the motion for a new trial and entering judgment in favor of the defendant McLeay is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD RAY ANDERSON, APPELLANT.

227 N. W. 2d 859

Filed April 10, 1975. No. 39557.

Criminal Law: Sentences. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record.

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

Frank B. Morrison, Sr., and Stanley A. Kreiger, for appellant.

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

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

WHITE, C. J.

The defendant contends, on appeal, the excessiveness of two concurrent indeterminate sentences of 8 to 15 years for separate acts of kidnapping against two different victims. We affirm the judgments and sentences of the District Court.

The sentences here imposed did not arise out of the same incident or "transaction." They were committed against two separate young women victims at separate times on September 10, 1973. In both cases the defendant forced the two student young women at gunpoint to drive their automobiles considerable distances in the City of Omaha, Nebraska, and in one case to the vicinity of Highways Nos. 36 and 133. Both victims escaped by jumping from their cars, one while almost stopped and the other while moving at considerable speed. Further details need not be recited. The crimes were premeditated and violent and could easily have resulted in death or serious physical injury. The second kidnapping was committed with an arrogant disregard of consequences and lack of fear of apprehension for the commission of the first one.

The defendant's record, as recited in his brief, does not commend itself to a minimum or "light" sentence: In 6 years, 18 traffic charges and 11 convictions, including 1 charge for driving on a suspended license, 2 auto theft charges, a conviction for assault, 30 days in jail for larceny, and 60 days in jail for carrying a concealed weapon. The trial judge observed the defendant during the course of the trial and heard the evidence. The

defendant here is the same person involved in State v. Anderson, No. 39631, *post* p. 467, 227 N. W. 2d 857, decided solely on procedural grounds in an opinion filed today.

We find no abuse of discretion appearing in the record, a necessary condition to modification of a criminal sentence on appeal. State v. Wilson, *ante* p. 26, 225 N. W. 2d 37.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD RAY ANDERSON, APPELLANT.

227 N. W. 2d 857

Filed April 10, 1975. No. 39631.

1. **Criminal Law: Verdicts: Judgments.** A court's final judgment of guilt must be based on a valid jury verdict.
2. **Criminal Law: Verdicts: Trial.** A jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge.

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

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

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

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

WHITE, C. J.

In this criminal prosecution for forcible rape and use of a firearm in the commission of a felony, the District Court, at the conclusion of final arguments, submitted

the case on both counts to the jury. After deliberation, the jury returned, stating it had reached a verdict. The court found, after the verdict form was delivered to him, that it was unsatisfactory and sent it back for further deliberations. The court suggested to counsel a mistrial and stated that the verdict form he received was not a "verdict." A motion for a mistrial was made which the court sustained and set a new trial for the following Monday. The jury was recalled to the courtroom and in its presence, the court declared a mistrial, dismissed the jury, and excused the jurors from further service during the balance of the term. The record of the pertinent proceedings is as follows:

"MR. CRIPE. * * * Your Honor, I am going to move for a mistrial.

"THE COURT: I will sustain your motion. We will start this case again, beginning Monday morning, Counselors.

"MR. COOPER: Well—

"THE COURT: Monday morning.

"MR. COOPER: Well, I want to move to endorse three other witnesses on the Information.

"THE COURT: All right. You can do that as soon as we get through here. Please call back the jury. (WHEREUPON, the Jury returned to the Courtroom at 4:45 o'clock, P. M.).

"THE COURT: Please be seated. Ladies and Gentlemen, I have declared a mistrial in this case. This means, that your services will be no longer needed. You are excused for the balance of the term. And, I want to thank you for your services as jurors. I can't understand how you could possibly make a mistake in those Instructions. Before you could find him guilty of using a firearm in the commission of a rape, you had to find him guilty of a rape. The Instructions say that, if you read them. They were right in there. Now, under those circumstances, I can't accept the verdict as you offered it. It is not a verdict. And, it would be unfair

to send you back to—now and deliberate again, after you have been at it over twenty-four hours, and you rendered a partial verdict. I think the motion for a mistrial made by the Defendant, is also agreed to by the Court, is a good motion. I am sorry that we didn't arrive at a verdict but I am happy for your services. You are excused. Anybody that wants to talk to the Jury, can. Let the record show, that they gave me back the verdict. And, they found him guilty of rape. But, it is too late as far as I am concerned."

On the following Monday morning, a new jury was empaneled. Before being sworn, defense counsel presented several motions, not pertinent here, and after overruling the motions, the court ordered the trial to proceed. At this time, responding to the State's suggestion, the court set aside its previous findings, found the defendant guilty of both counts, and sentenced the defendant on both counts in subsequent proceedings. The defendant asserts that the purported reinstatement and acceptance of the verdict after the declaration of a mistrial and discharge of the jury is void. We reverse and remand the cause for a new trial.

The sequence of events heretofore recited is so rare we have been unable to find any applicable authority. However, there never was a jury verdict. The court failed to accept it and expressly rejected it. In granting a mistrial (new trial) and setting its date, and in discharging the jury, the court made it irreversibly final that the jury could never return a legal verdict, and that none could be accepted. The court's order not only terminated the proceedings prior to the acceptance of a verdict, but, in discharging and dismissing the jury, made corrective action by further deliberation impossible. It is, of course fundamental, that a court's final judgment of guilt must be based on a valid jury verdict. A jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge. State v. Robinson, 84 Wash. 2d 42,

523 P. 2d 192 (1973); Magee v. Superior Court for County of Santa Clara, 34 Cal. App. 3d 201, 109 Cal. Rptr. 758 (1973); State v. Talbert, 282 N. C. 718, 194 S. E. 2d 822 (1973); 8 Wigmore on Evidence (1961), § 2350 (a), § 2356. See, also, Longfellow v. State, 10 Neb. 105, 4 N. W. 420 (1880). Other alleged errors, including the failure to furnish the defendant an opportunity to poll the jury, need not be discussed.

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

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL SHROPSHIRE, APPELLANT.

227 N. W. 2d 834

Filed April 10, 1975. No. 39642.

Criminal Law: Guilty Plea: Records. The decision in this case is controlled by our opinion and holding in State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815, filed October 31, 1974.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Remanded with directions.

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

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

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

WHITE, C. J.

This is an appeal from a conviction based upon a plea of guilty for the crime of burglary of an Omaha, Nebraska, home on February 18, 1974. The defendant's sole assignment of error is that the District Court committed reversible error in failing to make the required

arraignment record sufficient to show that the defendant pled guilty voluntarily, understandingly, intelligently, and with full knowledge of the rights he was waiving by so pleading.

The decision in this case is controlled by our opinion and holding in State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815, filed October 31, 1974. As in Lewis, in the present case the only material element which the judge left out in advising the defendant was the possible penalty for the crime; and the inadvertent omission of the word "jury" before the word "trial" in advising the defendant of his right to a jury trial. In State v. Lewis, *supra,* this court stated and held as follows: "Although the defendant did not at any time make application to the trial court for leave to withdraw her plea, in order that the fact of whether or not the defendant was aware of the possible penalties at the time she entered her plea may be reliably determined, we decide that, without vacating the judgment of conviction or the sentence, the cause shall be remanded with leave to the defendant to apply to the trial court to withdraw her plea. If she does so apply, the trial court shall hold an evidentiary hearing to determine the fact of the defendant's knowledge or the absence of such knowledge. If the court finds that she was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and she shall be permitted to plead again. If it determines that she did know, then the judgment and sentence shall stand. If she makes no application to withdraw her plea within 10 days of the filing of this opinion, then the sentence shall be carried into execution."

The cause is remanded to the District Court for Douglas County, Nebraska, with instructions to conduct further proceedings pursuant to the holding and decision in State v. Lewis, *supra.*

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. EDWARD DONALD KENNEDY ET AL., APPELLANTS.
227 N. W. 2d 607

Filed April 10, 1975. No. 39677.

1. **Bail: Bonds.** If a surety on a bail bond fails to deliver his principal into the custody of a proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited.
2. ———: ———. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody the surety will undertake that the principal will appear personally at any specified time and place to answer the charge against him; and upon the failure of the principal to so appear the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond.
3. ———: ———. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced.
4. **Bail: Damages.** In a forfeiture action there is no duty on the part of the State to prove damages.
5. ———: ———. Section 29-1107, R. R. S. 1943, gives the District Court authority to remit a part or all the penalty of a bail bond in its sound discretion, to be exercised as to what is right and equitable under the circumstances of the individual case.

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

Alfred A. Fiedler of Fiedler & Fiedler, for appellant Midland Ins. Co.

Paul L. Douglas, Attorney General, and Robert R. Gibson, for appellee.

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

SPENCER, J.

This is an appeal from forfeiture of a bail bond in the amount of $25,000, issued by Midland Insurance Company, October 16, 1972, for Edward Donald Kennedy,

pending appeal on his conviction on a charge of burglary with explosives. We affirm.

On January 10, 1973, a mandate was issued to the District Court for Lancaster County, affirming Kennedy's judgment of conviction. Kennedy did not appear and was not produced. A motion for bond forfeiture was sustained on January 19, 1973, and a bench warrant issued. On February 8, 1974, motion was filed for judgment on the bond, and Midland Insurance Company was made a defendant. On March 14, 1974, after hearing, judgment was rendered on the bond.

Kennedy was subsequently apprehended by the F. B. I. in California. He was returned to Lincoln by a Lancaster County deputy sheriff, and was in custody when Midland's motion for new trial or vacation of the judgment was heard. On May 24, 1974, L. S. Cornett, the attorney in fact for Midland, paid the Lancaster County sheriff the expense of returning Kennedy to Lincoln, or $911.21. On June 21, 1974, the trial court overruled Midland's motion for a new trial; gave Midland credit for the $911.21; and rendered judgment for $24,088.79.

Midland, relying on section 29-1107, R. R. S. 1943, and State v. Seaton (1960), 170 Neb. 687, 103 N. W. 2d 833, argues that the District Court abused its discretion in entering judgment for the full amount of the bond less the actual expense of bringing Kennedy back from California. State v. Seaton, *supra,* is not applicable on the facts of the present case. There, Seaton failed to appear for trial and the recognizance was forfeited. A month and a half later, he was surrendered in open court into the custody of the sheriff by the surety. Subsequent to his conviction, the county attorney filed a motion for judgment of default on the recognizance, which was forfeited on the day he was to appear for trial. Here, Kennedy was apprehended by the F. B. I. more than a year after the motion for bond forfeiture was sustained. He was returned from California by local authorities. L. S. Cornett did testify that he spent considerable time

and money in an attempt to locate Kennedy. At the hearing, however, he testified in generalities and produced no actual figures to sustain his guess on expenditures.

State v. Reed (1965), 178 Neb. 370, 133 N. W. 2d 591, is pertinent herein. There we said: "We examine the nature of this obligation, the liability imposed, and the reasons therefor. They are well stated in State v. Morse, 171 Neb. 87, 105 N. W. 2d 572, wherein it is stated: 'If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody, the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him; and upon failure of the principal to so appear, the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced. State v. Honey, 165 Neb. 494, 86 N. W. 2d 187.'

"There is no duty on the part of the State to prove damages. State v. Konvalin, 165 Neb. 499, 86 N. W. 2d 361. The giving of the bond transfers custody to the surety who becomes the keeper or jailer of the accused, the surety's dominance is a continuation of the original imprisonment, the State may not interfere with the surety's control, and the surety may discharge itself from liability at any time by surrendering the accused. State v. Liakas, 165 Neb. 503, 86 N. W. 2d 373."

Section 29-1107, R. R. S. 1943, is as follows: "The court may direct that a forfeiture of the recognizance be set aside, upon such conditions as the court may im-

pose, if it appears that justice does not require the enforcement of the forfeiture."

There is no question but that this provision gives the District Court authority to remit a part or all the penalty of a bail bond in its sound discretion, to be exercised with regard as to what is right and equitable under the circumstances of the individual case.

Kennedy was at large in January 1973, when the mandate was issued. He was still at large more than a year later, in February 1974, when a motion was filed for judgment on the bond, and on March 14, 1974, when, after hearing, judgment was rendered on the bond. Kennedy was subsequently apprehended and returned to Nebraska the day before the hearing on Midland's motion. His apprehension was not the result of any action taken by the surety. He was taken into custody solely and exclusively by virtue of the normal operation of the federal system of criminal justice.

Kennedy had been sentenced to a term of 20 years upon conviction for the offense of burglary with explosives, his seventh felony offense. The risk of his nonappearance after mandate was clearly evident by the amount of the bail bond, $25,000. Certainly the equitable principles called for in the cases cited by Midland might be more arguable if the surety had actively contributed to the ultimate return of Kennedy. The testimony on the surety's efforts to return Kennedy do not indicate any all-out effort to accomplish that purpose. Midland now seeks to escape the liability it undertook by relying on the efforts of the federal system for apprehension of fugitives. This is not a case where the ends of justice have been slightly delayed; rather, they have been frustrated and the orderly purposes of the court have been purposely abused. An habitual criminal already convicted and sentenced was at large for more than 15 months, requiring law enforcement agencies to spend time and money in his apprehension. The defendant was not apprehended until after default judgment

was rendered, and then only a very short time before hearing on Midland's motion for new trial or to vacate judgment. If Midland were to prevail in this case, we would be condoning haphazard bonding procedures and eroding the obligation Midland assumed herein.

The trial court granted remission of the only expense actually supportable on the record. We find the trial judge did not abuse his discretion. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN G. BAUTISTA, APPELLANT.

227 N. W. 2d 835

Filed April 10, 1975. No. 39701.

1. **Trial: Juries: Criminal Law.** Whether or not a jury should be sequestered during the trial of a criminal case is left to the sound discretion of the court.
2. **Trial: Verdicts: Evidence.** In order for a verdict to be set aside because of prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant.
3. **Trial: Witnesses.** Exclusion and sequestration of witnesses is within the discretion of the trial court, and the denial of a motion to sequester will not be disturbed in absence of prejudice to the accused.
4. **Homicide: Words and Phrases: Criminal Law: Time.** The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.

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

James T. Hansen, for appellant.

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

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

WHITE, C. J.

This is an appeal from a murder conviction. The defendant was charged with first-degree murder. After trial by a jury, a verdict of guilty of second-degree murder was entered, and the defendant was sentenced to 20 years hard labor at the Nebraska Penal and Correctional Complex. We affirm the judgment and sentence of the District Court.

The facts are as follows: On the evening of March 3, 1974, the defendant, John G. Bautista, and Phillip Esparza became involved in a fight outside Paul's Club in Scottsbluff, Nebraska. The evidence is disputed as to whether only these two men were fighting or whether others were also hitting the defendant. The defendant then left the club to take his nephew home, and later Phillip Esparza departed. Ten to 25 minutes after the defendant's departure from the club, he reappeared at the club carrying a rifle. He went over to the table where Paul Esparza, Phillip's father, was sitting and asked where his son was. Witnesses testified that the defendant said: "Look what he did to me" referring to his face and "how would you like it if I got you here and now?", or words to that effect, e.g., "if you don't tell me where he (Phillip) is I will shoot you." Paul Esparza turned away, then back toward the defendant, and began to get up from his chair. Then the defendant shot Paul Esparza with the rifle and the victim died from a hemorrhage resulting from a bullet wound in the heart. The evidence further indicated that the defendant's blood contained .13 by weight alcohol.

For his first error the defendant assigns the failure of the trial court to order that the jury be kept together (or sequestered) during the trial. The defendant finally moved the court to require the jury to be sequestered, or alternatively to be admonished not to read

newspapers or listen to television or radio accounts. This motion was denied. The applicable rule of law is that whether or not a jury is kept together during a criminal trial is left to the discretion of the court. St. Louis v. State, 8 Neb. 405, 1 N. W. 371 (1879). See, also, Wesley v. State, 112 Neb. 360, 199 N. W. 719 (1924); Smith v. State, 111 Neb. 432, 196 N. W. 633 (1923). Section 29-2022, R. R. S. 1943, provides that the jury is required to be kept together only after the case is submitted to it for a verdict. The statute does not require an additional affirmative showing of good reason on the record before the trial court allows jury members to disperse during trial. Also, the defendant makes no showing of prejudice because the trial court allowed the jury to separate, as required by State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87 (1970).

For his second error, the defendant claims that the trial judge erred in overruling his motion to order the jurors not to read newspaper accounts or to listen to radio or television reports concerning the progress of the trial. The defendant also moved for a mistrial because of the alleged prejudicial effect of published newspaper accounts. He also offered to poll the jury to establish whether the jurors had in fact read the newspaper accounts, but the trial court refused permission. The trial court did give the admonition mandated by section 29-2022, R. R. S. 1943; implicit in it is the admonition not to get information regarding the trial from sources other than the evidence presented at trial. No additional admonition is required by statute and the trial judge's discretion governs in absence of abuse. According to the general rule, in order for a verdict to be set aside because of prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant. Annotation, Juror Reading Newspaper, 31 A. L. R. 2d 417 (1953). The newspaper accounts in question here can-

not be considered prejudicial to the defendant. We have examined the defendant's exhibits 38 and 41, Scottsbluff Star-Herald, Wednesday, June 19, 1974, and Thursday, June 20, 1974, and have found that although they were not verbatim transcriptions of the courtroom proceedings, they were fair and accurate accounts. The news report included information which reflected well on the defendant's character, and any mistakes in reporting were of no prejudice on the issue of guilt. The contention is without merit.

For his third error, the defendant claims that the trial court abused its discretion in refusing to order an effective sequestration of witnesses. At the trial the defendant moved that all witnesses subpoenaed by the State be excluded from the courtroom until called as witnesses, and that they be ordered not to converse with one another. The trial court ordered the witnesses excluded from the courtroom, but refused to caution them against conversing about the case with each other. Exclusion and sequestration of witnesses is within the discretion of the trial court, and the denial of a motion to sequester will not be disturbed in absence of prejudice to the accused. Swartz v. State, 121 Neb. 696, 238 N. W. 312 (1931); Maynard v. State, 81 Neb. 301, 116 N. W. 53 (1908). The defendant claims prejudice in that a witness, Genovevo Saucedo, claimed that he was threatened by another witness, although the record indicates that what actually transpired was a slight quarrel unrelated to the trial. Further, there is no evidence that Saucedo's testimony was affected. On the contrary, Saucedo testified affirmatively that he had not been frightened by the supposed "threat" and had no intention of changing his testimony. The contention is meritless.

Fourth, even though not found guilty of the charge, the defendant assigns as prejudicial error the submission of the case to the jury on first-degree murder, because there was no evidence to sustain a finding of a pre-

meditated plan or of malice in the killing of Paul Esparza. We disagree and hold that on the record it was indeed a jury question as to whether the elements of first-degree murder existed. Malice is indicated by the above-quoted testimony regarding the words which passed between the defendant and the victim immediately before the shooting occurred. Further, the jury may well have found premeditation in the defendant's act of killing Paul Esparza, even though their preceding altercation was brief. As we recently stated in State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776 (1975): "* * * time is not the crucial element in establishing premeditation. * * * 'the time required may be of the shortest possible duration. The time may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.' " (Citing Savary v. State, 62 Neb. 166, 87 N. W. 34 (1901)). Accordingly, the defendant's fourth contention has no merit.

Fifth, the defendant assigns as error the failure of the trial judge to give instructions requested by him dealing with manslaughter and provocation. The transcript shows the trial court did instruct the jury as to the essential elements of manslaughter, and that the instruction tracked the words of the statute defining manslaughter, section 28-403, R. R. S. 1943. There was no error in refusing to instruct the jury further regarding reasonable provocation because there is no evidence in the record that the defendant was reasonably provoked by the victim. On the contrary, what provocation existed resulted from the acts of the victim's son, not the victim himself. There was no error on the part of the trial court for failure to instruct regarding provocation.

Lastly, the defendant claims that his 20-year sentence is excessive in light of his good character and absence of prior convictions. This court has repeatedly held

that where the punishment of an offense created by statute is left to the discretion of the trial court, and the sentence imposed is within those limits, such sentence will not be disturbed unless there is an abuse of discretion. Given the violent circumstances of the crime and the fact that the sentence imposed was below the statutory maximum, we cannot say that the trial judge abused his discretion.

We affirm the judgment and sentence of the District Court.

AFFIRMED.

DOROTHY JENSEN, APPELLANT, V. WESTERN PRINTING COMPANY, APPELLEE.

227 N. W. 2d 839

Filed April 10, 1975. No. 39711.

Workmen's Compensation: Evidence. When the findings of fact by the trial court in a workmen's compensation case are supported by reasonable, competent testimony, the cause will be not considered de novo on appeal.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

S. Caporale of Shrout, Caporale, Krieger, Christian & Nestle, for appellant.

Pilcher, Howard & Dustin, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., HAMILTON, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is a workmen's compensation case. An award by a single judge was appealed to the District Court for Douglas County, Nebraska, rehearing being waived. The District Court, after hearing and considering evidence, found that the plaintiff should be awarded com-

pensation for temporary total disability from April 28, 1970, to May 6, 1971, and for 25 percent permanent partial disability thereafter, affirming the previous award. The plaintiff appeals to this court. We affirm the judgment of the District Court.

The record shows that the appellant had been employed by the appellee since September 1969, performing unskilled work; she operated various types of machines incidental to the printing business and performed other tasks involving stooping, bending, and the lifting and carrying of heavy objects. On April 27, 1970, while moving a box from a "heat seal" table to a stack of boxes on a skid, the appellant felt something snap in her back and fell to one knee. The appellant was hospitalized immediately and given medical treatment for a lumbar condition. After a period of conservative treatment, exploratory surgery was performed on November 5, 1970; although no extruded disk material was revealed, the disk was opened and degenerative material removed. The appellant then received physical therapy out-patient treatment until May 6, 1971. Dr. Klein then released the appellant to return to work, with the recommendation that she avoid prolonged bending or heavy lifting. The appellant applied for work to the appellee and to several others but did not secure further employment. Her complaints of pain continued and further medical examinations of her were made at intervals up until the time of trial. Some testimony indicates that the appellant was suffering psychologically. Each of the medical experts was questioned about this and each stated that he considered both her psychological condition as well as her physical condition in forming an opinion as to the extent of her disability. The maximum disability stated was 25 percent; the trial court found this amount of permanent partial disability.

Both sides argue the facts and the law relating to a determination of the existence of total or partial disability. The record, however, contains reasonable com-

petent testimony to support the findings and judgment of the trial court. A trial de novo in this court, therefore, is not justified. Quincy v. J & S of Nebraska, Inc., 191 Neb. 208, 214 N. W. 2d 498; Chester v. Douglas County, 192 Neb. 666, 223 N. W. 2d 491.

The judgment of the trial court is affirmed.

AFFIRMED.

DOWD GRAIN COMPANY, INC., APPELLEE, V. FRANK A. PFLUG ET AL., APPELLANTS.
227 N. W. 2d 610

Filed April 10, 1975. No. 39718.

1. **Specific Performance: Trial: Appeal and Error.** An action for specific performance is triable de novo on appeal to this court.
2. **Specific Performance: Contracts: Time.** In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time.
3. **Specific Performance: Contracts.** Specific performance should, in general be granted as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship and when the ends of justice will be served thereby.
4. ———: ———. In a contract for the sale of land, specific performance may properly be decreed in spite of a minor breach by the plaintiff involving no substantial failure of the exchange for the performance to be compelled.

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

David S. Lathrop of Lathrop, Albracht & Dolan and Atkinson & Kelley, for appellants.

Francis M. Casey, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and LYNCH and BURKE, District Judges.

BURKE, District Judge.

This is a suit for specific performance of a contract for a sale of real estate.

After a bench trial the court found that the purchaser was entitled to a decree of specific performance and the defendants have appealed.

An action for specific performance is triable de novo on appeal to this court. § 25-1925, R. R. S. 1943; Friehe Farms, Inc. v. Haberman, 191 Neb. 292, 214 N. W. 2d 916.

We affirm.

The defendants contend that time was of the essence of the contract and that the purchaser was guilty of a material breach of contract justifying rescission by failing to make payment of the first installment on the date specified in the contract.

The defendants were the owners of approximately 91 acres of farm land in Sarpy County, Nebraska. The defendants listed their land for sale with their real estate agent for $320,000 sometime prior to January 1970. In his negotiations for the purchase of the land the purchaser met exclusively with the real estate agent and the legal counsel for the defendants and it was not until several months after the contract was signed that the purchaser met the defendants.

In June 1970, the parties executed a written agreement providing for the sale of the land to the plaintiff for the sum of $300,000. The agreement provided for a payment of $2,000 upon execution of the agreement with the balance of $298,000 to be paid in four annual installments. The first installment of $73,000 was due on June 15, 1971, with the three remaining installments of $75,000 coming due on the anniversary dates of the first installment.

The agreement was entered into with the understanding that the purchaser would be able to obtain certain commercial zoning and necessary access. The purchaser, with the cooperation of the defendants, was to

proceed without unnecessary delay to obtain the necessary changes. If the zoning and access had not been obtained by June 15, 1971, the purchaser had the right upon payment of $10,000 to be applied to the first installment payment to extend the due date on the remaining balance on said installment to the date access was obtained or June 15, 1972, whichever was earlier. The contract did not provide that time was of the essence.

The defendants under the terms of the contract were to execute warranty deeds to the property and deliver the deeds to the Bank of Papillion, as escrow agent, to be held until such time as delivery was authorized by the contract. In addition, the defendants were to provide an accurate description of a 2-acre tract surrounding the farmstead which, under the contract, was to be conveyed separately and which the defendants were permitted to occupy until final payment. Finally, the contract provided that should default be made in payment of the contract when due, the entire balance could be declared due and payable at the option of the defendants.

We have sketched the material portions of the contract and we now look into the acts and conduct of the parties in carrying out the contract in order to determine their true intent.

The purchaser paid $2,000 upon execution of the agreement and its counsel met with officials of the Department of Roads in November 1970 concerning the procedure for obtaining necessary access. In December 1970 purchaser's counsel met with a consulting engineer to determine the cost of obtaining sufficient engineering information to satisfy the requirements of the Department of Roads to permit access. The zoning change was approved by the board of county commissioners in January 1971. In February the engineers met with an official of the Department of Roads. A survey of the property was commenced in May 1971.

On May 25, 1971, the defendants forwarded a letter to the purchaser calling its attention to the fact that the first payment date of June 15, 1971, was rapidly approaching and inquiring as to the progress made in obtaining access. The purchaser had not obtained the necessary access as of June 15th.

On June 22nd, counsel for the plaintiff delivered a certified check in the amount of $10,000 to Mrs. Pflug. When asked by trial counsel for the purchaser at the trial why he had not made the payment on June 15th, counsel for the purchaser replied, "I hadn't calendared the date and I just missed it." On July 1st the defendants by letter returned the check to the purchaser and stated that the contract was void because of the purchaser's failure to make the payment on or prior to June 15th. At a meeting among the parties on June 28th, the defendant, Frank Pflug, stated that if the check had been 2 or 3 days late he would not have objected, but being a week late he did object.

As of June 15th, the defendants had not obtained an accurate legal description of the farmstead, had not placed the warranty deeds in escrow, and had not taken steps to remove a lien against the land.

The suit was filed in February 1972, and, within the time limits provided by the contract, the purchaser has tendered the remaining payments to the clerk of the District Court.

In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time. Langan v. Thummel, 24 Neb. 265, 38 N. W. 782; Klapka v. Shrauger, 135 Neb. 354, 281 N. W. 612; Schommer v. Bergfield, 178 Neb. 140, 132 N. W. 2d 345.

Specific performance should, in general, be granted, as a matter of course, of a written contract cognizable

in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship and when the ends of justice will be served thereby. Garsick v. Dehner, 145 Neb. 73, 15 N. W. 2d 235.

In a contract for the sale of land specific performance may properly be decreed in spite of a minor breach by the plaintiff involving no substantial failure of the exchange for the performance to be compelled. Restatement, Contracts, § 375 (2), p. 691; Albers v. Koch, 185 Neb. 25, 173 N. W. 2d 293.

Neither was there an express provision in the contract that time was of the essence nor does an examination of the contract as a whole clearly manifest such an intent. The relaxed manner in which the parties conducted themselves in carrying out the provisions of the contract clearly negatives any such intent.

Although a specific period of time was provided in the contract for the payment of the first installment, the breach was minor and, under the circumstances, equity treats such a provision as formal rather than essential.

AFFIRMED.

CAROLYN COLEMAN, APPELLEE, V. THE DIAMOND ENGINEERING COMPANY, APPELLANT.
227 N. W. 2d 841

Filed April 10, 1975. No. 39721.

1. **Negligence: Trial.** In an action where the comparative negligence doctrine has application a verdict should not be directed against the plaintiff on the ground of contributory negligence unless it can be said as a matter of law that the plaintiff's negligence was more than slight in comparison with that of the defendant.
2. ———: ———. The measuring of the comparison of negligence of the defendant and the contributory negligence of the plaintiff is ordinarily a factual question for the jury.
3. **Instructions.** NJI No. 4.02 does not overlap NJI No. 4.03.

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

Kenneth H. Elson, for appellant.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellee.

Heard before WHITE, C. J., NEWTON, MCCOWN, and CLINTON, JJ., and KELLY, District Judge.

CLINTON, J.

This is an action for personal injuries sustained by the plaintiff, Carolyn Coleman, when she drove her Volkswagen automobile into a cut or excavation made by the defendant contractor, The Diamond Engineering Company, in a public street. The plaintiff claimed the defendant was negligent in failing to give adequate warning by means of barricades and other means. The defendant denied negligence and claimed the plaintiff was contributorily negligent so as to bar recovery. The jury rendered a substantial verdict for the plaintiff and the defendant appealed.

The errors claimed on appeal are: (1) The trial court should have granted the defendant's motion for a directed verdict because the undisputed evidence shows, as a matter of law, that the plaintiff was guilty of contributory negligence more than slight when compared to the negligence, if any, of the defendant; and (2) the trial court gave an erroneous instruction which permitted the jury to duplicate elements of injury in determining the amount of damages. We affirm.

There is not much conflict in the evidence. Diamond Engineering was in the process of completing pavement repairs after having some months earlier laid a water main across Webb Road along the north side of Capital Avenue in the northwest part of the city of Grand Island, Nebraska. Webb Road runs north and south and the paved portion thereof is 24 feet wide. Capital Avenue runs east and west and intersects Webb Road.

The excavation in question extended from just west of the centerline of Webb Road to the east edge of the paved portion of Webb Road and a little beyond because the repair extended into the radius of the northeast corner of the intersection where the paved portion of the two streets join. Neither street has any curb or gutter at this point.

The excavation, which was 7 feet in width, had some time before the accident, been emptied of its temporary fill and the cut had, within a very brief time before the accident, been filled with fresh concrete to within an inch or so of the level of the pavement. At the time the accident occurred the concrete had been spread, leveled, and was about to be or was in the process of being trowelled. The fresh cement was about the same color as the paved street surface. On the morning of the accident before the concrete had been poured, there had been a barricade along the south edge of the excavation blocking the northbound lane of traffic. This barricade, however, had been moved to the east to permit defendant-contractor's two workmen more freedom in the use of the long-handled float which was used in the leveling process. It had not thereafter, before the accident, been returned to its original position in front of the cut. The evidence is in conflict as to whether or not this barricade was entirely off Webb Road at the time of the accident or whether it might have somewhat extended for a few feet in front of the east end of the cut. In any event it is clear that it did not block the center of the northbound lane on which the plaintiff was traveling. The plaintiff and certain disinterested witnesses testified it blocked no portion of the cut. It is undisputed that at the west end of the cut, entirely in the southbound lane of traffic and just west of and adjacent to the centerline, was a smaller barricade. However, this barricade was parallel to the centerline of Webb Road, and marked and guarded only the west edge of the cut.

At the time of the accident the plaintiff was traveling north on Webb Road toward the intersection of it with Capital Avenue. The speed limit on Webb Road at that time was 55 miles per hour. On the east side of Webb Road and south of Capital Avenue, at a location not precisely measured by the evidence but probably a block or more from the south edge of Capital Avenue, was a plainly visible warning sign. This consisted of two of the usual diamond-shaped signs, one above the other. On one were the words "one lane traffic"; on the other was the word "slow." On the top was a yellow light. As the plaintiff proceeded north she noted the one way traffic sign and slowed her car. When she came nearer to the intersection a car on Capital Avenue crossed in front of her. She at that time slowed further to 20 to 30 miles per hour and proceeded north.

She testified that there was no barricade across the northbound lane of traffic. She noted the barricade previously described which was just west of the centerline. It can be gathered from her testimony that it reasonably appeared to her that the southbound lane was the closed lane and that the northbound lane was open. She testified that when she got closer she saw the concrete, but that it was then too late to stop before hitting the excavation. The car hit the soft concrete and the north edge of the cut. Plaintiff was thrown against the windshield and the steering wheel and suffered the injuries about which she complains. Her car stopped with the rear wheels in the concrete and the front wheels north of the cut on the pavement.

One of the workmen testified that at the time the accident occurred he was on his hands and knees facing north trowelling the concrete and that the car passed 2 or 3 feet to his left. At the time he was wearing a white hard-top hat and yellow and white safety jacket. The plaintiff testified that she did not notice the workmen. The whereabouts of the second workman is not shown in the evidence.

In an action where the comparative negligence doctrine has application a verdict should not be directed against the plaintiff on the ground of contributory negligence unless it can be said as a matter of law, i.e., that reasonable minds could not differ in deciding that the plaintiff's negligence was more than slight in comparison with that of the defendant. Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65. We have many times said that the measuring of the comparison of negligence of the defendant and the contributory negligence of the plaintiff is ordinarily a factual question for the jury. Niemeyer v. Tichota, 190 Neb. 775, 212 N. W. 2d 557. The evidence in this case is similar in some respects to that in Huber v. Cornhusker Paving Co., 191 Neb. 108, 214 N. W. 2d 269, where the duty of a contractor with reference to the placement of the barriers and other warning signs is discussed. The general law of this state and the ordinances of the city of Grand Island which were in effect at the time the accident occurred required guarding of such excavation by barriers. In Huber v. Cornhusker Paving Co., *supra,* we said: "It is the duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel." In Tutsch v. Omaha Structural Steel Works, 110 Neb. 585, 194 N. W. 731, which involved a nighttime accident, it was held that a red warning light at the edge of the road could not be said as a matter of law to give warning of a ditch and obstruction in the road.

The jury was properly instructed on the doctrine of contributory and comparative negligence. From the foregoing recital the jury could reasonably have concluded, because of the improper placement of barricades, it appeared to the plaintiff that the northbound lane of traffic was the open lane and that the southbound lane was the closed lane; that the cut was difficult to see until one was close upon it; and that the

plaintiff's speed was not unreasonable under the circumstances. It could further have found that the presence of the workman doing the trowelling gave no real warning because even under his testimony he may have been working on that portion of the concrete which extended into the radius beyond the apparent east edge of the paving of Webb Road. Thus the workman himself could have been off the traveled portion of Webb Road. The jury could, therefore, properly conclude that the negligence, if any, of the plaintiff was slight in comparison with that of the defendant whose negligence it could have found to be gross in comparison. The trial court did not err in submitting the question of contributory negligence to the jury.

We now turn to the question of the claimed error in the damage instruction. The principal injuries suffered by the plaintiff in the accident were to the teeth and inside the mouth. An upper dental plate which she was wearing broke into three parts. Three natural lower front teeth were so badly loosened they had to be extracted and replaced with a bridge.

Instruction No. 12, given by the court, listed five elements of damage and, insofar as pertinent, was as follows: "If you find for plaintiff on the issue of liability, you must then fix the amount of money which will fairly and reasonably compensate plaintiff for any of the following elements of damage proved by a preponderance of the evidence to have proximately resulted from the negligence of the defendant:

"1. Nature and extent of the injury; . . .

"3. Functional loss of ability to bite:

(a) To date; and

(b) Reasonably certain to be experienced in the future. . . ."

Items 2, 4, and 5 pertained respectively to pain and suffering, medical expense, and motor vehicle repairs.

The defendant's argument is that the general language in item 1 is inclusive of the specific disability

described in item 3 and therefore duplicates or overlaps item 1 in part and thus permitted the jury to consider the same elements twice in arriving at the amount of damages. Stated more specifically, the argument is that the nature and extent of the injury includes the loss of the lower teeth and this inherently includes the loss of ability to bite. Defendant acknowledges that instruction No. 12 conforms to NJI Nos. 4.01, 4.02, and 4.03 approved by rule of this court. The pattern jury instructions were adopted after long and diligent work by members of the bench and bar of this state. They were fully and well considered. Nonetheless the defendant urges that the instruction is erroneous and we should at this time correct it by adopting an instruction approved by the Missouri court which states in part: "First, the nature and extent of the bodily injuries; in this regard you may consider:

(a) the duration of the injuries (whether temporary or permanent);
(b) the physical pain and mental anguish suffered by plaintiff (in the past and which plaintiff is reasonably certain to suffer in the future);
(c) plaintiff's disability;
(d) plaintiff's disfigurement;
(e) the aggravation of any pre-existing ailment or condition; . . . ."

The defendant concedes that if item 3 had simply been included as a subelement under item 1 it would have no quarrel with the instruction. It may be noted that the argument which the defendant makes can also be applied to the pain and suffering element which is covered by NJI No. 4.04. It can even be argued that item (e) of the Missouri instruction duplicates in part items (a), (b), and (c) of that instruction or all of them. The language of almost any instruction can be improved and it is at least arguable that the Missouri statement of the elements of damage would be an improvement over our instructions on the same subject. It seems to

us, however, that there is a difference between the nature and extent of the injury, which includes the loss of the teeth and the associated cuts and bruises, and the disability which followed as a consequence, one element of which was a decrease in the ability to bite. We believe the average jury can recognize this difference as well as we can. We do not see how the jury could have used these instructions to arrive at a monetary duplication of damage and, of course, that is where the prejudice would lie.

We note in passing that item 3 of instruction No. 12 varies from NJI No. 4.03 in that the approved pattern instruction refers to disability in general terms while the instruction given describes a specific disability. It was not necessary, and probably inadvisable, to be specific. This specificity is in fact a limitation, and would in some cases be undesirable or even perhaps erroneous because specificity could exclude consideration of some element of disability. Of course, only the plaintiff could complain about it and she does not. There was no error in the instruction given.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH KELLY, APPELLANT.

227 N. W. 2d 848

Filed April 10, 1975. No. 39732.

1. **Trial: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence.
2. **Trial: Verdicts: Evidence.** When there is substantial evidence sustaining the jury's finding, it will not be set aside.

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

Frank B. Morrison, Sr., and Stanley A. Kreiger, for appellant.

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

Heard before WHITE, C. J., McCOWN, and NEWTON, JJ., COLWELL, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

A jury found the defendant, Kenneth Kelly, guilty of rape. He appeals from the conviction and sentence thereon. His sole assignment of error relates to the overruling of motions for a directed verdict of "not guilty," made both at the end of the State's case-in-chief and at the conclusion of all the evidence.

The record shows that the defendant met the prosecutrix as she was passing behind a Safeway supermarket, on her way to another grocery store; that she entered his automobile; and that he drove on public streets with other traffic, stopping for at least one stop sign and observing other traffic signals, to a secluded area. The prosecutrix testified that the defendant drove up in his Volkswagen, drew a gun, ordered her into the car, and threatened to kill her if she screamed; that he indicated he was going to rape her and that she should not try anything or he would kill her; that she did not scream or yell while in the car or attempt to jump out or escape; that when he stopped the car, he ordered her to get out, disrobe, and get into the back seat; that defendant undressed and had sexual intercourse with her; that later she got out of the car and dressed; that defendant took some money from her purse and drove away; and that she ran down the street for help. The defendant testified that he offered the prosecutrix a ride; that she accepted, got into the car, and offered to perform an act of prostitution; that he drove to the location described by the prosecutrix where they both undressed and she voluntarily had intercourse with him; that when he then gave her $15, she demanded $25, which he did not have and refused to give her; and

that he then ordered her from the car and left for work. He admitted denying having anything to do with the prosecutrix when the police first questioned him, because he was scared and had a previous record.

The defendant's motions for directed verdict were overruled and the case was submitted to the jury.

Instructions Nos. 9 and 9A given by the trial court fully and correctly stated the rules relating to the necessity and extent of resistance by the prosecutrix on a charge of forcible rape, in accordance with State v. Campbell, 190 Neb. 22, 206 N. W. 2d 53; and State v. Smith, 192 Neb. 794, 224 N. W. 2d 537.

The defendant makes no direct attack on the credibility of the prosecutrix, but argues that it would not have been obviously useless, futile, or foolhardy for her to have jumped from the vehicle and to have escaped into the other traffic. In view of the testimony of the prosecutrix that defendant had threatened her with a gun, that she remained in fear, and that, since he had the gun, she was not going to open the door and get out of the car, the issue was not a question of law for the court, but a question of fact for the jury.

It is not the province of either the trial court or this court to resolve conflicts in the evidence, to determine the plausibility or reasonableness of explanations, or to weigh the evidence. Where there is substantial evidence sustaining the jury's verdict, it will not be set aside. Clark v. State, 151 Neb. 348, 37 N. W. 2d 601; Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761; State v. Marion, 174 Neb. 698, 119 N. W. 2d 164. The trial court properly submitted the issues to the jury; the verdict is supported by substantial evidence and the conviction of the defendant is sustained.

AFFIRMED.

FREDERICK L. CROUTER, APPELLEE, V. WILLIAM ROGERS, APPELLANT.

227 N. W. 2d 845

Filed April 10, 1975. No. 39739.

Trial: Damages. Where recovery is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, and emotional distress, it will not be interfered with unless it is so excessive as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury.

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

H. E. Hurt, Jr., and James A. Gallant, for appellant.

Wilbur C. Smith and Eileen A. Hansen, for appellee.

Heard before SPENCER, BOSLAUGH, CLINTON, and BRODKEY, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action brought by Frederick L. Crouter, plaintiff, to recover damages in a civil action for an assault upon his person by William Rogers, defendant. An answer and cross-petition was filed by the defendant, William Rogers, alleging that the plaintiff, Frederick L. Crouter, had committed an assault and battery against the defendant. The case was tried to a jury which returned a verdict for the plaintiff in the sum of $1,000 against the defendant on plaintiff's petition and for the plaintiff on the defendant's cross-petition. Defendant appeals from the judgment entered against him.

The incident which gave rise to this lawsuit took place on March 30, 1973, in front of the Cuming County courthouse in West Point, Nebraska. The plaintiff, his wife, and his mother-in-law had arrived at the courthouse just prior to the time set for a contested conservatorship hearing of the plaintiff's mother in which the defendant, her friend, was nominated to be appointed her conservator.

The facts of the altercation are in dispute. Briefly stated, the evidence in the record of this case is sufficient that the jury could have found by a preponderance of the evidence that the defendant approached the plaintiff in a threatening manner and, after some loud accusatory words, the plaintiff told the defendant that he had a tape recorder in his hand and he was recording the conversation, and that the defendant "would be prosecuted." The defendant thereupon "bumped" plaintiff with his shoulder and proceeded to grab the tape recorder and, after a struggle for possession of it, the defendant succeeded in forcibly taking it from the plaintiff and damaging it by slamming it into the pavement. Thereafter the defendant threw the tape recorder at the plaintiff or in his direction. The tape itself was not destroyed and was received in evidence.

The defendant assigns as error that the court submitted to the jury the issue of plaintiff's damage, alleging there was no evidence of any damage. The testimony of the plaintiff in substance relates his experiencing of mental anguish, humiliation, and emotional distress as a result of the assault, and that he discussed his problem with psychiatrists with whom he was associated, the plaintiff's profession being that of a psychologist. The trial court properly submitted to the jury the issue of damages in this case. Restatement, Torts, § 903, Comment a; 22 Am. Jur. 2d, Damages, §§ 309, 310, pp. 407, 409.

The defendant's second assignment of error is that the jury's verdict is excessive. In the recent case of Anson v. Fletcher, 192 Neb. 317, 220 N. W. 2d 371 (1974), our court held: "Where recovery is to be had for such subjective elements as the mental anguish caused by a humiliating beating, and the pain and suffering resulting therefrom, an appellate court ought to be very reluctant to substitute its judgment for that of a jury whose function it is to fix recovery." Our court then cited with approval Stewart v. Ritz Cab Co., 185 Neb. 692, 178

N. W. 2d 577 (1970), as follows: "It appears from our cases that where the recovery was not a mere matter of computation, and depends upon the intangible and quite subjective elements of pain and suffering and future disability, that it will not be interfered with unless it is so grossly unresponsive to the evidence to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to be based upon some oversight, mistake, misconception, or misinterpretation, or a consideration of elements not within the scope of the accident." We reject the defendant's second assignment of error.

The defendant's third assignment of error is that the record does not support a finding of intent on the part of the defendant to commit an assault on the plaintiff.

The trial court in its instruction No. 4, properly defined assault as a "wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt." NJI No. 14.10. An intent to inflict bodily injury is an essential element of an assault. Such intent may be "inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct." NJI No. 14.11. There is sufficient evidence of the defendant's hostility, his being the aggressor in the altercation, and his violently grabbing the tape recorder from the plaintiff, to warrant submitting this issue to the jury. 6 Am. Jur. 2d, Assault and Battery, § 110, p. 95. We find no merit in this assignment of error.

The last assignment of error raised by the defendant was the admitting into evidence the tape recording taken at the time of the incident by the plaintiff, exhibit 6, and the translation of the recording, exhibit 21, which was read to the jury by the court reporter. Under the circumstances of this case the tape recording of the conversations of the parties immediately prior to and during the altercation is relevant and admissible if a

proper foundation is laid. The rules for proper foundation for the reception of sound recordings into evidence are set forth in State v. Myers, 190 Neb. 146, 206 N. W. 2d 851 (1973), and 58 A. L. R. 2d 1032. The record supports the finding that a sufficient foundation was laid for the admissibility of exhibits 6 and 21, and there was no prejudicial error in this regard.

In reviewing the record in this case, we hold that the trial court properly submitted the issues to the jury, that the jury's verdict was not excessive, and that there was no prejudicial error in the admission of the sound recordings of the altercation into evidence.

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

AFFIRMED.

ROBERT SCOTT CARADORI, APPELLANT, V. STEVEN HAMILTON ET AL., APPELLEES.

227 N. W. 2d 850

Filed April 10, 1975. No. 39752.

1. **Pleadings: Actions.** The filing of an amended petition in a pending action when summonses are issued thereon and served upon the defendants is, for all intents and purposes, the filing of a new action in that case.
2. **Judgments: Res Judicata.** The judgment of the District Court in the former action is final as to every issue there decided and every other issue which could have been decided in the case. This rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause.
3. **Judgments.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.

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

Collins & Collins, for appellant.

John J. Respeliers, for appellees.

Heard before SPENCER, BOSLAUGH, CLINTON, and BRODKEY, JJ., and RONIN, District Judge.

SPENCER, J.

Plaintiff appeals from the dismissal of his amended petition in a personal injury action. We affirm the dismissal, but for reasons other than those stated by the trial court.

Plaintiff, who was a passenger in an automobile owned by Lester and Virginia Hamilton and operated by their son Steven Hamilton, sustained personal injuries when the Hamilton automobile collided with automobiles operated by Judy Monico and Sterling Jackson on or about August 1, 1970. On March 2, 1972, an action was filed by plaintiff, by his father and next friend, against the Hamiltons and other parties. On July 31, 1973, a summary judgment, based upon the automobile guest statute, was rendered in favor of the defendants Hamilton. On February 7, 1974, plaintiff, personally rather than by his father and next friend, filed a second amended petition against the Hamiltons, alleging exactly the same cause of action except that the words "and that the said negligence constituted gross negligence" were omitted from the second amended petition. The only other change was the elimination of a specific amount in the prayer for general damages.

While the petition was designated "Second Amended Petition," and was filed in the original action, summonses were issued thereon and served on the defendants. Defendants Hamilton filed a motion to dismiss, alleging res judicata and estoppel by record. The trial court did not reach the issue of res judicata, but sustained the motion to dismiss on the ground that the plaintiff could not revive the action by filing an amended petition holding a new action was required. In this the trial court was in error. The filing of an amended petition in a pending action when summonses are issued thereon and served upon the defendants is, for all in-

tents and purposes, the filing of a new action in that case.

Plaintiff's second amended petition obviously was premised upon the possible unconstitutionality of the guest statute. While there is no need to reach this issue, Botsch v. Reisdorff, *ante* p. 165, 226 N. W. 2d 121, filed February 18, 1975, reaffirmed the constitutionality of our guest statute.

Plaintiff did not appeal from the previous judgment but permitted it to become final. The present action was filed more than 7 months after the previous judgment was entered. The parties are the same. The allegations of negligence are identical. As heretofore noted, the second amended petition was identical with the first one except for the omission of the words alleging that the specific acts of negligence were gross negligence. When the summary judgment was entered the plaintiff's petition was dismissed as to the defendants Hamilton. No appeal having been taken from that judgment, it became final for all purposes. As we said in Norlanco, Inc. v. County of Madison (1970), 186 Neb. 100, 181 N. W. 2d 119: "The judgment of the district court in the former action is final as to every issue there decided and every other issue which could have been decided in the case. This rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause."

While the trial court assigned the wrong reason for sustaining plaintiff's motion to dismiss, the motion was properly sustained. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Houser v. Houser (1965), 178 Neb. 401, 133 N. W. 2d 618. The judgment is affirmed.

AFFIRMED.