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REPORTS OF CASES

DECIDED BETWEEN

NOVEMBER 10, 1976 and MARCH 15, 1977

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1976 and JANUARY TERM 1977

VOLUME CXCVII

MARVIN L. GREEN

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By Marvin L. Green, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1976

STATE OF NEBRASKA, APPELLEE, V. ERNEST L. SIMS, APPELLANT.

246 N. W. 2d 645

Filed November 10, 1976. No. 40419.

1. **Criminal Law: Homicide: Evidence: Trial.** As a general rule, in a prosecution for homicide where self-defense is an issue, evidence of threats recently made by the deceased against the defendant, which were communicated to the defendant, are admissible.
2. **Criminal Law: Judgments: Evidence: Trial.** A judgment will not be reversed for error in an evidentiary ruling if there was no prejudice to any substantial right of the defendant and the record as a whole shows the error was harmless beyond a reasonable doubt.

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

Frank B. Morrison 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.

The defendant was convicted of first degree murder and sentenced to life imprisonment. He has appealed and contends his conviction should be reversed for error in an evidentiary ruling.

Raymond Martzett was shot to death in Omaha, Nebraska, on May 15, 1975. The defendant admits that he killed Martzett but claims that Martzett was shot in self-defense.

The offense occurred shortly after 8 p.m. Prior to the shooting, Martzett had been driving north on 24th Street. An automobile operated by the defendant passed Martzett on the right and then stopped in front of him forcing Martzett to stop. The defendant then walked back to the Martzett automobile and accused Martzett of nearly causing an accident. After a brief conversation the defendant returned to his automobile and drove north on 24th Street. Martzett then turned into the driveway for a bakery near 24th and Blondo Streets and parked his automobile.

A short time later the defendant returned to the area and parked near the intersection. A passenger in the defendant's automobile stepped out of the car and fired a pistol in the air. The defendant removed a shotgun from the car and walked rapidly in the direction of Martzett who was standing against his car. The defendant stopped when he was about 10 feet away from Martzett and fired one shell which struck Martzett in the abdomen causing his death. The defendant then returned to his automobile and drove away. He was apprehended later that evening.

At the time the defendant had stopped his automobile in front of the Martzett automobile, Martzett had removed a pistol from the console in his automobile and had pointed it at the defendant during their conversation. At the time he was shot, Martzett was carrying the pistol under his belt.

The defendant testified that as he was walking from his automobile over to where Martzett was standing, the defendant said, "Hey, Man you done pulled a gun on me, you done threatened to take my manhood. I don't know what this is about. Let's talk." The defendant further testified that while he was talking, Martzett

went for his gun at which time the defendant fired the shotgun.

There were a number of witnesses who were present at the scene of the crime, five of whom were called by the State. None of these witnesses saw Martzett make any move toward the gun in his belt at the time the defendant fired the shotgun. The defendant also claimed that he was aiming at Martzett's feet, although it is undisputed the shot struck Martzett in the abdomen.

The following occurred during the direct examination of the defendant: "Q Had there been any previous times that you encountered this gentleman? A He had approached me in the streets as I was getting in my car. He told me I am going to get you. Mr. Merwald: I will object to this as being hearsay. The Court: I will sustain it." The defendant contends this ruling constituted prejudicial error.

As a general rule, in a prosecution for homicide where self-defense is an issue, evidence of threats recently made by the deceased against the defendant, which were communicated to the defendant, are admissible. See, Basye v. State, 45 Neb. 261, 63 N. W. 811; 40 Am. Jur. 2d, Homicide, § 322, p. 590. Evidence of threats against the defendant by the deceased together with evidence of an overt act indicating hostility are relevant to the issue of whether the defendant could reasonably believe that killing the deceased was necessary.

The State argues that the error was harmless and points out that the answer was not stricken from the record and the jury was not instructed to disregard it. See Nichols v. State, 109 Neb. 335, 191 N. W. 333. Furthermore, the direct examination of the defendant proceeded as if the objection had not been sustained. The defendant was asked when and where "this" had occurred; was "that" what he had reference to when he said to Martzett he did not know what this is about; and was "this" the reason the defendant had said to Martzett, "let's shake on it."

As we view the record, the ruling of the trial court was not prejudicial to any substantial right of the defendant and the error was harmless beyond a reasonable doubt.

We have also considered the contentions made in the separate brief filed by the defendant pro se and find them to be without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KAYE CHAPPLE, APPELLANT.

246 N. W. 2d 714

Filed November 10, 1976. No. 40476.

1. **Criminal Law: Evidence.** In a criminal action this court will not interfere on appeal with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence: Witnesses.** In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.
3. **Criminal Law: Sentences.** When two or more persons are killed, though it be by a single act, yet, since the consequences affect, separately, each person killed, there is a corresponding number of offenses.
4. **Criminal Law: Sentences: Double Jeopardy.** The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction 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.

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

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

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

WHITE, C. J.

Shortly after midnight on March 8, 1975, the defendant and one Sylvester Criss were in a red and white 1968 Impala, proceeding north on I-480 in Omaha, Nebraska, when their car went out of control, sheared off a road sign, crossed the median, struck a yellow 1972 Cougar in the south-bound lane, then a light pole, went over an embankment, and finally coming to rest. Both the driver, Nathan Becerra, and passenger, Deborah Becerra, in the Cougar were killed in the collision. Thereafter, the defendant was charged with, tried, and found guilty by a jury of two counts of motor vehicle homicide. The District Court sentenced the defendant to a term of 3¼ to 10 years in the Nebraska Center for Women at York, Nebraska, on each count, the sentences to run consecutively. The defendant appeals her conviction and sentence. We affirm the judgment and sentence of the District Court.

The defendant first contends that the District Court committed reversible error when it overruled her motions for a directed verdict. She argues that the evidence was insufficient as a matter of law, specifically that the State failed to prove beyond a reasonable doubt that she was driving the vehicle at the time of the accident, an essential element of the crimes charged.

The evidence adduced at the trial pertaining to the issue of who was driving the 1968 Impala was as follows. Sylvester Criss testified that the defendant had driven his car a few blocks from a restaurant to a bar in South Omaha around 10 p.m. When they left the

bar about an hour to an hour and a half later, the defendant again got into the driver's seat. He testified he let her drive because he thought she was "in better shape." He testified that she drove close to 70 miles per hour on the Interstate, and that at one point he grabbed the steering wheel to avoid hitting a small foreign car which she was overtaking too rapidly. This was shortly before the accident.

Officer Venditte testified that he saw the defendant sitting behind the wheel of a red and white Chevrolet in South Omaha about 11 p.m. on the night of the accident.

Kenneth Beckard, a passenger in a vehicle which was traveling about 60 to 70 yards behind the 1972 Cougar testified that he saw "two shadows" in the Impala as it crossed the median. He did not see anyone get out of the Impala. There was no one in the Impala when he walked down to it after directing traffic around the Cougar until the police arrived. Leland Milne, another passenger in the same vehicle, testified that he observed a man and a woman about two-thirds of the way up the bank northeast of where the car was, about 60 feet, when he went down the embankment to check the Impala. The woman was the defendant. He talked to them but did not determine who was the driver.

Officer Lynch, who arrived on the scene of the accident shortly after it happened, testified that he saw a "beige shoe with approximately a two or two and half inch heel on it" wedged between the gas pedal and the hump when he checked the Impala. He showed the shoe to Officer Piernicky while it was still in place. Officer Lynch then kept the shoe until he arrived at the hospital, where he saw an identical shoe lying with the defendant's personal property in the emergency room beneath a bed. Officer Piernicky testified that there was no one in the red Chevrolet when he arrived at the accident scene, and that the occupants of it were approximately 25 feet up the hill from the car. He re-

called that the shoe wedged in the red and white Chevrolet was a dark shoe, possibly black or navy blue. He testified that it was a right shoe.

The defendant acknowledged that she had been sitting in the driver's seat of Mr. Criss' car in South Omaha that evening and that she drove it a few blocks to a bar, but testified that Mr. Criss drove it when they left the bar and went onto the Interstate. She testified that she had black shoes on the night of the accident. Exhibit 14, the left shoe which she was wearing that evening was introduced into evidence. She testified that she had both shoes on when she left the bar and lost her right shoe sometime between entering the Interstate and going to the hospital. She had no idea where the right shoe was.

In State v. McClanahan, 194 Neb. 261, 231 N. W. 2d 351 (1975), we said: "In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt." The evidence, reviewed above, was sufficient to support a jury finding that the defendant, beyond a reasonable doubt, was the driver of the car at the time of the accident. The defendant argues that, based upon the evidence, it is just as plausible that Mr. Criss was driving at the time of the accident. In State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904 (1975), we said: "In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations or weigh the evidence. Such matters are for the jury." The District Court was correct in denying the defendant's motions for a directed verdict.

The defendant next contends that her sentence was erroneous and excessive. The District Court sentenced the defendant to a term of 3¼ to 10 years in the Ne-

braska Center for Women at York, Nebraska, on each count, and directed that these sentences be served consecutively.

It is settled law in Nebraska that: "When two or more persons are killed, though it be by a single act, yet, since the consequences affect, separately, each person killed, there is a corresponding number of offenses." Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611 (1951). The defendant argues that when a single highly negligent act results in the death of two or more persons, even though it gives rise to multiple offenses for the purposes of prosecution under Jeppesen, *supra,* for the purposes of sentencing, it should be treated as a single offense, and that the defendant, therefore, should not be subject to imprisonment for a period longer than that permitted on a conviction of one count of motor vehicle homicide, or a maximum of 10 years. § 28-403.01, R. R. S. 1943. There is no merit to this contention.

The defendant was properly charged with two counts of motor vehicle homicide. The District Court had the authority to sentence the defendant on each count which she was convicted of, and to direct that the sentences on each count be served consecutively, keeping in mind what was said in State v. Saxon, 193 Neb. 278, 226 N. W. 2d 765 (1975): "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."

For one of the counts the State had to prove the death of Nathan Becerra as a result of the defendant's actions. For the other count, the State had to prove the death of Deborah Becerra as a result of the defendant's actions. This satisfied the Saxon test. There was

nothing erroneous in the District Court sentencing the defendant as it did.

From our review of the record we do not believe that the sentence is excessive. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Howard, 194 Neb. 521, 233 N. W. 2d 573 (1975). The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record reveals an abuse of discretion. State v. Tweedy, 196 Neb. 251, 242 N. W. 2d 629 (1976). The defendant had been drinking heavily prior to the accident. A blood test, given the defendant by a doctor at the hospital after the accident to determine alcoholic content for the purposes of giving an anesthetic, revealed the alcoholic content in the defendant's blood at .29 percent by weight volume. The defendant was driving at high speed and was not even licensed to operate a motor vehicle at the time of the accident. The presentence report shows she has a lengthy record going back to 1954 including many varied offenses, such as obtaining merchandise under false pretenses, petit larceny, shoplifting, drunk driving, and prostitution. She has been known by over a dozen aliases.

As a result of the defendant's actions, two innocent people lost their lives. The sentence, as it was imposed by the District Court, will require the defendant to serve a minimum of 6½ years, a maximum of 20 years. Given the circumstances of this case as revealed in the record, we do not believe that this is an excessive price for society to ask the defendant to pay.

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

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent for the following reasons. The reliance by the court upon Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611, a double jeopardy case, is wholly

misplaced and, in my judgment, has no bearing upon the question of the propriety of consecutive sentences in this case. First: The holding in Jeppesen is probably dictum. Second: If it was not, it was nonetheless wrongly decided. Third: The defendant's culpability in this case lies in a single, unlawful act and ought to be judged in that way, and therefore imposition of a maximum sentence which is twice as long as that provided by law for the crime involved is unjustified.

In Jeppesen v. State, *supra,* the defendant was charged with manslaughter arising out of his alleged unlawful operation of a motor vehicle. In the accident two people in the second car were killed. Defendant was tried for the death of one and acquitted by the jury. He was then charged with the death of the other and convicted. On appeal in the second case this court overturned the conviction and dismissed the cause because the evidence was insufficient to show any unlawful act on the part of the defendant. The court nonetheless went on to hold that the prior acquittal did not bar the second prosecution. The acquittal by the jury in the first case and the dismissal by the Supreme Court in the second case were both on the same ground — no unlawful act shown. The Jeppesen dictum was wrong in failing to apply the principle of collateral estoppel by reason of the acquittal in the first case.

Ashe v. Swenson, 397 U. S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469, is in point. There the defendant had been acquitted of a charge of robbery. The defense was alibi. The robbery in question was of six poker players at a single table and only one transaction was involved. The United States Supreme Court held that the acquittal of the defendant on the charge of robbery of one of the gamblers prohibited, under principles of former jeopardy, subsequent prosecution for robbery of the others. The reason was collateral estoppel. Only a single transaction was involved and only one issue, that is, the identity of the perpetrator. The first acquittal

determined that issue. This is the principle that should have been applied in Jeppesen.

We ought not, in my judgment, give inadvertent approval to an erroneous application of former jeopardy in a case where the question is the propriety of consecutive sentences.

Since here the defendant was convicted in both cases at the same time and did not suffer two trials, jeopardy is not involved. See State v. Huffman, 186 Neb. 809, 186 N. W. 2d 715. In that case the charges were forgery and the uttering of forged instruments. Consecutive sentences had been imposed. We set one of the sentences aside as surplusage.

In the present case I do not believe consecutive sentences are justified because a single culpable act is involved, that is, the driving while intoxicated and in a highly dangerous manner. Such conduct is, of course, highly reprehensible and atrocious, but I cannot believe that if 10 people were killed consecutive sentences aggragating 32½ to 100 years would be justified, yet this is the principle which the court in this case approves. Conduct such as here involved, reprehensible as it is, is not to be viewed in the same light as a case where a person pulls the trigger 10 times and kills or wounds as many persons.

Lastly I believe the sentence is disproportionate to other sentences imposed in similar cases.

McCOWN, J., joins in this dissent.

GEORGE W. ABBOTT, APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, APPELLEE.
246 N. W. 2d 647

Filed November 10, 1976. No. 40498.

1. **Trial: Proximate Cause: Evidence.** Where evidence conflicts on a question of proximate cause of alleged injuries, the ques-

tion is ordinarily for the jury under proper instructions.

2. **Trial: Verdicts: Damages.** A verdict will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury.
3. **Trial: Instructions.** Jury instructions should be considered as a whole and the meaning of the instruction or instructions, when taken as a whole, must be considered and not just the phraseology of a particular part.
4. **Trial: Instructions: Damages.** The jury should be instructed to reduce to present value damages for future pain and suffering.

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

Warren C. Schrempp, Richard E. Shugrue, and Thomas G. McQuade of Schrempp, Dinsmore & McQuade, for appellant.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn & Meusey, for appellee.

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

CLINTON, J.

This is an action for personal injury sustained by plaintiff when, on August 24, 1970, the car which he was driving was struck in the rear by a motor vehicle belonging to the defendant and driven by one of its employees. The plaintiff had been forced to stop his vehicle quickly because a vehicle ahead of him had stopped. Defendant's vehicle was following and was unable to stop in time to avoid striking plaintiff's car. Defendant's speed at impact was estimated to be about 10 miles per hour. The trial court instructed the jury that the defendant was, as a matter of law, guilty of negligence which was the proximate cause of the collision, and submitted to the jury the issues of whether the injuries claimed by the plaintiff were proximately caused by the collision and the amount of damages.

The jury returned a verdict for the plaintiff in the

amount of $200 for which judgment was entered.

The plaintiff on this appeal assigns as error the following: (1) The verdict is inadequate; (2) instruction No. 5 was erroneous because it was inconsistent with the instruction directing the issue of negligence and permitted the jury to find for the defendant on the issue which the court had directed; and (3) the court erred in giving instruction No. 11 which directed the jury to reduce to present worth any award for future pain and suffering. We affirm.

At trial the extent of injuries sustained by the plaintiff in the accident was controverted. We summarize as follows. At the scene plaintiff complained of only an abrasion on a finger which was bandaged at the scene. He further testified that the evening of the accident he noticed pain in his neck. He saw Dr. Smith the next day, and again a week later. Plaintiff stated the pain in his neck was intermittent. In the winter of 1970-71 he remodeled his basement. While putting some ceiling tile in place and looking up he noted the severity of the pain. He then saw a neurologist apparently on referral from his regular doctor. He saw the specialist six times at intervals of about a month in 1971 and two times at longer intervals in 1972. To this specialist he related the history of the auto accident, made complaints of intermittent neck pain, aggravated pain at the time of the ceiling tile incident, and headaches that began in March, about 6 months after the collision. The specialist indicated that the headaches were of undetermined origin. The plaintiff also complained of forgetfulness which the doctor could not causally relate to the accident. His diagnosis was neck strain and was based solely upon the complaints of plaintiff from time of accident to time of trial. The doctor described the injuries as permanent. Medical expense for the doctor's services was $56.

In August 1975 the specialist hospitalized the plaintiff for diagnosis because of the continuing complaint of

forgetfulness. The examination disclosed nothing. The doctor would not attribute the symptom to injuries at the time of the collision. The bill for this hospitalization was $519.75 which was included in the plaintiff's claim for damages.

In 1971 through 1975 the plaintiff received regular annual physicals prescribed by the company by which he was employed. During each of these physical examinations he answered in the negative questions of his medical history which should have elicited complaints of neck pain, headaches, and the taking of medication.

An examination of the plaintiff on behalf of the defendant shortly before trial by an orthopedic surgeon disclosed no objective signs such as muscle spasm. This specialist rendered a diagnosis of no permanent disability. Based on the plaintiff's complaints, he rendered the opinion that plaintiff incurred a neck strain in the collision. The plaintiff testified that he had been regularly taking eight pain-killing pills daily and that his sleep was disturbed by the pain. He attributed the headaches and forgetfulness to injuries suffered in the accident.

The foregoing summary indicates that there was a conflict as to the extent to which the plaintiff's complaints were caused by injuries suffered at the time of the collision. The jury was not required to accept the plaintiff's testimony. Where evidence conflicts on a question of proximate cause of alleged injuries, the question is ordinarily for the jury under proper instructions. Brewer v. Case, 192 Neb. 538, 222 N. W. 2d 823. A verdict will not be set aside as inadequate unless so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake on the part of the jury. Parkhurst v. Barth, 189 Neb. 154, 201 N. W. 2d 708.

Instruction No. 5, of which the plaintiff complains, was as follows: "Before Plaintiff can recover against defendants on his Petition in this action, the burden is

upon Plaintiff to prove by a preponderance of the evidence:

"1. That as a direct and proximate result of the negligence of the Defendant, *as found by the Court,* the Plaintiff sustained damages; and

"2. The nature, extent and amount of the damages thus sustained by the Plaintiff.

"If the Plaintiff has failed to establish any one or more of the foregoing numbered propositions by a preponderance of the evidence, your verdict will be for the Defendant on Plaintiff's Petition.

"On the other hand, if the Plaintiff has established by a preponderance of the evidence all of the above numbered propositions, then your verdict will be for Plaintiff." (Emphasis supplied.)

An earlier instruction stated: "The Court has determined as a matter of law that the defendant was negligent and that said negligence was a proximate cause of the accident."

Plaintiff argues that the court had directed *liability* for the plaintiff and that this instruction permitted the jury independently to reassess the matter which the court had directed. The plaintiff is wrong on two counts. The court did not direct "liability." The instruction did not permit the jury to reassess the matter which the court had directed. It is, of course, elementary that liability depends not only upon proof of negligence, but also on proof of causation of damage. The court directed the verdict only on the issue that the negligence had caused the collision. The extent of injury and damage proximately caused by the collision was, by the instruction, left to the jury. The two instructions must be read together. Jury instructions should be considered as a whole and the meaning of an instruction or instructions, when taken as a whole, must be considered and not just the phraseology of a particular part. Cooper v. Hastert, 175 Neb. 836, 124 N. W. 2d 387. The instruction given was not erroneous.

Instruction No. 11 to the jury was in part as follows: "In computing the damages arising in the future, if any, because of injuries, you must not simply multiply the damages by the length of time you have found they will continue or by the number of years you have found that the plaintiff is likely to live. Instead, you must determine their present cash value." The only evidence of future damages was the claim of pain and suffering related to the claim of permanent injury. The plaintiff asserts that the instruction is erroneous and cites Chicago & N. W. Ry. Co. v. Candler, 283 F. 881 (8th Cir., 1922); Kepler v. Chicago, St. P., M. & O. Ry. Co, 111 Neb. 273, 196 N. W. 161; and Culver v. Union P. R. R. Co., 112 Neb. 441, 199 N. W. 794. It is true that this court over the years has vacillated on the question of whether the jury should be instructed to reduce damages for future pain and suffering to present value. See the commentary to NJI No. 4.13. The utility of the rule is arguable, but it is one that everybody can live with if the rule is certain. The most recent pronouncements of this court have approved the procedure of instructing the jury to reduce damages for future pain and suffering to present value. Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109; Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329; Oberhelman v. Blount, 196 Neb. 42, 241 N. W. 2d 355. We adhere to the rule of those cases.

AFFIRMED.

STANLEY J. HOTOVY, APPELLANT, V. TOWN OF ULYSSES TOWNSHIP, BUTLER COUNTY, NEBRASKA, ET AL., APPELLEES, FRANK P. KARPISEK ET AL., INTERVENERS-APPELLEES.
246 N. W. 2d 652

Filed November 10, 1976. No. 40536.

Highways. It is not essential that a public road be laid out upon the exact line prayed for in the petition, and slight varia-

tions in order to procure a more practicable route are permissible.

Appeal from the District Court for Butler County: HOWARD V. KANOUFF, Judge. Affirmed.

Robert L. Blevens of Blevens, Bartu, Blevens & Jacobs, for appellant.

James N. Norton, for appellees.

James M. Egr and William E. Tomek, for interveners-appellees.

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

BOSLAUGH, J.

The issue on this appeal is the location of a township road constructed in 1872. The trial court found that the centerline of the road as presently constructed is the centerline of the road in question. The plaintiff has appealed.

The plaintiff is the owner of the northeast quarter of Section 30, Township 13 North, Range 2 East of the 6th P.M. in Butler County, Nebraska. The defendants are Ulysses Township and the members of the township board. The interveners are landowners in Sections 20 and 29. The road in question runs north and south between Sections 29 and 30 and along the west line of Section 20.

The action as commenced contained two causes of action. The first cause of action related to drainage as affected by the roads constructed along the north and east lines of the plaintiff's property. The plaintiff sought injunctive relief to compel improvement of the roads to restore natural drainage conditions. The issues involved in the first cause of action were resolved by stipulation between the parties and are not involved in this appeal. The second cause of action sought de-

claratory relief as to the location of the north and south road between Sections 29 and 30.

The facts are not in dispute. The road was established by the commissioners of Butler County pursuant to a petition filed March 28, 1872. The petition and notice described the location of the road as commencing at the southeast corner of Section 31 in Township 13 North "and running thence North on a line parallel with the Line between Range 1 & 2 East, following Section Lines as nearly as practicable" to the northeast corner of Section 31 in Township 16 North, all in Range 2 East of the 6th P.M. The petition was allowed by the commissioners on April 3, 1872. The statute then in effect provided a public road was to be 66 feet wide. Ch. 47, § 3, R. S. 1866.

A plat attached to the decree of the trial court indicates that at the northeast corner of Section 30, the centerline of the road as presently constructed coincides with the line between Sections 29 and 30. At the southeast corner of the northeast quarter of Section 30 the centerline of the road as presently constructed is approximately 56 feet west of the line between Sections 29 and 30. The result is that at the south line of the plaintiff's property the road as presently constructed is located wholly upon the plaintiff's property.

The plaintiff's theory is that the centerline of the road which was established in 1872 was the section line between Sections 29 and 30. However, there is no evidence which shows that the road as constructed in 1872 actually followed the section line.

The petition and notice stated only that the road should follow section lines "as nearly as practicable." The stipulation recites that the road has been located in its existing position for more than 10 years last past. The petition of the interveners, Mary S. Klein and Maurice Klein, alleged that the road and the fence line along the west side of the northwest quarter of Section 29 have been in their present locations since 1927.

There is no evidence that the road was established or ever located in any other place than its present location.

It is not essential that a public road be laid out upon the exact line prayed for in the petition, and slight variations in order to procure a more practicable route are permissible. Richardson v. Frontier County, 94 Neb. 27, 142 N. W. 528. See, also, Brandt v. Olson, 79 Neb. 612, 113 N. W. 151, on rehearing, 79 Neb. 617, 114 N. W. 587; State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556.

The fact that there may be no obstruction on the land, apparent at this time, to explain why the road was established in its present location is not controlling. What is controlling is the fact that so far as the record discloses, the road has always been in this location.

The judgment of the District Court is affirmed.

AFFIRMED.

J. P. THEISEN AND SONS, A COPARTNERSHIP, APPELLEE, V. AKSARBEN CONTRACTING CORPORATION, A CORPORATION, APPELLANT.

246 N. W. 2d 720

Filed November 10, 1976. No. 40537.

1. **Trial: Evidence.** In determining whether the evidence supports the findings of the trial court in an action at law where the jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Trial: Judgments.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong.

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

Hutton & Garden for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

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

BOSLAUGH, J.

This case involves a dispute arising out of a Soil Conservation Service (SCS) contract. The defendant, Aksarben Contracting Corporation entered into a contract on June 28, 1971, to construct two grade stabilization structures for the AOWA Creek Watershed Project in Dixon County, Nebraska. One structure was to be erected at site 12-8. The other structure was to be built at site 31-1. The original contract price was $64,782.

The defendant received a notice to proceed with the work on July 30, 1971. According to the provisions of the contract, work was to be completed by November 18, 1971. On August 30, 1971, SCS notified the defendant its performance was not satisfactory because the work was approximately 35 percent behind schedule. On September 23, 1971, SCS notified the defendant that unless substantial progress was made within the next 10 days its right to proceed with the work would be terminated. At that time 48 percent of the time had expired but only 5 percent of the work had been completed. This letter also notified the defendant it would be held liable for any increase in cost occasioned by the government in completing the work and for liquidated damages as provided in the contract for failure to complete the work on schedule. On October 21, 1971, the defendant's right to proceed with the work was terminated. At that time 70 percent of the time had expired and only 25 percent of the work had been completed.

The default letter was later withdrawn pursuant to an agreement by the defendant to subcontract the bal-

ance of the work to the plaintiff, J. P. Theisen and Sons. This litigation arises out of the contract or subcontract between the plaintiff and the defendant. There was no written memorandum of the contract other than the plaintiff's proposal which consisted of a list of estimated quantities of work to be done at each job site together with the unit price for each type of work.

The plaintiff claims that its agreement with the defendant was to perform all work remaining to be done on the project and to be paid the amounts the defendant would have received if it had performed the work. The defendant claims that the plaintiff agreed to perform all the remaining work in the time specified in the contract and for the amounts listed in the plaintiff's proposal. At the outset the defendant's claim does not appear to be reasonable because the items listed in the proposal were merely estimates of the amount of work remaining to be done, and a very large part of the contract time had expired before the plaintiff took over the work.

The plaintiff completed the work to the satisfaction of SCS but not within the time specified in the contract. The defendant paid $22,896.47 to the plaintiff. The plaintiff claimed it was entitled to an additional amount of $12,150.16. The trial court found generally for the plaintiff and fixed the amount due the plaintiff at $11,955.66. The defendant has appealed.

In determining whether the evidence supports the findings of the trial court the evidence must be considered in the light most favorable to the plaintiff, all conflicts must be resolved in its favor, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

There are five items in dispute. Two of them involve change orders; two involve additional work required to repair water damage that occurred to work which had been completed by the defendant, but not adequately

protected; and the liquidated damages assessed against the defendant by SCS.

The principal item in dispute is the $2,378 assessed against the defendant as liquidated damages for failure to complete the work within the time specified in the contract. The evidence in regard to this item is in dispute and cannot be reconciled. The plaintiff's evidence was to the effect that the plaintiff agreed only to complete the work as quickly as possible. The parties are in agreement that there was never any discussion concerning liquidated damages.

The next largest item concerned $1,500 paid the defendant because of a change in the borrow area at site 31-1. The first borrow area proved to be unsatisfactory so an alternate borrow area was designated and as a result an additional $1,500 was paid to the defendant. The original borrow area was behind a dam that was being constructed. The alternate borrow area was at the top of a hill nearby and, according to the plaintiff's evidence, involved a longer and more difficult haul.

The plaintiff claimed that it was entitled to the $1,500 because it performed the additional work incident to the use of the alternate borrow area. The defendant claimed it was entitled to retain the $1,500 because it negotiated the arrangement with SCS before the plaintiff commenced work on the subcontract and the plaintiff knew about the change. The defendant's position if sustained would be in the nature of a windfall since all the extra work incident to the change in the borrow area was performed by the plaintiff.

The remaining three items involve common excavation work in the amount of $740.44 performed by the plaintiff and $350 for channeling work at site 12-8. The common excavation work was in the nature of repairs to work that had been completed by the defendant but which sustained water damage. Further excavation and back fill was necessary to make the work acceptable.

The channel work was an extra item added by SCS when the work on the project was nearly complete.

The finding by the trial court on each of the disputed items is equivalent to the verdict of a jury and will not be set aside on appeal unless clearly wrong. All the issues involved in this appeal were questions of fact. The evidence was in conflict, but the plaintiff's evidence was clearly sufficient to sustain the finding in its favor on each of the disputed items.

The judgment of the District Court is affirmed.

AFFIRMED.

JOHN GREEN, APPELLANT, V. JAMES HOUSEWORTH, APPELLEE.
246 N. W. 2d 650

Filed November 10, 1976. No. 40564.

1. **Motor Vehicles: Negligence.** Where the vision of a driver is obscured, it is his duty to stop until visibility is restored or to reduce his speed and have his car under such control that he can stop immediately if necessary.
2. ———: ———. Conditions which materially impair or wholly destroy visibility impose upon drivers a duty to exercise a degree of care commensurate with the surrounding circumstances.

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

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

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

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

BOSLAUGH, J.

This is an appeal in an action for damages arising out of an automobile accident. The jury returned a verdict for the defendant and the plaintiff has appealed.

The accident happened on August 25, 1973, at about 5:30 p.m. The weather was clear and the road was dry. The plaintiff was returning to Omaha, Nebraska, after fishing in a backwater along the west bank of the Missouri River in Washington County, Nebraska. He was driving south on the river road which is 24 to 26 feet wide and surfaced with rock or gravel. He was following another automobile operated by his brother, Willie Green, which raised a large amount of dust. The plaintiff testified that he followed the Willie Green car for about a mile or two at a distance of a car length and a half and then at the request of his mother, a passenger in the car, slowed down to approximately 5 miles per hour. The plaintiff claims that he was on the right side of the road at all times.

The defendant was driving north on the river road at about the same time. He met the automobile operated by Willie Green at a point about 1½ miles north of the county line. He estimated its speed at between 50 and 60 miles an hour. The defendant had been traveling about 45 miles per hour and reduced his speed to about 33 miles an hour as he passed the Willie Green automobile. He kept his foot off the accelerator and coasted into the dust. About 4 seconds later he saw the plaintiff's automobile which was then about 5 feet away and "in the middle" to his side of the road and at an angle to his car. The impact occurred immediately with the left front ends of the two cars colliding. After the accident the plaintiff's car was on the west side of the road headed to the southeast. The defendant's car was on the east side of the road headed to the northwest with the back end in the ditch and the rear wheels off the road. The defendant claims that he was on the right side of the road at all times.

At the close of the evidence the plaintiff moved for a directed verdict on the issues of negligence, proximate cause, and contributory negligence which motion was overruled. The plaintiff also submitted instructions,

which were refused, to the effect that the defendant was negligent in failing to keep a proper lookout, maintain reasonable control, and in driving at an excessive rate of speed.

The case was submitted to the jury on the issues of negligence, proximate cause, and contributory negligence as alleged in the petition and answer. The plaintiff contends the trial court should have directed a verdict on the issues of negligence and proximate cause. He relies on evidence that the defendant's vision was obscured by the dust and the defendant was unable to stop in time to avoid a collision after the plaintiff's automobile came into view.

The plaintiff cites Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250, in which it was said that where the vision of a driver is obscured, it is his duty to stop until visibility is restored or to reduce his speed and have his car under such control that he can stop immediately if necessary.

Conditions which materially impair or wholly destroy visibility impose upon drivers a duty to exercise a degree of care commensurate with the surrounding circumstances. Stevens v. Shaw, 179 Neb. 34, 136 N. W. 2d 169. It is usually a jury question whether the conduct of a driver confronted with such conditions was negligent under the circumstances. In Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885, this court noted that there is danger of being struck from the rear when one stops his car because of poor visibility on a highly traveled highway. Where visibility is lacking it is the duty of a driver to exercise the care of a reasonable and prudent person under similar circumstances.

There was some conflict in the evidence as to the extent the vision of each driver was obscured by the dust. The defendant testified that he could not see more than a foot beyond the front of his car after he entered the dust although he could see the weeds and the ditch on the right side of the road. The plaintiff testified

that he first saw the defendant's automobile when it was about 50 feet in front of him.

The defendant did take some precautions when he saw the Willie Green car approaching. He reduced his speed and continued to decelerate as his car entered the dust. The impact occurred about 4 seconds later. Whether this was negligence with respect to an automobile moving in the opposite direction was a jury question. See Bainter v. Appel, 124 Neb. 40, 245 N. W. 16.

It is clear that the accident would not have happened if both cars had been on the right side of the road at the time of the impact. If the defendant's automobile was on the right side of the road at the time of the impact, the specifications of negligence about which the plaintiff complains were not a proximate cause of the collision.

Miller v. Arends, 191 Neb. 494, 215 N. W. 2d 891, involved a head-on collision between automobiles proceeding in opposite directions on a two-lane highway in a snowstorm. In that case we said: "The critical fact in this case is whether Arends was on the east side of the road at the time of the impact. * * * If Arends was on his right side of the road at the time of impact, then the collision occurred because the Harris automobile crossed the centerline. In that event the plaintiff could not recover from Arends because his negligence, if any, was not the proximate cause of the accident."

The critical fact in this case is whether one or both of the parties were on the wrong side of the highway at the time of the collision. The evidence was in conflict and the issues of negligence, proximate cause, and contributory negligence were for the jury.

The judgment of the District Court is affirmed.

AFFIRMED.

MARIANNE W. JACKSON, APPELLEE, V. DAVID R. JACKSON, APPELLANT.
246 N. W. 2d 722

Filed November 10, 1976. No. 40577.

1. **Divorce: Property.** The division of property made by the trial court in a marriage dissolution action will not be disturbed on appeal unless patently unfair on the record.
2. **Divorce: Alimony.** The fixing of alimony rests in the sound discretion of the trial court, and, in the absence of an abuse of discretion, will not be disturbed on appeal.
3. **Divorce: Property: Alimony.** Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion.

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

William G. Line of Kerrigan, Line, Martin & Hanson, for appellant.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellee.

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

CLINTON, J.

This appeal arises in an action for dissolution of marriage. The husband appeals and urges: (1) The award of alimony is excessive; (2) the property division is unfair to him; and (3) the award of child support is excessive. We clarify and modify the award for child support, but otherwise affirm.

The parties were married in 1956 and have two daughters, one born October 29, 1959, and the other August 13, 1965. The husband is a business executive and his annual income from salary and commissions is between $30,000 and $36,000. The husband's salary is payable weekly. More than half of his annual income is in the form of commissions on sales and this is pay-

able annually. In addition, he receives some fringe benefits from his employment such as a noncontributory retirement plan and the use of an automobile. The wife is currently attending college and plans to obtain a degree after one more year of school. She hopes for a career as an accountant and has had some previous business experience.

The net value of the property of the parties to which any value was assigned was about $70,000, consisting principally of equity in a home in Fremont, Nebraska, and equity in the balance of a contract for a sale of an Ohio home, household goods, and some miscellaneous personal property, including an auto, boat, stock, small savings, and other property of uncertain value. The court awarded to the wife personal property, exclusive of household goods, of a value of about $2,800; the household goods which are of considerable value, part of which consists of antiques which were gifts from her family; and the sum of $9,186 to be paid by husband to wife. This latter amount is approximately one-half of the net value of the balance on the Ohio contract. The husband was awarded the balance due on the Ohio contract and valued property of about $8,300. The court directed that the Fremont house be sold and the net proceeds be divided equally, and it further awarded the wife alimony of $2,700, payable at the rate of $150 monthly. Furthermore, the husband was ordered to pay certain obligations which accrued during the divorce proceedings, the balance of a real estate commission on the sale of the Ohio property, and income tax owed for the year 1975.

The decree awarded child support "at the rate of $150 per week continuing during the time of the minority of the dependents herein." In addition, the husband was required to maintain hospital and medical insurance for the children and during their minority to keep in force certain life insurance policies on his own life and the lives of the children.

It is not possible to determine precisely the values of the property awarded to each party, but the divisions are not clearly inequitable. Neither is the periodic alimony excessive. We find the award for child support ambiguous and modify it as follows: $150 per week until the older child reaches her majority and $100 per week thereafter during the minority of the younger child.

It is apparent that the husband cannot make the alimony and child support payments required solely from his salary. This presents some practical problems for him because the commission income is paid once yearly, but does not justify reducing payments which are otherwise reasonable.

The following principles are applicable. The division of property made by the trial court in a marriage dissolution action will not be disturbed on appeal unless patently unfair on the record. Fanning v. Fanning, 194 Neb. 821, 235 N. W. 2d 878. The fixing of alimony rests in the sound discretion of the trial court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Olson v. Olson, *supra*.

The wife is awarded the sum of $300 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

JAMES VANGREEN, APPELLEE, V. INTERSTATE MACHINERY AND SUPPLY CO., A CORPORATION, APPELLANT, IMPLEADED WITH GEORGE L. FRAISSINET ET AL., APPELLEES.
246 N. W. 2d 652

Filed November 10, 1976. No. 40584.

Workmen's Compensation: Contribution: Parties. The Nebraska

Workmen's Compensation Act bars an action by a third party tort-feasor against an employer for contribution or indemnity based on a claim arising from the injury.

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

Haney, Hansen, Katz & Engels, for appellant.

John R. Douglas and Patrick B. Donahue of Cassem, Tierney, Adams & Gotch, for appellee PPG Industries, Inc.

Wall & Wintroub, for appellee Vangreen.

Ernest Wintroub, for appellee Hiab-Foco, A.B.

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

NEWTON, J.

James Vangreen, plaintiff, brought this action against Interstate Machinery and Supply Co., hereinafter referred to as Interstate, and George L. Fraissinet to recover for injuries to his right hand sustained while installing glass panes in a building. Plaintiff's employer PPG Industries, Inc., hereinafter referred to as PPG, was made a party for the purpose of determining its subrogation rights under the Nebraska Workmen's Compensation Act. PPG was also the employer of defendant Fraissinet. Interstate settled plaintiff's claim, filed a cross-claim against PPG, and seeks indemnification or contribution on the ground that PPG's negligence was the proximate cause of the accident. PPG's demurrer to the cross-claim was sustained.

Interstate assigns as error the ruling of the trial court that recovery is barred by the Workmen's Compensation Act; that its settlement with plaintiff was an admission of liability; and also that it constituted a voluntary payment. We affirm the judgment of the District Court.

Section 48-148, R. R. S. 1943, provides: "If any employee, or his dependents in case of death, of any em-

ployer subject to the provisions of sections 48-109 to 48-147 files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the court under said sections, *such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.*" (Emphasis supplied.)

Section 48-118, R. R. S. 1943, provides that in the event the injured employee recovers from a third party for injuries sustained, the employer shall be subrogated and reimbursed for any compensation paid.

In Annotation, 53 A. L. R. 2d 977, appears an extensive annotation on the subject at issue here with a number of additional cases cited in the supplement thereto. The great majority of the various jurisdictions dealing with the question have held that a third person tort-feasor, who is liable for injuries to, or for the death of, a workman, is not entitled to recover contribution from the workman's employer, notwithstanding the latter's negligence concurred in causing the injury or death, where the employer, the employee, and the injury or death are covered by the provisions of a workmen's compensation act. The decisions are based on two theories. First, that an employer covered by a compensation act does not have a common liability with a third party tort-feasor which is a necessary requisite to securing contribution. Second, that compensation acts must be construed as specifically limiting the liability of the employer, not only to the employee, but as to third persons as well. This proposition has, in some circumstances, been applied to the theory of indemnity as well as that of contribution.

Plaintiff Vangreen, for a cause of action against Interstate, alleged that it rented to PPG a hoist truck and that his injuries were proximately caused by Interstate's negligence in that the hoist was improper for the type of work for which Interstate knew it was to be used,

was not designed to handle the loads required, had a defective valve, failed to respond promptly to its controls, and that Interstate failed to apprise the hoist operator of its peculiarities. This is the action which Interstate settled and for which it now seeks indemnity from PPG. In its cross-claim against PPG, Interstate charges the accident was attributable to negligence on the part of PPG and its employee Fraissinet who operated the hoist. Interstate also alleges that it compromised and settled with Vangreen "in order to minimize the time and expenses of further defending plaintiff's action, and in view of the exposure of this defendant in the event plaintiff would obtain a verdict against the defendant, compromised plaintiff's claim in the amount of $42,000.00, said sum being fair and reasonable under all of the circumstances then and there existing." In its cross-claim Interstate also denies any negligence on its part. In its brief Interstate states that a further reason for its compromising the Vangreen claim was its exposure to liability under section 39-6,193, R. R. S. 1943. That statute renders truck owners liable for injuries sustained by others from the operation of a leased truck. The statute is inapplicable here as it was the operation of the hoist and not the truck that was involved in the injury.

It is apparent that Interstate's assertion that it was free of negligence has little, if any, validity in view of the nature of its settlement with Vangreen and this is apparent on the face of its cross-claim. Assuming, as we must since this case was determined on a demurrer, that PPG was also guilty of negligence contributing to the accident, is Interstate entitled to indemnity? Interstate does not urge a right to recover under an express or implied contract of indemnity but seeks recovery on the theory that PPG is a joint tort-feasor. Under such circumstances, is the exclusive-remedy provision contained in the Nebraska statutes circumvented? The statute, section 48-148, R. R. S. 1943, provides that a

workmen's compensation action "shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury." Section 48-118, R. R. S. 1943, awards to the employer subrogation rights against third parties. It is evident that the exclusive-remedy provision is not confined to the injured party but is designed to cover all claims "arising from such injury." Interstate's cross-claim is based on negligence and necessarily arises from the injury. The statute is not limited to claims for damages and it will not avail to assert that this is a claim for indemnity rather than damages.

The majority rule holds that, when the relation between the parties involves "no contract or special relation capable of carrying with it an implied obligation to indemnify, the basic exclusiveness rule generally cannot be defeated by dressing the remedy itself in contractual clothes, such as indemnity, since what governs is not the delictual or contractual form of the remedy but the question: is the claim 'on account of' the injury, or on account of a separate obligation running from the employer to the third party?" 2A Larson, Workmen's Compensation Law, § 76.44, p. 14-405. See, also, Montoya v. Greenway Aluminum Co., Inc., 10 Wash. App. 630, 519 P. 2d 22; Hilzer v. MacDonald, 169 Colo. 230, 454 P. 2d 928; Slattery v. Marra Bros., Inc., 186 F. 2d 134 (2d Cir., 1951); Graham v. City of Lincoln, 106 Neb. 305, 183 N. W. 569. To hold otherwise would nullify the exclusive-remedy provision in the statute and the statutory right of subrogation. If an injured workman recovers from a third party tort-feasor and such tort-feasor is permitted to recover from the employer, the protection accorded the employer by the Workmen's Compensation Act is circumvented as in the end the employer pays not only the compensation provided by statute but must pay all other damages. As well permit the injured workman to sue the employer for damages in the first instance as the result is the same.

The judgment of the District Court is affirmed.

AFFIRMED.

MICKELSON & MICKELSON HAY CONTRACTORS, A COPARTNERSHIP OF C. E. MICKELSON AND D. L. MICKELSON, APPELLANTS, V. EARL CHRISTENSEN, APPELLEE.

246 N. W. 2d 655

Filed November 10, 1976. No. 40591.

1. **Trial: Judgments.** The judgment of a trial court in an action at law where the jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong.
2. **Trial: Evidence.** Where there is irreconcilable conflict on a material issue, this court on appeal will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other.

Appeal from the District Court for Garden County: ALFRED J. KORTUM, Judge. Affirmed.

Benjamin M. Shaver, for appellants.

Richards & Richards and Eugene J. Hynes, for appellee.

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

WHITE, C. J.

This case involves a haying contract dispute. The plaintiffs brought two causes of action against the defendant alleging, first, that the defendant wrongfully violated the terms of their agreement, and secondly, that the defendant wrongfully prevented the plaintiffs from further performance under the contract, and sought damages on each count. The defendant filed a counterclaim alleging that the plaintiffs breached the contract by failing to perform satisfactorily and sought damages.

The parties waived a jury trial and the matter was tried to the court. The District Court found that the plaintiffs failed to sustain their burden of proof on their two causes of action and found generally against the plaintiffs. The court further found that the defendant failed to sustain his burden of proof on his counterclaim and generally found against the defendant on the counterclaim. The plaintiff's petition and defendant's counterclaim were dismissed. The plaintiffs appeal. We affirm the judgment of the District Court.

The record reveals the following facts. The hay contract was entered into by the parties on June 5, 1973. It provided that the plaintiffs were to stack "all of the hay located on the property known as the Eldred Ranch * * * which will yield approximately 5000 tons of hay" for the defendant. The plaintiffs were to be paid $6.50 per ton of hay. It was agreed that the term "all of the hay" in the contract meant all the hay that was to be stacked on the Eldred Ranch. The term "which will yield approximately 5000 tons of hay" in the contract was placed there at the request of Dan Mickelson so that the plaintiff could show the contract to their banker and obtain financing. At the trial, Clarence Mickelson testified that this term was to guarantee the plaintiffs 5,000 tons of hay. The defendant, Earl Christensen, testified that he was not guaranteeing any specific amount of hay. He further testified that there were 5,000 tons of hay on the Eldred Ranch, and that the plaintiffs could have stacked that amount had they gotten after it.

The Mickelsons started working around July 10, 1973. Jack DeWitt, foreman since 1950 at the Eldred Ranch, testified that he had the opportunity to view the Mickelsons' haying operation almost every day as he flew over the ranch checking cattle and fences. He testified that the Mickelsons were "real slow and were broke down a lot and spent a lot of time in the shop." Often there was just one man working. Dan Mickelson

testified at the trial that he actually never worked on the Eldred Ranch.

Clarence Mickelson testified that he had 2 brand new swathers and 2 hay busters, one was 2 years old and one was 3 years old. The defendant testified that he saw the Mickelsons' equipment and that it was pretty old and pretty well beat up. He also testified that he never observed the Mickelsons using all their equipment at one time.

Clarence Mickelson testified that under ordinary conditions, they should have been able to put up around 30 stacks per day with 2 hay busters such as his. There was testimony that the Mickelsons were putting up only about 3 stacks per day and that during 1 week they put up only 4 stacks; during another, 5; and another, 17.

There was testimony that the Mickelsons changed sickle blades about once per week. The defendant testified that the Mickelsons did a poor job mowing and left patches of hay on the ground. He testified that a sharp blade should not do this. There was testimony that changing sickle blades twice a day insures that the hay will be properly mowed down.

Clarence Mickelson testified that they stacked approximately 420 stacks. However, he stated that he never made an actual count of the stacks. Allen Reed, who was employed by the Mickelsons, testified that in his opinion they stacked around 450 to 500 stacks. Clarence Mickelson testified that the stacks they put up averaged around 6 tons.

The defendant testified that he counted the stacks put up by the Mickelsons and that there were 219 of them. He stated that in his opinion the stacks put up by them averaged about 2 tons. Jack DeWitt testified that he counted the stacks from the air several times. Gerald DeWitt, a ranch-hand on the Eldred Ranch, testified that he counted the stacks put up by the Mickelsons as he moved them and that he moved 168 of them. He testified that some stacks were left in the meadows and

that he did not move about 43 of the stacks put up by the Mickelsons which were already in the yard.

There was testimony that the stacks put up by the Mickelsons were smaller than what is considered customary, and that their stacks had holes, or doughnuts, in them, which would cause water to accumulate in the stacks and spoil the hay. The defendant testified that he had to bring in additional personnel in the latter part of August 1973, because the Mickelsons were not getting the hay stacked that they were supposed to. There was testimony that the haying season should be completed by early September because at that time hay starts to lose its food value and the weather makes it difficult to work.

Clarence Mickelson testified that the defendant told them they were through on September 14, 1973. The defendant testified that the Mickelsons left on September 14, 1973, without informing or notifying him. He stated that he did not tell them they were through, nor did he order them off the place.

Based on a formula supplied by the local A.S.C.S. office, the defendant testified that he computed the hay tonnage put up by the Mickelsons to be 642 tons. At the contract price of $6.50 per ton, this would come to $4,173. During the time that the Mickelsons worked for the defendant they were paid $5,500 plus $597.90 for gas, diesel, and oil expense for a total of $6,097.90.

It is a basic rule that when this court reviews a determination by a trial court, where there is a conflict in the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts over the other. As was stated in Peters v. Halligan, 182 Neb. 51, 152 N. W. 2d 103 (1967): "Where there is irreconcilable conflict on a material issue, this court will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their man-

ner of testifying and must have accepted one version of the facts rather than the other."

In this case, the parties waived a jury trial and the case was tried to the court. The judgment of a trial court in an action at law where the jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N. W. 2d 516 (1976).

There was sufficient evidence adduced at the trial to support the District Court's conclusion that the plaintiffs failed to show that they were entitled to any recovery from the defendant based on the contract or otherwise.

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

AFFIRMED.

PHILIP J. BURY, JR., APPELLEE, V. ACTION ENTERPRISES, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS ACTION REAL ESTATE, APPELLANT.

246 N. W. 2d 724

Filed November 10, 1976. No. 40597.

1. **Agency: Principal and Agent.** It is a fundamental rule underlying the structure of agency law that the principal is bound by, and liable for, the acts which his agent does with or within the actual or apparent authority from the principal, and within the scope of the agent's employment.
2. **Agency: Principal and Agent: Contracts.** If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon.
3. ———: ———: ———. It is well settled that one who purports as agent to enter into a contract, upon which the principal is not bound because of the fact that the agent has contracted without authority or in excess of his authority, is personally liable for the damage thus occasioned to the other contracting party.

4. ———: ———: ———. A person who purports to make a contract, conveyance, or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized.
5. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render judgment without affecting their interest.
6. **Parties: Courts: Trial.** The District Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others and need bring in other parties only when a determination of the controversy cannot be had without their presence.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed.

Kelly, Cripe & Wellman, for appellant.

Michael G. Helms for Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

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

NEWTON, J.

This is an action on an oral contract of employment. Plaintiff was employed as a salesman by the defendant corporation in August 1971 and was compensated on a commission basis. The defendant Action Enterprises, Inc., is engaged in the real estate business and had offices in several communities including Bellevue, Nebraska, where plaintiff was employed. There were five directors, including Ray and Guinevere Lemke and Curt and Pat Hart. Ray Lemke was president and the other three were vice presidents. All four were stockholders. The fifth director was Tom Costello. Plaintiff was hired by Pat Hart. In October 1973 she informed him he had been promoted to assistant sales manager in charge of the Bellevue office and would receive as additional com-

pensation 5 percent of the "company dollar" or net monthly profit of the office. On January 1, 1974, he was made sales manager and was so advised by Pat Hart. Curt and Pat Hart had been monitoring the Bellevue part of the business on a daily basis while plaintiff was in charge and the Harts also wrote all checks for money paid out at that office. Curt Hart and Mr. Hanson, the general sales manager, advised plaintiff that he would, as manager, receive 10 per cent of the company dollar and Curt Hart paid him that amount for the month of May 1974.

Discussions were had by plaintiff with the Harts and at a March meeting of all the directors about his receiving a 10 percent bonus. Subsequently he was advised by Pat Hart that he would receive the bonus on a semiannual basis. Plaintiff left his position with defendant in early July 1974. For the month of June he was paid 5 percent instead of 10 percent of the company dollar by Guinevere Lemke and was informed he was not entitled to the bonus as it was payable only annually. He sued for the additional 5 percent amounting to $664.35 and for the bonus amounting to $2,691.10. Defendant's answer alleged that the increase in plaintiff's compensation to 10 percent of the company dollar was unauthorized and admitted a bonus was to be paid but only on an annual basis. The jury found for plaintiff.

The evidence outlined above was submitted by plaintiff before he rested. Defendant assigns error because the court failed to dismiss the petition after plaintiff rested and argues that the authority of the Harts to act as agents for defendant was not proved. It would appear from the foregoing that at least a prima facie case had been proved as the Harts were officers of the defendant corporation and in charge of the Bellevue office. Other evidence was subsequently adduced by both parties and clearly a jury question was presented.

Defendant's remaining assignment of error is based on the failure of the court to permit Curt Hart to be

made a defendant on the theory that he acted without authority and would be personally liable to plaintiff. Under Nebraska statute law, the question is whether Curt Hart was or was not a necessary party.

It was the theory of plaintiff's petition that the Harts were agents of the defendant with actual or apparent authority. "It is a fundamental rule underlying the structure of agency law that the principal is bound by, and liable for, the acts which his agent does with or within the actual or apparent authority from the principal, and within the scope of the agent's employment, * * *." 3 Am. Jur. 2d, Agency, § 261, p. 626. If such was the case, then the Harts would not be personally liable to plaintiff. "If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon, * * *." 3 Am. Jur. 2d, Agency, § 294, p. 654. See, also, Restatement, Agency 2d, § 328, p. 80. If the Harts' acts as agents were not authorized, they would be personally liable. "It is well settled that one who purports as agent to enter into a contract, upon which the principal is not bound because of the fact that the agent has contracted without authority or in excess of his authority, is personally liable for the damage thus occasioned to the other contracting party." 3 Am. Jur. 2d, Agency, § 298, p. 657. "The view generally followed at the present time is that the liability of an agent to a third person on a contract rests upon the theory or ground that he warrants his authority, and not that the contract is deemed to be his own." 3 Am. Jur. 2d, Agency, § 229, p. 658. "A person who purports to make a contract, conveyance or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent

is not so authorized." Restatement, Agency 2d, § 329, p. 81.

It is evident that defendant and the Harts could not be jointly liable. The bases for liability were entirely different and distinct. Neither was an indispensable party to an action by plaintiff against the other. "Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render judgment without affecting their interest." Ohmart v. Dennis, 188 Neb. 260, 196 N. W. 2d 181. Defendant was not prejudiced in its defense. The District Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others and need bring in other parties only when a determination of the controversy cannot be had without their presence. See Bailey v. McCoy, 187 Neb. 618, 193 N. W. 2d 270.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES M. CLARK, APPELLANT.
246 N. W. 2d 657

Filed November 10, 1976. No. 40715.

Probation and Parole: Statutes. Under section 29-2268, R. R. S. 1943, a violation of a single condition of probation can support revocation of that probation where such violation is established by clear and convincing evidence.

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

Richard Douglas McClain, for appellant.

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

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

BRODKEY, J.

James M. Clark appeals to this court from a judgment of the District Court for Johnson County, Nebraska, affirming an order entered by the county court of that county on January 22, 1976, revoking appellant's probation. We affirm.

This case arose out of a fight involving the appellant, which resulted in property damage to the tavern in which the fight occurred. Other charges, including an assault, arose out of the incident referred to, but need not be considered in the disposition of this appeal. As a result of a plea bargain, the appellant, on October 3, 1974, pled guilty to the reduced charge of malicious destruction of property under $100 in the county court of Johnson County, and was placed on probation for 1 year, subject to 11 specific conditions of probation as set out in the order of the court. Among the terms of probation so specified were the following: "3. That he (defendant) shall report to the probation officer as directed by the Court or the probation officer. He is hereby ordered to make written monthly reports on the first day of each month and to present these reports in person to the said probation officer between the first and tenth day of each month; * * * 7. That he shall not violate the ordinance of any municipality, the laws of any State, or the laws of the United States; * * * 10. That the Defendant shall make restitution through this court to Marvin Kress to the maximum extent of $2500.00, the restitution to be justified to the court by receipts showing actual payment for medical services and payment for property damage resulting from the incident herein involved, credit being given toward said restitution for all amounts paid by insurance, specifically for property damage and medical expense, one-half of said restitution to be made by the defendant six months

from the date hereof, and the remainder to be paid within twelve months hereof."

Approximately 11 months thereafter, on September 4, 1975, the county attorney of Johnson County filed a motion in the county court to revoke Clark's probation and to impose the penalties provided by statute, "for the reasons that the said James M. Clark has failed, neglected and refused to make restitution as provided by Paragraph 10 of the Probationary Order," and "That additionally the said James M. Clark has refused to report to his probation officer as directed by the probation officer and has also failed, neglected and refused to make a written monthly report on the first day of each month and to present said report in person to the probation officer between the first and tenth day of each month, contrary to the provisions of Paragraph 3 of the Probation Order." A hearing was held on that motion on January 22, 1976, following a waiver of a preliminary hearing by the appellant, at which hearing the State presented evidence, but the appellant declined to do so. The court found that the appellant was in violation of the terms of his probation order, stating: "Specifically taken into consideration by the Court were instances shown by evidence to have occurred on July 3rd, 1975 and on August 7, 1975, said failure to report being in violation of the provisions of paragraph 3 of the probation order; that further, the Defendant violated the terms of the probation order in that he failed to make restitution as required by paragraph 10 of the probation order, the Court taking into consideration that an extended period of time elapsed from notification of the Defendant of the amount of restitution and the payment of the first half of the restitution; that the Defendant is in violation of his probation order in that he was convicted of intoxication in the County Court of Gage County, Nebraska, during the terms of his probation, although subsequent to the filing of the Motion to Revoke the Probation, and that said conviction was for

a violation of the laws of the State of Nebraska, contrary to the provisions of paragraph 7 of the probation order." The court then revoked the probation of the appellant entered on October 3, 1974, and sentenced the appellant to serve a term of 15 days in the county jail.

Clark appealed that order of revocation to the District Court for Johnson County, which heard the appeal on March 1, 1976. The District Court affirmed the order of the county court and ordered Clark's probation revoked, and sentenced Clark to serve 15 days in the county jail. In its judgment entry, the District Court noted that the alleged violation of paragraph 7 of the conditions of probation was not properly before the county court because the appellant was not given notice of this alleged violation in the county attorney's motion for revocation. The court stated: "In affirming the revocation of the County Court, the District Court considers that there was other independent basis for the revocation of probation aside from evidence of Defendant's conviction of intoxication during the term of his probation; the rights of the Defendant were not prejudiced by either the revocation proceedings, or, the Order of Revocation." The court also noted in its judgment, "The Bill of Exceptions relating to this appeal is not made a part of the record." It does not appear that it was ever offered in evidence at the hearing in the District Court.

In his assignments of error and argument contained in his brief on appeal, appellant concentrates almost exclusively upon the issue of whether he had violated the provisions of Item 10 of his probation relating to making restitution for damages in a maximum amount of $2,500, one half of said restitution to be made within 6 months and the remainder to be paid within 12 months. Primarily, he points out that it was impossible for him to make payment of one half of the restitution within 6 months for the reason that the receipts for the damages were not filed in time for him to do so, nor had

there been a determination of the amounts collected from insurance which was to be credited upon the amount of the damages, and therefore there was no violation on his part of the provisions of Item 10 of his order of probation. We have previously set out specifically Item 10 and shall not repeat it. There are, undoubtedly, ambiguities contained in that paragraph, due to lack of specificity as to procedure, but we do not believe it is necessary to decide whether or not appellant violated the terms of that particular paragraph in order to sustain the judgment of revocation entered by the District Court, and by the county court.

Appellant ignores, or at least minimizes, the fact that one of the grounds specified in the motion of the county attorney for revocation of probation was that Clark had refused to report to his probation officer as directed and had failed, neglected, and refused to make monthly reports to his probation officer. The county court found in its order revoking probation following the hearing on January 22, 1976, that Clark had violated his probation by failing to report, either in person or in writing, as required by the probation officer, and it cited specific instances shown by the evidence to have occurred on July 3, 1975, and on August 7, 1975. The evidence clearly shows that appellant missed both his July and August 1975, meetings with his probation officer, although he did telephone the officer on July 18, 1975, to say that he had forgotten his July meeting. The appellant was then told that it was unnecessary to report in July since it was late in the month, but he was ordered to come in August. When the appellant did not report in August, and when he made no payments of restitution, the county attorney commenced the revocation proceedings. Essentially, appellant contends that the county court reached a "prejudicial" determination in revoking his probation because all the alleged violations were not supported by the evidence. Such is not required, and where the evidence clearly shows one violation of the

conditions of probation it is sufficient to justify the revocation of that probation. Section 29-2268, R. R. S. 1943, provides that. "If the court finds that the probationer did violate *a condition* of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted." (Emphasis supplied.) It is clear that under the above statute a violation of a single condition of probation can support revocation, and the evidence is uncontroverted in this case that the appellant did violate paragraph 3 of the conditions of probation. This was established by "clear and convincing evidence," as required in section 29-2267, R. R. S. 1943. Thus, regardless of whether the appellant also violated the condition of probation as to restitution, the evidence supports the county court's judgment and the District Court's affirmance of that judgment. There was no abuse of discretion on the part of the county court in revoking appellant's probation, nor by the District Court in affirming that action.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MIKE LANG, ALSO KNOWN AS MICHAEL LANG, APPELLANT.
246 N. W. 2d 608

Filed November 10, 1976. No. 40758.

1. **Assault and Battery: Criminal Law.** To constitute the offense of assault with intent to do great bodily harm there must be an unlawful assault coupled with a present ability and intent to injure, but no actual battery need occur.
2. **Trial: Evidence: Criminal Law.** Properly verified photographs are not rendered inadmissible in evidence because of marks on them where the individual who made the marks explains them or testifies as to their correctness.

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

Thomas A. Vakulskas, 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.

MCCOWN, J.

The defendant was tried in the District Court for Dakota County on a charge of assault with intent to inflict great bodily harm. He was found guilty by a jury and the court imposed a sentence of 5 to 8 years imprisonment.

The charge here arose out of a melee which occurred on September 22, 1975, in the parking lot of a liquor store in South Sioux City, Nebraska. The particular part of the brawl out of which the charge here arose involved a fight between the defendant Lang and one Gene Boykin. According to Boykin's testimony, when the fight began the defendant pulled a gun and hit Boykin in the face with it and bruised his cheek. The gun fell out of the defendant's hands and there was a scramble for the gun. The defendant got it and then fired twice at Boykin but missed him. A friend of Boykin's intervened and in the scuffle the gun discharged again. The defendant shot twice at a car occupied by Boykin's friend and then left the scene in an automobile.

The defendant's version was that he tried to avoid the confrontation. He also denied he ever had a gun or saw a gun at the fight. Several witnesses confirmed various portions of Boykin's version and one witness confirmed the defendant's version.

Shortly after the defendant and his friends left the scene the police arrived, talked to several witnesses, and inspected the scene of the disturbance. They discovered four empty .38 caliber shell casings in the area and a lead slug some 5 feet from the wall of the liquor

store. The officers also saw dents in one of the cars that could have been made by bullets, and behind the car on the wall of the liquor store saw two marks which could have been caused by a ricocheting bullet. The officers took a picture of the two marks on the wall and circled the marks on the photograph. The liquor store owner testified that he did not actually see anything other than that there was a disturbance, but he did hear what could have been shots. The defendant was found guilty by the jury.

The defendant contends that the evidence established justifiable provocation and a lack of criminal intent. Evidence on these issues was in conflict and the issues were for the jury. They were properly submitted under instructions which are not challenged and the defendant's contentions of error on those grounds are wholly unfounded. See Garofola v. State, 121 Neb. 850, 238 N. W. 755.

Defendant also contends that the prosecution must prove as a necessary element of the crime charged that great bodily injury actually occurred. It is clear that to constitute the offense of assault with intent to do great bodily harm there must be an unlawful assault coupled with a present ability and intent to injure, but no actual battery need occur. See, Vanderpool v. State, 115 Neb. 94, 211 N. W. 605; State v. McDaniels, 145 Neb. 261, 16 N. W. 2d 164. The evidence here was more than sufficient to establish the necessary elements of the crime charged.

Defendant also complains that the marked photograph was inadmissible on the ground that it was marked on the basis of hearsay, and that it was prejudicial. Properly verified photographs are not rendered inadmissible in evidence because of marks on them where the individual who made the marks explains them or testifies as to their correctness. 29 Am. Jur. 2d, Evidence, § 784, p. 854. The officer who made the marks on the photograph explained them and testified in detail as to what

they represented. The foundation for the photograph was direct observation and not hearsay. The photograph was properly admitted.

Finally, the defendant contends that the trial court erred in allowing the prosecution to question the defendant about his felony convictions and prior conduct. After the defendant had admitted that he had been convicted of several felonies, the prosecutor asked how many times it had happened. An objection by defense counsel was sustained. There was no objection to prior questions and answers with respect to defendant's felony convictions, nor were there any later objections to questions about the defendant's prior conduct. The only objection to the testimony complained about was sustained and no objections were made to any of the other testimony to which he now objects. While the prosecutor may have been over zealous, there was no prejudicial error in the rulings of the court.

No further discussion would be required except that the issue of prior crimes and convictions was tried and briefed relying on section 25-1214, R. R. S. 1943, which dealt with interrogating a witness as to his previous conviction of a felony. We call attention to the fact that that section was repealed, and the Nebraska Evidence Rules went into effect on January 1, 1976. Those rules are now embodied in Chapter 27, Reissue Revised Statutes of Nebraska. Evidence of conviction of a crime is, in some respects, more limited, but is not restricted to felonies as such. See §§ 27-404, 27-608, and 27-609, R. R. S. 1943.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE J. SIERS, APPELLANT.

248 N. W. 2d 1

Filed November 17, 1976. No. 40480.

1. **Trial: Instructions.** To render a failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are thereby embodied. In addition, such propositions must be applicable to the facts.
2. ———: ———. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law.
3. **Partnership.** Under both statutory and case law in Nebraska, a partnership has long been considered as an entity separate and apart from the individual partners.
4. **Partnership: Embezzlement: Criminal Law.** In Nebraska, both by statutory interpretation and by our adoption of the legal entity theory of partnerships, a partner may be prosecuted for the embezzlement of partnership property.
5. **Trial: Instructions.** Where an instruction is technically correct, and is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is the party's duty to call the court's attention to the supposed defect and present a suitable instruction.
6. **Trial: Evidence: Criminal Law: Intent.** Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue.
7. **Trial: Embezzlement: Criminal Law.** Proof of the existence of a legal entity capable of owning property is not required in an embezzlement prosecution.
8. ———: ———: ———. The name of the owner of property stolen is material only to the extent it serves a descriptive purpose. Also it is to show it was not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. And, where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results.
9. **Sentences: Probation and Parole: Criminal Law.** This court on appeal will not overturn an order or sentence of the trial court

which denies probation unless there has been an abuse of discretion.

10. **New Trial: Criminal Law.** In criminal cases, alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal.

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

William K. Schaphorst and Robert J. Becker of Swarr, May, Smith & Andersen, for appellant.

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

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

SPENCER, J.

Defendant, George J. Siers, appeals from a judgment entered upon a verdict of the jury finding him guilty of embezzlement. A sentence of not less than 1 nor more than 3 years in the Nebraska Penal and Correctional Complex was imposed. Defendant lists nine assignments of error which will be enumerated as they are discussed. We affirm.

The information under which Siers was charged and tried alleges, so far as material herein, that between the dates of August 3, 1974, and April 7, 1975, inclusive, "George J. Siers * * *, being then and there the agent of Pathfinder II Ltd, a limited partnership, * * * did then and there by virtue of such position * * * as agent of said Pathfinder II Ltd, a limited partnership, receive and take into his possession certain money * * * all of which money was and is the property of * * * his principal, and did then and there fraudulently and unlawfully convert to his own use and embezzle said money, without the consent of said Pathfinder II Ltd., a limited partnership, his principal, * * *."

The salient facts of this case, so far as material to this appeal, are that Siers and Enlowe A. Hevner, both hav-

ing had experience as commodity brokers, in 1973 formed a general partnership, Pathfinder II, to trade in commodities and commodity futures. The bookkeeping and accounting was done primarily by Siers, although Hevner also had complete authority and access to the books. Both Siers and Hevner traded through the Pathfinder II account. Sometime later, they conceived the idea of operating limited partnerships in connection with their business for the purpose of trading in commodities, the apparent advantages being the limited liability of limited partners and greater flexibility in operation. With that in mind, in February 1974, Siers set up a small limited partnership with five investors, under the name of Prospector II. All the trading for that and another limited partnership was done through an account opened in the name of one of its investors, Rick Murphy, who was Siers' brother-in-law. Although probably illegal according to the evidence adduced at the trial, Siers did trade through Rick Murphy's account and explained the advantages of so doing on the basis of a reduction in paper work, and in margin requirements. Siers conceded that the effect of this procedure was that Murphy would legally have title to all the assets, including profits from trading, and was also liable for losses sustained by the account. Investors in the limited partnerships were not able to determine if they had made or lost money on the orders Siers placed for them, as the account statements all went to Murphy, and in effect, to Siers, who shared the Murphy account mailing address.

Plans for the formation of Pathfinder II, Ltd., grew out of discussions between Hevner and a Mr. Donald M. Vervaecke. Both Hevner and Vervaecke testified that Hevner was to be the trading agent and that the general partner of the limited partnership had not been determined. Hevner never considered himself a limited partner. Both Hevner and Vervaecke testified that it was their understanding and agreement that before Pathfinder II, Ltd., was to come into existence and commence

trading operations, it was necessary to obtain 10 limited partners, each of whom would invest $2,500. Hevner was to assist Vervaecke in finding investors to round out the total of the 10 limited partners, but, according to his testimony was unsuccessful. Siers, on the other hand, testified that when he and Vervaecke discussed the limited partnership, the agreement was that 10 limited partners was the *maximum* number that could participate, but that Pathfinder II, Ltd., could function with fewer limited partners. He also stated that he was to be the trading agent for the limited partnership.

The evidence indicates that Vervaecke sold seven $2,500 shares in Pathfinder II, Ltd., to prospective investors, and turned the money totalling $17,500, over to Siers. This money was in the form of checks drawn by the prospective limited partners, which, according to evidence in the record, at the suggestion of Siers were made payable to Pathfinder II. The payment for the shares took place between August 2 to August 8, 1974, and the money was deposited in the Pathfinder II account. Vervaecke and Hevner both testified that Siers told them the money would be held in an escrow account until the limited partnership was formed. Siers denied this, saying that the discussion with reference to an escrow account was in connection with another venture, Pathfinder Commodities Fund.

A great amount of conflicting testimony about the creation or existence of the Pathfinder II, Ltd., entity was adduced at the trial. Vervaecke believed that 10 investors were required and that trading could not begin without notice to the investors. Michael McCormack, who was one of the Pathfinder II, Ltd., investors, and the individual who filed the embezzlement complaint against Siers, testified to the same effect. Siers denied the 10 investor requirement, but further testified that he had found two investors on or about August 10, 1974, *who, in addition to himself, constituted the 10 investors,* and at that point he was entitled to

commence trading without notice to any of the investors. He produced as his defense witnesses two individuals who testified that they had invested in the venture.

During the trial exhibit 4, a purported limited partnership agreement of Pathfinder II, Ltd., containing signatures of six of the partners, was offered and received in evidence. Neither Mrs. Vervaecke, who was to be a partner, nor Michael McCormack signed the partnership agreement. The agreement was on a form prepared and used by Siers for forming his limited partnerships, and contained blanks which needed only to be filled in with pertinent data. There is evidence in the record that at the time the signatures were affixed to the form, it was a blank form. The name of the limited partnership and the date, now appearing on the form, were added later. The agreement itself, exhibit 4, does not require that 10 limited partners join in the venture; and it gives the general partner, designated as Pathfinder II, the power to "act unilaterally as his best judgment deems."

The record reveals that Vervaecke became alarmed when Buckmaster, one of the limited partners, mentioned that he had received a statement showing a profit for Pathfinder II, Ltd., for the month of September. McCormack also received statements showing small profits. Vervaecke did not receive any such statements. Vervaecke met with Hevner and Siers and inquired how the entity could turn a profit if it was unable to trade. He testified that Siers replied he had not traded and that the statements were just to hold the limited partners' interest. Hevner's testimony corroborated this. Siers denied this. He stated he had admitted trading in the Rick Murphy account, but had assured Hevner and Vervaecke that he would not do so again.

The State suggests and argues that the following occurred with regard to the $17,500 invested by the Vervaecke group. As previously stated, the money was

paid to Siers in early August 1974, by check or checks payable to Pathfinder II, not Pathfinder II, Ltd. The funds were placed in the Pathfinder II bank account, but, according to Hevner, later disappeared. It was the State's theory that Siers, by means of checks whose numbers were out of sequence with the current business transactions, removed the limited partners' money from the Pathfinder II bank account and placed it in the Rick Murphy trading account. The State adduced evidence that two checks, numbers 1292 and 1297, written on September 10 and 20 respectively, were never entered in the check register of Pathfinder II, exhibit 3. The evidence establishes that Pathfinder II in its business transactions used checks in numerical order, and the checks listed on the check register for the period September 10 to 20 are in numerical order. Siers testified the $13,000 check, No. 1292, was actually his money, and he withdrew the money about that time because of a serious injury to his partner Hevner in an automobile accident the day before, in order to avoid having the money tied up in the estate should Hevner die. By September 1, all but $713.50, or over $39,000, had been transferred by Siers from the Pathfinder II account into the Rick Murphy account. Hevner testified the Pathfinder II money was not to be transferred, but on the same day that he, Hevner, deposited $20,000 in that account, $14,000 was transferred by Siers to the Rick Murphy account. Siers admitted he put the Vervaecke group funds into the Rick Murphy account.

Siers testified the money in question was lost on 10 live cattle contracts purchased on August 16, 1974, by Hevner and Siers. Hevner contends the order was first placed in his account, the Hevner and Hevner account. The records of that account show several transactions in multiples of one or two cattle contracts. Hevner said at the end of the day Siers transferred the cattle contracts to the Rick Murphy account. He also testified that at the time of the purchase, he did not know

where Siers got the margin money for his 5 of the 10 contracts. He felt it "probably was" Siers' money, although he suspected it was not and he felt that the money transferred into the Rick Murphy account was probably not Murphy's. He denied knowing that part of it was the Vervaecke group's money. Siers contradicted part of Hevner's testimony, stating that Hevner himself had placed the order for the cattle contracts in Rick Murphy's account.

On April 16, 1975, following several abortive attempts to retrieve the $17,500, Vervaecke and McCormack attended, uninvited, a meeting in Fremont called by Siers for the Pathfinder Commodities Fund investors. Vervaecke testified that when confronted Siers had said that he had "converted" the Pathfinder II, Ltd., funds and lost all the money. McCormack testified at that time Siers admitted losing their money in the Rick Murphy account and attempting to "chase" it with the Pathfinder Commodities Fund money, which was also lost. Siers denied using any language about "conversion," but testified that the Pathfinder Commodities Fund, more accurately Pathfinder Trading Co. money, was "loaned" to Pathfinder II. Hevner, however, testified that he did not know of this loan.

Defendant's first assignment of error is as follows: "The District Court erred in failing to give instructions requested by the defendant permitting the jury to decide whether a debtor-creditor relationship had arisen and whether defendant as general partner could be convicted of embezzlement from his own partnership."

Siers submitted four instructions, one of which was given. That instruction directed the jury to return a verdict for Siers if it found he had authority and discretion to make trades for Pathfinder II, Ltd. The other instructions as submitted were properly refused.

Defendant urges a general principle of law, that where two persons create a relationship of debtor and creditor a failure of one of the parties to pay over money

does not constitute the crime of embezzlement. The record is absolutely void of any evidence which would support defendant's assertion that the investments by the individuals in Pathfinder II, Ltd., created a debtor-creditor relationship. To render a failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are thereby embodied. In addition, such propositions must be applicable to the facts. See Bell v. State (1954), 159 Neb. 474, 67 N. W. 2d 762.

Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Reeder (1968), 183 Neb. 425, 160 N. W. 2d 753.

With reference to the contention that a partner may not be adjudged guilty of embezzling partnership property, Siers is relying on State v. Quinn (1954), 245 Iowa 846, 64 N. W. 2d 323. That case, however, is distinguishable upon the grounds that Iowa apparently does not follow the entity theory of partnership.

Under both statutory and case law in Nebraska, a partnership has long been considered as an entity separate and apart from the individual partners. Svoboda & Hannah v. Board of Equalization (1966), 180 Neb. 215, 142 N. W. 2d 328. The Uniform Partnership Act adopted in Nebraska clearly mandates the entity theory of partnership. See §§ 67-304(4) and 67-306(1), R. R. S. 1943. See, also, Morse v. Mayberry (1968), 183 Neb. 89, 157 N. W. 2d 881.

Additionally, section 28-538, R. R. S. 1943, in defining the class of property subject to embezzlement, includes property "* * * which is partly the property of any other persons * * * and partly the property of such officer, attorney at law, agent * * *." We hold that in Nebraska, both by statutory interpretation and by our adoption of the legal entity theory of partnerships, a partner may be prosecuted for the embezzlement of partnership property.

The jury was properly instructed, and the record supported its finding that the defendant did not have the authority and discretion to make trades for Pathfinder II, Ltd. His actions in trading the funds of Pathfinder II, Ltd., in the Rick Murphy account were acts of embezzlement. Section 28-538, R. R. S. 1943, provides that embezzlement occurs when an agent uses for his own personal benefit funds which "shall have come into his or her possession or care in any manner whatsoever, * * *."

Defendant's second assignment of error is as follows: "The Court erred in giving its instruction No. 12 containing the civil responsibility of a partner to his co-partners."

Defendant concedes instruction No. 12 is a proper instruction on the law in regard to fiduciary duties of partners, but that it is prejudicially erroneous to use it in a criminal action. Siers does not seriously dispute the factual allegations of the State. His defense is predicated upon the fact he had no intent to embezzle the funds of the investors in Pathfinder II, Ltd. Intent was one of the essential issues before the jury. The instruction was proper for that purpose.

If the defendant desired a more specific instruction, he should have tendered one. Where an instruction is technically correct, and is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is the party's duty to call the court's attention to the supposed defect and present a suitable instruction.

Defendant's third assignment of error is: "The Court erred in requiring answers over objections to questions by the prosecutor concerning subsequent activity of defendant not related to the alleged embezzlement with which he was charged. The matters included an audit of Pathfinder Trading Company, a Nebraska corporation, and purchases of shares of stock by shareholders in Pathfinder Trading Company."

Much of the testimony, relating to the Pathfinder Trading Company came into the record without objection until Siers was questioned, under cross-examination, about the whereabouts of assets held by Pathfinder Trading Company. In any event, the record clearly indicates that the evidence was relevant on the issue of intent. The defendant made no objection to the introduction of exhibit 9 which was a prospectus for Pathfinder Trading Company. Later, in his own direct testimony, defendant sought to explain the existence of exhibit 9 and its importance in his defense. When the prosecutor attempted to learn what became of money held in escrow for Pathfinder Commodities Fund, the defendant then raised his objection that such testimony would be irrelevant.

Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue. State v. Young (1973), 190 Neb. 325, 208 N. W. 2d 267.

The fourth and fifth assignments of error concern the question of the existence of Pathfinder II, Ltd., a limited partnership, the alleged victim of the embezzlement. We agree with the State that defendant presented a defense which was based upon the accepted existence of Pathfinder II, Ltd., and sought to prove that he was the general and the trading partner of the limited partnership and in such position could not embezzle the funds of Pathfinder II, Ltd.

The State correctly identified the victim of the embezzlement as Pathfinder II, Ltd. It presented substantial evidence that there had in fact been a partnership formed which the defendant himself titled as Pathfinder II, Ltd., and that the defendant for his own personal use and benefit embezzled the funds of that part-

nership. It might well be argued that the promoters of Pathfinder II, Ltd., did not strictly comply with the provisions of section 67-202, R. R. S. 1943, which specify certain requirements for the formation of a limited partnership. However, subsection (2) of said section provides: "A limited partnership is formed if there has been substantial compliance in good faith with the requirements of subsection (1) of this section."

Siers testified he was to be the trading agent for the limited partnership. There is no question the money collected, totalling $17,500, was turned over to him, and he admits transferring it to the Rick Murphy account. The State's evidence is that Siers was to hold the money in an escrow account until the limited partnership was formed. This Siers denies.

The trial court determined there was substantial compliance in good faith sufficient to create the formation of a limited partnership. That determination, however, is not necessary herein. If there was no limited partnership, there was a partnership agreement and the money was paid under its terms. Any variance in the name would be immaterial because defendant could not have been misled or confused as to the money he was accused of embezzling.

As early as 1905, in Higbee v. State, 74 Neb. 331, 104 N. W. 748, this court held that the allegation of the information that the party injured is a corporation is sufficiently sustained by proof that it is a de facto corporation. Proof of the regularity of the proceedings to incorporate is not necessary.

Nationally, some of the more recent cases, with which we agree, hold that proof of the existence of a legal entity capable of owning property is not required in an embezzlement prosecution. In Straub v. People (1961), 145 Colo. 275, 358 P. 2d 615, the court held that failure to prove the corporate existence of the company named in the information did not constitute a material variance and the trial court correctly denied defend-

ant's motion for a directed verdict. It said: "The name of the owner of property stolen is material only to the extent it serves a descriptive purpose. Another is to show that it is not the property of the accused, and that the accused may know whose property he is alleged to have stolen so that he may be prepared to meet or refute the charge at the trial. And, where the identity of the alleged owner is sufficiently established and the defendant is not deceived or misled to his prejudice, no error results."

In State v. Scofield (1968), 7 Ariz. App. 307, 438 P. 2d 776, the defendant was convicted of embezzlement from a car rental agency after he failed to return the car. On appeal he challenged the sufficiency of proof showing that Econo-Car International, Inc., of Tucson, the alleged owner, was a legal entity capable of owning the automobile. The Arizona court affirmed the judgment of the trial court, stating: "Under the allegations of this information, there is no confusion as to the identity of the motor vehicle which defendant is charged with having embezzled from 'Econo-Car International Inc. of Tucson.' The proof is uncertain as to whether this was a separate corporation or merely a trade name under which an individual by the name of Earl J. Mort did business. * * * whoever or whatever owned this automobile, it is crystal clear that the defendant did not and that this charge relates to a particular motor vehicle which he rented from a lessor doing business under the name indicated in the information. We hold that if there was a variance from the information or a failure of proof, it was as to matters basically immaterial."

In State v. Colson (1972), 17 Ariz. App. 598, 499 P. 2d 726, defendant appealed his conviction for embezzlement, urging there was a fatal variance between the information and the proof at trial. The information charged defendant with theft by embezzling property from Dana Brothers Shamrock Service Station, his employer. The evidence showed that although the business

name of the service station was Dana Brothers Shamrock Service Station, it was actually a sole proprietorship owned by one Ferrell Dana. The court held the variance was immaterial, stating: "It is clear to us that the defendant was put on notice that he was being charged with the crime of embezzling money from his employer, irrespective of the exact name of the owner alleged in the information. We hold as in Scofield, that if there was a variance between information and proof, it was as to a basically immaterial matter."

Defendant's requested instruction No. 2, which was given by the trial court, was as follows: "If you find that George Siers had the authority and discretion to make trades for Pathfinder II, Ltd. and that in the exercise of his discretion he did invest the funds of Pathfinder II, Ltd. and lost them, then you must return a verdict of not guilty." In this instruction it is evident the defendant was predicating his defense on the existence of Pathfinder II, Ltd., and his authority and discretion to make trades for it. Whether or not Pathfinder II, Ltd., existed as a legal entity was not an essential element of the crime and is immaterial on the record herein.

In this case, if there was a variance from the information, or a failure of proof, it was as to a matter basically immaterial under the facts herein. This case is not unlike State v. Reynolds (1900), 65 N. J. L. 424, 47 A. 644. There, a defendant on trial for embezzling funds of the company for which he had been acting as an agent and to which he had been returning funds collected for it, was not permitted to challenge the organization or existence of the company. The court there said: "A defendant * * * will not be permitted, when charged with embezzlement of its funds, to say, 'It is true, I took the money as you say, but you are not the company,' and to call in question its organization of existence. By his own agreement he recognizes the company, and his agency of it, and he will not be per-

mitted to claim immunity by simply asserting that it does not exist. * * * One who receives money or other things of value in the assumed exercise of authority as an agent for another, is estopped to deny such authority in a criminal as well as civil action."

The investors in Pathfinder II, Ltd., entrusted their funds to the defendant during the formative stages of the partnership on the assumption that he was organizing a limited partnership. He testified he had completed its organization by securing the additional partners. It would be a travesty of justice to permit the defendant to go free because he did not complete the existence of the limited partnership. He admitted receiving the money. He admitted using it to cover losses in the Rick Murphy account. The material issue was not the existence of Pathfinder II, Ltd., but whether or not the defendant, George J. Siers, as an agent of Pathfinder II, Ltd., received funds and whether or not he did then convert or embezzle the funds in violation of the law of embezzlement under the charge which is brought in the information.

Defendant does not specifically argue his sixth assignment of error in his brief. Pursuant to our rules, we consider it waived. In any event, our reading of the record would indicate it is without merit.

Defendant's seventh assignment of error alleges the sentence imposed is excessive in light of defendant's record of service to his community and the offense charged. Defendant has not argued this assignment. We assume, however, that he is contending the court should have granted probation. We have repeatedly held this court on appeal will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Schleis (1976), 196 Neb. 327, 243 N. W. 2d 50. There has been no abuse of discretion herein.

Defendant's eighth assignment of error complains that the court erred in imposing civil judgment in the

amount of $17,500. This alleged error was not assigned in defendant's motion for a new trial. The assignment, therefore, is not properly before us. See State v. Fauth (1974), 192 Neb. 502, 222 N. W. 2d 561, in which we held: "In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal." For the legality of civil judgment in a criminal case, see Coffey v. County of Harlan (1907), 204 U. S. 659, 27 S. Ct. 305, 51 L. Ed. 666. That case involved an appeal to the United States Supreme Court from a Nebraska prosecution under an embezzlement statute.

Defendant's last assignment of error is as follows: "The Court erred in imposing sentence under Section 28-539 R. R. S. Neb. 1943 because the evidence and the charge failed to apply to this section." The initial complaint, the information, the evidence adduced at the trial, and the instructions indicate that defendant was charged with a violation of section 28-538, R. R. S. 1943. The court in imposing sentence did state that the defendant had been found guilty of a violation of section 28-538 and section 28-539, R. R. S. 1943. This was a misstatement. Section 28-539 covers conversion by clerks, apprentices, or servants. There is no question defendant was charged and tried under section 28-538. The erroneous reference to section 28-539 was at most error without prejudice.

For the reasons given, the judgment of the District Court is affirmed.

AFFIRMED.

BRODKEY, J., dissenting.

The majority opinion states that it "would be a travesty of justice to permit the defendant to go free because he did not complete the existence of the limited partnership." It is also a travesty of justice for a court in its zeal to make bad law simply because it is faced with a hard case. Apparently the law now is that a person can be charged and convicted of embezzling

from a partnership which may or may not exist, without a jury determination that the partnership does exist. Such a result defies logic, common sense, and prior law, and I must respectfully dissent.

The defendant in this case was alleged to have embezzled from Pathfinder II, Ltd., a limited partnership. Essential parts of the information charged that (1) Siers was "the agent of Pathfinder II Ltd, a limited partnership"; (2) as agent of Pathfinder II, Ltd., a limited partnership, Siers embezzled money, "all of which money was and is the property of the said Pathfinder II Ltd, a limited partnership, his principal"; and (3) Siers embezzled said money "without the consent of the said Pathfinder II Ltd, a limited partnership, his principal, * * *." Thus Pathfinder II, Ltd., and that entity alone, was the alleged victim of the embezzlement.

The record reflects that at the close of the State's case the defendant moved to dismiss on the grounds the evidence adduced did not establish there was ever any embezzlement from a partnership called Pathfinder II, Ltd.; and that that entity did not exist, as the legal requirements for the creation of a limited partnership had not been fulfilled. Again, at the end of all evidence, the defendant renewed his previous motion of dismissal, stating, among other grounds for dismissal, that in order for there to be an embezzlement of the property owned by Pathfinder II, Ltd., as was charged in the information, that entity had to have been in existence; and that the evidence adduced showed that this had not occurred. In ruling upon this facet of defendant's motion, the court stated: "And now that the Defendant has moved to dismiss on the basis of no showing that there was a partnership, the Court must, in response to that Motion, make a determination from the facts as a matter of law, rather than leaving it for the Jury, because the Court, once having determined it for this purpose, the Court sees no reason why it

should then set aside its own finding and submit the question of whether or not there was a partnership formed as a question to the Jury.

"So, the Court * * * now determines that at the times in question as recited in the Information, Pathfinder II, Limited was a limited partnership and in existence, and that the Motion of the Defendant should be overruled and the fact question submitted to the Jury as to whether or not the Defendant, George J. Siers, as an agent of the Pathfinder II, Limited, a limited partnership, received funds and whether or not he did then convert or embezzle the funds in violation of the law of embezzlement under which the charge is brought in the Information." In its subsequent instructions to the jury, the court frequently referred to "Pathfinder II, Ltd., a limited partnership," but nowhere in those instructions submitted the question of the existence of that limited partnership to the jury for its determination. Defendant argues that this was clearly erroneous and prejudicial to his defense, and that it withdrew from consideration of the jury the determination of an essential element of the offense with which the defendant was charged.

The applicable embezzlement statute involved in this case is section 28-538, R. R. S. 1943, which, so far as material, provides: "If any clerk, *agent*, attorney at law, servant, factor or commission agent of any private person *or any copartnership,* except apprentices and persons within the age of eighteen years, or if any officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, shall embezzle or convert to his own use, fraudulently take or make away with or secrete with intent to embezzle or fraudulently convert to his own use, without the assent of his or her employer or employers, or the owner or owners thereof, any money, goods, rights in action

or other valuable security or effects whatever, belonging to any other persons, body politic or corporate, or which is partly the property of any other persons, body politic or corporate, and partly the property of such officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company * * * which shall have come into his or her possession or care in any manner whatsoever * * *, every person so offending shall be punished in the manner provided by law * * *." (Emphasis supplied.)

The requirements for forming a limited partnership are contained in the Nebraska Uniform Limited Partnership Act, sections 67-201 to 67-232, R. R. S. 1943. Section 67-202 provides that two or more persons desiring to form a limited partnership shall sign and swear to a certificate, containing 14 specified items of information, and file the certificate for record in the office of the county clerk of the county in which the principal place of business of the partnership shall be situated. It is then provided in subsection (2) of section 67-202, that: "A limited partnership is formed if there has been *substantial compliance in good faith* with the requirements of subsection (1) of this section." (Emphasis supplied.) Under the foregoing provision, it would seem that "substantial compliance in good faith," even though less than full compliance, would still result in the creation of a limited partnership, somewhat analogous to the status of a de facto corporation. In the instant case, it is clear from the evidence that there was far from complete compliance with the provisions of the foregoing section, but whether there was sufficient compliance to constitute "substantial compliance in good faith" would clearly be a question of fact for the determination of the jury.

The record contains the comments of the court in overruling defendant's motion for a directed verdict indicating the court was following the general rule that the existence of a partnership depends upon the agree-

ment of the parties, and their intention is to be ascertained from all the evidence and circumstances, as set out in cases such as Baum v. McBride, 143 Neb. 629, 10 N. W. 2d 477 (1943), and Carlson v. Peterson, 130 Neb. 806, 266 N. W. 608 (1936); and also the rule set out in Lewis v. Gallemore, 173 Neb. 211, 113 N. W. 2d 54 (1962), that the existence and scope of a partnership may be evidenced by a written or oral agreement, or implied by the conduct of the parties and what was done by them. I have no quarrel with the foregoing rules but wish to point out that they did not involve limited partnerships, and further that even those cases hold that the existence of a partnership is a question of fact under the evidence.

Therefore the question of what will constitute a partnership is a matter of law for the court to determine, but whether a partnership exists under the facts presented in evidence is a fact question which is for the jury to decide. See, Lewis v. Gallemore, *supra;* Baum v. McBride, *supra;* Johnson v. Graf, 162 Neb. 396, 75 N. W. 2d 916 (1956); 59 Am. Jur. 2d, Partnership, § 81, p. 994; 68 C. J. S., Partnership, § 59, p. 484. Cases in other jurisdictions have specifically held that the question of whether a partnership existed in an embezzlement case is one of fact for the jury to determine. Adams v. State, 43 Ala. App. 281, 189 So. 2d 354 (1966).

Since the trial court in this case took from the jury the question of whether Pathfinder II, Ltd., in fact existed, the question in this case is whether proof of the existence of the limited partnership was essential to the State's case. The majority contends without citation of authority, that a determination on the issue of the existence of Pathfinder II, Ltd., was not necessary, for: "If there was no limited partnership, there was a partnership agreement and the money was paid under its terms. Any variance in the name would be immaterial because defendant could not have been misled or confused as to the money he was accused of embezzling."

The majority continues: "Whether or not Pathfinder II, Ltd., existed as a legal entity was not an essential element of the crime and is immaterial on the record herein. * * * In this case, if there was a variance from the information, or a failure of proof, it was as to a matter basically immaterial under the facts herein." Finally, the majority opinion states that: "The material issue was not the existence of Pathfinder II, Ltd., but whether or not the defendant, George J. Siers, as an agent of Pathfinder II, Ltd., received funds and whether or not he did then convert or embezzle the funds in violation of the law of embezzlement under the charge which is brought in the information."

In so stating, the majority ignores fundamental and long-established principles of law, and oversimplifies the issues. It is elementary that the burden of proof at a trial for embezzlement rests, as in other criminal cases, upon the prosecution to establish every material allegation against the defendant beyond a reasonable doubt. What must be alleged must be proved. 26 Am. Jur. 2d, Embezzlement, § 48, p. 601. See, also, Yost v. State, 149 Neb. 584, 31 N. W. 2d 538 (1948). It is a universal rule that the defendant must be convicted, if at all, of the particular offense charged in the information, and that the allegations and proof must correspond. See, State v. Watson, 272 N. C. 526, 158 S. E. 2d 334 (1968); Scarboro v. State, 207 Ga. 449, 62 S. E. 2d 168 (1950); 42 C. J. S., Indictments and Informations, § 254, p. 1273.

It is well-established that where there is a conflict in the evidence it is error for the trial court to determine any question of fact involved in a criminal case. In Goldsberry v. State, 66 Neb. 312, 92 N. W. 906 (1902), we held that in the trial of an information charging a felony, the presiding judge is without lawful authority to determine an issue, or any of the questions of fact involved in the issue. That power belongs exclusively to the jury, regardless of the state of the evidence. The

jury must be fully satisfied of the existence of every fact constituting an element of the crime charged, and it cannot be assumed that it is so satisfied because it ought to be. In Goldsberry, the court stated: "For the error committed by the court in taking away from the jury the question of fraudulent intent, and authorizing them to find defendants guilty without finding that the intent charged was proved by the evidence beyond a reasonable doubt, the sentence must be reversed, *although there is much reason to suppose the result of the trial would have been the same if the case had been submitted under proper instructions.*" (Emphasis supplied.)

The general rule in a majority of jurisdictions in the United States is that in embezzlement cases the information must allege, and the State must prove, who owned the property allegedly embezzled. Sisk v. State, 260 So. 2d 485 (Miss., 1972); Meyers v. State, 193 So. 2d 728 (Miss., 1967); Loker v. State, 2 Md. App. 1, 233 A. 2d 342 (1967), affirmed 250 Md. 677, 245 A. 2d 814, cert. den. 393 U. S. 1082, 89 S. Ct. 862, 21 L. Ed. 2d 774; Commonwealth v. Nichols, 206 Pa. Super. 352, 213 A. 2d 105 (1965); Scarboro v. State, *supra;* and, see, Annotation, 88 A. L. R. 485, and supplements thereto. It is also a general rule that where ownership of embezzled property is in an association, partnership, corporation, or the like, the information must allege and prove such organization to be an entity capable of owning property. State v. Roberts, 14 N. C. App. 648, 188 S. E. 2d 610 (1972); State v. Monk, 193 Ore. 450, 238 P. 2d 1110 (1951); 26 Am. Jur. 2d, Embezzlement, § 39, p. 592. This latter rule has been modified in some states by statute. See State v. Fulper, 16 Ariz. App. 357, 493 P. 2d 524 (1972). Nebraska has no similar statute. Finally, in an information for embezzlement the agency or fiduciary relationship of the accused should be clearly stated. 26 Am. Jur. 2d, Embezzlement, § 40, p. 593.

The information in this case clearly charged the de-

fendant with embezzling from Pathfinder II, Ltd., a limited partnership. Obviously the existence of that entity was material to the State's case, since, under the rules stated above, it was required to prove who owned the property and what the fiduciary relationship was between the defendant and the victim of the embezzlement. If Pathfinder II, Ltd., did not exist, how could it have owned the property allegedly embezzled, *and how could Siers have been its agent?* The majority itself states that the material issue herein is "whether or not the defendant, George J. Siers, *as an agent of Pathfinder II, Ltd.,* received funds and whether or not he did then convert or embezzle the funds in violation of the law of embezzlement under the charge which is brought in the information." (Emphasis supplied.) If Pathfinder II, Ltd., did not exist, Siers could not have been its agent, and could not have converted or embezzled its funds.

In reaching its conclusion, the majority confuses the issue by discussing the question of whether there was a variance between the allegations and the findings of fact, and refers to cases which deal with questions of variance. Variance between pleadings and proof is not the main issue here; the defendant was charged with embezzling from Pathfinder II, Ltd., and was found guilty of embezzling from that entity. The issue presented in this appeal is whether the trial court erred in taking from the jury a question of fact which was material to the State's case, that question being whether the alleged victim in fact existed. In none of the cases cited by the majority did the trial court take from the jury the question of whether the victim of the crime existed. In each one there was a question as to the proper name of the victim, as alleged in the information, but not one of whether the entity from which property was embezzled or converted was an ongoing entity, which existed in fact and was conducting business. In none of those cases did the trial court hold as

a matter of law that the victim of the alleged crime existed.

Cases in Nebraska have long established that proof of the existence of a corporation is essential when the alleged victim of an embezzlement or larceny is a corporation. In Braithwaite v. State, 28 Neb. 832, 45 N. W. 247 (1890), we held in a larceny case that it was necessary to prove that the victim was at least a de facto corporation. This same rule has been followed in Sharp v. State, 61 Neb. 187, 85 N. W. 38 (1901); Higbee v. State, 74 Neb. 331, 104 N. W. 748 (1905); Bloom v. State, 95 Neb. 710, 146 N. W. 965 (1914); Peterson v. State, 115 Neb. 302, 212 N. W. 610 (1927); and Larson v. State, 107 Neb. 800, 186 N. W. 981 (1922). All these cases indicate that there must be some evidence of the existence of the corporate victim of the alleged crime presented to the jury in order to sustain a conviction, even if the evidence is only sufficient to show de facto existence.

The cases cited by the majority from only two jurisdictions, Arizona and Colorado, do not deal with the failure of the trial court to submit all material issues of fact to the jury, and therefore, they do not convincingly dispose of the issue raised in this appeal. State v. Scofield, 7 Ariz. App. 307, 438 P. 2d 776 (1968), and State v. Colson, 17 Ariz. App. 598, 499 P. 2d 726 (1972), were cases decided under a specific Arizona statute. In Scofield, the information alleged that the defendant embezzled property from a corporation, and the proof in the case was conflicting as to whether this entity was a separate corporation or a trade name under which an individual did business. There was no issue in the case as to whether the corporation was in existence in terms of doing business and in terms of possessing the property embezzled, and the trial court made no ruling as a matter of law that the corporation was a separate corporation. The court held that the variance between the proof and the information, if any,

was immaterial. Colson involved precisely the same kind of question, and the Scofield decision was followed. Both cases relied on A. R. S., § 13-681 et seq., which provides that: "No variance between the allegations of an indictment, information or bill of particulars, which state the particulars of the offense charged, * * * and the evidence offered in support thereof shall be ground for the acquittal of the defendant." Nebraska's variance statute, section 29-1502, R. R. S. 1943, is much narrower, and deals with variance in names.

In Straub v. People, 145 Colo. 275, 358 P. 2d 615 (1961), the defendant contended that the State had not proved the corporate existence of the alleged victim of a larceny, "The Continental Oil Company." The State had called three witnesses who testifed that they were employees of said company, and that the stolen property belonged to that company. The substance of the court's holding was that this evidence was sufficient to establish the identity of the alleged owner of the stolen property. The trial court had not held that the corporation existed as a matter of law, and had not taken that issue from the jury. More recent Colorado cases hold that in a larceny case it is necessary to at least show that the named victim had possession, control, and custody of the chattel which was the alleged object of the larceny. Diebold v. People, 175 Colo. 96, 485 P. 2d 900 (1971); Kelley v. People, 166 Colo. 322, 443 P. 2d 734 (1968). In the case at hand, if Pathfinder II, Ltd., did not exist in any respect, de facto or otherwise, it could not have had possession, control, and custody of the money allegedly embezzled, and the question of the existence of the entity was a fact question for the jury.

The majority places great weight on the fact that the defendant predicated his defense on the existence of Pathfinder II, Ltd. This fact does not relieve the State of its burden to prove all the material facts relevant to the crime charged, and does not allow the trial court to take factual issues from the jury. The

jury may well have found that Pathfinder II, Ltd., did exist, particularly in light of the defendant's own testimony, but this possibility does not warrant upholding the trial court's error of failing to submit a material factual question to the jury. See Goldsberry v. State, *supra*.

The judgment should be reversed and the cause remanded for a new trial.

McCOWN, J., joins in this dissent.

CLINTON, J., respondente.

This is not a "hard case." The simple issue is whether there was a material variance between the allegations of the information and the proof which prejudiced the defendant in his defense of the charge. State v. Nelson, 182 Neb. 31, 152 N. W. 2d 10. The dissent treats the issue as if proof of technical compliance with the provisions of the Uniform Limited Partnership Act by the persons who invested or intended to invest their money was an element of the crime of embezzlement. The technicalities involved in the formation of the entity in which ownership of embezzled or stolen property rests is not and never has been an element of the crime.

It is fundamental that an indictment or information must allege the ownership of the property embezzled or stolen. The purpose is to identify the offense so that the accused will know with certainty whose property he is alleged to have embezzled or stolen so that he may know what he must defend, and also so that the crime is sufficiently identified that if there is an attempt to try him again he may prove former jeopardy. 1 Underhill, Criminal Evidence (5th Ed.), § 85, pp. 139, 140; State v. Davis, 61 N. J. Super. 536, 161 A. 2d 552; People v. Bristow, 8 Ill. App. 3d 805, 291 N. E. 2d 189.

The record in this case undisputedly establishes that the defendant knew and knows what funds and whose funds he was charged with embezzling. His defense was that he had authority from the owners to invest the funds as he did. It is also clear that the jury was

properly instructed as to what it must find as to the identity and ownership of the funds the defendant was alleged to have appropriated before the jury could find the defendant guilty. It is crystal clear that the defendant was not hampered in any way in meeting the charges.

The majority opinion does not announce new law as the dissent implies, although some courts have taken the same hyper-technical view as the dissent. Numerous decisions in addition to those cited in the majority opinion hold that variances such as may here exist are immaterial. State v. Nelson, *supra* (ownership of stolen cattle alleged to be in ranch foreman in whose possession the cattle were, rather than in the ranch owner who, in fact, owned the cattle); Commonwealth v. O'Brien, 12 Allen 183 (Mass., 1866) (individual partner and partnership); People v. Leonard, 106 Cal. 302, 39 P. 617 (corporation or de facto corporation); State v. Harrison, 347 Mo. 1230, 152 S. W. 2d 161 (Missouri Federal Relief Commission and Federal Relief Commission); Helms v. State, 40 Ala. App. 622, 121 S. 2d 104 (some difference in the name of the individual from whose custody property was taken); Hunt v. State, 229 Ga. 869, 195 S. E. 2d 31 (Valley Produce, Co., Inc., and Val Produce, Co., Inc.); Garza v. State, 171 Tex. Cr. App. 267, 347 S. W. 2d 265 (proprietor of a beer garden and owner of juke box located in the garden); United States v. Spatuzza, 331 F. 2d 214 (New York Central "System" and New York Central Transport Company); Gaynor v. State, 247 Ind. 470, 217 N. E. 2d 156 (allegation of joint ownership sustained by proof of ownership in one of the individuals); State v. Zammar (Mo. App.), 286 S. W. 2d 54 (Katz Drug Store and Katz Drug Company, Inc.).

Can anyone doubt that had the defendant been acquitted he could successfully plead double jeopardy should he again be charged with embezzling property of the individuals who were or intended to become Path-

finder II, Ltd.? Should the proposition contended for by the dissent become law, the effect ultimately would be not merely a new trial, but the acquittal of a defendant who, if the jury's findings of fact are to be given any credence, is guilty.

BRODKEY, J., responding to respondente.

As pointed out in the dissenting opinion, the principal issue in this case is not variance, but rather the failure to submit to the jury for its determination an essential element of the charge against the defendant. If this constitutes being "hyper-technical," then so is the Constitution of the United States.

DORIS D. MAYS, APPELLANT, V. DANA M. SIEKMAN ET AL., APPELLEES.

247 N. W. 2d 613

Filed November 17, 1976. No. 40523.

1. **Negligence: Motor Vehicles: Animals.** Common law rules of negligence require horseback riders to exercise reasonable care to avoid injury from motor vehicles on the highway.
2. **Negligence: Motor Vehicles.** As a general rule it is negligence for the operator of a motor vehicle to drive so fast that he cannot stop within the range of his vision.
3. **Negligence: Motor Vehicles: Animals.** In meeting and passing a horseback rider, or a horse-drawn vehicle, a motorist is ordinarily under no obligation to stop or to take special steps to avoid a collision therewith, unless the horse shows signs of fright or that its rider or driver has lost control of it.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

William A. Wieland of Healey, Healey, Brown & Wieland, for appellant.

David A. Johnson of Emil F. Sodoro Law Office, for appellee Siekman.

Barlow, Johnson, DeMars & Flodman, for appellee Hall.

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

NEWTON, J.

This is a damage action by plaintiff, a horseback rider, to recover for personal injuries and the loss of the horse as the result of being struck by defendant Dana M. Siekman's automobile. Plaintiff's action against defendant Siekman and another defendant, Edward E. Hall, was dismissed. The court directed a verdict against plaintiff as to liability on defendant Siekman's counterclaim for damage to his automobile and the jury assessed his damages at $1,154. We affirm the judgment of the District Court.

The accident occurred on the evening of October 16, 1972, on the north approach to a viaduct over railroad tracks. The viaduct is on a north-south graveled road located 2 miles east of the intersection of North 84th Street and Havelock Avenue in Lincoln, Nebraska. Evidence regarding the time of the accident and the degree of darkness is conflicting. It is evident however that the two automobiles involved in the accident had lights on and that the glow of the lights could be observed by anyone approaching the viaduct from the opposite direction. This indicates an advanced degree of darkness.

The plaintiff, with others, left her home on horseback, rode west under the viaduct and north adjacent to it, then into some fields. Plaintiff returned alone and chose to ride over, rather than around, the viaduct. She was riding a dark-colored horse and wore dark clothing. The north approach to the viaduct had guardrails extending north from the northeast corner of the concrete bridge a distance of 335 feet and within that area the guardrails prevented the horse from leaving the 24-foot wide roadway. The defendant Hall approached the graveled road on an intersecting road about 125 feet north of the guardrails, turned south, and

then noticed the horse and rider going south and cutting over to the east side of the road. He also noticed the glow from lights on a car approaching from the south side of the viaduct; and he moved over to the right within a foot of the guardrail and slowed to a virtual stop. The defendant Siekman was driving the northbound car at 40 to 45 miles per hour and on approaching the viaduct observed the glow of the lights on defendant Hall's automobile, slowed down some, and on crossing the concrete bridge, he saw the horse and rider next to the guardrail on his side of the road. The speed limit on that road was 50 miles per hour. Defendant Siekman tried to stop but slid on the gravel. He was going 20 to 25 miles per hour when he struck the horse in the right hind leg. The Hall automobile occupied about 7 feet from the west guardrail leaving a distance of 17 feet for passage of the horse and the Siekman automobile. Being unable to stop, Siekman attempted to drive between the horse and the Hall car, but the undisputed evidence shows that at the last instant the horse shied and its rear quarters entered the path of the Siekman automobile resulting in the accident.

At the time of this accident, although no longer true, statutory traffic rules had not been made applicable to horseback riders, but such riders were bound by common law rules of negligence and must have exercised reasonable care to avoid injury from motor vehicles using the highway. See Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571. That plaintiff was negligent is apparent. She rode on to the viaduct approach on a road with a 50 mile per hour speed limit knowing that it was at least partially dark; that cars might approach from either direction; that the guardrails would prevent her riding off the road; and that both her clothes and the horse were dark colored, and without a reflector or lights. Also, she could have ridden around and under the viaduct as she had done earlier in the evening. She was an experienced horsewoman and knew that horses

sometimes become frightened and shy. She could not have been surprised that the horse shied when facing the lights of an oncoming vehicle.

The plaintiff's husband testified he had previously cautioned people not to ride over the viaduct but had not so cautioned his wife who was an experienced horsewoman. He knew crossing the viaduct to be dangerous. When he rode over the viaduct he made sure he had time to get across before encountering any problems such as traffic. He would go across rapidly as he would not "want to be caught on there with anyone." If he were caught, he would turn around and go back. If caught, he would probably dismount. He had been riding horses all his life and was in the business of breeding and training horses.

Although the defendant Siekman was not proceeding in an unusual or dangerous manner, it would appear that he was in violation of the rule that one is negligent who drives so fast that he cannot stop within the range of his vision. See Bartosh v. Schlautman, 181 Neb. 130, 147 N. W. 2d 492. In this instance his failure to observe plaintiff and to stop in time may have presented a jury question due to the darkness, the dark color of the horse and rider's clothing, and a dark background.

It is evident that had the horse not shied, the defendant Siekman would have had ample room to pass between the horse and the defendant Hall's automobile. Any negligence on Siekman's part was not the proximate cause of the accident. That cause was the shying of the horse as he attempted to pass. Had Siekman had full control of his automobile and proceeded to pass through the wide opening left between the Hall automobile and the horse, as he might reasonably have done, the accident would still have occurred. " '* * * if a motorist is, in other respects, driving with due care and a horse turns suddenly into the path of the motor vehicle so quickly that the motorist cannot avoid striking it, he is absolved from negligence as a matter of law.' "

Matson v. Dawson, 185 Neb. 686, 178 N. W. 2d 588.

"However, in meeting and passing a horseback rider, or a horse-drawn vehicle, a motorist is ordinarily under no obligation to stop or to take special steps to avoid a collision therewith, unless the horse shows signs of fright or that its rider or driver has lost control of it." 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 392, p. 942.

"Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury." Starlin v. Burlington Northern, Inc., 193 Neb. 619, 228 N. W. 2d 597. See, also, Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551.

In the case of defendant Hall we are unable to perceive any negligence whatever on his part We conclude that the District Court was correct in dismissing plaintiff's petition as to both defendants.

Regarding the defendant Siekman's recovery on his counterclaim, it would appear that substantially the same situation is presented. Although plaintiff doubtless could not control her horse when it commenced to act up, its actions were such as one familiar with horses might reasonably be expected to anticipate under the circumstances and she knew that she was likely to meet motor vehicles coming from the south on the road. The horse shying and the resultant accident followed in a natural and continuous sequence upon plaintiff's negligence. We cannot say that her conduct was not a substantial factor in bringing about the accident and consequently conclude that the judgment on the counterclaim should be sustained.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The District Court not only dismissed plaintiff's cause

of action, it also directed a verdict against the plaintiff as to liability on defendant Siekman's counterclaim for damages to his automobile, and the jury assessed his damages at $1,154. This court has now affirmed that judgment. For all practical purposes, this court has held that it is negligence as a matter of law to ride a horse at dusk on a highway bounded by guardrails, even though the horse is well-trained, not fractious, and is fully accustomed to vehicular traffic. Such a holding is wholly unsupported under the facts here and is in direct conflict with Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571. The holding in this case will no doubt come as a rude surprise to many a cowboy, real or rhinestone.

There were ample issues which should have gone to the jury on both causes of action. There was serious factual conflict as to the extent of the dusk or darkness. There was the clear issue of the failure of the defendant Siekman to stop within the range of his vision. Any assessment of comparative negligence between the plaintiff and the defendant obviously required an assessment of the factual issues. The case should have been submitted to the jury.

STATE OF NEBRASKA, APPELLEE, V. PAUL BLUNT, APPELLANT.
246 N. W. 2d 727

Filed November 17, 1976. No. 40658.

1. **Criminal Law: Right to Counsel.** The right of an indigent defendant to counsel does not give him the unbridled right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
2. ———: ———. An indigent defendant who refuses to accept offered counsel without justifiable reason and elects to proceed pro se has not been deprived of his constitutional right to counsel.
3. **Criminal Law: Right to Counsel: Waiver.** The determination of

whether there has been an intelligent waiver of the constitutional right to counsel must depend in each case upon its particular facts and circumstances, including the background, experience, and conduct of the accused.

4. **Criminal Law: Right to Counsel: Appeal and Error.** If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity.
5. **Criminal Law: Right to Counsel: Appeal and Error: Post Conviction.** In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence.

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

Alan E. Peterson of Cline, Williams, Wright, Johnson & Oldfather, 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.

PER CURIAM.

In this post conviction action defendant, Paul Blunt, sought to vacate and set aside a judgment and sentence of 24½ to 35 years imprisonment entered by the District Court for Douglas County on December 8, 1970, following defendant's conviction on a charge of robbery. Following the evidentiary hearing in the District Court on the motion to vacate and set aside the sentence, the District Court overruled the motion for post conviction relief on all grounds except one.

The District Court found that in the former direct appeal of the robbery conviction, after jurisdiction had vested in the Supreme Court, the District Court which had tried the case permitted defendant's appointed ap-

pellate counsel to withdraw on grounds that the appeal was "wholly frivolous" and the defendant was therefore required to and did proceed pro se in this court. The District Court in the current proceeding therefore granted the defendant a new direct appeal from the robbery conviction and sentence with time for appeal to begin on January 22, 1976. That appeal is now before this court.

The State contends that under the provisions of the Post Conviction Act neither the District Court nor this court has jurisdiction to grant or consider a new direct appeal from the robbery conviction and sentence of December 8, 1970. The State also denies that defendant has or had grounds for relief, either on direct appeal or under post conviction proceedings.

In view of the dual state-federal court consideration of varying aspects of this case, and to remove any doubt as to exhaustion of state remedies, we consider the issues fully.

The facts underlying the defendant's conviction for robbery are set out in State v. Blunt, 187 Neb. 631, 193 N. W. 2d 434. Briefly, the evidence showed that on May 28, 1970, after having first entered a cleaning establishment on a pretext, the defendant left and returned a few minutes later. He created a disturbance in the rear room and again left the premises. He later returned and attempted to take some money out of the cash drawer. The counterclerk closed the drawer on his hand. Blunt pushed her away with sufficient force that she fell and lacerated her knees. Blunt then jerked the cash drawer out, removed the money, and fled. He was apprehended a few minutes later about 2 blocks from the cleaning establishment. The amount missing from the cash drawer was $169.26, and the defendant was in possession of a substantial portion of that amount in cash and checks and a claim check from the cleaning establishment in another name. He also had a scraped area on the back of his hand.

The District Court appointed a representative of the public defender's office as counsel for Blunt and the first trial commenced on September 14, 1970. After a jury was convened and trial commenced, a mistrial was granted. Blunt's counsel had disclosed defendant's prior felony convictions in the voir dire of the jury. Counsel's reason for disclosure was that Blunt's defense was an alibi and counsel assumed that Blunt would, of necessity, testify. Blunt was incensed at his counsel for the disclosure and later requested counsel's removal. At a hearing after the mistrial the trial court offered to appoint another counsel from the public defender's office but flatly refused to appoint private counsel. Blunt refused and asked for time to obtain his own attorney. A new trial date was set for November 2, 1970. Blunt did not obtain counsel and on the new scheduled trial date he appeared before the trial court and stated that he would not permit anyone from the public defender's office to represent him. He was again offered assistance from the public defender's office and again he refused. He asked for more time to prepare for trial, as did the public defender's office. The trial court denied the requests, called the case for trial that afternoon, and directed that the public defender's office be in court to assist Blunt in the trial. Blunt then went to trial with the same representative of the public defender's office who had represented him in the prior aborted trial acting as his technical advisor. Blunt personally made opening comments to the jurors before voir dire in which he recited his "bad history" and told them he was representing himself because he and his attorney had developed a lot of distrust. After these opening remarks Blunt conducted little of the trial himself. The legal advisor told Blunt when to object or cross-examine and then Blunt would tell the legal advisor to go ahead and do it. Technically, however, Blunt was in charge as his own counsel with the legal advisor's assistance. The trial proceeded in comparatively routine fashion.

The State called three witnesses who were all cross-examined by the legal advisor, although Blunt himself cross-examined the counterclerk following her recall for redirect examination. Blunt's cross-examination of her was directed at her testimony at the preliminary hearing as to whether or not she had identified Blunt at that hearing. She repeated her previous testimony that she identified him at the preliminary hearing.

After these State's witnesses had been examined, the State moved to strike the names of the three witnesses remaining on its list of witnesses. This motion was granted over the objection of the legal advisor for Blunt. The legal advisor then filed five praecipes for subpoenas for witnesses. Trial was recessed until the following morning. The only witness who appeared the next morning was the manager of the cleaning establishment.

The court, before proceeding, determined that Blunt also wished to recall two State's witnesses who had previously testified 2 days before, been examined and cross-examined, and released. The court refused to issue subpoenas for their reappearance. The legal advisor for Blunt then examined Richard Parsons, the store manager, who was the only witness presented by the defendant. The defendant rested. The jury found the defendant guilty.

Motion for new trial was filed and overruled. An habitual criminal count was dismissed by the State before sentencing. On December 8, 1970, Blunt was sentenced to 24½ to 35 years in the Nebraska Penal and Correctional Complex for robbery. On December 23, 1970, Blunt filed a notice of appeal to the Supreme Court and a praecipe for transcript requesting that it include a transcript of the preliminary hearing. The transcript of the preliminary hearing was lost or misplaced and has not been found. The District Court appointed a different member of the public defender's staff to represent Blunt on the appeal. After jurisdic-

tion vested in the Supreme Court, the new counsel from the public defender's office filed a motion in the District Court for leave to withdraw as appointed counsel on the ground that the appeal was frivolous. The trial judge who presided at the trial granted the motion to withdraw on May 20, 1971. Thereafter, in the appeal to the Supreme Court, Blunt therefore represented himself. The brief for Blunt was pro se. This court affirmed his conviction on that appeal on January 7, 1972. See State v. Blunt, 187 Neb. 631, 193 N. W. 2d 434.

Blunt's motion to vacate and set aside his sentence under the Post Conviction Act raises issues which, for purposes of this opinion, we will separate into issues related to the trial stage and issues related to the appeal.

As to the trial stage, the defendant asserts: (1) That defendant made an involuntary, unintelligent, and unknowing waiver of counsel at trial;

(2) That defendant's trial counsel caused the mistrial, and prior to that trial performed only nominal investigation of the case;

(3) That the appointment of the same individual as legal advisor instead of the appointment of separate nonpublic defender counsel denied defendant effective assistance of counsel;

(4) That the trial court deprived defendant of due process of law by (a) failing to advise or assist defendant in his jury selection rights, (b) failing to grant defendant an opportunity to obtain a transcript of the preliminary hearing, and (c) refusing to grant a continuance to defendant in proceeding pro se;

(5) That the trial court erred in failing to recall certain State's witnesses, and to provide compulsory process for certain defense witnesses; and

(6) That the evidence was so deficient on the required element of taking by force that the conviction constituted a denial of due process of law.

As to the appeal, the defendant contends that:

(1) Defendant was denied his right to counsel on appeal because the trial court, rather than a reviewing court, granted appointed counsel the right to withdraw and refused to grant defendant effective counsel on appeal;

(2) The State failed to provide a transcript of the preliminary hearing for use on appeal; and

(3) The defendant's sentence was excessive.

In general, the issues raised by the defendant which are related to the trial stage are grounded on allegations that his counsel was so incompetent and ineffective that to permit Blunt to proceed pro se with that counsel's assistance as legal advisor rather than to appoint new counsel outside the public defender's office was sufficient to deny Blunt the effective assistance of counsel and there was no constitutionally valid waiver of the right to counsel at trial. The evidence, however, was contradictory on many of the factual issues involved. The individual who represented Blunt as counsel at the mistrial and as legal advisor in the actual trial denied that Blunt had asked him to make an investigation to locate witnesses or had given him the name or names of any possible witnesses to be interviewed.

Blunt wants to have it both ways. He contends on the one hand that he did not voluntarily, intelligently, and knowingly waive his right to counsel; and also contends that his legal advisor was ineffective and incompetent counsel. The trial court expressed confidence in the individual appointed to represent Blunt but also offered to appoint other counsel from the public defender's office. The court expressed the view that it was highly advisable for Blunt to have counsel, and that he should not undertake to proceed pro se, but the court refused to appoint counsel outside the public defender's office. The offers were refused by Blunt who stood on his demand that he be given private counsel and, if not, that he be permitted to proceed as his own counsel.

The law is quite clear that the right of an indigent

defendant to have counsel does not give him the unbridled right to be represented by counsel of his own choosing and that mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. See State v. Bratton, 187 Neb. 460, 191 N. W. 2d 612. An indigent defendant who refuses to accept offered counsel without justifiable reason and elects to proceed pro se has not been deprived of his constitutional right to counsel. See, State v. Reed, 188 Neb. 195, 195 N. W. 2d 503; State v. Thunder Hawk, 188 Neb. 294, 196 N. W. 2d 194.

The determination of whether there has been an intelligent waiver of the constitutional right to counsel must depend in each case upon its particular facts and circumstances, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461. In this case, Blunt's demands to have an individual attorney in the public defender's office released were complied with and the court then offered to appoint other counsel from the public defender's office. No sufficient reason has ever yet been advanced by Blunt for rejecting that offer. Blunt demanded the release of the public defender appointed for him and refused to accept the offer to appoint any other public defender, after being informed by the court that either of such counsel would competently represent him, and that no attorney outside the public defender's office would be appointed. Those facts establish that Blunt adequately and sufficiently waived his right to be represented by counsel at trial in District Court. See Johnson v. United States, 318 F. 2d 855 (8th Cir., 1963).

Defendant's claims of error in the trial court on grounds of deprivation of due process are marginal at best and require no detailed discussion. Blunt does claim, however, that he was denied his Sixth Amendment right to compulsory process. The record fails to support that assertion. When the prosecution rested, it

moved to strike the names of three witnesses remaining on its list. The motion was granted over the objection of Blunt's legal advisor, who then filed five praecipes for subpoenas for witnesses. Three of those five were the prosecution witnesses who had been stricken. The other two were the manager of the cleaning establishment and one Wanda Cokes, who (on a collateral record) allegedly might testify how Blunt happened to have an injured hand. So far as the record shows, subpoenas were personally served on two individuals. The other three were not found after due search and inquiry. The manager of the cleaning establishment appeared and testified. Wanda Cokes was not found. At no time has Blunt or his counsel stated for the record what the expected testimony of any of the five witnesses would be. There is no showing that it was not cumulative, nor impeaching, nor that there was any probability that it might affect the result, nor has it ever been shown that due diligence had been exercised to secure the attendance of any absent witnesses. Even on this appeal there is still no specific information as to why the failure of four witnesses to appear was a denial of due process. Neither is there yet a showing of how or why the absence of the testimony of any of these witnesses was prejudicial to the defense.

When trial resumed on the day after Blunt's subpoenas had been issued, Blunt also requested that two of the State's witnesses who had testified 2 days before be subpoenaed to return, and this request was denied. The two witnesses had been examined and cross-examined and Blunt himself participated in a recross-examination of one of them. As to these two witnesses also there was no showing that they could not have been fully examined when they were on the stand, nor was there any showing as to how or why additional testimony, or the absence of it, was in any way prejudicial to Blunt.

In any event, the evidence and the record fail to es-

tablish the claim that Blunt was denied his Sixth Amendment rights to compulsory process.

Turning to the issues involved at the appeal stage, the evidence establishes that on Blunt's prior appeal to this court it was the trial judge who reviewed the record and granted the motion of appointed counsel on appeal to withdraw. Blunt's motion for appointment of alternate counsel on appeal was then also denied by the same District Judge. This court did not review nor rule on either of these motions.

The only briefs submitted in this court on Blunt's behalf were prepared with the assistance of the inmate legal assistance program at the penitentiary. On such facts it is clear that Blunt was deprived of his right to counsel on appeal and did not have an effective appeal. The decision on the former appeal must therefore be deemed a nullity. See, Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811; Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493; Blunt v. Wolff, 501 F. 2d 1138.

Blunt also contends that failure to provide a transcript of the preliminary hearing for use on the appeal rendered the appeal critically deficient. By the time of the appeal the transcript of the preliminary hearing had been misplaced, lost, or destroyed. The only basis for the assertion that the transcript was necessary is Blunt's claim that the counterclerk failed to identify him at the preliminary hearing. The counterclerk testified under oath at trial that she had identified him at the preliminary hearing. She also identified him at trial, as did every other prosecution witness. There is no credible basis to support any claim that the loss of the transcript of the preliminary hearing was prejudicial to the defendant.

The State takes the position that in a post conviction proceeding such as this where there has been one prior appeal, neither the District Court nor this court has jurisdiction to grant a new direct appeal under the

terms of the Post Conviction Act. §§ 29-3001 et seq., R. R. S. 1943.

Under the terms of the Nebraska Post Conviction Act, if the District Court determines that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, "the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate." § 29-3001, R. R. S. 1943.

In the case now before us we have determined that there was no error of constitutional dimensions at the trial stage of the original criminal proceedings but that there was a denial of the constitutional right to counsel on the former appeal. Under the State's interpretation of the Post Conviction Act, if the evidence establishes that there was a denial of the constitutional right to counsel at any stage of the proceedings the only remedy is to discharge the prisoner or grant a new trial, even though the denial of counsel occurred only at the appeal stage and not at trial. We do not believe the Legislature intended any such restriction on the jurisdiction of the court, nor on its power to grant relief.

The Legislature specifically gave the District Court the power to set aside a judgment if the court found there had been a denial or infringement of the prisoner's constitutional rights sufficient to render "the judgment" void or voidable. That power obviously includes the power to void the entire criminal proceeding, including judgments on trial and on appeal, if there was one. Jurisdiction and power to set aside judgments or proceedings are not restricted to all or nothing. Where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power, in a post conviction proceeding, to grant a new direct appeal without granting

a new trial or setting aside the original conviction and sentence. The Legislature intended to give the courts jurisdiction to grant appropriate relief under the Post Conviction Act. The court is specifically empowered to vacate and set aside "the judgment." The judgment of this court on appeal is a "judgment" within the meaning of the Post Conviction Act, if that judgment is voidable because of a denial or infringement of constitutional rights. The power to grant a new appeal is implicit under the provisions of section 29-3001, R. R. S. 1943.

The final issue involves the sentence of 24½ to 35 years imposed upon Blunt for the robbery. Blunt contends the sentence is excessive. While the court is not unanimous, a majority has determined that the original sentence of 24½ to 35 years imprisonment was not excessive.

Blunt also contends that the sentence is in violation of section 83-1,105, R. S. Supp., 1976, the relevant portion of which became effective July 6, 1972. That section applies to indeterminate sentences and specifically provides that "the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, * * *." The maximum for robbery is and was 50 years. Therefore, the minimum limit of an indeterminate sentence for robbery cannot exceed 16 2/3 years. When the law under which a defendant was convicted is amended pending appeal so as to mitigate the punishment, it is logical to assume that the Legislature intended the new punishment, which it now feels fits the crime, to apply whenever possible. State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225. The appeal now before us is a direct appeal, the former appeal being a nullity, and the rule is applicable. The minimum term of the sentence imposed on Blunt is reduced from 24½ years to 16 2/3 years in conformity with the statute.

The judgment of the District Court in the post con-

viction proceeding is affirmed in all respects. On the direct appeal from the original conviction and sentence, the conviction for robbery is affirmed. The sentence of 24½ to 35 years is vacated and a sentence of 16 2/3 years to 35 years is imposed.

AFFIRMED AS MODIFIED.

BRODKEY, J., not participating.

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

I concur in the majority opinion with the exception of that part of the opinion dealing with the excessiveness of the sentence. My views on that score were set out in the former case of State v. Blunt, 187 Neb. 631, at page 633, 193 N. W. 2d 434, at page 436.

The defendant here took something over $100 in cash and checks from a cash register and pushed or shoved the cashier to her knees when she shut the cash register drawer on his fingers. He did not display or use or pretend to have any weapon.

It is significant that an habitual criminal charge was dismissed before he was sentenced. We have very recently held in State v. King, 196 Neb. 821, 246 N. W. 2d 477, that proportionality in sentencing ought to mean that the more serious offenders generally merit the greater punishment and that those offenders who offer the greatest menace to society deserve the greater punishment. In the case now before this court the original minimum sentence of 24½ years was 4½ years more than the highest minimum which could be imposed on an habitual criminal charge for conviction of any crime except murder. The minimum sentence of 16 2/3 years now imposed by this court is exactly twice as much as the highest minimum term which can be imposed for forcible sexual assault causing serious personal injury, and the maximum sentence of 35 years is 10 years more than the maximum which can be imposed for that crime.

Clearly the defendant's prior record is bad. He is entitled to no leniency. That fact should not justify a sentence which clearly does not fit the crime. Neither

does it authorize the court to sentence him as though the habitual criminal count had not been dismissed. Any sentence in excess of 10 years, in my opinion, constituted an abuse of discretion on the facts here. Where the court is required to enter a new sentence, as it is here, that sentence ought to reflect a more evenhanded justice. Injustice remains intolerable, no matter what proportions it may have.

STATE OF NEBRASKA, APPELLEE, V. EDGAR L. NANCE, ALSO KNOWN AS EDGAR LEE NANCE, JR., APPELLANT.
246 N. W. 2d 868

Filed November 24, 1976. No. 40558.

1. **Criminal Law: Trial: Evidence: Constitutional Law.** A show-up identification procedure is constitutionally invalid only when so unnecessarily suggestive and conducive to irreparable mistaken identification that a defendant is denied due process of law, and admission of evidence of a show-up without more does not violate due process.
2. **Criminal Law: Trial: Evidence.** A determination as to the likelihood of misidentification must be made on the totality of circumstances of each case.
3. **Criminal Law: Trial: Evidence: Right to Counsel.** A defendant is not entitled to the assistance of counsel at a pretrial identification procedure conducted before the filing of the information.
4. **Criminal Law: Trial: Evidence.** An in-court identification may properly be received in evidence if it is independent of, and untainted by, an illegal pretrial identification procedure.
5. **Criminal Law: Indictments and Informations: Joinder.** Two or more offenses may be charged in the same information if both are of the same or similar character.
6. **Criminal Law: Trial: Joinder.** Severance of counts in a criminal case is a matter directed to the sound discretion of the trial court, and no ruling thereon will be disturbed on appeal in the absence of a showing of prejudice to the defendant.

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

Frank B. Morrison and Joseph F. Bataillon, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

BRODKEY, J.

In count I of a seven count information, the defendant, Edgar L. Nance, was charged with the robbery of Daniel Short on May 28, 1975, under section 28-414, R. R. S. 1943. Count II charged the defendant with the use of a firearm in the commission of that robbery under section 28-1011.21, R. R. S. 1943. Counts III and IV charged the defendant with the robbery of Mary West on May 29, 1975, and with the use of a firearm in the commission of that robbery. Counts V and VI charged the defendant with the robbery of Frank Gundersen on June 5, 1975, and with the use of a firearm in the commission of that robbery. Count VII charged the defendant with being a habitual criminal under section 29-2221, R. R. S. 1943. The defendant moved to sever the counts relating to each individual robbery pursuant to section 29-2002(4), R. R. S. 1943. The trial court partially granted his motion, severing the charges relating to the Gundersen robbery, but consolidating for trial the charges relating to the Short and West robberies.

After a jury trial on October 20, 1975, the defendant was found guilty of the robbery of Gundersen, but was found innocent of the charge of using a firearm in the commission of that robbery. The defendant was also found guilty of the robberies of West and Short after a jury trial commencing November 3, 1975. The trial court had dismissed the charge of using a firearm in the commission of the Short robbery after the close of the State's case; and the jury found the defendant not guilty of the charge of using a firearm in the commis-

sion of the West robbery. Upon defendant's motion, the trial court dismissed Count VII of the information, which charged the defendant with being a habitual criminal.

The defendant was sentenced to 4 years imprisonment for the Gundersen robbery, and 5 to 7 years each for the West and Short robberies. The sentences on the West and Short robberies were ordered to be served concurrently, but consecutive to the sentence on the Gundersen robbery. The defendant now appeals his convictions to this court. We affirm.

In support of his appeal, defendant makes two assignments of error which he contends were prejudicial and require reversal of his convictions in the trial court. They are that the District Court committed reversible error (1) in allowing evidence of a one-man show-up to be presented to the jury; and (2) in partially overruling a defense motion for severance of the offenses. The first assignment of error relates only to testimony at the Gundersen trial, and in no way challenges the identification procedures related to the West/Short trial. The second assignment relates only to the issue of whether charges relating to the West and Short robberies should have been severed for separate trials. We discuss each of these assignments in the order presented.

The evidence in the Gundersen case shows that on June 5, 1975, an individual came to the Merker Realty Company, where Frank Gundersen was employed, and expressed interest in purchasing a home. The individual was at the realty office approximately 5 minutes, during which time he was viewed by Gundersen and two other employees, Cathy Bluvas and Mary Sortino. Gundersen then drove the prospective client to 3602 Blondo Street in Omaha for the purpose of showing him a house. The drive from the realty office, which is located at 2314 L Street in Omaha, took approximately 15 minutes. During the drive the prospective client at

one point waved at a police officer who was in a cruiser next to the Gundersen car when it was stopped at a traffic light.

Upon reaching the house on Blondo Street, Gundersen spent approximately 15 minutes showing the prospective client the house. The individual then struck Gundersen on the side of the head, kicked him, and placed him in a closet. The assailant removed some credit cards from Gundersen's billfold, and then left in his car. The police were notified. Gundersen described the assailant as a negro male in his mid-20's, approximately 6 feet tall, weighing 170 to 180 pounds, wearing a green short sleeved shirt with colored design flowers and two medalions.

The defendant was apprehended the next day when the police were investigating the West robbery, and was found in possession of the credit cards belonging to Gundersen. He was then taken to the police station for the purpose of standing in line-ups conducted for witnesses of all the robberies involved in this appeal. On the morning of June 6, 1975, the defendant stood in two line-ups, where he was viewed by witnesses in the Short and West cases. The defendant thereafter refused to stand in any further line-ups. He testified that the reason for his refusal was that he had not been provided an attorney. Upon his refusal, a show-up, which is a procedure where the defendant alone is presented to witnesses for the purpose of identification, was conducted for the witnesses in the Gundersen case.

Gundersen positively identified the defendant as his assailant in this show-up procedure. Cathy Bluvas was unable to positively identify the defendant, but stated that his chin, eyes, and nose resembled those of the individual she had seen in the realty office on June 5, 1975. Mary Sortino could also not positively identify the defendant at the show-up, but did state that the medalions that the defendant was wearing were like

those worn by the individual who was in the realty office the day before. She did state that she "believed" the man in the show-up was the individual who came to the realty office on June 5, 1975.

A suppression hearing was held prior to the Gundersen trial to determine whether testimony of the pretrial identification procedure should be excluded from evidence. The trial court overruled defendant's motion to suppress, and Gundersen was permitted to testify at the trial that he had identified the defendant in the show-up procedure. He also made an independent identification of the defendant in the courtroom during the trial. Cathy Bluvas testified at the trial, but made no identification of the defendant, and stated that she had been unable to make a positive identification at the show-up. Mary Sortino testified that she had not positively identified the defendant at the show-up, but stated at the trial, as she had at the show-up, that the defendant appeared to be the man who had come to the realty office on June 5, 1975.

The other testimony at the trial showed that the defendant had made a statement to the police after his arrest, admitting his guilt of the Gundersen robbery. The defendant also told a police officer where he had left the Gundersen automobile, which was subsequently recovered in the place where the defendant said he had left it. Another police officer testified that she had searched the defendant's apartment with his consent and had found a green shirt with flowered print like that described by witnesses as the shirt worn by the robber on June 5, 1975. A third police officer testified that it was the defendant who had waved to him from the Gundersen automobile on June 5, 1975, and that he had identified the defendant during a line-up procedure on June 6, 1975. Medalions found in the defendant's possession, like those described by the witnesses as being

worn by the robber, were offered and received into evidence.

The ground on which the defendant challenges his conviction of the Gundersen robbery is that evidence of the show-up identification procedure should not have been presented to the jury. This court has recently reviewed the validity of pretrial identification procedures in State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504 (1974), on reargument, 192 Neb. 380, 220 N. W. 2d 562, cert. den., 420 U. S. 909 (1975); and State v. Banks, 195 Neb. 340, 237 N. W. 2d 875 (1976). In those cases we applied the legal principles set forth in Neil v. Biggers, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). In that case the court stated that the critical issue was whether the show-up procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law, and set forth factors to be considered. Such a determination must be made on the totality of the circumstances of the case. The court concluded that it "is the likelihood of misidentification which violates a defendant's right to due process," and stated that "the admission of evidence of a showup without more does not violate due process." 409 U. S. at 198.

We cannot say that the show-up procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law. The critical identification made in this case was that by Mr. Gundersen, for he was the only witness who made a positive identification at both the show-up and the trial. Neither witness Bluvas nor Sortino made a positive identification at the show-up or the trial, and therefore their testimony could not be said to have resulted in misidentification. We also note that Mr. Gundersen had ample opportunity to view his assailant. He was with the criminal, at close proximity, for more than 30 minutes. He specifically testified that

he closely observed the face of the individual who robbed him, stating: "I just watched his face, like I do any other customer, to see what reaction they have about buying a home." Gundersen gave a generally accurate description of the robber to the police prior to the show-up, including reference to a green shirt and medalions of the type that were later found in the possession of the defendant. Gundersen was unequivocal in his identification of the defendant at both the show-up and the trial, and demonstrated a high level of certainty. Finally, the show-up was held 1 day after the crime took place. These facts indicate, on the totality of the circumstances, that there was no substantial likelihood of misidentification in this case. Further facts substantiate this conclusion. The defendant's own statement to the police indicated that he had committed the crime, and his statement of the events that occurred was substantially the same as Gundersen's. The defendant's statement led the police to the discovery of Gundersen's automobile, which was found in the place where the defendant had said he had left it. The police officer at whom the defendant had waved from Gundersen's car identified him in a line-up, not merely a show-up. Finally, Gundersen's credit cards were found in defendant's possession.

It should also be noted that the pretrial identification procedures in this case were conducted before the filing of the information, and therefore the defendant was not entitled to assistance of counsel at either a line-up or show-up. Kirby v. Illinois, 406 U. S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

The purpose of a rule barring evidence of unduly suggestive confrontations is to deter the police from using a less reliable procedure when a more reliable one may be available. Neil v. Biggers, *supra.* In this case, the purpose of the rule would not be fulfilled by excluding the evidence, for the police were prevented

from conducting a more reliable identification procedure due to the defendant's own recalcitrance. While we do not commend the use of show-ups, which have been widely criticized, as a normal means of pretrial identification procedure, under the totality of the circumstances of this case there was no violation of due process. See Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

Gundersen made an in-court identification of the defendant at the trial. Even if the show-up procedure could be considered as unnecessarily suggestive in this case, which we do not concede, the rule is well-established that an in-court identification may properly be received in evidence if it is independent of, and untainted by, the illegal pretrial identification procedure. See, Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970); Moss v. Wolff, 505 F. 2d 811 (8th Cir., 1974); State v. Sanchell, *supra;* State v. Banks, *supra.* It would appear from the facts discussed above that Gundersen did have an independent basis to make his in-court identification, which further supports the conclusion that there was no constitutional error present in this case. We find the defendant's first assignment of error to be without merit.

Defendant's remaining assignment of error is that the District Court erred in overruling his motion for severance of the charges relating to the West and Short robberies. Section 29-2002, R. R. S. 1943, provides in part: "(1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, *are of the same or similar character* or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." (Emphasis supplied.) Subsection (4) of section 29-2002 provides that if it appears that a defendant

would be prejudiced by a joinder of offenses, the trial court may order an election for separate trials of counts in the information.

The basis for joinder in this case was that the West and Short robberies were of the same or similar character. The evidence in the Short case showed that the defendant had entered Short's automobile repair shop on May 28, 1975, at approximately 6:30 p.m. The defendant stated that he wanted to get a car repaired, and was in the shop about 15 minutes. Other customers who were in the shop then left, and the defendant then took Short's billfold at gunpoint. The defendant then made Short get into the trunk of a car, and made his escape. Short subsequently identified the defendant as the robber in a line-up held on June 6, 1975.

The evidence in the West case showed that the defendant came to Bettcher Industries on the following day, May 29, 1975, at approximately 1 p.m. At that time Mrs. West was the only person in the office, and the defendant asked her whether any jobs were available. After a brief discussion, the defendant threatened Mrs. West with what appeared to be a gun, and forced her to lie down on the rest room floor. After binding Mrs. West, he removed her engagement ring. When she eventually freed herself, she discovered that her money and credit cards, as well as her employer's car, were missing. Mrs. West identified the defendant as the robber in a line-up held on June 6, 1975. She subsequently went to a preliminary hearing held in the case, and at that time saw her engagement ring on the hand of the defendant's girl friend, Sadie Harbour. Ms. Harbour testified that the defendant had given her the ring.

We are of the opinion that the two robberies referred to were "of the same or similar character" under the Nebraska statute referred to above, notwithstanding the fact that the offenses were committed against two different individuals, and with approximately 19 hours

intervening between the commission of the offenses. A similar situation was presented to the Supreme Court of New Jersey in the case of State v. Baker, 49 N. J. 103, 228 A. 2d 339 (1967). The New Jersey court rule on joinder, like the Nebraska statute, permits joinder of offenses of the "same or similar character." In that case, the defendant was charged with the sale of heroin in two indictments. Each indictment charged a single sale, one to a federal agent on January 10, 1963; and one to a Newark officer on March 4, 1963, almost 2 months later. The court held that the two offenses were of the "same or similar character," under its rules, and a joint trial of the separate indictments for the offenses was authorized. The court observed that the factual situations in the cases were uncomplicated, and the evidence to each offense was simple and distinct.

The facts show that the two robberies in the instant case were generally of the same or similar character. This court had a similar situation before it in State v. Rodgers, 186 Neb. 633, 185 N. W. 2d 448 (1971). In that case a defendant was charged in a two count information with the robbery of two different service stations on the same day. The trial court overruled the defendant's motion to sever the counts for separate trials. The defendant on appeal contended that the failure to sever resulted in cumulative evidence being submitted to the same jury. We stated: "Defendant maintains that the combining of the two offenses for trial was prejudicial due to weakness in the evidence on Count I. As pointed out, the record fails to sustain this contention. The question of election between counts and the advisability of joint or separate trials is one directed to the sound discretion of the trial court." The court, following prior cases, held that unless some prejudice has resulted from the failure to sever, no abuse of discretion will be found. The rule announced in the Rodgers case was adhered to in State v. McDonnell, 192 Neb. 500, 222 N. W. 2d 583

(1974), a case involving a similar factual situation.

It is clear, under our procedure, that severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal in the absence of a showing of prejudice to the defendant. See, generally, State v. Foster, 183 Neb. 247, 159 N. W. 2d 561 (1968); State v. Shimp, 190 Neb. 137, 206 N. W. 2d 627 (1973); State v. Erving, 180 Neb. 824, 146 N. W. 2d 216 (1966).

Although defendant contends that it is inherently prejudicial to be defending on several unrelated counts at the same time because they will tend to enforce each other, he has made no actual showing of how he was, or may have been, prejudiced. In effect, the defendant here makes the same argument as did the defendant in State v. Rodgers, *supra;* but, as in Rodgers, the facts of this case do not support such an argument. The evidence on each robbery was distinct and simple. The trial court separately instructed the jury on the elements of each count, and a further instruction provided: "The material elements of each count will be considered separately by you and a separate determination made as to each Count."

We conclude that the consolidation of the counts in this case was not an abuse of discretion, and the defendant's second assignment of error is without merit.

The judgment of the trial court must be affirmed.

AFFIRMED.

McCOWN, J., dissenting as to joinder issues only.

Section 29-2002, R. R. S. 1943, specifically provides that if it appears a defendant would be prejudiced by a joinder of offenses, the trial court may order separate trials. In this case the two robberies which were joined were completely separate offenses. They involved different victims, different locations, different property, and different witnesses. They did not even occur on the same day.

This court has continuously held that in a trial for commission of one crime, evidence of other unconnected crimes is inadmissible. See, Morgan v. State, 56 Neb. 696, 77 N. W. 64; State v. Casados, 188 Neb. 91, 195 N. W. 2d 210. One basic reason for the rule is that evidence of another crime may be given too much weight by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged. 1 Jones on Evidence (5th Ed.), § 162, p. 290; 2 Wigmore on Evidence (3d Ed.), § 302, p. 200. Exactly the same reason exists for holding that a trial for unconnected separate crimes should be separated if requested.

The very recent case of United States v. Foutz, 540 F. 2d 733 (4th Cir., Aug. 1976), specifically holds that where two or more offenses are joined for trial solely on the theory that the offenses were of the same or similar character, it was reversible error to deny a motion for severance, under a rule permitting severance where the accused would be unduly prejudiced by joinder. The court noted that one specific source of prejudice in such a case is that the jury may conclude the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition. It is particularly interesting to note that the test of prejudice adopted by the 4th Circuit in that case is whether evidence of one crime would be admissible at a separate trial for the other.

The ABA Criminal Justice Standards Relating to Joinder and Severance, approved and adopted in 1968, are specific on this point. "2.2 Severance of offenses. (a) Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses." As noted in the commentary, the public interest in avoiding duplicitous time-consuming trials is weighed against prejudice to

defendants. Where the offenses are completely separate as here, duplicity in trial time, if any, would ordinarily be minimal. As a practical matter, trial time may actually be saved in many cases. By trying one case first, the proceedings may be shortened, and a second trial may be eliminated. In this case, for example, the sentence on each count was the same, to run concurrently. On the other hand, if the defendant should be found not guilty on one count, the other counts may be prosecuted or dismissed as circumstances warrant.

It seems to me better judicial policy to grant a defendant's motion for separate trials when the only connection between two counts is that they are both robberies or both burglaries. The possibility of prejudice is obvious and the constitutional guaranty of a fair trial should not have to rest on a technical interpretation of a joinder statute. Neither should the effectiveness of the constitutional right to a fair trial be dependent upon an exercise of judicial discretion in granting or denying a motion for separate trial in a case like this.

MELVIN REEVES, APPELLANT, V. ASSOCIATES FINANCIAL SERVICES COMPANY, INC., A CORPORATION, APPELLEE.
247 N. W. 2d 434

Filed November 24, 1976. No. 40570.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law.
2. **Uniform Commercial Code: Foreclosure: Sales.** Under section 9-504(2), U. C. C., a debtor is entitled to any surplus arising from a repossession sale of collateral by a secured party.
3. **Principal and Agent.** Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

4. **Principal and Agent: Sales.** One who receives goods from another for resale to a third person is not thereby the other's agent unless his duty is to act primarily for the benefit of the one delivering the goods to him.
5. **Contracts: Assignments: Uniform Commercial Code.** Where a seller assigns an installment contract to a finance company subject to a repurchase agreement or guaranty, it is the seller who has the rights and duties of a secured party when the finance company repossesses collateral and transfers it to the seller pursuant to the repurchase agreement or guaranty. § 9-504(5), U. C. C.
6. **Uniform Commercial Code: Sales.** A secured party has a duty to sell repossessed collateral in a commercially reasonable manner, and price, as a term of sale, is a relevant consideration in determining whether a sale is commercially reasonable.

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

George A. Sommer, for appellant.

George P. Burke of Van Steenberg, Myers & Burke, and Lawrence W. Rice, for appellee.

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

BRODKEY, J.

Plaintiff, Melvin Reeves, appellant herein, commenced this action in the county court of Scotts Bluff County against defendant, Associates Financial Services Company, Inc., appellee herein, for an accounting of an alleged surplus arising out of the repossession sale of a motor vehicle which the appellant had purchased under an installment contract, and in which the appellee held a security interest as assignee of that contract. Upon cross-motions for summary judgment, the county court entered summary judgment in favor of the appellant. On appeal, the District Court for Scotts Bluff County reversed and vacated the judgment of the county court, granted the appellee's motion for summary judgment, and dismissed the appellant's petition. Reeves has appealed, contending that the District Court erred

in granting summary judgment to the appellee and dismissing his petition. We reverse and remand.

The facts relevant to this appeal are as follows. On August 31, 1972, Reeves purchased a truck tractor from Floyd's Sales and Service, Inc. ("Floyd's"), for $36,664.04 under a retail installment contract. At that time, Floyd's apparently had a financing arrangement with the appellee, hereinafter referred to as "Associates," whereby Floyd's would assign its installment contracts to Associates.

The printed form contract, furnished by Associates and used by Floyd's in the sale to Reeves, provided that the contract could be assigned, specifically naming Associates as assignee, and provided for three alternate forms of assignment: (1) Assignment without recourse; (2) assignment with recourse; and (3) assignment with either a full or limited repurchase agreement. On August 31, 1972, Floyd's assigned the Reeves contract to Associates, making use of the "assignment without recourse" provision. A notation in handwriting next to the printed words of assignment, however, indicated that the assignment, was "Subject to The White Dealer Agreement." The White Dealer Agreement itself is not included in the record, and its specific terms are unknown, although Associates contends in its brief that Floyd's was the guarantor of Reeves' contractual obligation under the dealer agreement.

After making 19 payments, Reeves defaulted on the contract in July 1974, with a balance due of $15,820.16. Reeves turned the truck over to Associates on July 29, 1974, and Associates notified Floyd's of the repossession by letter on July 30, 1974. This letter indicated that the truck was financed under the terms of the "White-Associates financing program," although the terms of that program are not in the record.

After repossession, the truck was stored at Floyd's. A repossession report prepared by Associates on July

30, 1974, indicated that the transactions between Floyd's and Associates were subject to the "White Factory Plan," and that Floyd's was to pay in full for the truck when it was sold. Floyd's signed a receipt of this repossession report, acknowledging that it had taken possession of the truck "merely as a bailee" for Associates, that it would store the truck without cost to Associates and would return the truck upon demand, and that it authorized Associates to secure replacement insurance at the expense of Floyd's.

On July 30, 1974, Associates notified Reeves that the truck would be offered for private sale beginning August 12, 1974. Associates also notified Floyd's of the date set for the foreclosure sale. On September 3, 1974, Floyd's sold the truck to Donald and Velma Rising for $18,220.16 under an installment contract, and on the same day assigned the Rising contract to Associates. This assignment, as was the case with the Reeves contract, was under the "assignment without recourse" alternative on the form contract, but subject to the "White Dealer Agreement." The evidence does not show how much Associates paid Floyd's for the assignment of the Rising contract; nor whether the assignment of the Rising contract was related to the reassignment of the Reeves contract. On September 4, 1974, Floyd's issued a $15,820.16 check to Associates, and Associates reassigned the Reeves contract to Floyd's without recourse.

Reeves initiated this action in county court, alleging in his amended petition that Associates had repossessed the truck with a balance due of $15,820.16, and had sold it for $18,220.16. Reeves demanded an accounting for the resulting $2,400 surplus under section 9-504(2), U. C. C. In its answer, Associates denied selling the truck for $18,220.16, and stated that it sold the truck to Floyd's for $15,820.16. Associates thus denied receiving any surplus whatsoever, alleging that it received the

exact amount due on the Reeves contract from Floyd's in consideration for its reassignment of that contract to Floyd's.

In support of its position, Associates presented a check, dated September 4, 1974, for $15,820.16 from Floyd's; an affidavit of its vice-president, who stated that $15,820.16 was the complete amount Associates received from Floyd's for the sale of the truck; and an affidavit of Floyd's president, stating that Floyd's had paid Associates $15,820.16 for the truck. Reeves presented the Rising contract, which showed that Floyd's had sold the truck to the Risings for $18,220.16 on September 3, 1974. Reeves also contended that Floyd's was an agent of Associates when Floyd's resold the truck to the Risings, and that Associates was therefore liable for the surplus arising out of that sale.

On August 28, 1975, the county court granted summary judgment to Reeves, awarding him $2,400 and costs. The findings of the county court relevant to this appeal were: (1) There was no genuine issue of material facts to be resolved; (2) that Associates did not comply with section 9-504(3), U. C. C., in disposing of the collateral to Floyd's; (3) that the sale of the collateral to Floyd's was not commercially reasonable; and (4) that Reeves was entitled to an accounting of the surplus arising out of the resale of the collateral to the Risings.

On November 17, 1975, the District Court reversed and vacated the judgment of the county court, denied the motion of Reeves for summary judgment, and granted Associates' motion for summary judgment, dismissing the plaintiff's petition with prejudice. The District Court made no findings and did not explain its grounds for dismissing the petition.

The central issue in this appeal is whether summary judgment was properly granted to Associates on the facts presented. The rules as to summary judgments

are well-established in this jurisdiction. "The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law." Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152 (1973). The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541 (1976); Farmland Service Coop., Inc. v. Klein, 196 Neb. 538, 244 N. W. 2d 86 (1976). This court has stated that summary judgment is not appropriate even where there are no conflicting evidentiary facts if the ultimate inferences to be drawn from those facts are not clear. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976). Thus, "Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt." Barnes v. Milligan, *supra,* at p. 53. This appeal must be decided within the framework of these principles. For the reasons given below, we find that genuine issues of material fact exist, and therefore remand the cause for further proceedings.

Reeves contends that Associates, as a secured party, is liable for the surplus arising from the resale of the truck to the Risings under section 9-504(2), U. C. C. That section provides that where a secured party repossesses and sells collateral, "the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." There is no dispute in this case that Associates did be-

come the secured party in the Reeves contract on August 31, 1972, when Floyd's assigned to it that contract. See § 9-105(1), U. C. C. Although Reeves acknowledges that Floyd's, and not Associates, sold the truck to the Risings, he contends that Floyd's was acting as Associates' agent when it made the sale.

Associates contends that it is not liable for the surplus in question for two reasons. First, Associates argues that it received no surplus at all because it received only $15,820.16, the exact balance due on the Reeves contract, from Floyd's as consideration for the reassignment of the Reeves contract to Floyd's on September 4, 1974. In its pleadings, Associates characterizes the reassignment as a sale of the truck to Floyd's. Secondly, Associates argues that the reassignment of the Reeves contract to Floyd's on September 4, 1974, was not a sale or disposition of collateral under section 9-504(5), U. C. C., but rather was a transfer of collateral to Floyd's, which succeeded to the rights and duties of the secured party. The import of this latter argument is that Reeves has sued the wrong party, and that Floyd's is the party who is liable for the surplus in question.

It is clear that under section 9-504(2), U. C. C., Reeves, as debtor, is entitled to any surplus arising from a repossession sale of the collateral by the secured party. What is less clear is whether Associates conducted a repossession sale which resulted in a surplus, and whether Associates is liable to Reeves for the surplus that arose when the truck was sold to the Risings. A determination as to whether Associates is liable to Reeves turns on the questions of whether Floyd's acted as Associates' agent in selling the truck to the Risings; and whether the reassignment of the Reeves contract to Floyd's was a sale or disposition of collateral under section 9-504(5), U. C. C.

If Floyd's acted as Associates' agent in selling the

truck to the Risings, Associates, as a principal, would be liable to Reeves for the surplus in question under section 9-504(2), U. C. C. "(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement, Agency 2d § 1, p. 7. See, also, Anderson v. Valley Feed Yards, Inc., 175 Neb. 719, 123 N. W. 2d 839 (1963). Thus the distinguishing features of an agency relationship are consent and control. Donahoo v. Home of the Good Shepherd of Omaha, Inc., 193 Neb. 586, 228 N. W. 2d 287 (1975). Restatement, Agency 2d, § 14 J, p. 73, provides: "One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction: whether he is an agent for this purpose or is himself a buyer depends upon whether the parties agree that his duty is to act primarily for the benefit of the one delivering the goods to him or is to act primarily for his own benefit."

Although the facts presented in the record do not warrant a finding that Floyd's was Associates' agent under these principles, neither do they clearly show what the relationship between Floyd's and Associates was. It was Associates, not Floyd's, that notified Reeves of the repossession sale. Floyd's acknowledged receiving possession of the truck after repossession as bailee and agreed to return it upon demand. Floyd's paid Associates the exact amount due on the Reeves contract, yet also assigned the Rising contract to Associates. The transactions between Floyd's and Associates were subject to a dealer agreement, the terms of which are not in the record. Floyd's, at the time it held the truck as bailee, authorized Associates to secure replacement insurance at the expense of Floyd's. Conflicting inferences can be drawn from these facts, and material issues of fact exist as to what the relationship between

Floyd's and Associates was, and as to whether an agency relationship was in effect. Therefore, the District Court judgment may not be sustained on the ground that Associates was not responsible, as a principal, for the surplus arising out of the Rising sale, for the material issues of fact are not clear beyond doubt, and summary judgment on this ground is improper. We turn to the question of whether section 9-504(5), U. C. C., is applicable in this case.

Section 9-504(5), U. C. C., qualifies the characterization of certain transfers of repossessed collateral, providing: "A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article." This subsection clarifies who has the rights and duties of a secured party when a seller and a finance company have a guaranty or repurchase agreement on a contract which has been assigned to the finance company. Where a seller assigns an installment contract to a finance company subject to a repurchase agreement or guaranty, it is the seller who has the rights and duties of a secured party when the finance company repossesses collateral and transfers it to the seller pursuant to the repurchase agreement or guaranty. Such a transfer is not a sale or disposition of collateral. Jefferson Credit Corp. v. Marcano, 302 N. Y. S. 2d 390, 60 Misc. 2d 138 (1969); Rangel v. Bock Motor Co., 437 S. W. 2d 329 (Tex. Civ. App., 1969); Community Management Assn. of Colorado Springs, Inc. v. Tousley, 32 Colo. App. 33, 505 P. 2d 1314 (1973). If the seller, after such a transfer, then resells the collateral for less than the amount due on the debtor's contract it may recover the deficiency from the debtor. § 9-504(2), U. C. C.; Donovan

v. Wechsler, 11 Cal. App. 3d 210, 89 Cal. Rptr. 669 (1970). If the resale by the seller results in a surplus, the debtor is entitled to recover that surplus from the seller, not from the finance company. § 9-504(2), U. C. C.; Whiteman v. Degnan Chevrolet, Inc., 217 Pa. Super. 424, 272 A. 2d 244 (1970). The purpose of section 9-504(5), U. C. C., is to insure that the value of repossessed collateral is measured by a bona fide sale in the market place, and not by an artificial value, usually the balance due on the debtor's contract, set by a repurchase or guaranty agreement between a seller and a finance company.

Obviously the application of section 9-504(5), U. C. C., in this case depends on whether Floyd's and Associates in fact had a guaranty or repurchase agreement. No direct evidence was presented which dispositively resolves this factual issue. The form contract used in the sale to Reeves provided a space for assignment of the contract to Associates with a full repurchase agreement, but an alternate section entitled "Assignment Without Recourse" was used when the assignment was made. It was Associates which notified Reeves of the repossession sale. Floyd's took possession of the truck as bailee after Reeves defaulted. Associates' repossession report indicates that Floyd's was to pay for the truck in full upon resale. The assignment of the Reeves contract to Associates was subject to a dealer agreement, the terms of which are not in the record. Floyd's paid Associates the exact balance due on the Reeves contract, although it also assigned to Associates the Rising contract. These, and other facts previously mentioned, permit conflicting inferences to be drawn as to whether Associates and Floyd's did have a guaranty or repurchase agreement. It is apparent that a material issue of fact exists in regard to whether section 9-504(5), U. C. C., should be applied in this case, and therefore summary judgment cannot be sustained on section 9-504(5) grounds.

A final word must be added in light of the confusion that has resulted in this case due to the parties switching their legal theories at various stages of the proceedings. Reeves' petition alleged that Associates was liable to him for the surplus arising out of the Rising sale under section 9-504(2), U. C. C. On appeal, Reeves now, arguing in the alternative, raises the additional argument that the reassignment of his contract to Floyd's on September 4, 1974, was not a commercially reasonable sale under section 9-504(3), U. C. C., and that he is entitled to damages under section 9-507(1), U. C. C. Although Reeves did not raise this issue in his pleadings, the county court made a finding of fact that Associates' reassignment of the truck to Floyd's on September 4, 1974, was not commercially reasonable under section 9-504(3), U. C. C. Although the county court may have gone beyond the pleadings in making such a finding, the rule is that on appeal a case will be considered upon the theory on which it was tried in the trial court. Timmerman v. Hertz, 195 Neb. 237, 238 N. W. 2d 220 (1976); Ford v. Perkins, 190 Neb. 304, 207 N. W. 2d 694 (1973).

Although the county court finding indicates that one of the theories this case was tried on was commercial unreasonableness of the reassignment of the Reeves contract to Floyd's, we find it unnecessary to pass on this issue at this stage of the proceedings. Upon remand, if it is found that section 9-504(5), U. C. C., is applicable because Associates and Floyd's had a repurchase or guaranty agreement, the case against Associates may be disposed of on that ground, and Reeves will have to look to Floyd's for the surplus arising out of the Rising sale. A determination as to the commercial reasonableness of the reassignment of the Reeves contract to Floyd's need only be made if section 9-504(5) is found to be inapplicable, and only if it is further found that Floyd's was not the agent of Associates when it resold the truck, but rather that Floyd's was a bona

fide purchaser of the truck from Associates. If such is the case, Associates' line of defense would be that its assignment of the Reeves contract to Floyd's for $15,820.16 was a commercially reasonable sale of repossessed collateral. Under section 9-504(3), U. C. C., a secured party has a duty to resell repossessed collateral in a commercially reasonable manner. Price, as a term of sale, is a relevant consideration in determining whether a sale is commercially reasonable. First Nat. Bank of Bellevue v. Rose, 188 Neb. 362, 196 N. W. 2d 507 (1972); Associates Finance Co. v. Teske, 190 Neb. 747, 212 N. W. 2d 572 (1973). If the sale was not commercially reasonable, Reeves might be entitled to damages under section 9-507(1), U. C. C.

Since the record in this case does not show beyond doubt whether Associates and Floyd's in fact had a guaranty or repurchase agreement, or whether Floyd's acted as Associates' agent in reselling the truck to the Risings, the case was not appropriate for summary judgment. We reverse the judgment and remand the cause to the District Court for further proceedings, not inconsistent with this opinion.

REVERSED AND REMANDED.

DEBORAH L. GRACE, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.
246 N. W. 2d 874

Filed November 24, 1976. No. 40575.

Insurance: Contracts: Motor Vehicles: Statutes. A requirement in an automobile insurance policy that there be physical contact of a hit-and-run motor vehicle with the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to the assertion of a claim under the hit-and-run clause of an uninsured motorist provision, is valid and reasonable. It is not an impermissible limitation or restriction on the insurance coverage required by section

60-509.01, R. R. S. 1943, nor is it in conflict with the beneficial public policy of that statute.

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

David J. Cullan of Cullan & Cullan, for appellant.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn & Meusey, for appellee.

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

McCOWN, J.

Plaintiff brought this action against the insurer under the uninsured motorist provisions of an automobile insurance policy. She seeks recovery for personal injuries sustained in a one-car accident caused by the negligence of the driver of an unidentified automobile which did not strike the car in which plaintiff was riding but left the scene of the accident. The sole issue is whether the insurance policy definition of "hit-and-run vehicle," which requires physical contact between the unidentified automobile and the automobile which the plaintiff was occupying, is in violation of statutory requirements for uninsured motorist coverage. The District Court found that the policy provisions requiring physical contact were valid and dismissed plaintiff's causes of action.

The facts were stipulated and the case was tried to the court without a jury. On April 26, 1969, plaintiff was a passenger in an automobile being driven in an easterly direction on Interstate 80 in Omaha, Nebraska. As the automobile approached the Kennedy Freeway exit, a vehicle also traveling in an easterly direction turned to the right to enter the exit to the Kennedy Freeway and then suddenly and without warning turned sharply to the left to return to the eastbound lane of travel on Interstate 80 immediately in front of the car in which plaintiff was riding. The driver of plaintiff's

car slammed on the brakes, which caused a skid, and the car then collided with a metal light pole on the side of Interstate 80 injuring the plaintiff. The other vehicle did not make physical contact with any vehicle or object but left the scene of the accident, and neither the vehicle nor the driver of the vehicle have ever been identified. Plaintiff received serious personal injuries resulting in extensive hospital confinement and disability. It is stipulated that those injuries were the direct and proximate result of the negligence of the driver of the unidentified vehicle and the resultant collision with the light pole.

Both plaintiff and the driver of the car in which she was riding had automobile insurance polices with the defendant which included uninsured motorist coverage. Plaintiff's causes of action were filed separately on each policy, but the actions were consolidated by agreement. It is stipulated that the plaintiff qualifies as an insured within the meaning of the provisions of each policy, and that plaintiff complied with all the conditions required by the policy in the definition of a hit-and-run motor vehicle except that there was no physical contact of the unidentified vehicle and the vehicle which the plaintiff occupied at the time of the accident.

The District Court specifically found that plaintiff's damages proximately resulting from the accident exceeded the sum of $20,000, and that the policy coverage of the two insurance policies could be "stacked." However, the court determined that the policy definition of a hit-and-run vehicle requiring physical contact of such vehicle with the vehicle which the insured was occupying at the time of the accident was a valid provision and was not in violation of the requirements of section 60-509.01, R. R. S. 1943. The District Court therefore dismissed plaintiff's petitions.

Section 60-509.01, R. R. S. 1943, in part provides: "No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any

person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 60-509, under provisions approved by the Director of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; Provided, * * *."

The insurance policies involved here provided that an uninsured motor vehicle includes a hit-and-run motor vehicle as defined in the policy. That definition is: "Hit-and-Run Motor Vehicle—means a land motor vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with a vehicle which the insured is occupying at the time of the accident, * * *." The policy also requires that the identity of neither the operator or owner of the hit-and-run motor vehicle can be ascertained, in addition to other requirements which are immaterial here in view of the stipulation.

The validity of physical contact requirements in connection with uninsured motorist coverage in automobile insurance policies has been considered by many courts in many different situations. However, it is a case of first impression in this state. Uninsured motorist statutes may be roughly classified in three different categories: (1) Those which use only the term "uninsured motorist" and do not specifically mention hit-and-run vehicles or a physical contact requirement; (2) those which may or may not include the term "hit-and-run" but have a specific requirement of physical contact; and (3) those which include the term "hit-and-run," but do not have a specific physical contact requirement

in the statute. The Nebraska statute falls in the latter category. In many states uninsured motorist coverage is not compulsory. In general, Nebraska requires such coverage to be included in any motor vehicle liability insurance policy unless rejected by the insured. No matter which of the various statutory categories may be considered, courts have apparently reached opposite conclusions on the physical contact issue in every category. See Annotation, "Uninsured Motorist Endorsement: Validity and Construction of Requirement that there be 'Physical Contact' with Unidentified or Hit-And-Run Vehicle," 25 A. L. R. 3d 1299.

The judicial appraisal of the critical issue of physical contact, in essence, rests upon a determination of legislative policy and intent, particularly where uninsured motorist coverage is required by statute. Logical and persuasive reasons have been given by many courts to support the validity or invalidity of physical contact requirements. In general courts holding that the physical contact requirement is invalid have held that the requirement is contrary to public policy and legislative intent to protect persons injured on the public highways from the uninsured or hit-and-run motorist and is therefore invalid. See, for example, Hartford Acc. & Ind. Co. v. Novak, 83 Wash. 2d 576, 520 P. 2d 1368; Webb v. United Services Auto. Assn., 227 Pa. Super, 508, 323 A. 2d 737; Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337 (N. M.).

In those courts which have concluded that it is reasonable to require physical contact with or by a hit-and-run vehicle under uninsured motorist provisions, the reasoning is generally based on the premise that a physical contact requirement precludes fraud upon the insurer and prevents recovery of damages in cases where the insured's injuries are only accidental or the result of his own or his driver's negligence, without the intervention of any other vehicle; but it is alleged by the insured that the accident was caused by an unidentified

vehicle which subsequently left the scene of the accident. See, Ely v. State Farm Ins. Co., 148 Ind. App. 586, 268 N. E. 2d 316; MVAIC v. Eisenberg, 18 N. Y. 2d 1, 218 N. E. 2d 524. See, also, Prosk v. Allstate Ins. Co., 82 Ill. App. 2d 457, 226 N. E. 2d 498.

In Nebraska the legislative history is not of much assistance in determining the intent of the Legislature in May of 1963, when Nebraska adopted its uninsured motorist statute. Neither can we say with any degree of assurance exactly what concept of "hit-and-run" the Legislature had in mind. The physical contact restriction was standard in most insurance policies at the time the Nebraska statute was adopted. See, Widiss, A Guide to Uninsured Motorist Coverage, § 2.2, p. 20. Comment on the floor during legislative discussion indicates that the Legislature was aware that the statute was written in the universal insurance policy language of the time. Nevertheless, there was no discussion of the issue involved here.

Courts universally agree that the prevention of fraud is a permissible and justifiable legislative purpose. Courts may disagree, however, as to which factors the Legislature considered most important in making such a policy decision. It need only be said that a requirement of physical contact attempts to prevent fraudulent claims by requiring of the claimant tangible proof of a collision with a hit-and-run vehicle. That requirement defines and limits the risk underwritten by insurers so that "fulfillment of the liberal aims of the law is not incompatible with the economic realities of insurance coverage." See Ely v. State Farm Ins. Co., *supra*. It can be, and has been, argued that the term "hit-and-run" means exactly what it says and requires physical contact. See Prosk v. Allstate Ins. Co., *supra*. It might well be said that "hit-and-run" does not translate into "cause-and-run" where statutory and contract terms are involved.

The specific policy provision here requiring physical

contact has been approved by the Nebraska Director of Insurance as required by section 60-509.01, R. R. S. 1943. While the basis for the conclusion may be ephemeral, we are convinced that the Legislature did not intend to broaden the then accepted insurance concept of a hit-and-run motor vehicle. A requirement in an automobile insurance policy that there be physical contact of a hit-and-run motor vehicle with the insured or the vehicle which the insured is occupying at the time of the accident, as a condition precedent to the assertion of a claim under the hit-and-run clause of an uninsured motorist provision, is valid and reasonable. It is not an impermissible limitation or restriction on the insurance coverage required by section 60-509.01, R. R. S. 1943, nor is it in conflict with the beneficial public policy of that statute.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. The result reached in the majority opinion defeats what I believe is the underlying purpose of the uninsured motorist statute and that result is not required by either the express provisions of the statute, nor the prior opinions of this court. The reliance which the majority place upon the literal meaning of the term "hit" in the phrase "hit-and-run" is misplaced. "Hit-and-run" is a colloquialism. When viewed in the light of the evident legislative purpose, it refers not to physical contact, but rather to causation and to an operator whose identity is unknown because he fled the scene. I do not believe that anyone would suggest (irrespective of policy definitions, that the term "hit-and-run" for purposes of the statute would include a motorist who in fact is insured and who, after physical contact between vehicles, flees the scene and whose identity is unknown but is later discovered before claim is made. Yet, if we give to the phrase "hit-and-run" the literal meaning which

the majority opinion gives it, such an individual is a "hit-and-run" motorist against whom "uninsured motorist" coverage is afforded under the claimant's own policy. The language "hit-and-run" was intended to convey a concept and not necessarily to describe only physical contact between vehicles.

It is surely doubtful that the Legislature, when enacting the uninsured motorist statute, was focusing on the literal meaning of the word "hit." Rather it was concerned with affording "uninsured motorist" coverage where an unidentified motorist caused the accident and could not be found. I think that the average person who has purchased uninsured motorist coverage will be astounded to learn that he has no such coverage when he is injured after being forced from the highway by a drunken driver who is never apprehended and whose identity is never learned.

In State Farm Mut. Auto. Ins. Co. v. Selders, 187 Neb. 342, 190 N. W. 2d 789, we said, quoting from Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133: " 'A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident *caused* by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose.' " (Emphasis supplied.) We went on to say: "Statutory requirements must be complied with by insurers and if the policy issued fails in this respect, the statute will be read into the policy. See Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179."

There is ample precedent from other jurisdictions

supporting the position I would take. Hartford Acc. & Ind. Co. v. Novak, 83 Wash. 2d 576, 520 P. 2d 1368; Webb v. United Services Auto. Assn., 227 Pa. Super. 508, 323 A. 2d 737; Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337.

INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLEE, V. EARL G. HAWKINS ET AL., APPELLANTS.
246 N. W. 2d 878

Filed November 24, 1976. No. 40583.

1. **Appeal and Error: Records: Trial.** Prejudicial error must appear affirmatively in the record, and the party appealing from the judgment has the burden of showing prejudice.
2. **Contracts: Insurance: Notice: Tender.** Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee.
3. **Contracts: Insurance: Notice: Tender: Damages.** In the absence of notice or tender of defense, the amount to be indemnified is a question of fact.
4. **Appeal and Error: Records: Evidence.** Purported evidence which does not appear in the record cannot be considered by this court on appeal.
5. **Judgments: Trial.** The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong.

Appeal from the District Court for Douglas County: RUDOLPH TESAR and DONALD J. HAMILTON, Judges. Affirmed.

Thomas J. Monaghan of Malcolm D. Young Law Offices, for appellants.

Theodore J. Stouffer of Cassem, Tierney, Adams & Gotch, for appellee.

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

McCOWN, J.

This is an action by the plaintiff, Insurance Company of North America, against the defendants, Earl G. Hawkins and Kenneth J. Hawkins, to recover damages for breach of a written indemnity agreement. The District Court entered judgment for the plaintiff in the sum of $8,016.18 and costs, and the defendants have appealed.

The essential facts are not in dispute. This case, however, is interwoven with prior litigation involving the same or related parties, and reference to that litigation is essential to clarify the issues in the present case.

On August 15, 1958, the defendants, Earl G. Hawkins and Kenneth J. Hawkins, entered into a written indemnity agreement with plaintiff, Insurance Company of North America. The agreement recited that the defendants, who were financially and otherwise interested in the affairs of Parsons Construction Company, Inc., were interested in having Parsons secure prompt execution of contract bonds. The defendants Hawkins therefore agreed, in consideration of the issuing of contract bonds by INA for Parsons Construction Company, that the defendants would pay, or cause to be paid, all premiums on such bonds and would perform all the obligations of any such bonds and would "at all times indemnify and keep indemnified (INA) from and against every claim, demand, loss, liability, cost, charge, attorneys' fee, expense * * * that (INA) shall or may for any cause at any time sustain, incur or become subject to by reason of executing any such bond(s)." The agreement was a continuing one applying to each contract bond subsequently issued by INA for Parsons Construction Company.

On January 7, 1960, INA issued a performance and maintenance bond on behalf of the Parsons Construction Company to Sanitary Improvement District No. 35 in Douglas County for the construction of a sanitary

sewer by Parsons. INA also had in effect a contract of liability insurance for Parsons Construction Company. On May 1, 1964, T. H. Lundt, doing business as T. H. Lundt Construction Company, filed a petition against Parsons Construction Company and INA. The petition alleged two causes of action. In the first cause of action, Lundt alleged that during the construction of the sanitary sewer by Parsons, Parsons had negligently damaged an adjoining storm sewer which had been constructed by Lundt. The second cause of action alleged that Parsons Construction Company's contract with SID No. 35 required it to protect all property along its line of construction and pay for damage by it; that the contract provision was to protect adjoining landowners; and that Parsons was liable to Lundt for breach of this contract. In addition, the second cause of action alleged that INA provided the performance and maintenance bond for Parsons on the SID No. 35 job, and therefore, Lundt was entitled to recover from INA as well as Parsons. INA then demurred on the ground there as a misjoinder of causes of action and a defect of parties defendant. That demurrer was sustained and counsel for Lundt then made an oral motion to sever the claim against INA from the claim against Parsons and for leave to separately file and docket the case against INA and that leave was granted and the case separately docketed. The original action of Lundt v. Parsons went to trial, resulted in a jury verdict in favor of Lundt and against Parsons, was appealed to this court, and affirmed on appeal with modification. See Lundt v. Parsons Constr. Co., 181 Neb. 609, 150 N. W. 2d 108.

Subsequently, Lundt's claim against INA on the performance bond for attorneys' fees incurred by Lundt in connection with the prior Parsons case was tried to the court without a jury. The District Court entered judgment against INA which was subsequently appealed to this court and reversed and dismissed on appeal. See

Lundt v. Insurance Co. of North America, 184 Neb. 208, 166 N. W. 2d 404.

INA then brought this action against the Hawkinses to recover the attorneys' fees, expenses, and costs incurred in the defense of Lundt's suit against INA on the Parsons performance bond. Trial of the case was bifurcated by agreement into trial of the liability issue and the damage issue. The trial on the liability issue consisted solely of the introduction of exhibits and stipulated testimony with accompanying identification by stipulation or waiver of objection. At the conclusion of that portion of the trial, the District Court found that trial of the issues was to be confined to the issue of liability and, pursuant to stipulation, the court considered the matter as submitted upon a motion for partial summary judgment on the issue of liability only. The court thereupon sustained the plaintiff's oral motion for partial summary judgment on the issue of liability. At a later portion of the trial on the issue of damages, presided over by a different judge of the District Court, judgment was entered for the plaintiff and against the defendants for attorneys' fees and other costs and expenses in the total sum of $8,016.18. This appeal followed.

The defendants contend that the entry of a partial summary judgment on the issue of liability was erroneous and deprived them of due process of law. The contention is that the District Court had previously overruled a motion for summary judgment, and that the partial summary judgment order here was made without any further hearing. The record, however, clearly reflects that a trial was scheduled and held. Evidence was adduced by stipulation or waiver, exhibits were introduced, arguments made by counsel and briefs submitted.

While it was technically inaccurate to designate the order as a partial summary judgment on the issue of liability, the error, if any, was technical and procedural.

The defendants had their full day in court on the issue of liability, had the opportunity to introduce all the evidence they wished to submit, and made all appropriate objections to plaintiff's evidence. The defendants fail to assert or prove any prejudice or injury caused by the procedural inadvertence, and the record wholly fails to sustain any contention of violation of due process. Prejudicial error must appear affirmatively in the record, and the party appealing from the judgment has the burden of showing prejudice. McClellen v. Dobberstein, 189 Neb. 669, 204 N. W. 2d 559. Due process does not require a technically perfect trial, but only a fair one.

Defendants also contend that plaintiff cannot recover from defendants because the plaintiff failed to tender defense of the lawsuit on the performance bond to the individual defendants. The evidence reflects that plaintiff did tender the defense to Parsons Construction Company in a letter addressed to one of the individual defendants but it did not specifically notify either of the defendants in their capacities as individual indemnitors. Notice of suit or tender of defense is not ordinarily a condition precedent to recovery on an indemnity contract for a liability incurred or determined in a prior action against the indemnitee. See National Surety Co. v. Love, 105 Neb. 855, 182 N. W. 490. In the absence of notice or tender of defense, the amount to be indemnified is a question of fact rather than being conclusively established by the prior judgment. See, 73 A. L. R. 2d 506; 42 C. J. S., Indemnity, § 26, p. 604; National Surety Co. v. Love, *supra*. Any failure to notify the individual defendants here did not preclude any recovery against them on the indemnity contract. It simply left the plaintiff with the burden of proving the amount for which it was entitled to be indemnified.

Defendants also assert that the plaintiff took inconsistent positions and failed to assert the statute of limitations as a defense in the performance bond case.

These contentions are not supported by the record. Purported evidence which does not appear in the record cannot be considered by this court on appeal. Schetzer v. Sullivan, 193 Neb. 841, 229 N. W. 2d 550.

Finally, the defendants contend that the attorneys' fees included in the judgment were excessive. The evidence as to attorneys' fees was, to some extent, conflicting. Both parties introduced the testimony of expert witnesses on the issue of the amount and reasonableness of the attorneys' fees involved. The trial court saw and heard the witnesses and determined that those fees were reasonable. In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. Snay v. Snarr, 195 Neb. 375, 238 N. W. 2d 234. The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N. W. 2d 772. The evidence was sufficient to fully support the determination of the trial court as to the reasonableness of the attorneys' fees involved here.

The judgment is affirmed.

AFFIRMED.

BRODKEY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ROLANDER L. BROWN, APPELLANT.
247 N. W. 2d 616

Filed December 1, 1976. No. 40556.

Criminal Law: Aiders and Abettors: Statutes. Mere failure to report a known felony is not concealment sufficient to constitute a violation of section 28-202, R. R. S. 1943, and make the person

failing to report the felony an accessory after the fact to the felony.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Reversed and remanded with directions.

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

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

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN, District Judge.

BOSLAUGH, J.

The defendant was convicted of being an accessory after the fact to manslaughter for unlawfully concealing knowledge of the crime. He was sentenced to imprisonment in the Douglas County correctional complex for 5 months. He has appealed and contends that the evidence was insufficient to sustain the conviction.

The record shows that the defendant was present on the evening of September 27, 1975, when his companion, Stephen Carter, fired 5 or 6 shots through the window of an apartment in Omaha, Nebraska. Debra Carter was in the apartment at the time, and one of the shots struck her causing her death.

The defendant and Carter were apprehended later the same night and jailed in connection with a burglary. The defendant did not learn that someone had been killed in the shooting until 2 days later. He discussed the matter with Carter but told no law enforcement official about the incident until he was questioned by detectives on October 3, 1975. At that time he gave the officers a statement concerning the shooting.

The defendant contends that mere passive failure to disclose a crime does not constitute a violation of the statute and that "concealing" requires an affirmative

act such as refusing to disclose the crime after being questioned by a law enforcement officer.

The statute provides in part that, "An accessory after the fact is a person who, after full knowledge that a felony has been committed, conceals it from the magistrate, * * *." § 28-202, R. R. S. 1943.

At common law the crime of misprision of a felony consisted of the failure to report a known felony. 21 Am. Jur. 2d, Criminal Law, § 7, p. 87. However, it is generally held under statutes similar to section 28-202, R. R. S. 1943, that the mere failure to volunteer information about a felony does not constitute a violation of the statute.

In People v. Garnett, 129 Cal. 364, 61 P. 1114, the Supreme Court of California said: "* * * the word 'conceal,' as here used, means more than a simple withholding of knowledge possessed by a party that a felony has been committed. This concealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the commission of the felony." See, also, Fields v. State, 213 Ark. 899, 214 S. W. 2d 230; Lowe v. People, 135 Colo. 209, 309 P. 2d 601. We think these cases state the correct rule of law.

It is unnecessary to consider the other assignment of error.

The judgment is reversed and the cause remanded with directions to dismiss the information.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERTA DAWN KLABUNDE, APPELLEE, V. WILLIAM E. KLABUNDE, APPELLANT.
247 N. W. 2d 58

Filed December 1, 1976. No. 40646.

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

James R. Welsh of Riedmann & Welsh, for appellant.

Gordon R. Hauptman of Stern, Harris, Feldman, Becker & Thompson, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN, District Judge.

REAGAN, District Judge.

William E. Klabunde appeals from an order of the District Court dismissing his application to modify custody provisions of a divorce decree. The order of dismissal was entered on appellee's motion at the close of appellant's case-in-chief. The nature of the case requires that we determine all controverted facts, and reasonable inferences arising from the facts, in favor of appellant. Marco v. Marco, 196 Neb. 313, 242 N. W. 2d 867. This does not entitle appellant to inferences arising from speculation, conjecture, or imagination.

Appellant's principal contention is that appellee is engaged in an illicit relationship with Gary Klabunde, appellant's younger brother, to the detriment of the children. Appellee is 34 years of age and Gary Klabunde is 19. Gary's frequent presence around the home, both before and after the divorce, is not disputed. William and Gary operated a small engine repair service from the home prior to the divorce and Gary has continued with the business since the divorce. Appellee testified that Gary helped with the children and other things around the house, and, in return, she frequently included him in the family dinner hour and did some of his washing. Appellee admits that Gary discussed marriage, but she refused. She denies any improper relationship. The record is completely void of any evidence which would warrant a reasonable inference of improper conduct or a material change of circumstances. The dismissal was proper and the judgment is affirmed. Appellee is awarded the sum of $500 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MAX ABRAMSON, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. PAUL CAPPELLANO, JR., APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. WAYNE V. WOMOCHIL, APPELLANT.

247 N. W. 2d 59

Filed December 1, 1976. Nos. 40660, 40661, 40662, 40663, 40664, 40665, 40666, 40667, 40674, 40675, 40676, 40677.

Criminal Law: Guilty Plea: Waiver: Indictments and Informations. A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional, except the defense that the information is not sufficient to charge an offense.

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

David L. Herzog and William T. Weisbecker, for appellants.

Herbert M. Fitle, Gary P. Bucchino, and George A. Sutera, for appellee.

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

CLINTON, J.

The defendants were charged with gambling. Initially they pleaded not guilty and moved to suppress evidence acquired by a wiretap, claiming that the statute under which the tap was authorized was unconstitutional. After the municipal court overruled the motions, the defendants changed their pleas to nolo contendere pursuant to a plea bargain. The court accepted the pleas and sentenced the defendants as follows: Defendant Abramson was fined $1,550 and costs; defendant Cappellano was sentenced to 25 days in county jail; and defendant Womochil was sentenced to 30 days in county jail. The sentences were affirmed in the District Court.

On appeal to this court the defendants contend that the convictions should be reversed because the Nebraska wiretap statute, section 86-703, R. R. S. 1943, is unconstitutional in allowing wiretaps in misdemeanor gambling investigations. The only issue here is whether a plea of nolo contendere waives the right to test the statute's constitutionality. We affirm.

A plea of nolo contendere is equivalent to, and places a defendant in the same position as, a plea of guilty. State v. Hylton, 175 Neb. 828, 124 N. W. 2d 230; State ex rel. Nebraska State Bar Assn. v. Stanosheck, 167 Neb. 192, 92 N. W. 2d 194. A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional. State v. Griger, 190 Neb. 405, 208 N. W. 2d 672; State v. Mason, 187 Neb. 675, 193 N. W. 2d 576; State v. Workman, 186 Neb. 467, 183 N. W. 2d 911. It is undisputed that the pleas were voluntary and intelligently made. The only defense not waived by a plea of guilty is that the information is not sufficient to charge an offense. Wolff v. State, 172 Neb. 65, 108 N. W. 2d 410. There is no claim by the defendants that the informations do not state offenses, or that the statute defining the crime is unconstitutional, only that evidence of the offenses was unconstitutionally obtained. Such a claim is waived by a plea of nolo contendere.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES MCFALL, JR., APPELLANT.
247 N. W. 2d 60

Filed December 1, 1976. No. 40775.

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

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

Ralph J. Fischer, for appellant.

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

Heard before SPENCER, McCOWN, and CLINTON, JJ., and MORAN and KELLY, District Judges.

SPENCER, J.

Defendant, James McFall, Jr., appeals his sentence of 3 to 5 years in the Nebraska Penal and Correctional Complex on the claim that the sentence imposed upon him is excessive. We affirm.

McFall was originally charged with four counts of forgery. By virtue of a plea bargain he was permitted to plead no contest to an amended charge, making and delivering a certain bank check with the intent to defraud, when he knew he did not have an account in the bank on which the check was drawn. The amended information was drawn under the provisions of section 28-1212, R. R. S. 1943, commonly referred to as the "no-fund check" statute. The maximum penalty provided in the statute is imprisonment in the Nebraska Penal and Correctional Complex not exceeding 10 years.

This court has repeatedly held that a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. When the sentence is considered with reference to McFall's previous record, we cannot say that there has been an abuse of discretion.

Defendant, who will be 33 years of age the 5th of December, has been in almost constant conflict with the law since 1963. He had a conviction for grand theft in California in 1963. He was placed on probation for 3 years, could not live up to the terms of the probation, and it was revoked. In 1965, he served 90 days on a check charge. Also in 1965, he was convicted of ve-

hicle theft and paroled. In October of the same year he was sentenced to 1 year in the county jail at Bowling Green, Missouri, on a no account check charge. In November of 1966, he was sentenced to 6 months to 5 years for vehicle theft. He was paroled November 2, 1967, and in 1968 was sentenced to 180 days in the county jail after parole violation. In September of 1968, he received 9 months in the county jail for forgery. In May of 1969, he was sentenced to 180 days in the county jail for burglary. In October 1970, he received a sentence of 4 to 5 years in the Arizona state prison for grand theft.

After conviction on the charge herein, he was continued on bond for 30 days pending the preparation of a presentence report. During that period he was convicted of a misdemeanor in Minnesota for which he was imprisoned. This prevented his appearance at the time originally scheduled for sentencing herein. Defendant's brief suggests that the conviction in Minnesota was for possession of a controlled substance with intent to deliver.

While ordinarily the sentence of 3 to 5 years on a no account check charge might be considered excessive, that certainly is not the situation herein. Defendant's record would have justified the filing of an habitual criminal charge. The record indicates that on occasions when defendant has been on parole he has violated the terms of the parole. It is very evident that defendant has never been rehabilitated. The fact that he came into conflict with the law while awaiting sentence in this state is an indication that lenient treatment in the past has merely permitted the defendant to continue to prey upon the public. He has now reached the place where he must pay his debt to society. On his record, the sentence imposed herein cannot be considered excessive.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BURL HOLLOMAN, APPELLANT.

248 N. W. 2d 15

Filed December 8, 1976. No. 40462.

1. **Searches and Seizures: Trial: Evidence.** Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.
2. **Appeal and Error: Trial: Evidence.** A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered or adduced.
3. **Criminal Law: Rape: Trial: Evidence.** The slightest penetration of the sexual organs of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence.
4. **Criminal Law: Trial: Evidence.** It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant.
5. **Criminal Law: Rape: Trial: Evidence.** If it satisfactorily appears from the evidence in a prosecution for rape that the prosecutrix is not the sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to such facts.
6. **Criminal Law: Sentences.** The action of the District Court in directing that a sentence be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN T. GRANT and SAMUEL P. CANIGLIA, Judges. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, 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.

WHITE, C. J.

This is an appeal from defendant's conviction for forcible rape and robbery. Having been found guilty by a jury, the defendant was sentenced by the District Court to a term of 8 to 15 years imprisonment in the Nebraska Penal and Correctional Complex on the rape charge, and to a term of 10 years imprisonment on the robbery charge, said sentences to be served consecutively. We affirm the judgment and sentences of the District Court.

It is not necessary for us to detail the facts of this offense. Suffice it to say, that on April 20, 1975, Gladys M. Mann, a 76-year-old retired registered nurse living in Omaha, Nebraska, was forcibly raped in her home in the early morning hours and afterwards robbed of $20 by her assailant.

The defendant raises four contentions on appeal. We shall discuss each of these separately.

The defendant first alleges that the District Court committed reversible error in overruling his pretrial motion to suppress, from use against him at trial, evidence of the impression of the bottom of the heel of one of his shoes and a blue sweater, which he claims were seized in violation of his constitutional rights. The facts giving rise to the seizure of these two items of evidence are as follows.

After her assault, Mrs. Mann called several neighbors and the Omaha police. Patrolman Ray E. Hunt was assigned to go to Mrs. Mann's residence to continue the rape and robbery investigation. Upon his arrival he first talked with the officers who had initiated the investigation and then with Mrs. Mann. He inspected the rear door of Mrs. Mann's residence and found that it had been forcibly entered. On the damp, fresh ground outside the door were several footprints and heel prints.

After obtaining a general description of her assailant from Mrs. Mann, Officer Hunt conducted a house-to-house check to see if any of the neighbors might have seen or heard anything. As a result of these inquiries, he was directed to a vehicle possibly belonging to the suspect.

He took the license number down and ran a computer check on it which revealed that the vehicle was registered to the defendant, who lived next door. He and another officer then knocked unsuccessfully at the defendant's door.

Officer Hunt then returned to the police station, and ran a computer check to ascertain if the defendant had a prior criminal record. The defendant did. Officer Hunt then took the defendant's photo from his police file and combined it with three others. He and Officer Keavy returned to Mrs. Mann's residence and showed her these photos. Mrs. Mann positively identified the defendant from these photos as her assailant. Officers Hunt and Keavy then approached the defendant's residence, which was next door. The officers knocked on the defendant's door. After several minutes, he appeared and voluntarily let them in. The defendant identified himself, as did the police officers. The defendant was then advised by the officers that he was a possible suspect in a rape case and asked him to come to the police station with them for questioning. The defendant agreed to accompany the officers but had to dress first. While the defendant was getting dressed, Officer Hunt observed several pair of shoes lying on the floor next to where the defendant was. He picked these up and observed the heels, comparing them with the prints he had observed earlier outside Mrs. Mann's home. He noticed that the heels on one of the pair of shoes had a similar design. These shoes were seized as evidence. Officer Keavy then observed a light blue sweater in a chair next to the defendant's bed which matched the description of the one worn by Mrs.

Mann's attacker. The sweater was also seized. After he was dressed, the defendant was taken to the police station and subsequently arrested. In Harris v. United States, 390 U. S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968), the Supreme Court stated: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

In Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), the court elaborated upon the plain view doctrine: "[T]he 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. * * *

"What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine seems to supplement the prior justification - whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused - and permits the warrantless seizure."

Nebraska has followed the plain view doctrine. State v. Shepardson, 194 Neb. 673, 235 N. W. 2d 218 (1975); State v. Romonto, 190 Neb. 825, 212 N. W. 2d 641 (1973); State v. Smith, 184 Neb. 363, 167 N. W. 2d 568 (1969).

It is clear under the facts of this case that the police officers had a "right to be in the position to have [the] view." Harris v. United States, *supra*. The defendant was a suspect in a rape and robbery case. He had been positively identified by the victim as her assailant. He lived next door to the rape victim. After the officers knocked on the defendant's door, and identified themselves as police officers, they were let in by

the defendant. The defendant agreed to accompany them to the police station for questioning after he first dressed. The record is devoid of any objection by the defendant to the presence of the officers in his apartment while he dressed.

The officers entered the defendant's residence solely for the purpose of having the defendant accompany them to the police station. They were not searching for evidence against the accused. Thus, their viewing of any evidence in plain view was clearly inadvertent. Coolidge v. New Hampshire, *supra.*

There is no question that the seizure of the defendant's light blue sweater was proper. It was clearly "in plain view" on a chair by the defendant's bed and fit the description given by Mrs. Mann of the one worn by her assailant. The real question in this case is whether or not Officer Hunt's actions in picking up several pair of the defendant's shoes and examining the heels went beyond the "plain view" doctrine and constituted an unconstitutional search and seizure. We hold that it did not.

Officer Hunt was aware, from his work on the case, that several distinctive heel prints were left in the damp ground outside the victim's rear door. In the defendant's apartment, he observed several pair of shoes. He picked them up and examined their heels comparing the heel design with the prints he saw earlier that morning. That led to the seizure of one of the pair of shoes as evidence. While the shoes themselves were clearly in plain view, the heel prints could not have been observed without Officer Hunt taking the action that he did.

In United States v. Catanzaro, 282 F. Supp. 68 (S. D. N. Y., 1968), a postal inspector, lawfully in the defendant's apartment, noticed a rifle on a wall rack. Recalling from his investigation of the defendant's alleged fraudulent use of credit cards, the repair of such a rifle with a credit card, he examined the rifle more carefully

and observed that the serial number on the rifle matched that of the one repaired through the use of a credit card. The rifle was seized as evidence. The court, denying a motion to suppress the rifle as evidence, said: "The inspector and his companions were lawfully present in the defendant's apartment * * *. Discovery of the rifle required no search * * *. The inspector was not precluded from observing what was clearly and plainly to be seen. Having seen the rifle, the inspector properly scrutinized it more carefully, thereby confirmed his suspicions that it was part of the fruit of the alleged crime. That he was required to examine it more closely to identify the serial number did not transform a mere observation into an unconstitutional search." See, also, Scott v. State, 331 So. 2d 759 (Ala. Crim. App., 1976); State v. Proctor, 12 Wash. App. 274, 529 P. 2d 472 (1974); State v. Campbell, 15 Wash. App. 98, 547 P. 2d 295 (1976).

The defendant's shoes were in plain view. Officer Hunt's actions under the circumstances clearly were not unreasonable. We hold that Officer Hunt had the right to scrutinize these shoes more carefully, and to examine them, including lifting them up and turning them over. The District Court was correct in denying the defendant's motion to suppress.

The defendant's next assignment of error concerns the following exchange at trial:

"Q. (Prosecutor Pane) What did you show her?

"A. I showed her four mug shots from the Omaha Police Division.

"Mr. Carey (Defense counsel): I will move to strike that, Your Honor.

"The Court: Four photos, you mean?

"Mr. Hunt (Witness): Yes sir.

"The Court: It will be overruled.

"Q. Four photos?

"A. Yes, sir.

"Q. And, after you showed her these four photos what happened then?

"Mr. Carey: I am going to object to that as being incompetent; irrelevant, immaterial, self-serving and hearsay.

"The Court: It will be overruled.

"A. After I showed her these four photos, she picked out this photo and stated that this was positively the party who raped and robbed her on this day.

"Q. And, who was that party?

"A. Burl Holloman."

The defendant contends that the District Court committed reversible error in overruling the defendant's motion to strike Officer Hunt's reference to the police photographs of the defendant as "mug shots."

In support of this contention, the defendant draws attention to our recent decision in State v. Atwater, 193 Neb. 563, 228 N. W. 2d 274 (1975). In that case, we reversed a conviction for robbery due to the "inexcusable conduct of the prosecution in presenting before the jury possible inferences of previous crimes on the part of the defendant." During direct examination relative to photographs of the defendant shown to witnesses, these were referred to as "mug shots." In addition, testimony was given that these photos were "selected from the Robbery Detail Office. They have files and books concerning parties that are possible suspects in that type of crime or parties they have known to have committed that type of crime before." We held: "It is evident that the description of the photos as 'mug shots,' and that they concerned parties 'known to have committed that type of crime before' was sufficient to convey the impression to the jury that the defendant was a known criminal who had previously been arrested for a crime exactly like the one on trial. The officer had testified on two previous occasions in this same case, out of the presence of the jury, about these photo-

graphs. In neither of the previous instances did the officer refer to them as 'mug shots,' * * *.

"Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. Harmless error is intended to cover those inadvertent slips, which occasionally creep into a hotly contested trial, which do not severely prejudice the rights of the defendant. Harmless error should never be applied in those instances where the prosecution deliberately, or because of very careless procedures, injects prejudical error into the proceedings."

Unlike State v. Atwater, *supra,* there is nothing which would indicate that the reference here to the photos as "mug shots" was made deliberately by the prosecution or was the result of very careless procedures. The reference appears to be nothing more than an inadvertent slip by the testifying police officer, which was immediately corrected by him after the interjection of the court. This isolated reference to "mug shots" was unaccompanied, unlike Atwater, by any prejudicial explanation of their origin. In light of the total evidence in this case, any prejudice resulting to the defendant from this single reference to the photos as "mug shots" was harmless error.

In his brief, the defendant argues that admission of these photographs into evidence as exhibit 17 was also error. A review of the record fails to show any objection to these photos by defense counsel, either when they were identified, introduced, or received by the trial court. It is a well-settled rule that a defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered or adduced. State v. Temple, 192 Neb. 442, 222 N. W. 2d 356 (1974). Thus, the admission into evidence of these photographs is not subject to review by this court.

The defendant next alleges that the District Court committed reversible error in failing to grant his mo-

tion for a directed verdict of acquittal based upon the State's failure to prove essential elements of the offense of forcible rape. The defendant argues that the State failed to establish beyond a reasonable doubt that carnal knowledge of the victim was had by the defendant, including a penetration of the vagina by the male sexual organ. In support of his position, the defendant cites testimony by Mrs. Mann's personal physician, Dr. Allan Hruby, who examined her the day after the rape occurred. Dr. Hruby testified that Mrs. Mann's vagina was completely closed as a result of past cancer surgery and a condition of corrosis. Dr. Hruby, however, testified that in his opinion Mrs. Mann had been raped. Mrs. Mann also testified several times that there was penetration.

In State v. Atkinson, 190 Neb. 473, 209 N. W. 2d 154 (1973), we held: "The slightest penetration of the sexual organs of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence.

"It is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant." There was sufficient evidence for the jury to conclude that penetration had occurred. There is no merit to this contention.

Likewise without merit is the defendant's contention that the State failed to establish that Mrs. Mann was neither the defendant's daughter or sister. Former § 28-408, R. S. Supp., 1974. Mrs. Mann testified that she neither knew the defendant or knew that he lived next door. The defendant was 29 years old; Mrs. Mann was 76. The jury could obviously observe that Mrs. Mann and the defendant were of different races. "If it satis-

factorily appears from the evidence that the prosecutrix is not the wife, sister or daughter of the accused, a conviction will not be reversed because no witness testified in direct language to these facts." Hanks v. State, 88 Neb. 464, 129 N. W. 1011 (1911). See, also, Jump v. State, 146 Neb. 501, 20 N. W. 2d 375 (1945). There was sufficient evidence that Mrs. Mann was neither the sister or daughter of the defendant.

The defendant's last contention is that his sentence is excessive. The District Court sentenced the defendant to a term of 8 to 15 years imprisonment for the forcible rape, and to a consecutive term of 10 years imprisonment for the robbery. A sentence imposed within statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976). Nor will the action of the District Court in directing that sentences be served consecutively be disturbed on appeal unless the record shows an abuse of discretion. State v. Tweedy, 196 Neb. 251, 242 N. W. 2d 629 (1976). The presentence report shows that the defendant has a lengthy arrest record going back many years. This record shows a continuing pattern of aggressive criminal behavior, ranging from disorderly conduct, to assault to rape, and abusing an officer. In 1969, he was sentenced to 2½ years in the Kansas State Penitentiary for armed robbery. This crime was a violent sexual assault upon a 76-year-old woman. There was no abuse of discretion in either of the sentences nor in the fact that they are to be served consecutively.

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

AFFIRMED.

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

247 N. W. 2d 440

Filed December 8, 1976. No. 40518.

1. **Criminal Law: Evidence: Statutes: Constitutional Law.** The Identifying Physical Characteristics Act, sections 29-3301 to 29-3307, R. R. S. 1943, held constitutional.
2. **Criminal Law: Evidence: Self-Incrimination.** The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to the defendant's body, nor to the secretions therefrom, nor to the introduction of chemical analysis in evidence.
3. **Criminal Law: Evidence.** The Identifying Physical Characteristics Act applies only to physical evidence and not to oral communications or testimony.
4. **Criminal Law: Evidence: Self-Incrimination.** Requiring defendant, under threat of contempt for noncompliance (pursuant to the Identifying Physical Characteristics Act), to submit to blood tests involved no violation of her privilege against self-incrimination.
5. **Criminal Law: Evidence: Witnesses.** In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.

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

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

Paul L. Douglas, Attorney General, and Jerold V. Fennell, 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 for assault with intent to murder. The alleged assault occurred on a newly born male child found on June 11, 1974, abandoned in a women's toilet at the Lodgepole State Way-

side Park in Kimball County, Nebraska. The defendant was found guilty by a jury, and sentenced by the District Court to the State of Nebraska Department of Corrections for not less than 3 years and 6 months, nor more than 7 years. We affirm the judgment and sentence of the District Court.

The defendant, on appeal, raises two primary contentions. First, that certain evidence was taken from her in violation of her constitutional rights and later erroneously admitted into evidence; and, second, that the evidence does not support the verdict.

On November 5, 1974, Nebraska State Patrol criminal investigator, James G. Robinson, filed an affidavit of peace officer in the District Court for Kimball County, Nebraska, pursuant to the Nebraska Identifying Physical Characteristics Act, sections 29-3301 to 29-3307, R. R. S. 1943, requesting an order requiring four parties, including the defendant, to submit to blood tests. That same day the District Judge ordered the four persons, including the defendant, to submit to blood tests. On December 17, 1974, the defendant was formally charged with assault with intent to murder in violation of section 28-409, R. R. S. 1943. The results of the blood tests administered to the defendant were admitted into evidence at the trial.

The defendant contends that the Identifying Physical Characteristics Act is unconstitutional and that her constitutional rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and their equivalents in the Constitution of the State of Nebraska, were violated by having been compelled under the Act to submit to a blood test. We hold that the Identifying Physical Characteristics Act is constitutional and that there was no violation of the defendant's constitutional rights when she was required under the Act to submit to a blood test. Consequently, there was no error in admitting the result of this test at the trial.

The Identifying Physical Characteristics Act lays out a procedure whereby law enforcement officers can obtain physical evidence from individuals to aid them in identifying the perpetrators of criminal offenses. Section 29-3301, R. R. S. 1943, defines identifying physical characteristics as including: "* * * fingerprints, palm prints, footprints, measurements, handwriting exemplars, lineups, hand printing, voice samples, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, and photographs of an individual."

Section 29-3302, R. R. S. 1943, authorizes judges and magistrates to issue orders for obtaining these items. Section 29-3303, R. R. S. 1943, provides in part that: "The order may issue upon a showing by affidavit of a peace officer that (1) there is probable cause to believe that an offense has been committed; (2) that procurement of evidence of identifying physical characteristics through nontestimonial identification procedures from an identified or particularly described individual may contribute to the identification of the individual who committed such offense; and (3) that the identified or described individual has refused, or there is reason to believe he will refuse, to voluntarily provide the desired evidence of identifying physical characteristics."

Section 29-3304, R. R. S. 1943, spells out situations where it is not necessary to obtain an order to secure identifying physical characteristics. Section 29-3305, R. R. S. 1943, describes what the order shall contain, and provides that the person to whom the order is directed shall be guilty of contempt in the event he fails to comply with the order. Section 29-3307, R. R. S. 1943, limits the punishment for contempt to 30 days imprisonment in the county jail.

In Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the Supreme Court affirmed the defendant's conviction for driving while in-

toxicated. After the defendant's arrest, while he was at the hospital receiving treatment for injuries suffered in an automobile accident, a blood sample was withdrawn from the defendant over his objections. The report of the chemical analysis of the blood sample, showing intoxication, was admitted into evidence at the defendant's trial. On appeal, one of the defendant's contentions was that the compulsory blood test violated his constitutional privilege against self-incrimination. Rejecting that contention, the court held: "We hold that the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and the use of the analysis in question in this case did not involve compulsion of these ends." The court went on to say: "Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend upon chemical analysis and on that alone. Since the blood test evidence, although an incriminatory product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."

Nebraska follows the distinction explicitly recognized in Schmerber v. California, *supra*. In State v. Oleson, 180 Neb. 546, 143 N. W. 2d 917 (1966), we held: "The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to the introduction of the chemical analysis in evidence." See, also, United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); Holt v. United States, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021. The Identifying Physi-

cal Characteristics Act clearly follows this distinction and applies only to physical evidence, and not to oral communications or testimony. See §§ 29-3301, 29-3303(2), 29-3305(6), R. R. S. 1943.

The minute sample of blood which the defendant was required to supply for testing was physical evidence, not testimony or communications. Requiring the defendant to submit to the blood test, under threat of contempt, involved no violation of her privilege against self-incrimination.

The defendant's Fourth Amendment rights against unreasonable search and seizure were not violated. "* * * the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions * * *." Schmerber v. California, *supra*. The procedure followed in obtaining a sample of the defendant's blood for testing was analogous to obtaining a search warrant. The peace officer must file an affidavit with a judge or magistrate. Upon a showing of probable cause, the judge or magistrate has the power to issue the order. The order must be specific as to what is desired, and remains in force no more than 15 days after issuance. The entire Identifying Physical Characteristics Act is rife with safeguards designed to protect the individual from whom physical evidence is sought. What the court said in Schmerber, regarding the defendant's search and seizure claim there, is relevant here: "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 requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' * * * The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search

of evidence of guilt is indisputable and great." We find no constitutional infirmities in the application of the Act to the defendant.

The defendant next contends that the evidence does not support the verdict. The evidence in this case was circumstantial and largely conflicting. In determining whether the evidence was sufficient to support the verdict, we keep in mind the following rules: "In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury." State v. Spidell, 194 Neb. 494, 233 N. W. 2d 900 (1975). "The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt." State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904.

The evidence adduced at the trial, which could be said to support the State's case, was as follows: Albert Manderville of Grand Island, Nebraska, testified that in the course of his employment he was required to visit Kimball, that he became acquainted with the defendant, and that they had sexual relations. He testified that they had sexual relations during the months of August, September, and October of 1973.

Nathan Walls, a police officer with the Kimball police department, testified that the baby boy was found at approximately 6:45 p.m. on June 11, 1974. Dr. John P. Byrd, a general practitioner in Kimball, examined the baby on June 11, 1974, shortly after he was discovered and rescued, around 7:45 p.m. He testified that in his opinion the baby was 6 to 12 hours old at that time.

Mrs. Oma Smith, a neighbor of the defendant, testi-

fied that in her opinion the defendant was pregnant during the first 6 months of 1974. She also testified that when the defendant returned from a vacation (around July 1, 1974) she appeared to have lost a lot of weight. Dorothy Shelburne, a coworker of the defendant's, testified that on June 11, 1974, the defendant called in to work and stated that she would not be in. She also testified that in her opinion the defendant was pregnant. Barbara Ann Thacker, coowner of the Hickory Inn where the defendant worked, also testified that she thought the defendant was pregnant in the spring of 1974. She also observed that the defendant had lost a lot of weight when she returned from her vacation. Carol Crow, another coworker of the defendant, also testified that the defendant was pregnant, as did Linda Hatch, a beautician, who testified that she had known the defendant for many years. Mrs. Hatch further testified that on June 11, 1974, while the defendant was at her beauty shop at approximately 3 p.m., the defendant discharged a large amount of blood on one of the chairs at the beauty salon. Dorothy Shelburne testified that on June 12, 1974, the defendant looked "gastly white," and appeared not to feel well that day. Carol Crow testified that the defendant "looked awful" on June 12, 1974.

Albert Manderville testified that on July 18, 1974, while he was with the defendant at his motel room, she told him that she had had a baby in Scottsbluff and had given it away, and indicated to him that he was the father of this baby.

The defendant was also employed by Mrs. Bernice Linn in Kimball as a house-cleaner. Mrs. Linn's daughter-in-law, Mrs. Donna Linn, testified that this home contained an apartment which was unoccupied on June 11, 1974. She testified that on June 16, 1974, she discovered a large stain on the bedroom rug in the apartment and on July 28, 1974, she discovered stains on the mattress and bed in the same room.

Special Agent William Gavin of the FBI testified that he conducted laboratory tests on various of the State's exhibits: The mattress padding, mattress cover, piece of rug, and blood scrapings found on a bedrail, all from the bedroom in the apartment in the Linn home. He testified that type A human blood was present on these items. Dr. Alvin Armstrong from Scottsbluff testified that he examined the sample of the defendant's blood brought to him by Officer Robinson and that it was type A blood.

Sheriff James J. Taylor of Kimball County, Nebraska, testified that on June 13, 1974, he contacted the defendant and requested that she have a physical examination. When he later contacted her about this physical, she showed him exhibit 5, which purports to be a letter from Dr. Robert H. Bowden of Casper, Wyoming, stating that there has been a medical examination and that there is "no evidence of pregnancy in the past three weeks." Officer Robinson testified that he questioned the defendant on July 24, 1974, and that during this meeting she also produced exhibit 5. He testified further that he then advised her that he was aware that she had not taken the physical described in exhibit 5, whereupon the defendant produced exhibit 11, a letter from Dr. Bowden describing a physical given to a 23-year-old female weighing 98 pounds. The defendant admitted to Officer Robinson that she had typed exhibit 5 herself, and admitted at the trial that she had also forged Dr. Bowden's signature to it.

Exhibit 4 was the hospital record of the abandoned child found on June 11, 1974. It indicates that he weighed 8 pounds, 4 ounces. The defendant testified that the 5 children she had given birth to ranged from 6 to 9 pounds.

The above-outlined evidence, if believed by the jury, was sufficient to support a finding of guilty.

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

AFFIRMED.

IN RE CONSERVATORSHIP OF THE ESTATE OF EVA LANGE. EARL WINTERS, APPELLANT, V. EVA LANGE ET AL., APPELLEES.
247 N. W. 2d 617

Filed December 8, 1976. No. 40580.

Conservators. When a person who has property deems himself or herself unable to manage it by reason of infirmities of age or physical disability, that person may apply to the county court to have a conservator appointed to manage the property.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

Lawrence F. Weber, for appellant.

Richard G. Kopf of Cook, Lubberstedt & Kopf, for appellees.

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

CLINTON, J.

This appeal arises from objections to the application of Eva Lange, an aged person, for the appointment of a conservator of her property under the provisions of section 38-901, R. R. S. 1943, Reissue 1974. The county court overruled the objections and appointed E. A. Cook, III, as conservator. The objector, Earl Winters, son of Eva Lange, appealed to the District Court where the order of the county court was affirmed.

The ground of the objection is that Eva Lange had previously placed all her property in a trust which named herself and Winters cotrustees and that, since there was no property for the conservator to manage, the appointment was inappropriate.

The caption of the trust instrument denominated the trust as revocable. Its terms, however, included a provision that the grantor could not revoke the trust without consent of cotrustee Winters. The trust provided, among other things, that the: "Trustees shall pay all the net income from the Trust Estate, and such portions of the principal as the GRANTOR may from time to time direct in writing to the GRANTOR, or in such manner as she may otherwise direct in writing." Eva Lange, in writing, declared the trust revoked and sought Winters' consent thereto which was refused. She also requested in writing the distribution to her of the income and principal of the trust under the provisions of the trust above quoted. As to certain personal property the record shows she was able to secure possession as she had never relinquished control and no formal transfer of title to the trust had ever been made. Therefore, the record establishes that there was property of the applicant to be managed, the appointment of a conservator by the county court was proper, and the order of appointment ought to be affirmed.

The parties argue to us here, as they did in the county court and in the District Court, many questions involving construction of the trust insofar as it relates to the revocability thereof and to the delivery or nondelivery of a deed of real estate from Eva Lange to herself and Winters as trustees. We find it inadvisable to decide these questions because we doubt the jurisdiction of the county court under statutes presently in effect, to wit, section 24-517, R. R. S. 1943, to construe trust instruments. Cf. § 30-2806, R. R. S. 1943, Reissue 1975, operative January 1, 1977. Certainly the county court had no jurisdiction to determine title to real estate.

The order appointing the conservator is affirmed.

AFFIRMED.

IN RE APPLICATION OF MILLS.
VALOROUS MILLS, DOING BUSINESS AS MILLS FILM TRANSFER, APPELLANT, V. NEBRASKA MOTOR CARRIERS ASSOCIATION, APPELLEE.
247 N. W. 2d 619

Filed December 8, 1976. No. 40588.

1. **Carriers: Rates: Words and Phrases.** "Premium rates" referred to in an order of the Public Service Commission authorizing transportation of "express" packages means rates higher than general freight rates.
2. **Carriers: Rates: Public Service Commissions.** The rate-fixing power of the Public Service Commission, if properly exercised, is legislative in character and has the force and effect of a statute on the subject.
3. **Administrative Law: Public Service Commissions.** On appeal to the Supreme Court from an order of the Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority, and whether the order complained of is reasonable and not arbitrarily made.
4. ———: ———. If there is evidence to sustain the findings of the Public Service Commission, this court may not intervene. It is only where the findings of the commission are against the evidence that this court may hold the commission's findings are arbitrary and capricious.
5. ———: ———. On an appeal to the Supreme Court from an order of the Public Service Commission this court cannot disturb the findings of the commission unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved.

Appeal from the Nebraska Public Service Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, Patrick E. Quinn, and Steven K. Kuhlmann, for appellant.

James E. Ryan, for appellee.

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

McCOWN, J.

Valorous Mills, doing business as Mills Film Transfer,

of Lincoln, Nebraska, filed an application with the Nebraska Public Service Commission for authority to establish a motor carrier express tariff on general commodities between Lincoln and Omaha, Nebraska. The Nebraska Public Service Commission denied the application and Mills has appealed.

Prior to 1966, Mills held a certificate of public convenience and necessity authorizing the transportation of "motion picture films, newspapers and express packages exclusively," between Omaha and Lincoln, Nebraska, and to other points and places in Nebraska. On February 16, 1966, the Nebraska State Railway Commission entered an order interpreting the words "express packages exclusively" to mean packages of not more than 150 pounds, in shipments of 2,000 pounds or less, and that an express package and a shipment of express packages "must be transported by Mills at premium rates." The order also provided that Mills was authorized to charge the rates it had previously been charging "until applicable express rates are prescribed." For commodities other than films and newspapers, Mills had been charging rates established under official class and commodity tariff 4 (later 4-A). No express rates were ever established and Mills' rates, except for films and newspapers, have always been governed by Nebraska class and commodity tariff 4-A, until October 15, 1973.

In 1973, an application was filed on behalf of a large number of Nebraska intrastate motor carriers for an increase in Nebraska class and commodity tariff 4-A. As to shipments within Mills' weight limitations, the increase requested was 5 percent. As an intervener in that proceeding, Mills opposed any such increases as they might apply to Mills. On October 15, 1973, the Nebraska Public Service Commission entered its order granting the application for the increase in rates of tariff 4-A. It specifically referred to the 1966 order interpreting Mills' certificate and to the provision in

that order requiring Mills to charge tariff 4-A rates until applicable express rates were prescribed. The Publice Service Commission then ordered that the tariff 4-A rate increase granted October 15, 1973, would not be applicable to Mills for a period not to exceed 90 days, during which time Mills could submit to the commission proposed motor carrier express tariffs.

On November 27, 1973, Mills filed with the Public Service Commission a "motor carrier's truck express tariff." That tariff was simply a proposal to retain the rates which had been in effect on shipments of 2,000 pounds or less under tariff 4-A prior to the order of October 15, 1973. The express tariff filed was to apply only to shipments between Lincoln and Omaha but not to Mills' traffic to other points and places. Protests were filed but later withdrawn, and letters in opposition to the proposed express tariff were filed by other carriers. Hearing on the application was held on February 6, 1974.

Mills' testimony indicated that it was losing business to private carriage and not to other carriers under the rates in effect before the 5 percent increase of October 1973. Mills' testimony was that it did not need the increase to remain profitable, nor did it compete with other motor carriers for the Lincoln-Omaha traffic because of the unique weight limitations on its certificate of operation, its expedited express-type service, and its exclusive handling of films and magazines. The evidence indicated that Mills received approximately 25 percent of its business from the transportation of liquor and that this business was primarily the business being lost to private carriage. At the completion of the hearing Mills was allowed to continue the old rates until the application for the express tariff was resolved.

On December 18, 1975, almost 2 years later, the Nebraska Public Service Commission found "(1) There should be no disparity in the class rates in Nebraska

Intrastate Commerce as regards Official Class and Commodity Tariff 4-A.

"(2) The proposed tariff submitted by Valorous Mills, dba Mills Film Transfer is unacceptable as it does not prescribe 'premium rates' as called for by the interpretation order of Mills' authority of 1966." Mills was therefore ordered to effectuate the same class rates in official class and commodity tariff 4-A as all other participants in that tariff, effective January 12, 1976. This is the order from which Mills has appealed.

Essentially, Mills contends that the Public Service Commission erred in determining that Mills' "express" authority required premium rates; that the denial of Mills' express tariff was arbitrary and unreasonable; and the order is not supported by sufficient competent and probative evidence. Mills does not challenge the 1966 order which authorizes Mills to transport express packages exclusively and to transport them at premium rates, but asserts only that "premium" rates are not required to be higher than class rates, but may be lower.

The Interstate Commerce Commission has continuously held, with respect to interstate traffic, that "express" authority requires premium rates and premium rates have been interpreted to mean more than general freight rates. See, Railway Express Agency, Inc., 31 M. C. C. 363; Transportation Activites of Arrowhead Freight Lines, Ltd., 61 M. C. C. 131 and 63 M. C. C. 573. In the latter case the Commission said: "(I)t is fundamental that any motor carrier authorized to perform a premium service must, if it provides such service, make appropriate premium charges therefore. * * * Because express service is marked by an undertaking to provide transportation services superior to that normally required and furnished for ordinary freight, it is both appropriate and proper that relative higher charges should be established for it."

The finding of the Public Service Commission that the proposed "express" tariff submitted by Mills did not

prescribe premium rates as called for by the interpretation order of 1966 is clearly supported by the evidence.

This court has consistently refused to act as a superior public service commission with authority to substitute its judgment for that of the commission. See Safeway Cabs, Inc. v. Honer, 154 Neb. 533, 48 N. W. 2d 672. The rate-fixing power of the Public Service Commission, if properly exercised, is legislative in character and has the force and effect of a statute on the subject. United Mineral Products Co. v. Nebraska Railroads, 175 Neb. 285, 121 N. W. 2d 492. On an appeal to the Supreme Court from an order of the Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority, and whether the order complained of is reasonable and not arbitrarily made. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865. That rule is peculiarly applicable to an appeal from an order of the commission fixing rates for common carriers.

In determining the question of whether the findings of the Public Service Commission are arbitrary and capricious, this court has held that if there is evidence to sustain the findings of the commission, this court may not intervene. It is only where the findings of the commission are against the evidence that this court may hold the commission's findings are arbitrary and capricious. Robinson v. National Trailer Convoy, Inc., 188 Neb. 474, 197 N. W. 2d 633.

As late as 1975, this court reaffirmed the rule that this court, upon appeal, cannot disturb findings of the Public Service Commission unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved. Nebraska Railroads of Omaha v. Nebco, Inc., 194 Neb. 322, 231 N. W. 2d 505.

There is evidence in the record to support the finding of the commission that there should be no disparity in

the class rates in Nebraska intrastate commerce as regards official class and commodity tariff 4-A. There is also evidence to support the commission determination that the denial of permission to flag out of class rates would not preclude carriers from effectuating commodity rates and utilizing flag outs to tailor compensatory rates to their particular type of operation.

The Public Service Commission here acted within the scope of its authority in fixing rates. The order entered was reasonable. There is evidence to sustain the findings of the commission and those findings are not arbitrary nor capricious.

The order of the commission is affirmed.

AFFIRMED.

DONNA STECKER, APPELLEE, V. JACK STECKER, APPELLANT.
247 N. W. 2d 622

Filed December 8, 1976. No. 40626.

1. **Trial: Appeal and Error: Evidence.** There is a presumption the trial court, trying a case without a jury, in arriving at a decision, would consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court.
2. ———: ———: ———. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded by this court.
3. **Divorce: Appeal and Error: Parent and Child: Infants.** The discretion of the trial court with respect to awarding or changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Thomas F. Colfer and William W. Lyons of Russell, Colfer, Lyons & Wood, for appellant.

Mousel & Burger, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and HAMILTON and WINDRUM, District Judges.

WINDRUM, District Judge.

This is an appeal from a decree dissolving the marriage of the parties.

The parties were married August 29, 1971. To the union was born one child, Sean Michael Stecker, on August 2, 1972.

Trial on the merits was held on July 28, 1975, at the conclusion of which, the District Court requested the "Social Services Unit" make an investigation of the circumstances of the minor child and the parties, and report to the court in writing. The report was duly furnished the court, whereupon a further hearing was had before the court on August 20, 1975. The report requested was received into evidence over the objection of appellant. Prior to its receipt each of the parties was given an opportunity to examine same. The District Court thereafter decreed the marriage dissolved. The decree disposed of all other items germane to the action, including the custody of the child, Sean. The custody of the child was awarded appellee, under the supervision of certain welfare agencies, subject to extensive visitation rights awarded appellant. Appellant duly filed a motion for new trial attacking only the decision as to custody. On September 19, 1975, appellant filed a motion to modify final decree. Hearing was had thereon on November 14, 1975. Prior thereto, the Nemaha County division of public welfare had been requested to investigate the new residence of appellee and to compose a written report thereof. Said report was received into evidence over objection by appellant. Both parties had been given an opportunity to examine

same. The court continued the matter and requested that another investigation of appellee's situation be made in Nemaha County. On January 7, 1976, a final hearing was held. The third investigative report was received into evidence without objection. The motion of appellant to modify was sustained to the extent that legal custody of Sean was vested in the Hitchcock County division of public welfare with courtesy supervision by the Nemaha County division of public welfare. Physical possession was awarded appellee with extensive visitation rights vested in appellant. A motion for a new trial as to this hearing was duly filed on January 17, 1976, and was duly overruled.

The only issue presented on appeal concerns the propriety of the custody award, as originally ordered and thereafter, partially modified.

Appellant complains of the reception into evidence of the three written reports of various social service agencies. The court announced that it did not rely on the first. A perusal of the second indicates it furnished nothing of value, thus the reason the court ordered a third investigation. The written report of the third investigation was examined by both parties and received in evidence without objection. This entire question of investigative reports in actions for dissolution of marriage was discussed in Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617, and Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111. It would serve no useful purpose to discuss the matter further herein, except to say that the last report was not objected to and, assuming, arguendo, the admission of the first two reports in evidence were erroneous, it will be presumed the trial court did not base its decision thereon and they will be disregarded by this court in a determination de novo.

Appellant, in several particular assignments of error, alleges in essence that the court erred in the award of custody of the child as above related, as such an award

was contrary to the evidence, contrary to law, and an abuse of discretion. To recite salient bits of evidence in this case would not be of help to the legal profession so far as precedence is concerned. Suffice to say, that variations thereof are all too common.

This case is controlled by the following quotation contained in Chilese v. Chilese, 196 Neb. 784, 246 N. W. 2d 475: " 'The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and 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 children in custody proceedings.' Fisher v. Fisher, supra. See, also, Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647 (1971). 'The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.' Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544 (1968). See, also, Conger v. Conger, 194 Neb. 771, 235 N. W. 2d 634 (1975)."

The record indicates that the court devoted much time and thought to the question of the custody of the child, as determined by the child's best interests. There were seven separate hearings, each of which involved some facet of the question of custody. Pages of the bill of exceptions record the court's announcements from the bench indicating thought processes in arriving at its decision. No more conscientious effort could have been exercised or asked for. Sufficient evidence exists in the record to support the court's findings that each of the parties was immature and that the interests of the child be best served by vesting legal custody in someone other than themselves to insure a measure of

control and supervision. Likewise, sufficient evidence exists to warrant the order awarding physical custody in appellee, with extensive visitation rights vested in appellant.

Lastly, appellant alleges as error that the court has no jurisdiction to terminate parental rights. Since no order of the court terminated parental rights, said allegation shall not be further discussed.

The judgment of the District Court is correct and is affirmed. The appellee is awarded $500 for the services of her attorney in this court.

AFFIRMED.

STEVEN G. INSERRA, A MINOR, BY ANTHONY R. INSERRA, HIS FATHER AND NEXT FRIEND, APPELLANT, V. VILLAGE INN PANCAKE HOUSE, APPELLEE.

247 N. W. 2d 625

Filed December 8, 1976. No. 40639.

Workmen's Compensation: Appeal and Error. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award.

Appeal from the Nebraska Workmens' Compensation Court. Affirmed.

Joseph P. Inserra of Krause, Inserra, Petersen & Burkhard, for appellant.

Richard L. Walentine of Walsh, Walentine & Miles, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and CANIGLIA and COADY, District Judges.

SPENCER, J.

Plaintiff prosecutes this appeal from an award of the Workmen's Compensation Court en banc. Essentially, plaintiff claims the court erred in holding his total disability ceased on October 12, 1975, and in not assessing an expert witness fee for his physician. We affirm.

On the date of the accident plaintiff was 17 years old. He had worked in defendant's restaurant since 1972, working full time during the summer and on weekends during the school year as a cook. On July 24, 1974, when returning to the kitchen from the stockroom, carrying a can of cooking grease, plaintiff slipped on some water. His feet flew out from under him and he landed on his low back. He worked for a time after this incident but because of pain in his back, he was driven home by another employee. He was taken to the hospital, where he was examined, X-rayed, and told to return home, apply hot packs to his back, and not return to work for 10 days. After the 10-day period he felt better and returned to his job.

Plaintiff worked until September when school classes started again. Thereafter, he continued working on Saturdays and Sundays until school was out for the summer of 1975, when he resumed full time employment. His low back gave him trouble through the spring and summer of 1975, although he did continue to work. On August 29, 1975, plaintiff had a spinal fusion. He was released from the hospital on September 12, 1975. He started back to school on October 13, 1975.

Doctor Gross testified by deposition on November 18, 1975. He had last examined plaintiff on September 19, 1975. He testified that plaintiff was progressing nicely. Doctor Gross intended to examine plaintiff again around Christmas time. Except for testimony that plaintiff recuperated at home, there is no evidence in

the record concerning plaintiff's physical condition or his activities following surgery.

On rehearing, after a one-judge award, it was determined that plaintiff's accident had aggravated a preexisting condition to a state of disability and there was need for corrective surgery. Plaintiff was found to have been temporarily totally disabled following the surgery for a period of 6 4/7ths weeks from August 28, 1975, to October 12, 1975. Benefits were allowed for that period, including medical care and hospital expenses relating to surgery in the amount of $3,287.75.

The Workmen's Compensation Court found plaintiff's temporary total disability ended on October 12, 1975, the day prior to his return to school, and that no permanent disability had been proved. Was there sufficient competent evidence to support this determination?

No evidence was introduced by plaintiff to indicate he was unable to return to work after October 12, 1975. The record would indicate he was recovering very well and did not require further medical treatment. The only restriction placed on plaintiff by the doctor when he was examined on September 19, was that he should avoid contact sports. Plaintiff has the burden of proof on all issues involved. On the record, we cannot say the finding of the Workmen's Compensation Court is erroneous.

We note under section 48-185, R. S. Supp., 1976, which became effective August 24, 1975, there is no longer a provision for de novo review in this court in compensation cases. That statute now provides in part: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is

not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award."

Plaintiff next complains that he should have been allowed a $150 expert witness fee for his medical witness, to be taxed as costs. This witness testified by deposition. The deposition costs in the amount of $60 were taxed as a part of the costs.

The applicable statute on the taxation of costs by the Nebraska Workmen's Compensation Court is section 48-172, R. R. S. 1943, which provides: "Each applicant for an order or an award by the Nebraska Workmen's Compensation Court shall pay all the expense of his own making; Provided, that there shall be no filing fees charged by the court, and that the court may at its discretion assess the costs of the applicant or applicants against the respondent or respondents as in like manner done in other courts of the state."

There is nothing in section 48-172, R. R. S. 1943, which authorizes the Workmen's Compensation Court to tax as an item of cost the fee of an expert witness. Section 48-172 does permit the Workmen's Compensation Court, at its discretion, to "assess the costs of the applicant * * * as in like manner done in other courts of the state." There is no merit to the plaintiff's assignment.

The judgment is affirmed.

AFFIRMED.

JOHN H. MILLER ET AL., APPELLANTS, V. HAROLD R. MILLER ET AL., APPELLANTS, IMPLEADED WITH DONALD M. MILLER ET AL., APPELLEES.

247 N. W. 2d 445

Filed December 8, 1976. No. 40695.

1. **Wills: Estates.** A conveyance will not be construed to create

an estate upon condition unless the language is so clear there can be no other construction.

2. ———: ———. Estates upon condition subsequent are not favored in law, and a condition will be liberally construed to avoid a forfeiture.

3. **Wills: Estates: Liens.** A devise of land under condition that the devisee pay $2,000 to each of four other persons within 1 year after the will is admitted to probate conveys the land in fee simple to the devisee subject to leins for the amounts due the four other persons, and a breach of the condition does not work a forfeiture of the estate of the devisee.

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

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

Michael J. Murphy, Vincent Valentino, and Max C. Mankin, for appellees.

Heard before SPENCER, BOSLAUGH, NEWTON, and BRODKEY, JJ., and BURKE, District Judge.

BOSLAUGH, J.

This case involves a controversy concerning the construction of the second paragraph of the will of Edna L. Miller, deceased.

Edna L. Miller died testate on May 29, 1972. The second paragraph of her will, which was admitted to probate on July 25, 1972, provided as follows: "SECOND: I hereby give, devise and bequeath all of my interest in and to the real estate described as: The South 40 acres of the East 120 acres of the Southeast Quarter (SE¼) of Section Sixteen (16), Township Nine (9) North, Range Six (6) West of the 6th P.M., Hamilton County, Nebraska, to my son, Don M. Miller, or to his heirs by right of representation, under the condition that Don M. Miller pay to Harold R. Miller, John H. Miller, Alvin P. Miller, and Virginia L. Church, or their heirs by right of representation, the sum of $2,000.00 each, within one year after this will is admit-

ted to probate. This is to carry out my wish that my said son, Don M. Miller shall have the farm on which he presently is living."

The third paragraph of the will devised the rest and remainder of the property of the testatrix to the five children named in the will or their heirs.

On December 13, 1974, John H. Miller and his wife, Virginia L. Church and her husband, and Alvin P. Miller and his wife brought this action to partition the 40 acres described in the second paragraph of the will together with two other tracts of land. The defendants are Harold R. Miller and Donald M. Miller and their wives and James E. Koepke, the Administrator C. T. A. of the Estate of Edna L. Miller, deceased. The amended petition alleged that the five children of Edna L. Miller, deceased, each owned an undivided one-fifth interest in the real estate described in the petition.

Donald M. Miller and his wife filed an answer alleging that they were the sole owners of the 40-acre tract described in the second paragraph of the will. The answer further alleged they were ready and willing to pay $2,000 each to the persons named in the will but those persons had refused to receive the same in payment.

The reply alleged that Donald M. Miller's failure to comply with the condition set out in the will resulted in the five children having an equal interest in the 40-acre tract.

The trial court found that Donald M. Miller was the sole owner of the 40-acre tract subject to his obligation to pay $2,000, with interest from May 29, 1973, to each of the other four children of the deceased which obligation was a lien on the real estate. The judgment ordered these amounts be paid within 30 days and ordered partition be made of the other two tracts. The plaintiffs and defendants Harold R. Miller and wife have appealed. There is no cross-appeal.

The appellants contend that the payment of $2,000 to each of the other four children within 1 year was a con-

dition precedent or a condition subsequent, and that breach of the condition prevented the title from vesting in Donald M. Miller or divested his title. The appellants contend that Donald M. Miller's failure to satisfy the condition within the time provided resulted in a forfeiture of his rights under the second paragraph of the will.

A devise to one with a provision that after receiving the gift he pay certain sums of money to persons designated is generally construed as not strictly a condition the breach of which may forfeit the estate, but rather as imposing a personal liability upon the devisee or as creating a charge or lien. Morys v. Morys, 123 Neb. 188, 242 N. W. 420. Estates upon condition subsequent are not favored in law, and a condition will be liberally construed to avoid a forfeiture. Erskine v. Board of Regents, 170 Neb. 660, 104 N. W. 2d 285. A conveyance will not be construed to create an estate upon condition unless the language is so clear there can be no other construction. Majerus v. Santo, 143 Neb. 774, 10 N. W. 2d 608.

We think it is clear from the language of the will which was executed May 11, 1970, approximately 2 years before her death, that the testatrix intended Donald M. Miller should have the 40-acre tract because it was the farm upon which he was living at the time the will was made. Then, in an attempt to equalize the distribution of the estate, the devisee was required to pay $2,000 each to the other four children of the deceased. This intention is fully satisfied by construing the "condition" to create a lien upon the land.

The record shows there was considerable negotiation between the parties in an attempt to arrive at a family settlement. When the will was read, on June 27, 1972, the other children of the deceased expressed dissatisfaction with the second paragraph of the will. They were willing for Donald to have the land but he should be required to pay a reasonable price. Thereafter, on sev-

eral occasions Donald offered to buy the interests of the other children in all the land. His first offer was $67,000. He later offered to pay $83,000, but the other heirs were thinking of a higher price. Negotiations were still being carried on at the time this action was filed. Under these circumstances we think the decision of the trial court granting Donald M. Miller an additional 30 days in which to make the payments required under the will was justified.

The judgment of the District Court is affirmed.

AFFIRMED.

FRANK BEMIS, DOUGLAS COUNTY ASSESSOR, APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

247 N. W. 2d 447

Filed December 8, 1976. No. 40711.

Taxation: Administrative Law. The county assessor's responsibility after recommending either taxable or exempt status under section 77-202.01, R. R. S. 1943, is limited to an advisory rather than an adversary capacity.

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

Donald L. Knowles, William T. Ginsburg, and John Q. Powers, for appellant.

Steven J. Riekes, Harold M. Zabin, and Michael J. Rubach of Beber, Richards, Riekes & Brown, for appellee.

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

SPENCER, J.

Frank Bemis, the Douglas County assessor, appeals from an order of the District Court for Douglas County

sustaining a demurrer to his appeal from a tax exemption determination by the Douglas County Board of Equalization.

The sole issue presented is: Does the assessor have the legal capacity to maintain an appeal to the District Court from a tax exemption determination by the county board of equalization? We hold he does not, and affirm the judgment of the District Court.

The Douglas County assessor's office increased the valuation of the furniture, fixtures, machinery, tools, equipment, and supplies of United Parcel Service, located in Douglas County, from $30,815 to $236,735. United Parcel Service applied for a tax exemption. The Douglas County Board of Equalization granted the request and reduced the personal property valuation to $30,815, the original figure. Bemis appealed from this determination to the District Court for Douglas County. The District Court sustained a demurrer on the theory the assessor lacked legal capacity to maintain the action.

The statutory scheme of sections 77-202.01 through 77-202.07, R. R. S. 1943, which governs the procedure herein, may be summarized as follows: A person, corporation, or organization seeking a tax exemption applies to the county assessor. The county assessor makes a recommendation to the county board of equalization. The county board of equalization determines whether tax exemption will be granted. If the exemption is denied, the aggrieved taxpayer may appeal de novo to the District Court. The State Tax Commissioner may intervene in the appeal. The Tax Commissioner is also given the authority to review and reverse any decision of the county board of equalization which grants tax exemption.

Bemis contends the county assessor is a litigating party at a tax exemption hearing where he has recommended taxable status. The statutory language does not support this contention. Section 77-202.01, R. R. S. 1943, provides in part: "The county assessor shall ex-

amine the application and recommend either taxable or exempt status * * *." Under section 77-202.02, R. R. S. 1943, the county board of equalization "after a hearing on ten days' notice to the applicant, and after considering the recommendation of the county assessor and other information it may obtain, shall grant or withhold tax exemption * * *." It appears the county assessor's responsibility is limited to an advisory rather than an adversary capacity.

Plaintiff's principal argument is premised upon sections 77-1510, 77-1511, and 77-1513, R. R. S. 1943. The last sentence of section 77-1510 commences: "The county may cross appeal, without giving bond, * * *." Section 77-1511 sets out District Court procedure on appeal from a board of equalization on assessments of property. Section 77-1513 covers appeals by any person from the assessment of his property, and also the appeal of any person from the assessment of the property of another as fixed by the county board of equalization. The last portion of section 77-1513 reads: "* * * where the appeal is not sustained, the costs shall be taxed to the appellant, unless the appellant shall be the county assessor or county clerk, in which case the costs shall be paid by the county."

The fallacy in the assessor's argument is that an appeal from a tax exemption determination can no longer be taken pursuant to the general provisions of sections 77-1510 and 77-1511, R. R. S. 1943. It must be brought under section 77-202.04, R. R. S. 1943. The provisions of sections 77-202.01 through 77-202.07, R. R. S. 1943, are clear and comprehensive. These provisions, adopted in 1963 as L. B. 386, constitute a complete and comprehensive act dealing with the matter of tax exemptions. They specifically provide who may appeal from the decision of the county board of equalization on a tax exemption determination. They further provide that the Tax Commissioner has the power to review and reverse the determination made by a county board of equaliza-

tion. The remedy of the assessor if he feels aggrieved is not to prosecute an appeal but rather to call the ruling to the attention of the Tax Commissioner who may or may not act, depending upon his independent judgment. Whether this remedy may be adequate or otherwise is a legislative and not a judicial determination. If the county feels aggrieved, its remedy is in the Legislature.

We affirm the judgment of the District Court.

AFFIRMED.

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, A CORPORATION, APPELLANT, V. NEBRASKA GAME AND PARKS COMMISSION, APPELLEE.
247 N. W. 2d 449

Filed December 8, 1976. No. 40748.

Labor and Labor Relations. Supervisory or managerial personnel may not enter into a bargaining unit with rank and file employees and may not retain the same bargaining agent.

Appeal from the Nebraska Court of Industrial Relations. Affirmed.

Steven D. Burns, for appellant.

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

Heard before SPENCER, NEWTON, and BRODKEY, JJ., and HASTINGS, District Judge, and KUNS, Retired District Judge.

NEWTON, J.

This is an appeal from the Court of Industrial Relations. The Nebraska Association of Public Employees, as plaintiff, sought designation as the bargaining agent for supervisory personnel of the Nebraska Game and Parks Commission, defendant. The court refused to

call an election or to permit such representation. We affirm the judgment of the Court of Industrial Relations.

Material to a solution of this case is a determination of what is meant by the terms "employer" and "Employee" for purposes of labor relations under Nebraska law. These terms have received a multiplicity of definitions under acts involving employer-employee relationships in other respects such as workmen's compensation and fair employment acts. None are applicable here. Resort must be had to legislative intention as expressed in Chapter 48, article 8, R. R. S. 1943. Most jurisdictions have specifically defined these terms and classified supervisory personnel as "management" as distinguished from employees. Experience under the National Labor Relations Act under which supervisory personnel were formerly classified as employees proved to be so unsatisfactory that it was amended by Congress so that supervisors could not be deemed employees. Presumably the Legislature was aware of the federal experience at the time the Nebraska act was amended in 1972 with regard to firemen and policemen.

Section 48-801, R. R. S. 1943, states: "Employer shall mean the State of Nebraska * * *" and that "Employee shall include any person employed by any employer * * *." The State, like a corporation, can only function through individual officers and assistants yet, strictly interpreted, the statute blandly ignores this fact. No line is drawn between management and labor. Department heads and officers would be free to enter into a bargaining unit with employees under their supervision and subject to be discharged by them. There would be no one left to negotiate in behalf of the State. Chaos would result and the public policy declared in section 48-802, R. R. S. 1943, would be completely nullified.

Section 48-823, R. R. S. 1943, provides that the act shall be liberally construed to effectuate the enunciated public policy. In City of Grand Island v. American Fed.

of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860, we held that: "Individuals who are authorized to responsibly direct other employees are supervisory employees and should be excluded from an employee bargaining unit." That decision dealt with *all* city employees and personnel. Subsequently the Legislature amended section 48-816, R. S. Supp., 1969, to exempt certain fire and police officers from the effect of our ruling. The Legislature did not make a general amendment affecting all city managerial or supervisory officers, nor, indeed, did it exempt all fire and police officers. This restraint on the part of the Legislature demonstrates that it is cognizant of the necessity to separate departmental officials from the rank and file for bargaining purposes and we believe such to be the legislative intention.

To permit supervisory personnel to retain the same bargaining agent as the employees' union would be tantamount to permitting them to enter the same bargaining unit and such agent could, and doubtless would, manipulate its efforts jointly in behalf of each. We hold that supervisory or managerial personnel may not enter into a bargaining unit with rank and file employees and may not retain the same bargaining agent. In view of this holding, it is unnecessary to consider other assignments of error or propositions discussed in the briefs.

The order of the Court of Industrial Relations is affirmed.

AFFIRMED.

MARK A. BUCHHOLZ, APPELLEE AND CROSS-APPELLANT, V. CLEONE S. BUCHHOLZ, APPELLANT AND CROSS-APPELLEE.
248 N. W. 2d 21

Filed December 15, 1976. No. 40496.

1. **Marriage: Contracts.** Marriage is generally considered a civil

contract differing in notable respects from ordinary contracts, but it is also and specially a status or personal relation in which the state is deeply concerned and over which the state exercises exclusive dominion.

2. **Marriage: Property: Husband and Wife.** A married person's interest in the marital status is not a property right.
3. **Marriage: Contracts: States.** A state has plenary power to fix conditions under which the marital status may be created or terminated.
4. ———: ———: ———. Vested rights may be impaired with due process of law under many circumstances. The state's inherent sovereign power includes the so-called police power right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well-being of the people.
5. **Marriage: Divorce: Statutes.** The Nebraska divorce laws do not discriminate against either party to a marriage.
6. **Marriage: Divorce: Constitutional Law.** The Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions.

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

Paul E. Galter, for appellant.

Barney & Carter and Herbert M. Brugh, for appellee.

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

PER CURIAM.

This is an action to dissolve a marriage brought by Mark A. Buchholz against his wife Cleone S. Buchholz. The principal thrust of the respondent wife on appeal is the assertion that the Nebraska divorce statutes are unconstitutional. She also contends that the award of alimony is insufficient. We affirm the District Court judgment.

Respondent's first contention is that she has a property right in the marriage. Although not entirely clear from her brief, she apparently believes that the decree of divorce deprives her of a substantial property inter-

est in violation of the Fourteenth Amendment's due process clause. Respondent cites no case in point but seeks to compare the situation with that of a tenured job holder who loses his position "without fault." See Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570. It is generally held that marriage is not an ordinary civil contract. Its nature is well expressed in the following quotation from 55 C. J. S., Marriage, § 1 b, p. 806: "Marriage is generally considered a civil contract differing in notable respects from ordinary contracts, but it is also and specially a status or personal relation in which the state is deeply concerned and over which the state exercises exclusive dominion." See, also, 52 Am. Jur. 2d, Marriage, § 5, p. 867; Ritzer v. Ritzer, 243 Mich. 406, 220 N. W. 812; Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L.R.A.N.S. 767.

In Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654, it was held: "Marriage is something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties which they cannot change; and the rights and obligations of which depend not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority. Legislation, therefore, affecting this institution and annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts by state legislation."

The proposition here presented was directly in issue in In re Marriage of Walton, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472. The California law is similar to our own. The court stated: "Similarly, Wife's contention that the dissolution of her marriage on the ground of irreconcilable differences under the Family Law Act unconstitutionally deprives her of a vested interest in her married status cannot be sustained. Certainly a wife has a legitimate interest in her status as a married

woman, but, separate and apart from marital property and support rights as to which Wife makes no contention, we entertain some doubt whether her interest in her status as a married woman constitutes property within the purview of the due process clauses of article I, section 13 of the California Constitution and the Fourteenth Amendment to the United States Constitution. In any event, in view of the state's vital interest in the institution of marriage * * * and the state's plenary power to fix the conditions under which the marital status may be created or terminated * * *, it is clear that Wife could have no vested interest in the state's maintaining in force the grounds for divorce that existed at the time of her marriage. Her interest, however it be classified, was subject to the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. * * *

"Even if Wife is said to have some constitutionally protected vested right, she has not been deprived thereof without due process of law. 'Vested rights, of course, may be impaired "with due process of law" under many circumstances. The state's inherent sovereign power includes the so called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people * * *.' " See, also, In re Marriage of Franks (Colo.) 542 P. 2d 845.

We agree that the marriage contract does not create a property right in the marital status. A marriage is not a property interest but is, in essence, a personal relationship subject to dissolution on terms fixed by state law.

It is asserted that the Nebraska statutes discriminate against women and are in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that women, after a divorce, are not as capable of supporting themselves

as are men. Section 42-365, R. S. Supp., 1976, provides: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, * * * and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party."

Section 42-366, R. R. S. 1943, provides that the parties may agree on a property settlement and, in the absence of an agreement, the court may decree a property division with due regard for the economic circumstances of the parties and any other relevant evidence. In addition to an award of property, the court may make an award of alimony.

It is evident that the law is designed to meet the question of ability of either party to provide for himself or herself and to offset it as nearly as can be done considering the economic situation of the parties. The respondent would have us rule, in substance, that once a marriage is effected a wife has a lifetime lien on her husband for support. Such a rule would be a two-edged sword as often the wife is much wealthier than the husband. We are unable to perceive any discrimination against women; on the contrary, the statutes are designed for their protection. The alimony and division of property provisions are rarely, if ever, invoked in behalf of men. In some instances husbands have asserted that statutes which grant alimony to a wife but not to a husband are discriminatory. Such contentions have been rejected. See, Saraceno v. Saraceno (Mass.), 341 N. E. 2d 261; Hendricks v. Hendricks (Tex. Civ. App.), 535 S. W. 2d 668; Williams v. Williams (La.), 331 So. 2d 438. In the latter case it was held: "Equal protection clause of Fourteenth Amendment to United States Constitution does not deny the state power to make legislative classification based on sex, provided

that classification is reasonable, not arbitrary, and rests upon some ground of difference having fair and substantial relation to object of legislation."

Respondent's final assignment of error is that the award of alimony was insufficient or inadequate. The parties were married September 6, 1953, and have been separated since October 27, 1972. They have a son now 20 years of age and a daughter 18 years of age. Petitioner Mark A. Buchholz is a Judge of the Nebraska Workmen's Compensation Court whose salary at the time of trial was $30,500 per year. Respondent is a registered nurse. Each of the parties received property valued at approximately $27,000; support for the minor daughter was fixed at $150 per month, payable to respondent who received physical custody; and petitioner was ordered to pay alimony of $500 per month for 24 months and of $400 per month for an additional 95 months, terminable on the death of either party or the remarriage of respondent. In addition, petitioner was ordered to pay the expense of respondent's retraining as a registered nurse within 3 years of the decree, not exceeding $2,000, should respondent desire such training. Costs including an attorney's fee of $2,500 were taxed to petitioner.

Petitioner cross-appeals on the ground that alimony and attorney's fees allowed are excessive. He points out that he will desire to finance the two children through college. The cross-petition is denied.

The judgment is affirmed in all respects and respondent is allowed an attorney's fee of $500 to be taxed to petitioner with other costs.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID COLEMAN, APPELLANT.
247 N. W. 2d 627

Filed December 15, 1976. No. 40625.

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

David Coleman, pro se.

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

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

NEWTON, J.

This is an appeal from a post conviction proceeding. The motion to vacate the judgment was denied without a hearing. We affirm the judgment of the District Court.

The defendant advances as grounds for the vacation of the judgment against him five propositions. They are, namely: An illegal arrest, an illegal line-up, lack of effective assistance of counsel, failure to charge him as an habitual criminal, and an alleged resentencing by nunc pro tunc order.

Examination of the record adequately demonstrates that his complaints are groundless. Defendant was arrested at the home of his confederate when found hiding in a closet. The police had been informed that there were two wanted men in the house. They had a warrant for the confederate, arrested him, then searched for the second party. The defendant was found and arrested. The police had previously identified the confederate from fingerprints found at the scene of the crime and the defendant had been identified by a photograph. "The applicable standard 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." State v. Atwater, 193 Neb. 669, 228 N. W. 2d 876. Both elements were present in this instance.

A Wade hearing was had on the alleged illegal line-up. The record fails to disclose any irregularities in connection with the line-up or the in-court identification of defendant.

The record also discloses that defendant was well represented by his counsel and his complaint in this respect is without merit.

Defendant states that the information failed to charge him as an habitual criminal although he was sentenced as such. This is incorrect. An amended information had been filed long before trial containing such charge.

The nunc pro tunc order complained of did not change defendant's sentence but simply corrected the time for his transference to the Nebraska Penal and Correctional Complex. There was no prejudice.

It appearing that the District Court could resolve all questions raised by reference to the record, a hearing on defendant's application was not required.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE APPLICATION OF GROENEWOLD.
E. RAYMOND GROENEWOLD, APPELLEE, V. BUILDING MOVERS, INC., ET AL., APPELLANTS.
247 N. W. 2d 629

Filed December 15, 1976. No. 40632.

1. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.

2. **Public Service Commissions: Administrative Law.** The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
3. ———: ———. Law violations are not necessarily a bar to an approval of an application, if the public interest will best be served by approval of the transaction presented.
4. ———: ———. In the absence of a specific restricting statute, the extent to which past unauthorized service may be considered in determining public necessity for the issuance of new authority is properly for the Nebraska Public Service Commission to determine.

Appeal from the Nebraska Public Service Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, Michael J. Ogborn, and Scott E. Daniel, for appellants.

Wightman & Fallesen, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and HAMILTON and WINDRUM, District Judges.

CLINTON, J.

This is an appeal from an order of the Public Service Commission granting to E. Raymond Groenewold of Farnam, Nebraska, a certificate of public convenience and necessity as follows: "SERVICE AUTHORIZED: Transportation of houses and other buildings and component parts of buildings of all kinds in . . . Dawson, Gosper, Frontier, Hayes, Hitchcock, Furnance (sic), Red Willow Counties and Lincoln County east of Highway 83 and excluding the City of North Platte, Nebraska. *RESTRICTION*: Excluding commodities in bulk in tank type equipment." The appellant protestants are holders of certificates of public convenience and necessity authorizing the furnishing of services similar to those in the Groenewold authorization except as to area. Two of the protestants have statewide authority and

are located respectively at Hastings and York. Two others are located respectively at Kearney and North Platte and have limited territorial authority which overlaps in part the area encompassed in the Groenewold certificate.

The substance of the assignments of error made and argued by the protestants is as follows: (1) The evidence does not support the grant of authority to Groenewold and that, therefore, the action of the Nebraska Public Service Commission is arbitrary and unreasonable; and (2) the court erred in admitting into evidence exhibit 3 which is a list of the persons for whom Groenewold had performed building moving services, the charges made therefor, and the dates of services.

We will treat the last assignment first. Protestants contend that the admission of the exhibit violated subsections (f) and (g) of Rule 13 of the Rules of Commission Procedure pertaining respectively to Abstracts From Documents and Materials in Books, Papers, or Documents. We do not think that the exhibit can be properly characterized as an abstract of a document nor as a portion of books, papers, or documents within the meaning of the above rules. The list in question was simply an enumeration of the names of persons for whom the applicant had performed services during the period in question and the amounts paid for the services, as well as the dates the services were performed. These were ultimate facts, not necessarily provable by documents. The applicant's oral testimony showed that he had personal knowledge of the facts and laid an appropriate foundation for the admission of the list. The commission did not abuse its discretion in admitting the list. Neither does section 27-1006, R. R. S. 1943, have any application for the exhibit was not a summary of voluminous documents.

The principles applicable to a determination of the first assignment are as follows: "A certificate shall be

issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." § 75-311, R. S. Supp., 1976. "On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." Dahlsten v. Harris, 191 Neb. 714, 217 N. W. 2d 813. See, also, Mills v. Nebraska Motor Carriers Assn., *ante* p. 159, 247 N. W. 2d 619. "The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene." Dahlsten v. Harris, *supra.*

The commission discussed the evidence, made specific fact findings, and then concluded: "1. That Applicant is fit, willing and able to perform the proposed service. 2. That the proposed service is in the public interest and will not unduly restrict competition. 3. That the proposed certificate of public convenience and necessity should read as follows: . . . (herein was set forth the authority as described in the first paragraph of this opinion). 4. That the above certificate should be issued."

The protestants attack the portion of the commis-

sion's findings that the proposed service is in the public interest and will not unduly restrict competition, contending particularly that the public convenience and necessity does not require an additional carrier and that the present carriers can and do satisfactorily meet the needs of the public.

An examination of the record indicates that in 1972 Groenewold purchased the equipment of one Howard Haynes who had been for some time engaged in the house-moving business and by whom Groenewold had been employed on a part-time basis. Haynes did not at any time hold a certificate of public convenience and necessity. When Groenewold acquired Haynes' equipment in 1972, he did not know that a certificate was required. At that time he made inquiries, apparently at the county road department of his county and the district office of the State Department of Roads, as to whether any permits were required and was informed by the persons of whom inquiry was made that they knew of no permits that were required. He then engaged in the house-moving business for a period of 3 years. Shortly before the filing of his application for a certificate of public convenience and necessity in this case, he apparently had a chance conversation with a retired house mover at McCook who held such a certificate and was told by him that a certificate was required. Groenewold then immediately applied for a certificate. The commission then directed that he cease building-moving services which he promptly did. Hearing was held and the order entered is the one appealed from to this court in this case.

We have examined the record before the commission and in our judgment it clearly shows substantial evidence to support the commission findings. It indicates that such services were in fact performed by Groenewold and his testimony was supported by a number of persons for whom services had been performed and whose opinions were elicited as to present and future

need. The record does not establish the extent or the period during which his predecessor had apparently engaged in unauthorized services. No complaint was made against Groenewold by any carrier until after he had filed the application.

The record further shows that one holder of a certificate operating out of McCook has died and apparently no attempt has been made to transfer this certificate; thus there are no operations thereunder. The evidence justifies a conclusion that the business of the protestants has not been damaged by Groenewold's operation as these businesses apparently have remained stable. As further justification, the record shows that Groenewold met a need by offering more prompt service than the protestants. The record contains at least one instance where one of the authorized carriers demanded substantial additional charges over and above the normal charge in order to render early service.

No objection was made to the evidence and testimony offered by Groenewold and his witnesses on the ground that it must be excluded because it consisted of evidence of services unlawfully rendered. However, the commission appears to have specifically considered that matter and its opinion includes the following: "The Nebraska Supreme Court has stated in Preisendorf Transportation Co., Inc. v. Herman Bros., Inc., 169 Neb. 693 100 N. W. 2d, 865 (1960): '. . . Law violations are not necessarily a bar to an approval of an application, if the public interest will best be served by approval of the transaction presented.' The highest Court of Nebraska, in the same opinion, stated, 'It should be emphasized that we do not condone these unauthorized operations (operating under invalid certificate) but under some conditions past unauthorized operations have been found not to operate as a bar to the granting of authority. Applicants should not be found unfit to perform the proposed operations because of their past unlawful operations since the violations were not willful and

since Applicants were willing to conform to the ICC regulations.'

"The Preisendorf case quoted language from an Interstate Commerce Commission case.

"All indications are that we have a similar case before us whereby Applicant did not knowingly or willfully violate the pertinent provisions of the Nebraska Motor Carrier Act, and further, it would appear that Applicant is now willing to conform to the governing regulatory statutes as well as this Commission's Rules and Regulations."

Although the protestants made no specific point that such evidence was inadmissible, they point out in apparent response to the commission's findings that in Preisendorf the applicant was operating under color of authority, and that in this case Groenewold had no color of authority and that hence the Preisendorf case is inapplicable. In Preisendorf the carrier had a certificate, but it was void because issued without notice and hearing. It is true that our holding in Preisendorf seems to be grounded upon the fact that the applicant had operated under color of authority and we cited several cases which held that past service may not be considered as evidence of need when such services have been unlawfully rendered and there is an absence of color of right. We there said, referring to decisions of the ICC. "Many of its decisions are cited in support thereof. Therein the commission came to the conclusion that: '* * * law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented.' To like effect, see . . . (citations omitted). As stated in C. J. Skjonsby and Orville Heglie Common Carrier Application, supra: 'It should be emphasized that we do not condone these unauthorized operations but under some conditions past unauthorized operations have been found not to operate as a bar to the granting of authority.' The commission held: '* * * that appli-

cants should not be found unfit to perform the proposed operations because of their past unlawful operations since the violations were not wilful and since applicants were willing to conform to ICC regulations.' "

We then went on to hold: "Under the situation here presented, where appellee has for many years very satisfactorily rendered the service to the public, under color of authority, that it herein seeks authority to continue, we think these holdings apply. In view thereof, we find the evidence shows that appellee is fit, willing, and able to properly perform the services proposed; that it will fully conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943; and that it will, as it has in the past, fully conform to the requirements, rules, and regulations of the commission promulgated and issued thereunder. In view thereof, we do not think the commission acted either unreasonably or arbitrarily in so finding."

The Nebraska Public Service Commission derives its authority from Article IV, section 20, of the Constitution of Nebraska. Its powers are plenary and self-executing in the absence of specific restricting legislation. There is no statute which prohibits the commission from considering past unauthorized services in determining public necessity for the issuance of new authority.

We do not think that the performing of unlawful services necessarily renders an applicant unfit to receive a certificate at least where, as here, the record shows and the commission has found that there was no willful and intentional violation. Accordingly we cannot find that the action of the commission was unreasonable and arbitrary.

AFFIRMED.

IN RE APPLICATION OF HOPKEN.
ALVIN G. HOPKEN, APPELLEE, V. BUILDING MOVERS, INC., ET AL., APPELLANTS.
247 N. W. 2d 633

Filed December 15, 1976. No. 40633.

Public Service Commissions: Administrative Law. In determining whether the proposed service is or will be required by the present or future public convenience and necessity, controlling questions are whether the operation will serve a useful purpose, responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether the operations of existing carriers will be endangered or impaired contrary to the public interest.

Appeal from the Nebraska Public Service Commission. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate, Michael J. Ogborn, and Scott E. Daniel, for appellants.

Daniel E. Bryan of Heinisch & Bryan, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and HAMILTON and WINDRUM, District Judges.

BOSLAUGH, J.

This is an appeal from an order of the Nebraska Public Service Commission granting a certificate of public convenience and necessity to the applicant, Alvin G. Hopken, authorizing the transportation of houses (not house trailers on wheels) and other buildings using house-moving equipment or lowboys in Clay, Fillmore, Saline, Nuckolls, Thayer, and Jefferson Counties, Nebraska. The appellants are two protestants, Williams Brothers and E. R. Hornbacher & Son, who each hold statewide authority which includes the right to move houses and buildings.

The application as originally filed sought authority between all points in Nebraska. Before the hearing the application was amended so that authority was sought only within a 50-mile radius of Bruning, Nebraska. The

authority finally granted was limited to Clay, Fillmore, Saline, Nuckolls, Thayer, and Jefferson Counties.

Before the commission may issue a certificate, the commission must find, after notice and hearing, that the applicant is fit, willing, and able to perform the service proposed; will conform to the requirements of the statutes and rules and regulations of the commission; and the proposed service will be required by the present or future public convenience and necessity. § 75-311, R. S. Supp., 1976. The appellants contend, in substance, that the findings of the commission, which are substantially in the language of the statute, are not supported by the record.

The applicant presented his own testimony and that of four customers who had hired him in the past. The applicant testified that around 15 years ago he bought a house in Bruning, Nebraska, but couldn't find anybody to move it for him. As a result he bought some equipment from a contractor and moved the house himself. Since that time he has been engaged in the house-moving business on a regular part-time basis but never obtained authority from the Public Service Commission.

Prior to 1961 the commission did not require house movers to obtain authority. Since that time the commission has required that house movers obtain certificates of public convenience and necessity. The record does not show whether the applicant was already engaged in the house-moving business at the time the commission began requiring house movers to obtain authority.

The applicant inquired at the highway department and other offices to find out if he was required to obtain a special license. He was not advised that a certificate of authority was required until July 1975, when he was contacted by a representative of the commission after he had been reported by one of the protestants. The applicant then discontinued operations and filed an

application for a certificate. This proceeding followed.

Much of the applicant's business consists of moving farm buildings. The applicant testified that many people came to him and said they couldn't get anybody else to do their job for 6 months. He further testified that he receives calls nearly every day asking him to move buildings. When he discontinued operations he had at least a dozen jobs that had to be canceled.

The other witnesses testified generally that they had used the applicant's services, that they were satisfied with his work, and would employ him again if they wanted a building moved.

The evidence shows that the applicant is fit, willing, and able to perform the proposed service and will conform to the requirements of the statutes and the rules and regulations of the commission. The principal issue is whether the evidence sustains the finding that the proposed service is or will be required by the present or future public convenience and necessity. Controlling questions in determining this issue are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether the operations of existing carriers will be endangered or impaired contrary to the public interest. Moritz v. Transcontinental Bus Lines, Inc., 153 Neb. 206, 43 N. W. 2d 603.

The applicant in this case did not hold a certificate which was void or ambiguous, but he operated under the mistaken belief that no certificate was required. The fact that the commission did not require house movers to obtain certificates of public convenience and necessity until 1961, approximately the time that the applicant began to operate, strengthens his position and suggests that he might have been eligible for a certificate on a "grandfather" basis at that time. See Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584. The evidence fully sustains

the finding by the commission that the applicant did not willfully violate the statute.

The applicant's evidence will sustain a finding that there is a demand for his services and that other carriers have not been able to satisfactorily supply this service. The protestants produced evidence which tended to prove the contrary. This created an issue which was resolved in favor of the applicant by the commission. In considering the effect of the applicant's operations upon other carriers in the field the commission could consider the local nature of the service to be performed by the applicant, the fact that there is no resident certificate holder in the territory of the applicant's authority, and the limited nature of the defendant's authority. As we view the record the evidence was sufficient to sustain the findings of the commission and the action of the commission was not unreasonable, arbitrary, or capricious.

The order of the commission is affirmed.

AFFIRMED.

ALEX SALINAS, APPELLEE, V. CYPRUS INDUSTRIAL MINERALS CO., APPELLANT.

247 N. W. 2d 451

Filed December 15, 1976. No. 40640.

1. **Workmen's Compensation: Administrative Law.** The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. There is no statutory requirement that the symptoms be observed by others or that the existence of the symptoms be proved by independent testimony.
2. **Workmen's Compensation: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favor-

able to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Richard L. Huber of Higgins, Higgins & Huber, for appellant.

Cunningham, Blackburn, VonSeggern & Livingston, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and CANIGLIA and COADY, District Judges.

McCOWN, J.

This is a workmen's compensation case. Plaintiff's petition was dismissed by the one-judge Workmen's Compensation Court. Upon rehearing before the Workmen's Compensation Court en banc, plaintiff received a weekly award for temporary total disability for so long as it continued, together with medical costs. An award for residual permanent partial disability is to await the cessation of total temporary disability. The employer has appealed.

Alex Salinas had worked for Cyprus Industrial Minerals Co. for almost 17 years with one break in the employment in 1962 because of a back injury. The business of Cyprus consisted chiefly of grinding rocks into talc. Salinas was a leadman in a position of some authority. Salinas' work was physically demanding and required using a sledge hammer, moving rocks, and tightening bolts, among other things.

About 8:30 p.m., on Friday, April 18, 1975, while working the swing shift, Salinas went up on top of the packer bins to clean magnets. There was standing water and talc on the top of the bin. Salinas slipped and fell on his back. An employee operating the packer heard the noise and saw talc powder float down from the top of the bin. Salinas lay there for a few mo-

ments because of the pain and then got up and went down below and told the man running the packer that he had fallen. Salinas had wet talc powder from his neck to his ankles on his back, and the packer operator tried to blow it off with an airhose. The packer operator then entered the accident in the daily schedule book. Salinas later told the maintenance man about his fall so that the maintenance man could clean up the water on top of the bin. Salinas worked the rest of his shift that night.

Salinas' next work day would have been Monday. On Monday Salinas called in that he would not report to work because of an accident at his home on Sunday in which he had received some nail scratches on his back and his hand in tearing down a building. On Monday afternoon Salinas went to Dr. House, an orthopedic surgeon. His stated reason was because his leg was sore and he had difficulty walking, and his back hurt. On his original visit to Dr. House, Salinas did not mention the Friday night fall nor the Sunday nail incident, but did mention a car accident in 1960, and said that he had had pain in his back and right hip for some 20 years. Dr. House had first seen Salinas in 1962 for a minor back complaint arising out of another work-related accident. The doctor testified that there was suspicion of a disc lesion on the basis of the 1962 findings, but that no extensive testing had been done.

On Wednesday, April 23, 1975, Dr. House had Salinas go to the hospital to have tests done and saw Salinas again on May 5, 1975, at which time he diagnosed Salinas' problem as a small intervertebral disc protrusion at the L4, L5 level on the right side. Salinas was placed in a heavy lower back brace and advised that if this treatment was not successful, he would have to undergo surgery.

Three days after his second office visit, Salinas wrote Dr. House a letter telling the doctor of two work accidents that might have precipitated his problem, one

on February 26, 1975, and the other one the accident of April 18, 1975. References to both those accidents had been recorded in the daily records of the defendant. In December 1974, Salinas had an accident which involved an injury to his shoulder for which he was treated by his family physician. Dr. House was not advised of that accident, nor of the nail accident of April 20, 1975. He had knowledge of the 1960 car accident, the 1962 work accident, and the accidents of February 26, 1975, and April 18, 1975. There is no evidence that Salinas ever missed work because of his back except for the occasion in 1962 when he hurt his back in a work-related accident.

Dr. House testified that in his opinion the falls or accidents which Salinas incurred on February 26, 1975, and April 18, 1975, aggravated the preexisting weakness in the patient's lower lumbar spine. Dr. House also testified that his opinion was based on the fact that there was documented evidence that Salinas had clinical symptoms of vertebral disc injuries which dated back to 1962. Dr. House recommended conservative treatment with a heavy back brace for the time being and testified that the plaintiff was not able to perform the work he had been doing for defendant.

The three-judge Workmen's Compensation Court, over the dissent of one judge, awarded Salinas $89 per week for temporary total disability to the date of the hearing and for so long in the future as he should remain totally disabled, together with medical costs, and ordered that if total disability ceased, Salinas should receive the statutory amounts of compensation for any residual permanent partial disability due to the accident and injury.

The defendant contends that there were no objective symptoms of an injury at the time of the accident, and that the findings of fact are not supported by the evidence.

Section 48-151, R. R. S. 1943, defines the word "acci-

dent" to mean "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Defendant contends that because no one except the plaintiff observed any objective symptoms of an injury at the time Salinas fell on the top of the bin there can be no recovery under the Workmen's Compensation Act.

Even under previous statutory language defining "accident" as an unforeseen event rather than an unforeseen injury, we said: "The requirement that objective symptoms of an injury be produced 'at the time' of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown." Schoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N. W. 2d 547. In that case we also said: "There is no statutory requirement that the symptoms be observed by others or that the existence of the symptoms be proved by independent testimony." There is no evidence in the case now before us that objective symptoms of an injury did not manifest themselves according to the natural course of such matters. In fact, the thrust of the defendant's argument is that the injury was not caused by a compensable accident but resulted from some other source.

The fundamental issue in this case involves the effect of the findings of the Nebraska Workmen's Compensation Court and the sufficiency of the evidence to support its award. Under the new statutory procedures for workmen's compensation cases, appeals from the judgments, orders, or awards of the Workmen's Compensation Court are taken directly to the Supreme Court, and there is no longer a de novo review in this court.

Section 48-185, R. S. Supp., 1976, provides in part: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the

same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award."

Under the language which makes the findings of fact by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict, it is obvious that related rules as to verdicts in civil cases also come into play. We have consistently held that in testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. Speedway Transp., Inc. v. DeTurk, 183 Neb. 629, 163 N. W. 2d 283. We now hold that in testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom. Obviously the findings of fact after rehearing are not required to be unanimous in order to have the statutory effect.

The findings of fact of the Nebraska Workmen's Compensation Court on rehearing were that on April 18, 1975, while engaged in the duties of his employment, the plaintiff suffered injuries to his back as a result of an accident arising out of and in the course of his employment by the defendant; that his fall on a packer bin aggravated a preexisting back condition; and that

he was temporarily totally disabled and would remain so for an indefinite period of time. There is sufficient competent evidence in the record to warrant the making of those findings of fact and to support the award to the plaintiff.

AFFIRMED.

IN RE INTERESTS OF DAWN MICHELLE SPERLING AND STACY ANN SPERLING, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. VIRGINIA SPERLING, APPELLANT.

247 N. W. 2d 635

Filed December 15, 1976. No. 40684.

1. **Parent and Child: Infants: Courts.** Findings of fact made by a Juvenile Court are accorded great weight on appeal because of the trial court's opportunity to hear and observe the parties and witnesses.
2. **Parent and Child: Infants: Statutes.** Parental rights may be terminated under section 43-209(5), R. S. Supp., 1976, when the parent is found to be unable to discharge responsibilities because of mental illness or deficiency, and there are reasonable grounds to believe such condition will continue for a prolonged and indeterminate period.

Appeal from the Separate Juvenile Court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed.

Bauer, Galter & Geier, for appellant.

Ronald D. Lahners and Diana M. Bloss, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN, District Judge.

REAGAN, District Judge.

This is an appeal from an order terminating parental rights of Thomas and Virginia Sperling to their children, Dawn Michelle and Stacy Ann Sperling. Grounds to terminate the natural father's rights were found to

exist under section 43-209 (2), R. S. Supp., 1976, and the order as to the father has become final without appeal. The trial court found Virginia Sperling was unable to discharge parental responsibilities because of mental illness or deficiency, and that there were reasonable grounds to believe her condition would continue for a prolonged indeterminate period. Her parental rights were terminated under section 43-209(5), R. S. Supp., 1976, and she prosecutes this appeal.

Although the trial in this court is de novo on the record, findings of fact made by the trial court are accorded great weight because of the opportunity to hear and observe the parties and the witnesses. State v. Johnson, 196 Neb. 795, 246 N. W. 2d 591. Both experts testifying below agreed that Virginia's problem was chronic undifferentiated schizophrenia. The only dispute of significance centered around the possibility of keeping the condition in a state of remission. Dr. Gray testified in substance Virginia would be unable to discharge the role of parent with its attending pressures, particularly with a history of noncooperation on her part in taking medication and attending counseling. Dr. Chesen testified his prognosis for Virginia was "fair" and that she would be able to discharge parental responsibilities *if* they were gradually phased in over an extended period of time and *if* there was on-going psychiatric monitoring with home nurse visits. He testified his prognosis would worsen if there was poor or minimum follow-up or counseling.

Both children have been in foster or boarding homes since February of 1972. Dawn was born November 7, 1969, and Stacy was born October 29, 1970. Virginia has been hospitalized for her condition several times, dating as far back as 1959. At the time of the hearing, she was unemployed and residing in the State of Maine. She had no plans for providing for the children should they have been returned to her, and no plans for the future concerning employment. The finding that she

was unable to discharge her parental responsibilities due to mental illness or deficiency, and that such condition would continue for a prolonged and indeterminate period, was well within the evidence before the trial court, and was not an abuse of discretion. State v. Johnson, *supra*; State v. O'Tool, 196 Neb. 708, 246 N. W. 2d 198. The order entered terminating parental rights was correct and should be affirmed.

AFFIRMED.

JOHN J. MORITZ, APPELLEE, V. S & H SHOPPING CENTERS, INC., A DELAWARE CORPORATION, APPELLANT.
247 N. W. 2d 454

Filed December 15, 1976. No. 40690.

1. **Equity: Forcible Entry and Detainer.** The pendency of an equitable action in the District Court will not ordinarily preclude an action in forcible entry and detainer instituted by a landlord against a defaulting tenant.
2. **Forcible Entry and Detainer: Parties.** An action in forcible entry and detainer will lie against a lessee not in actual physical possession of the leased property.
3. **Agency: Forcible Entry and Detainer: Lessor and Lessee.** The possession of an agent or subtenant of the lessee is the possession of the lessee.
4. **Contracts: Assignments: Lessor and Lessee.** Assignment by a lessee of an interest in a lease which prohibits such assignment without the lessor's consent is ineffective without such consent.
5. **Contracts: Forcible Entry and Detainer: Parties: Lessor and Lessee.** Assignees, and subtenants of the lessee not affected by a breach of the lease, are not necessary parties in an action of forcible entry and detention brought by the lessor against the lessee.

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

Fraser, Stryker, Veach, Vaughn & Meusey, for appellant.

Paul Scott Dye of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee.

Heard before SPENCER, BOSLAUGH, NEWTON, and BRODKEY, JJ., and BURKE, District Judge.

NEWTON, J.

This is an action in forcible entry and detainer. Plaintiff is the owner of a tract of land in Omaha, Nebraska, which he leased to defendant on April 29, 1971, for a period of 56 years. On breach of the lease terms, plaintiff seeks to recover possession of the property. Judgment was for plaintiff and that judgment is affirmed.

The lease contemplated the development of a shopping center on the tract in question by defendant. Authority was conferred upon defendant to erect improvements and sublease to tenants. In the event of a default by defendant, cancellation of the lease was not to affect the subtenants, their possessions or rights under the subleases. Defendant was to keep the property free of mechanic's liens but had authority to subject plaintiff's interest to a mortgage not exceeding $16.50 per square foot of the footage of buildings constructed. Defendant was to pay taxes, special assessments, insurance costs, and a monthly rental. The lease could only be assigned with lessor's written consent. Defendant has defaulted in the payment of rent and taxes and has failed to pay construction costs with the result that several mechanic's liens have been filed and are under foreclosure.

By way of defense and assignment of error, defendant maintains that in view of the mechanic's lien foreclosure in the District Court, the municipal court was without jurisdiction of this action; that since defendant is a sublessor and not in actual possession of the property, forcible entry and detainer will not lie; and that subtenants and assignees of defendant are necessary parties.

We are at a loss to understand why the pendency of a mechanic's-lien-foreclosure action should affect plain-

tiff's right to possession and possessory action. It is true that if the District Court were to find the mechanic's liens were valid against plaintiff's property and appointed a receiver, both parties could be deprived of rents accruing on the subleases. This has not been done and the only parties affected by this action are plaintiff and defendant. In the event of a mortgage-foreclosure action, the owner, during the action's pendency on stay, would be entitled to recover possession from a defaulting tenant in the absence of a receivership. Here, the pending mechanic's lien foreclosure is intended only to determine the rights of third-party lienors and not to resolve any questions regarding possession that may exist between plaintiff and defendant. As demonstrated by Warlier v. Williams, 53 Neb. 143, 73 N. W. 539, and Schmidt v. Henderson, 148 Neb. 343, 27 N. W. 2d 396, the District Court does not have original jurisdiction in a forcible entry and detainer action and equity will not ordinarily intervene in regard to possessory rights as between a landlord and tenant. There is no conflict of jurisdiction.

In this state forcible entry and detainer will lie against a lessee not in actual possession of the property. The case of Post v. Bohner, 23 Neb. 257, 36 N. W. 508, holds that one who retains possession through an agent or tenant is subject to the action although he is not in actual possession. This is necessarily true. One claiming possession of an unimproved tract of land does not reside thereon and, in a sense, is not in actual possession yet he may be evicted in forcible entry and detainer. There is no other remedy. The Nebraska statute, section 24-569, R. R. S. 1943, provides that the action is a proper one as against all tenants holding over their terms, and a tenant shall be deemed to be holding over whenever he fails to pay rent due. Defendant cannot deny that he is a tenant under his lease and that he has defaulted. A tenant is one who holds lands of another. See Black's Law Dictionary (4th Ed.), p. 1635.

Defendant held the land of plaintiff under a lease, brought about the construction of a shopping center through its agents, and continued to exercise possession and dominion over the property through its subtenants. As stated in 49 Am. Jur. 2d, Landlord and Tenant, § 1, p. 42, "as a general rule, the possession of a tenant is that of his landlord." The possession of defendant's subtenants is the possession of defendant.

Defendant had no authority to assign the lease without the consent of plaintiff. Such consent was never given or received and defendant's contention that it transferred certain interests in the lease is necessarily immaterial as no valid rights could have been transferred or acquired in the absence of plaintiff's consent. Such purported assignees are not necessary parties to this action. The same is true as regards defendant's subtenants. They have attorned to plaintiff, are protected by the lease, and no relief is sought as to them.

The judgment of the District Court is affirmed.

AFFIRMED.

RAYMOND VETICK, APPELLANT, V. THOMAS KULA, APPELLEE.
247 N. W. 2d 637

Filed December 15, 1976. No. 40706.

Adverse Possession: Boundaries. It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.

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

Philip T. Morgan of Morgan & Morgan, for appellant.

Steven M. Curry of Sampson & Armatys, for appellee.

Heard before WHITE, C. J., McCOWN, and CLINTON, JJ., and STUART and RIST, District Judges.

CLINTON, J.

This is a boundary line dispute between plaintiff-appellant Vetick, the owner of the northwest quarter of Section 6, Township 15 North, Range 4 West of the 6th P. M., Merrick County, and defendant-appellee Kula, the owner of the adjoining northeast quarter.

The evidence undisputedly establishes that a fence had been the acknowledged boundary line between the adjoining properties for at least 56 years. Kula farmed the disputed tract for over 20 years, during which time he had grown crops, leveled the land, and put in an irrigation pump.

A survey taken in the fall of 1975 established that the fence was not the actual boundary, the actual boundary lying east of the fence. It established that a tract of land of approximately 5.09 acres, which both parties thought belonged to Kula, was within the tract to which Vetick held record title. Vetick brought an action of ejectment to recover this tract and for a mandatory injunction requiring removal of the fence. Kula denied generally and pled a claim of title by adverse possession. The trial court entered judgment for Kula. We affirm.

The case of McCain v. Cook, 184 Neb. 147, 165 N. W. 2d 734, is controlling. "It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own." The above evidence fully establishes Kula's title under McCain rationale.

AFFIRMED.

JOHN J. MARFISI, APPELLANT, V. ALFRED SPAGNOLA, APPELLEE.

248 N. W. 2d 24

Filed December 15, 1976. No. 40745.

1. **Equity: Appeal and Error.** In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court.
2. **Equity: Appeal and Error: Evidence: Witnesses.** In an equity case, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of facts rather than the opposite.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Wilbur C. Smith and Eileen A. Hansen, for appellant.

Robert G. Spagnola, for appellee.

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

WHITE, C. J.

This is an appeal in an equity action in which the plaintiff sought a decree from the District Court setting aside a purported bill of sale by which the plaintiff allegedly transferred all right, title, and interest in the Hollywood Spots-Lite Company to the defendant, requiring the defendant to return the assets and records of the company to the plaintiff, and restraining the defendant from doing business as the Hollywood Spots-Lite Company.

The issue was tried before the District Court. On February 13, 1976, the District Court, in its decree, found that the bill of sale was a valid instrument and as such transferred all right, title, and interest to the assets, good will, trade name, patents, and patent rights held in connection with the operation of the Hollywood

Spots-Lite Company, and dismissed the plaintiff's petition. The plaintiff appeals. We affirm the judgment of the District Court.

In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Kolc v. Krystyniak, 196 Neb. 16, 241 N. W. 2d 348 (1976); Campbell v. Buckler, 192 Neb. 336, 220 N. W. 2d 248 (1974). However, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of facts rather than the opposite. Pinney v. Hill, 191 Neb. 844, 218 N. W. 2d 212 (1974); Parkhurst v. Parkhurst, 184 Neb. 687, 171 N. W. 2d 243 (1969).

The sole factual determination presented in this case is whether or not the plaintiff did knowingly and willfully execute a bill of sale, which operated to transfer all his right, title, and interest in the Hollywood Spots-Lite Company to the defendant. We find that he did.

The plaintiff, in 1949, started up a small one-man business known as the Hollywood Spots-Lite Company. Prior to 1949, the plaintiff had been in the ballroom business in Omaha, Nebraska. The plaintiff's company, which operated out of a location in North Omaha, manufactured a revolving, global light fixture which cast off beams of colored light, and which was used primarily by skating rinks and ballrooms. The plaintiff had developed this device over a period of 7 years and had received a patent on it.

Around 1959, the defendant, the plaintiff's nephew by marriage, began helping the plaintiff in his business. Over the next 4 years, the defendant spent several evenings per week and many Saturdays assisting his uncle.

On June 3, 1963, the plaintiff's wife of 40 years died

of a sudden heart attack. The plaintiff was admitted to the hospital that day and remained there for 2 days. On June 4, 1963, the plaintiff while in the hospital, asked Samuel Caniglia, who was at that time a practicing attorney in Omaha, to prepare a bill of sale for the transfer of the Hollywood Spots-Lite Company to the defendant. Caniglia was also directed by the plaintiff to prepare a will at the same time. Caniglia testified that the plaintiff told him to omit any reference to his business in the drafting of the will because the bill of sale had taken care of this. The bill of sale recited a consideration of one dollar, and this sum was handed over by the defendant to the plaintiff's brother, who in turn handed the money to the plaintiff. Caniglia testified that both documents, the bill of sale and the will, were signed by the plaintiff in his presence and in the presence of two nurses acting as witnesses.

The plaintiff testified that he signed the will on June 4, 1963, at the hospital, but denied having signed the bill of sale. In his pleadings, the plaintiff states that the signature on the bill of sale appears to be his, but that he recalls only the execution of the will.

Several months after his wife's death and the execution of the bill of sale, the plaintiff accompanied the defendant to the North Side Bank in Omaha, and placed the defendant's signature on the company account. In 1964, the plaintiff helped the defendant move the business from its location in North Omaha to the defendant's basement. The defendant offered the plaintiff a key to his house at this time, but the plaintiff refused, not wanting to be involved if anything would be missing from the defendant's house.

In 1965, the plaintiff wrote to the Danbury State Fair, a former business customer of the company. In that letter he stated:

"* * * I would like to call your attention to a change that has been made in the management of the firm, about 20 months ago my wife passed away with a sud-

den heart attack and as I am now near 76 years of age it has been such a shock that I did not feel I could carry on the business.

"For the past 8 years I have had one of my nephews helping me and he is a very good mechanic so I decided to turn the business over to him and he has done a very fine job of carrying on the same policy and service as I had done.

"He has asked me to write you personally on account of our past contact * * *."

In 1969, the plaintiff had another will made. Caniglia testified that the plaintiff again instructed him to make no reference to the business since it was the defendant's and had been transferred to him a long time ago.

The plaintiff admitted on cross-examination that he has not personally constructed a "Spots-Lite" since the execution of the bill of sale in 1963. He also admitted that, since 1963, he has written no further checks on the company account. There was testimony that for 6 to 9 months after his wife's death, the plaintiff did not even come around or show up at the business location.

In late 1964, the plaintiff purchased a 1965 automobile, placed title in Hollywood Spots-Lite Company, and licensed it each year. The defendant testified that after 1963, he continued to let the plaintiff deposit money received from company sales in the North Side Bank. He stated that he did this because the plaintiff enjoyed going to the bank, and it gave him something to do.

The defendant testified that in 1971, the plaintiff told him that he no longer wanted to make deposits and that he then had the company business account transferred to the Center Bank due to its more convenient location. The North Side Bank made out a cashier's check in the amount of $2,576.17 to the Hollywood Spots-Lite Company. This check was endorsed and deposited by the defendant. The defendant testified that he offered to have the plaintiff co-sign the new account,

but that he refused, stating that he wanted no part of it; that it belonged to the defendant as the sole owner; and that he could do with it as he saw fit.

In 1971, the defendant gave the plaintiff a check for $150 from the company account at the plaintiff's request. The plaintiff accepted the check, endorsed it, and cashed it. The plaintiff testified that he periodically received money from the company account around Christmas time, or on other occasions, an example of one being when he wanted to go on a fishing trip.

The above-reviewed evidence supports a finding that the plaintiff did knowingly turn over his business to the defendant on June 4, 1963. In his brief, the plaintiff intimates that undue influence surrounds the execution of the bill of sale, pointing out the traumatic time in the plaintiff's life that the bill of sale was executed - in a hospital, while the plaintiff was in shock and grief following the sudden death of his wife of 40 years, and the fact that the defendant was the plaintiff's nephew by marriage and they had worked closely together for a number of years.

The plaintiff's turning over of his business to a nephew, who had worked with him and helped him in that business for the previous 4 years, is not an unnatural disposition. The plaintiff's attorney was present at the time the bill of sale was executed, and the plaintiff's attorney drafted the bill of sale.

Even if the plaintiff's condition at the time of execution could be legitimately questioned, there remains the lengthy continued relationship between the parties following the execution of the bill of sale, which contained the numerous factors, mentioned previously, all indicative of an intention by the plaintiff for the defendant to have the business and an acknowledgment on the plaintiff's part of the defendant's ownership. The plaintiff was not moved to assert his claim against the defendant until many years after the bill of sale was executed. We note that a family argument between the

parties seems to have precipitated the events which led to this lawsuit.

It is true that the change in ownership between the parties was not as clean or clear-cut as might be expected between total strangers. Given, however, the facts that the parties were related, had worked together for a number of years, and that the plaintiff was quite elderly during this period, we do not find it unusual or inconsistent with the defendant's position that the plaintiff received minor sums periodically from the business account, was allowed to remain on the company account until 1971, was allowed to make company deposits, and was in other ways permitted to relate to the business.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL JOHN JOHNSEN, APPELLANT.
247 N. W. 2d 638

Filed December 15, 1976. No. 40772.

1. **Criminal Law: Words and Phrases: Lesser Included Offenses.** A lesser included offense is one which includes some of the elements of the crime charged in the information without the addition of any element irrelevant to the original charge.
2. **Criminal Law: Assault: Lesser Included Offenses.** Assault with intent to inflict great bodily injury is included within a charge of stabbing with intent to wound or maim.
3. **Criminal Law: Verdicts: Evidence.** The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Walter J. Matejka and William E. Pfeiffer, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

McCOWN, J.

The defendant was charged with stabbing with intent to wound or maim in violation of section 28-410, R. R. S. 1943. The jury found the defendant guilty of the lesser offense of assault with intent to inflict great bodily injury. The defendant was sentenced to 2 years imprisonment.

On the evening of August 14, 1975, after a softball game, Harmon Maples and several fellow ball players went to a southwest Omaha bar. After a few hours of drinking at that bar, some of them decided to go to another bar and lounge in Sarpy County. They arrived at the Cabay Lounge about midnight, ordered beer, and proceeded to create a general disturbance with their loud and vulgar behavior. The defendant, Paul Johnsen, who had come into the bar just before Maples and his friends arrived, was sitting at the bar. Maples left his companions and went up to the defendant at the bar. A fight started. According to Maples' testimony, the defendant had been staring at him and when Maples asked the defendant what his problem was, the defendant hit him in the head with a hard object and he does not remember much after that. According to defendant's testimony, he told Maples to watch his language. Maples' friends came over. Someone took a swing at the defendant. The defendant swung back and the next thing he knew he was on the floor being kicked in the ribs and choked.

The witnesses generally agreed that the fight started between Maples and the defendant, and that some of Maples' friends went to his assistance. One of the bar patrons finally broke up the fight and picked Maples up off the floor. Some of Maples' friends started to assist

him to the door and discovered that he had been stabbed in the chest and was bleeding badly. When they got outside they met two police officers coming to investigate the disturbance. The officers ascertained that Maples had wounds on his chest and abdomen and sent him to the hospital while everyone else was held for questioning.

One of Maples' friends told the officers, and later testified, that within 15 to 30 seconds after the fight had been broken up he observed the defendant standing by a fireplace in the bar with a knife in his right hand. After interviewing the witnesses, the officers proceeded to search the area and the patrons for the knife involved. The knife was never found but a broken ashtray was found on the floor.

Maples spent 11 days in the hospital. He had suffered a concussion and stab wounds. The defendant was charged with stabbing with intent to wound or maim. A jury trial was held. At the conclusion of the evidence the jury was properly instructed on the essential elements of the offense charged as well as the essential elements of the lesser offenses of assault with intent to inflict great bodily injury and assault and battery. The defendant was found guilty of the offense of assault with intent to inflict great bodily injury and was sentenced to 2 years imprisonment.

The defendant contends that the evidence is insufficient to sustain a conviction for the offense of stabbing with intent to wound or maim, and that he was entitled to a directed verdict. The argument ignores the fact that defendant was not found guilty of that charge but instead was convicted of the lesser offense of assault with intent to inflict great bodily injury.

The rule in Nebraska is that when some of the elements of the crime charged in the information, without the addition of any elements irrelevant to the original charge, may constitute another crime or crimes, such other crime or crimes are included within the crime

charged. State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152.

Assault and battery is included within a charge of shooting with intent to wound. Moore v. State, 147 Neb. 390, 23 N. W. 2d 552. It is clear that where a higher crime fully embraces all the ingredients of a lesser offense, and when the evidence requires it, the jury may convict a defendant of the lesser offense. Assault with intent to inflict great bodily injury is included within a charge of stabbing with intent to wound or maim. In this case the jury was properly instructed on the essential elements of the offense of stabbing with intent to wound or maim, as well as on the essential elements of the offense of assault with intent to inflict great bodily injury and the essential elements of the offense of assault and battery. There was and is no objection to those instructions. Under such circumstances the sufficiency of the evidence must be determined with reference to the specific offense for which the defendant was convicted.

In this case the evidence was clearly sufficient to support the jury verdict on the offense of assault with intent to inflict great bodily injury. Obviously there was an assault and the criminal intent is to be determined from the evidence and surrounding circumstances and is, therefore, for the jury. State v. Lang, *ante* p. 47, 246 N. W. 2d 608. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Coleman, 196 Neb. 721, 246 N. W. 2d 61.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARL FONVILLE, APPELLANT.

248 N. W. 2d 27

Filed December 22, 1976. No. 40487.

1. **Trial: Evidence: Offer of Proof.** Where on objection a ruling excluding evidence is made, an offer of proof is generally a prerequisite to review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
2. **Trial: Witnesses: Criminal Law: Evidence.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, R. R. S. 1943, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness. § 27-608, R. R. S. 1943.
3. ———: ———: ———: ———. An inquiry as to whether or not a witness has committed a simple assault and battery is generally not probative of untruthfulness.

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

Frank B. Morrison and Joseph F. Bataillon, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN, District Judge.

CLINTON, J.

Defendant was charged with grand larceny, tried before a jury, found guilty, and sentenced to a term of 2 to 5 years in the Nebraska Penal and Correctional Complex.

On appeal he asserts the trial court erred: (1) In "refusing to allow the accused to testify as to the relation between himself and his co-defendant prior to

trial"; (2) in refusing "to allow the defense counsel to attack the credibility of the State's corroborating witness on cross-examination, to wit: her bias for or against the accused and his co-defendant"; and (3) the sentence is excessive. We will treat the assignments in order.

On direct examination the defendant's counsel asked defendant the following question: "The State has alleged that you and Mr. Jungwirth have entered into a conspiracy. Is there any reason that you might not have considered Mr. Jungwirth a proper person to conspire with?" The prosecutor made objection in the following form: "I am going to object to that for the same reason. Secondly, his answer could only be self-serving." The trial judge sustained the objection "as calling for a conclusion." No offer of proof was made and the defendant's counsel did not further pursue whatever subject the question was intended to elicit.

We must treat the objection as a general objection and not a specific objection for two reasons: (1) We cannot tell for certain from the record what "same reason" is, and (2) that an answer may be "self-serving" states no recognized legal grounds for excluding evidence. We recognize, however, that such objection is often used as a substitute for the objection of hearsay in situations where a party seeks to offer his own out-of-court hearsay statement, and such statement is not otherwise material and admissible as, e.g., an excited, spontaneous declaration, or as an operative fact. The question before us then is, was an offer of proof by the defendant necessary, or does it reasonably appear from the context that the answer would be material and competent.

At this point it is advisable to state some background information. The substance of the State's case was that the defendant Fonville and one William Jungwirth, as a cover for the larceny, conspired to make it appear that a Vicker's service station which Fonville managed

had been robbed. The evidence indicates that pursuant to agreement between the two persons, Jungwirth appeared at the station shortly before opening time one morning. Fonville opened the safes, gave Jungwirth the money therefrom, then directed Jungwirth to hit him on the head. Jungwirth complied with the request, inflicting a slight injury. Fonville then reported a robbery. Later the two met at the home of Jungwirth's niece and divided the loot.

Section 27-103, R. R. S. 1943, provides in part as follows: "(1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and: . . . (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. . . . (4) Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." The above-quoted portion of the statute does not appear to have changed the general rule previously applicable that where evidence is excluded an offer of proof is generally a prerequisite to review on appeal. Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574. Since no offer of proof was made, the question then becomes, was "the substance of the evidence . . . apparent from the context within which . . . (the question was) asked," § 27-103(1)(b), R. R. S. 1943; Thamann v. Merritt, 111 Neb. 639, 197 N. W. 413; In re Estate of Johnson, 100 Neb. 791, 161 N. W. 429; and would it have been material and competent, In re Estate of Johnson, *supra*.

Previous to the question to which objection was made and sustained, defendant's counsel was interrogating his client on the subject of how long he had known Jungwirth and the number of times they had talked or visited and where. He then asked: "Is there any reason that you might not have confided in Jungwirth?" The prosecutor made an objection to this question, the

substance of which was that the question could not be understood. The court sustained the objection.

In the above context we do not believe it is reasonably clear what information was sought to be elicited by the question and whether it was material and competent. One can speculate on many possible answers. Was Fonville going to relate something that he had been told by a third party? Was he going to tell something from his own knowledge that made it unlikely that he would conspire with Jungwirth? Was he simply going to give an unfounded opinion? Did he want to relate some event which had occurred? If so, what was its nature? We simply cannot tell from the context, hence we believe that under the circumstances the rule that where evidence is excluded an offer of proof is generally a prerequisite to review on appeal should be applied. The defendant's first assignment is not well taken.

Jungwirth's niece with whom he lived was called as a witness by the State. She testified, among other things, that before the alleged robbery she heard Fonville and her uncle discussing a plan to steal money from the Vicker's station. She also testified that on the afternoon following the alleged robbery Fonville came to her home, that he and Jungwirth then went to the basement, and that shortly thereafter Fonville left. Immediately thereafter Jungwirth gave her a large quantity (more than $60) of coins, along with a $20 bill. Jungwirth was unemployed at the time. This witness also testified on cross-examination that in the past Jungwirth had beaten her.

Jungwirth testified for the State after having pled guilty to a charge of grand larceny involving the events hereinbefore described. On cross-examination of Jungwirth, Fonville's counsel asked him whether he had at any time beaten his niece. Objection was made that the evidence was not relevant or material and the objection was sustained. The defendant here contends that the

evidence was admissible on the question of Jungwirth's credibility.

Section 27-608, R. R. S. 1943, is in part as follows: "(1) The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (a) The evidence may refer only to character for truthfulness or untruthfulness, and (b) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

"(2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness, ..." See Basye v. State, 45 Neb. 261, 63 N. W. 811. It does not seem to us that whether Jungwirth had beaten his niece or not is probative of his untruthfulness. Clearly we cannot say that the trial court abused its discretion in refusing to admit the evidence. See, also, § 27-403, R. R. S. 1943. The defendant's second assignment is not well taken.

Neither can we find from the record before us that the trial court abused its discretion in imposing a 2 to 5 year sentence.

AFFIRMED.

FIRST MID AMERICA, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. KAY F. PALMER, APPELLEE AND CROSS-APPELLANT.

248 N. W. 2d 30

Filed December 22, 1976. No. 40528.

1. **Verdicts: Evidence.** The verdict of a jury based upon conflict-

ing evidence will not be set aside unless it is clearly wrong.

2. **Instructions.** Instructions to the jury should be considered as a whole, and if they fairly submit the case, they are not erroneous.
3. **Contracts.** In construing a written instrument, the court must look to the agreement in its entirety.
4. ———. Generally, in the absence of fraud, one who does not read a contract before signing it cannot later relieve himself of its burdens.
5. **Trial: Instructions.** A trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case.

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

Knudsen, Berkheimer, Endacott & Beam, for appellant.

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin and Fortes, Eiger, Epstein & Skirnick, for appellee.

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

WHITE, C. J.

This suit was brought by the plaintiff, First Mid America, Inc., against the defendant, Kay F. Palmer, to recover upon an account which the defendant had opened with the plaintiff for the purpose of trading commodities futures contracts. The account was opened by the defendant in June of 1973 and closed by the plaintiff in August of 1973. On the date of the closing, the account had a debit balance of $31,329.11.

The defendant alleged three affirmative defenses to the plaintiff's suit for the account balance. First, that certain orders were entered without authority; second, that the plaintiff violated a contractual and fiduciary duty owed the defendant by not following the defendant's specific instructions concerning liquidating his account if it became undermargined and by violating

various exchange rules; and, third, that the transactions constituted illegal gambling transactions.

At the close of the evidence, both sides moved for a directed verdict in their favor. Both of these motions were denied. The jury returned a verdict for the defendant. The plaintiff then moved for judgment notwithstanding the verdict or for a new trial. This motion was also denied. The plaintiff appeals the denial of its motions for a directed verdict and for judgment notwithstanding the verdict or a new trial. We affirm the judgment of the District Court.

On appeal, the plaintiff's primary contention concerns the submission of the defendant's second defense to the jury. That defense involved two assertions: (1) That the plaintiff violated Palmer's instructions relative to liquidating his account if it became undermargined; and (2) that the plaintiff violated certain exchange rules.

"It is a broker's duty to execute his principal's orders in conformity with the authority conferred on him and in compliance with his principal's instructions * * *." 12 C. J. S., Brokers, § 25, p. 68. See, also, 12 Am. Jur. 2d, Brokers, § 83, pp. 835, 836; B. C. Christopher & Co. v. Danker, 196 Neb. 518, 244 N. W. 2d 79 (1976).

The defendant testified that before he bought his first contract, he told E. Warren Bedell, the plaintiff's employee, that "If it ever gets into deficit, you sell it," and "I will never under any circumstances put up any margin money." By deficit, the defendant testified he meant, "If this contract that we had bought, if the thing went against us and went down, he was to sell it and get out of it; I would not put up any more money."

The defendant testified that after July 1, 1973, he had almost daily conversations with Mr. Bedell concerning margin calls. He stated: "I would tell him that I couldn't afford to lose any more than the $3,000 that I had originally told him that I could probably commit to the market; and if my account ever got into any

kind of problems, to blow me out of it, I didn't want any — I couldn't afford any losses, any more than the three." He told Bedell that he would "never meet a margin call, never," and instructed Bedell to liquidate any contracts necessary to meet a margin call. He testified that if he had known his account was in a deficit position, he would never have stayed in the market.

E. Warren Bedell, plaintiff's account executive, testified that the defendant promised to send money to meet margin calls, and always agreed to bring in money that was needed. Bedell could not remember whether or not the defendant ever requested him to liquidate a position to cover a margin call.

Thomas J. Vaughn, a senior vice president for the plaintiff, testified that the defendant had met a margin call. However, when pressed on cross-examination, Vaughn could not state for sure that the cash deposited by the defendant to his account was sent in by the defendant as a response to margin calls issued by the plaintiff - that the defendant intended the money he sent in be used to meet his outstanding margin call at the time.

The record shows that the defendant deposited $1,200 with the plaintiff on June 7, 1973; $1,000 on June 28, 1973; and $1,000 on July 5, 1973. On August 10, 1973, the defendant deposited another $2,000 with the plaintiff. The defendant testified that he added the last $2,000 at the urging of Mr. McClung, another of the plaintiff's employees. He testified that the $2,000 was money he had made that summer.

The record shows also that the defendant received his first margin call from the plaintiff on June 11, 1973, and that his account was undermargined most of the time his account with the plaintiff was open.

"In determining whether a motion for judgment notwithstanding the verdict should have been sustained, the evidence must be considered in the light most favorable to the party who obtained the verdict. Every con-

troverted fact must be resolved in his favor and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. * * * The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong." Department of Banking v. Colburn, 188 Neb. 500, 198 N. W. 2d 69 (1972).

There was sufficient evidence for the jury to have concluded that the plaintiff failed to follow the instructions given to it by the defendant, and for it to determine that had the defendant's account been closed out within a reasonable time after it became initially undermargined that the defendant would not have sustained the loss he did.

The second part of the defendant's second defense alleged that the plaintiff violated certain exchange rules in the handling of the defendant's account.

The customer's agreement, prepared by the plaintiff and signed by the defendant provided: "1. All transactions under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house, if any, where the transactions are executed by you or your agents, and, where applicable, to the provisions of the Securities Exchange Act of 1934, the Commodities Exchange Act, and present and future acts and amendatory thereof and supplemental thereto, and the rules and regulations of the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and of the Secretary of Agriculture in so far as they may be applicable."

The plaintiff is a clearing member of the Chicago Merchantile Exchange, and a nonclearing member of the Chicago Board of Trade. The defendant's trading in commodities was on these two exchanges.

Mr. Vaughn testified that it is the plaintiff's policy to follow the rules and regulations of the various exchanges on which it deals. He testified that it is the plaintiff's policy to abide by the rules and regulations

of the exchanges concerning margin, and that the plaintiff's policy, in connection with closing out an undermargined account is in accord with exchange rules. Mr. Vaughn testified that the rules of the Chicago Mercantile Exchange and the Chicago Board of Trade applied to the plaintiff, and that the plaintiff in the customer's agreement agreed to abide by the exchange rules.

At the trial, various exchange rules were placed into evidence. Rule 928 c of the Chicago Mercantile Exchange provides: "* * * whenever a customer's margins are depleted below the minimum amount required, the clearing member must call for such additional margins as will bring the account up to initial margin requirements, and if within a reasonable time the customer fails to comply with such demand (except for unusual circumstances the clearing member may deem one hour to be a reasonable time), the clearing member must close out the customer's trades or sufficient thereof to restore the customer's account to required margin status."

This rule provides that whenever a customer's account becomes undermargined, the clearing member must issue a margin call, and if this is not complied with in a reasonable time either close out the account, or else liquidate a portion of it to restore the required margin.

Rule 210 of the Chicago Board of Trade provides: "No member may accept or carry an account for a customer, whether a member or non-member, without proper and adequate margin. The Board, by regulation, shall fix minimum margin requirements." This rule prohibits the carrying of undermargined accounts by members of the Chicago Board of Trade.

Instruction No. 5, given by the trial court to the jury reads in part as follows: "Exchange rules have been received in evidence concerning margins required to be maintained by customers. In this connection you are instructed that the rules require only that margin de-

mands are required to be met within a reasonable time, and that a reasonable time is not any fixed number of hours or days but is a determination that is required to be reasonably made by the broker under all the facts and circumstances then known by him or which he reasonably ought to have known, as reflected in the evidence.

"Likewise, with regard to the closing out of a customer's account for failure of the customer to maintain an adequate margin. In this connection, the broker is required to liquidate the account within a reasonable period of time which, again, is not any fixed or predetermined number of hours or days, but is that period of time reasonably determined by the broker under all the facts and circumstances then known by him or which he reasonably ought to have known, as reflected in the evidence.

"In either event, the broker is required to act with due regard to the customer involved, as one of the circumstances; but in neither event are post-judgment facts (as distinguished from pre-judgment reasonable expectations or concerns) to be considered."

It was proper for the court to submit to the jury the issue of whether the plaintiff violated certain applicable exchange rules. The plaintiff in its agreement specifically represented and agreed that it would follow exchange rules. Failure to follow these rules was thus a breach of the plaintiff's contractual duty owed the defendant. It is axiomatic that the plaintiff cannot recover from the defendant for losses caused by its own breach of contract.

A factual issue was presented to the jury: Whether the plaintiff closed out the defendant's undermargined account within a reasonable length of time, thereby grossly aggravating the defendant's losses.

Mr. Vaughn testified that, "* * * the whole name of the game is knowing the customer * * *," concerning the closing out of undermargined accounts. He testified

that one factor taken into account is the customer's past practice of meeting margin calls. He testified that the defendant's account was closed because the plaintiff was fearful that the defendant was not going to come up with the money.

Sandra Sturges, the assistant manager of the commodity department for the plaintiff at the time of the transactions involved here, testified that she reviewed the defendant's account before it was closed, and that, in her opinion, the plaintiff acted reasonably in allowing the defendant's account to remain open as long as it did. She testified that she never reviewed any financial statement from the defendant.

Mr. Bedell testified that the plaintiff never requested a financial statement from the defendant. He stated that he did not recall any conversation in which the defendant told him what his financial condition was and what he thought he could lose. The defendant testified that he told Bedell that he could only afford to lose $3,000.

There was sufficient evidence for the jury to conclude that the plaintiff kept the defendant's account open an unreasonable length of time after it became undermargined.

The plaintiff contends that instruction No. 5 is erroneous in that it tended to indicate certain exchange rules were applicable to all transactions which took place between the plaintiff and the defendant. Instructions to the jury should be considered as a whole, and if they fairly submit the case, they are not erroneous. Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 195 Neb. 578, 239 N. W. 2d 499 (1976); Duling v. Berryman, 193 Neb. 409, 227 N. W. 2d 584 (1975). When instruction No. 5 is considered along with instruction No. 7 and instruction No. 10, we feel that the instructions as a whole make it adequately clear that violations of exchange rules can only be considered regarding trans-

actions occurring on the exchange whose rules are violated.

There was no error by the District Court in giving instructions Nos. 5 and 7 to the jury, which thereby submitted the defendant's second defense to the jury, and as reviewed above, there was sufficient evidence for the jury to find in favor of the defendant on the basis of that defense.

The plaintiff contends that the defendant, as a matter of law, abandoned his original instructions to his broker, and that the defendant, as a matter of law, ratified, approved, and acquiesced in the plaintiff's handling of the defendant's account.

The defendant testified that he received all monthly statements, daily statements, margin requests, and confirmations. He testified that he never paid too much attention to these documents. The defendant indicated that he did not understand some of these documents.

The defendant testified that whenever he received a margin call, he would contact Mr. Bedell, who would tell him that the market went in his favor and that there was no need to send in any margin money. The defendant testified that he did not keep a daily record of how he was doing on the market, instead, he relied on Mr. Bedell to keep him informed. He testified that when Mr. Bedell went on vacation during August 1973, he received a telephone call from him, and was told by Bedell that Bedell had called Lincoln and that everything looked good.

There was evidence that the defendant was in the plaintiff's office almost every day during the period that he traded with the plaintiff. He stated that he went to the plaintiff's office because he was concerned about how his account was doing.

The defendant testified that he never objected in writing to the plaintiff concerning any trade or account balance; nor did he give any orders to sell out his account, although he knew how to fill out sell orders.

The defendant testified that he wrote out at least one order himself and handed it directly to the wire room, about the time that Mr. Bedell went on vacation, under Mr. McClung's direction. He testified that, under the direction of Mr. Bedell, he filled out more than one sell order. He stated that Mr. Bedell showed him how to fill out orders before he left on vacation, and that Mr. Bedell left him several blank slips with the broker's number and his account number filled in by Bedell.

The defendant testified that he instructed the plaintiff through its agent, Mr. Bedell, that he could not afford to lose over $3,000, which was what he could commit to the market. The record shows that the defendant actually put in $5,200 to his account, including $2,000 on August 10, 1973. He testified that this last investment was made at the suggestion of Mr. McClung, with money he had earned over the summer. The defendant stated that he always bought on the suggestion of the plaintiff's agents, either Mr. Bedell or Mr. McClung.

The issue of ratification and approval of the plaintiff's handling of the defendant's account was submitted to the jury. It is apparent that the jury, in returning a verdict in the defendant's favor, concluded that he did not ratify, approve, or acquiesce in the plaintiff's handling of his account. "To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake." Dort v. Swift & Co., 193 Neb. 606, 228 N. W. 2d 588 (1975). We cannot say, based on our review of the record, that the jury's determination that there was no ratification was clearly erroneous or manifestly wrong.

The plaintiff also contends that the court should have found for the plaintiff as a matter of law on the basis of paragraphs 7, 9, and 14 of the customer's agreement, which the plaintiff urges control this controversy.

The relevant provisions of paragraph 7 read: "You are hereby authorized in your discretion * * * (c) should margins, in your judgment, be insufficient for your protection, or (d) upon my failure fully to respond to any margin call made by you, to sell any or all of the securities and commodities or other property which may be in your possession, * * *. Such sale, purchase or cancellation may be made according to your judgment and may be made, at your discretion, on the exchange or other market where such business is then usually transacted, * * * and the undersigned shall remain liable for any deficiency * * *."

The relevant portion of paragraph 9 states: "The undersigned undertakes, at any time upon your demand, to discharge obligations of the undersigned to you, or, in the event of a closing of any account of the undersigned in whole or in part to pay you the deficiency, if any, * * *."

Paragraph 14 of the customer's agreement states: "Reports of the execution of orders and statements of the accounts of the undersigned shall be conclusive if not objected to in writing, the former within two days, and the latter within ten days, after forwarding by you to the undersigned by mail or otherwise."

As shown previously, paragraph 1 of this agreement provides that all transactions undertaken pursuant to it were done subject to various rules and regulations. In construing a written instrument, the court must look to the agreement in its entirety. Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721 (1959). In ascertaining the agreement between the parties, the court must, in addition to the written agreement, consider any oral understandings, in this case the defendant's instructions to his broker when he opened his account.

Paragraph 7 merely authorizes the plaintiff to take certain actions if certain events happen. Paragraph 9 requires the undersigned to discharge "obligations." Paragraph 14 appears to be designed primarily for the

purposes of establishing certainty as to the figures. Any interpretation of these three paragraphs which would have the effect of making the customer absolutely liable for any action taken by the plaintiff would be unconscionable. There is no merit to this contention.

The plaintiff also finds error in the District Court's refusal to give instructions Nos. 1 and 2 tendered by the plaintiff. At the trial, the defendant testified that he did not read the customer's agreement, the hedging letter, or the authorization to transfer funds between his nonregulated and regulated accounts, even though he signed these documents. He admitted that he had the opportunity to read the customer's agreement, but did not do so. He stated that he was just handed a bunch of papers which they said had to be signed, and he signed them. He stated that he had no knowledge of what these documents contained, prior to being on the witness stand.

The plaintiff's requested instruction No. 1 reads as follows: "You are instructed that the fact that the Defendant, Mr. Kay Palmer, may have failed to read the documents, including the customer agreement, which he executed with the plaintiff, First Mid America, Inc., should not be considered as relieving him of his obligations nor the consequences which are imposed under the provisions of those documents."

While it is true in Nebraska that, in the absence of fraud, one who does not read a contract before signing it cannot later relieve himself of its burdens; e.g. Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204 (1972), we are of the opinion that under the circumstances the District Court was correct in refusing this instruction. The trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case. Bowley v. Airport Authority of Omaha, 186 Neb. 292, 182 N. W. 2d 911 (1971). This instruction tended to focus undue attention upon the customer's agreement, whereas the agreement between the

plaintiff and the defendant consisted of both written and oral understandings.

The plaintiff's requested instruction No. 2 sought to instruct the jury that unless it found for the defendant on one of his defenses, he was liable to the plaintiff for $31,329.11 plus 9 percent interest from August 24, 1973. This instruction would have given the impression that the defendant was either liable for everything, or liable for nothing. There was no error in refusing it.

We therefore come to the conclusion that the submission of the case to the jury was proper and that the District Court's determination refusing a directed verdict, refusing a judgment notwithstanding the verdict, or for a new trial was correct, and that submitting the case to the jury was without prejudicial error. In light of these holdings, it becomes unnecessary to consider the cross-appeal or other contentions made by the parties.

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

AFFIRMED.

IN RE INTERESTS OF CHRISTOPHER J. TIBBS, DANICA TIBBS, AND SUSAN TIBBS, MINOR CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. MELVIN TIBBS, APPELLANT, IMPLEADED WITH JOANNE TIBBS, APPELLEE.

248 N. W. 2d 330

Filed December 22, 1976. No. 40550.

1. **Infants: Parent and Child.** The right of a parent to maintain the custody of his children is a natural, but not an inalienable, right, and the public has a paramount interest in the protection of the rights of the children.
2. **Infants: Parent and Child: Courts.** An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, is heard in this court by trial de novo upon the record, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses.

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

Jerry L. Snyder, for appellant.

Charles W. Balsiger, for appellee State.

K. E. Mahlin, for appellee Joanne Tibbs.

Dean Dalke, guardian ad litem of Christopher Tibbs et al.

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

BRODKEY, J.

On or about December 26, 1974, the county attorney of Gage County, Nebraska, filed separate amended petitions in the county court of Gage County, juvenile division, alleging that Christopher J. Tibbs, age 5, Susan Tibbs, age 4, and Danica Tibbs, age 2, the children of the appellant, Melvin Tibbs, and his wife, Joanne Tibbs, were children as described in section 43-202(2) (b)(c) (e), R. S. Supp., 1974, and further alleging that the parental rights between the parents of said minor children should be terminated due to the fact that the parents have substantially and continually or repeatedly neglected the children and refused to give the children necessary parental care and protection.

Section 43-202, previously referred to, provided, so far as material herein, that the county court in each county shall have: "Exclusive original jurisdiction * * * as to the following: * * * (2) Any child under the age of eighteen years * * *; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects, is unable, or refuses to provide proper or necessary subsistance, education, or other care necessary for the health, morals, or well-being of such child; * * * or (e) 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; * * *." Section 43-209, R. S. Supp., 1974, provides, among other things, that: "The court may terminate all parental rights between the parents * * * and such child when the court finds the action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exists: * * * (2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection; * * * (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; * * *."

A hearing was had on the three petitions in the Gage County court on January 17, 1975, on which date the court entered an order finding that said children were those described in section 43-202, R. S. Supp., 1974, and also finding that there were sufficient facts to terminate all parental rights of both parents. However the court reserved ruling as to whether the parental rights would be terminated until further order of the court. A further hearing was held in the county court on February 11, 1975, in which the court reaffirmed the findings contained in its order of January 17, 1975, again without a determination at that time to terminate the parental rights of the parents. The court placed the children temporarily with the welfare office of Gage County and granted physical custody of the children to the appellant, Melvin Tibbs, subject to the following terms and conditions: (1) That he enroll Christopher in kindergarten in Beatrice; (2) that he enroll Susan and Danica in a day-care center in Beatrice and provide adult supervision for the children when he could not be with them; (3) that he live alone with the children, but that the mother, Joanne Tibbs, was to have the right to visit said children from 1 p.m. to 5 p.m., on

Sundays. The hearing on the adjudication of parental rights was continued to a future date.

An appeal was taken to the District Court for Gage County where, on July 3, 1975, the court affirmed the finding of the county court that the minor children are ones described in section 43-202(2), R. S. Supp., 1974, but found that since no order had been entered by the county court with regard to the termination of parental rights, there was no basis for consideration of that issue by the District Court; and it remanded the proceedings to the county court with directions that the county court make and enter its order and judgment with respect to the prayer for termination of parental rights on or before September 5, 1975.

An adjudication hearing was held in the county court on August 28, 1975, and an order was entered on that date terminating the parental rights of both parties, awarding the care of said children to the Nebraska State Department of Public Welfare with authority to consent to the legal adoption of said children. In its order the court found that the parents had substantially and continually or repeatedly neglected the children and refused to give the children the necessary parental care and protection, and that grounds exist for termination of the parental rights of each parent; and the court further found that it was in the best interests of said children that all parental rights should be terminated.

The appellant then perfected his appeal to the District Court for Gage County, which, on October 16, 1975, consolidated the three cases; and, on motion of the State, affirmed the judgment of the county court terminating the parental rights, and placing the children with the Nebraska State Department of Public Welfare. The court specifically found that the evidence adduced supported the action of the county court and that the action of said court was not an abuse of discretion. It should be noted that in all these proceedings the chil-

dren were at all times represented by a guardian ad litem appointed by the court.

The appellant has appealed from the decision of the District Court to this court, challenging the termination of his parental rights and the sufficiency of evidence in support thereof. Although a great deal of evidence was presented in all the hearings with reference to the conduct and mental capacity of Joanne Tibbs, wife of Melvin Tibbs, the evidence adduced is uncontradicted that she suffered from schizophrenia, chronic undifferentiated type, without any prospects of being cured, and that she had injured the children and others in the past, and could be a danger to them in the future, without being aware of the consequences of her behavior. The evidence indicates that she has now moved to her parent's home in New Jersey, and is no longer residing with appellant; and also that separation proceedings instituted by appellant are pending. However she did not file a notice of appeal in this case, and her parental rights are not an issue in this appeal. The issue to be decided herein is whether the facts justify the termination of the parental rights of the father, Melvin Tibbs, or whether the courts below abused their discretion in so doing.

It is the contention of the appellant that the courts below, in deciding that issue on the basis of what was in the best interests of the children, ignored the natural rights of the parents to their children. This court has held that while every effort should be made to protect the rights of parents to their children, the public also has a paramount interest in the protection of the rights of those children. The right of parental control is a natural, but not an inalienable, right. State v. Loomis, 195 Neb. 552, 239 N. W. 2d 266 (1976). We have also held that an appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, is heard in this court by trial de novo upon the record. See State v. Johnson, 196 Neb. 795, 246 N. W. 2d 591 (1976), and cases cited therein.

We have also held that even though the trial is de novo upon the record, the findings of fact made by the trial court will be accorded great weight for the reason the trial court heard and observed the parties and the witnesses. State v. Johnson, *supra;* State v. Kinkner, 191 Neb. 367, 216 N. W. 2d 165 (1974); Mingus v. Stuchlick, 185 Neb. 139, 174 N. W. 2d 194 (1970).

Numerous witnesses testified at the various hearings held in connection with the Tibbs children, and a considerable volume of evidence was received, some of it contradictory. No purpose would be served in detailing the testimony of the various witnesses. We have examined the entire record and have concluded that there is ample evidence in it to support the findings of the District and county courts that appellant substantially and continuously or repeatedly neglected to give the children the necessary parental care and protection so as to justify the termination of his parental rights.

The record reflects that Melvin Tibbs is a man 39 years of age who had served in the military service in Korea and who had received an honorable discharge. He married Joanne Tibbs in 1968 and is the father of the three children involved in this action. He is engaged in part-time farming and part-time construction work; and, for a period of approximately 1 year prior to the proceedings herein, was in the process of remodeling an old house in Virginia, Nebraska, in which he and his family resided. The record reveals that in December of 1974, prior to and at the time of the institution of the proceedings, and notwithstanding that he was receiving reasonably good earnings, the home he provided for his family was dirty, disorderly, and unsanitary, as amply verified by photographs of the home introduced in evidence and by the testimony of witnesses. There is testimony that the children were frequently unclean and dressed in inadequate and ill-fitted clothing, and were often unclean when taken to the day-care center in Beatrice pursuant to the order

of the court. There is also evidence that the child Christopher had a penchant for destroying toys at the day-care center. The record reveals that appellant on occasions acted violently toward both his wife and his children, and there is testimony that Christopher had a mark on his back as the result of being hit by the buckle on a belt while being disciplined by appellant. Witnesses also testified that the youngest child, Danica, received a cut on her body from a broken ash tray as the result of an accident which occurred when appellant pushed or shoved his wife. Also, it appears that two of the children had continuous bedwetting problems. Although Melvin Tibbs attributed many of those conditions to the fact that he was unable to get his wife Joanne to take her medication and properly supervise the children, the fact is that after the first hearing in county court, he violated the order of the court entered at that time directing him to live alone with the children, but granted Joanne visitation rights. The evidence reveals that he often allowed her to stay over night with him and the children and also allowed her to be with the children while he was at work.

In the original hearing in county court, Melvin Tibbs testified that his wife was a fine mother and housekeeper, but in the hearing in District Court he changed his testimony. In explaining why he had taken his wife back to New Jersey to reside with her parents, and was willing to proceed with a separation action pending between them, he testified that he felt his wife Joanne was totally incapable of taking care of the children and that her presence would result in the mental impairment of the children, which resulted in a comment by the District Judge that he believed the appellant would willingly change his testimony to substantiate his position at any given time.

There is, however, evidence in the record favorable to appellant to the effect that the children had been examined by doctors who had found them normal, both

mentally and physically, and that they were not malnourished. Also in evidence is a letter written to the court by a juvenile probation officer of Gage County, dated May 15, 1975, indicating that on an apparently unannounced visit to the Tibbs home the officer found the rooms "relatively clean," with food in the refrigerator, childrens' clothes in the closet, and toys for them to play with. The appellant denied he had hit or beaten the children, but his wife, Joanne, testified that appellant had thrown the boy Christopher across the room onto a metal headboard of a bed, causing injuries, approximately 2½ years prior to the hearing. Notwithstanding Joanne's mental condition, the weight of her testimony was for the court, who observed her while she testified.

Although appellant has indicated a willingness to accept conditions of close supervision of his family by the State Department of Public Welfare if the children are left in his custody, it must be remembered that he has already had one chance to do that, as he was given physical custody of the children under supervision of the Welfare Department from approximately February 11, 1975, the date of the original order of the county court, to approximately August 28, 1975, on which date the county court entered its order providing for the termination of parental rights, a period of over 6 months. During that period, he violated the clear order of the court, and the condition of the children did not appear to have improved. Although the appellant would like additional time to demonstrate his ability to properly care for his children, we point out that this litigation has been pending for approximately 2 years, and the best interests of the children require that it be brought to final conclusion without further delay.

We conclude there is sufficient evidence in the record to justify the action taken by the courts below and the judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. First, the opinion recites that Joanne Tibbs is no longer in the home of the appellant. It was Joanne's unsupervised presence in the home which constituted the danger to the children. Her absence removes the sole justifiable reason for absolute termination of the parental rights of the appellant. A parent's right to the custody, care, companionship, and love of his or her childen ought not to be taken away simply because that spouse found it difficult to finally choose between his duty to his wife and his duty to his children. This court makes specific mention of Joanne's testimony that Tibbs had thrown one of the children across the room. Tibbs absolutely denied this. That Joanne Tibbs was and is a badly mentally disturbed person, divorced from reality, is clearly evidenced by the reading of her testimony in the record. No credence whatever should be placed on such testimony.

Secondly, the opinion, at least by implication, denigrates the natural and fundamental right of a parent to his child and the right of a child to his parent. This case involves not mere custody, but absolute termination of the parent-child relationship. That relationship ought not to be lightly severed. A parent may, of course, by misconduct which jeopardizes the permanent welfare of the child, forfeit his right to custody or even in extreme cases to the parent-child relationship, but before a court takes such a drastic step a necessity must be extremely clear. I do not believe it is in this case.

One of the things we are sometimes inclined to forget is what may happen to such children when the parental relationship is terminated. Frequently they become mere wards of the state, inmates of institutions or foster homes, which in many cases cannot replace even a less than perfect parental relationship.

The statement in this case and in State v. Loomis, 195 Neb. 552, 239 N. W. 2d 266, that the right of the

state in the welfare of the child is paramount to that of the parent, does not, I believe, conform to the philosophical and historical views which have prevailed in this country from the beginning. The natural rights of parent and child were, I am sure, considered so obvious and fundamental that no special mention of them in the Bill of Rights was thought to be required. The mutual rights of parent and child are, I believe, among those "retained by the people" under Amendment IX to the Constitution of the United States.

GEORGE STEWART, JR., APPELLANT, V. NORTH SIDE PRODUCE COMPANY, A CORPORATION, ET AL., APPELLEES.
248 N. W. 2d 37

Filed December 22, 1976. No. 40601.

Contracts: Employer and Employee: Time. An employment contract with no fixed term may be terminated at any time by either the employer or the employee, at his own pleasure.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Jon B. Abbott, for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellees.

Heard before WHITE, C. J., McCOWN, and CLINTON, JJ., and STUART and RIST, District Judges.

STUART, District Judge.

This is an appeal from the sustaining of a demurrer to plaintiff's petition.

Plaintiff's petition alleged defendant North Side Produce Company employed plaintiff as a truck driver under an employment contract with no fixed term. Defendant Jordan, acting within the scope of his employment by defendant North Side Produce Company, an-

nounced a policy: "That if any further mechanical breakdowns of the company's trucks occurred, somebody would be fired." Following mechanical trouble in a truck assigned to plaintiff, plaintiff was fired, and plaintiff's petition prayed for damages incurred by reason of this discharge. For his second cause of action plaintiff alleged defendant Jordan, acting within the scope of his employment, later informed prospective employers of plaintiff that he had been fired for cause, and thereupon prayed for damages for slander.

It was held in State v. Employers of Labor, 102 Neb. 768, 169 N. W. 717 (1918): "If there is no contract for any fixed term of employment, the employer may discharge, or the employee stop work, at his own pleasure." This holding was quoted and followed in the case of Ploog v. Roberts Dairy Co., 122 Neb. 540, 240 N. W. 764 (1932), and it is the controlling rule of law on plaintiff's first cause of action.

The plaintiff's brief does not argue the trial court's action in sustaining the demurrer as to the cause of action for slander and therefore it will not be considered here. See Rule 8a 2(3), Revised Rules of the Supreme Court, 1974.

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

AFFIRMED.

ANN C. BARTLEY, APPELLANT, V. JOSEPH R. BARTLEY, APPELLEE.

248 N. W. 2d 39

Filed December 22, 1976. No. 40610.

1. **Divorce: Parent and Child: Infants.** A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action.

2. **Divorce: Parent and Child: Infants: Adultery.** While adultery does not, as a matter of law, deprive a parent of the custody of a minor child, it is a factor which may properly be considered by the trial court in determining what is in the best interest of the child. This is particularly true when the parent cohabits out of wedlock in the home where the child lives.

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

Michael Kelley of Kelley & Kelley, for appellant.

Walter J. Matejka and William E. Pfeiffer, for appellee.

Heard before WHITE, C. J., McCOWN, and CLINTON, JJ., and STUART and RIST, District Judges.

RIST, District Judge.

Ann C. Bartley appeals from an order of the District Court for Douglas County, Nebraska, modifying the decree of dissolution of marriage of the parties by terminating appellant's custody of the minor child of the parties, Joseph Matthew Bartley, and awarding custody of the child to Joseph R. Bartley, the appellee.

The marriage of the parties was dissolved by the District Court on July 5, 1973. The decree awarded custody of their minor child, born September 8, 1970, to the appellant, subject to reasonable visitation by appellee.

On January 11, 1974, appellant filed an application with the court for permission to remove the child to Dallas, Texas, where she had secured improved employment. The application was heard on January 25, 1974, and an order entered January 30, 1974, giving appellant permission to remove the child to Dallas and modifying the decree of dissolution to provide that appellee should have the child during January, February, and March of each year until the child reached the age of 6 years, and thereafter during the months of June, July, and August of each year. The parties were also to alternate having the child a week at Christmas.

Appellant and the child moved to Dallas in February

1974. She there married Tommy Nash in June of 1974, which marriage ended in divorce approximately 1 year later. No children were born of this marriage. The divorce action was brought in Texas by Mr. Nash. Appellant testified the reason for the divorce was that Nash did not want the child in their home.

Following the modification of the decree appellee first had the child in his home commencing in late December 1974, and continuing until the end of March 1975, when the child was returned to appellant. In April 1975, appellant called the appellee and advised him she was having marital difficulties and requested that he take the child for that reason. Appellee went to Dallas and returned with the child to Omaha. The child remained with appellee until July 6, 1975, when appellant came to Omaha and returned to Dallas with him.

The child's stay in the home of appellee and his present wife on these occasions appears to have been both happy and harmonious.

In late July or early August 1975, the appellant and the child moved into the home of Paul Cooper in Dallas, where they lived with Cooper up to the time of the hearing on appellee's application to change custody. Appellant and Cooper were not married, although they both testified they planned to marry approximately 1 month after the date of hearing. Cooper has been previously married and divorced with no children of that marriage.

While the child was in Dallas appellant worked but made arrangements for the child to attend a private school and day center of apparent good quality.

The appellee married Kathleen Bartley on September 14, 1974, after having lived with her for approximately 1 year. Kathleen Bartley had been married twice before, one marriage ending in divorce and the other by annulment. She has no children by her previous marriages. Her present marriage to appellee is apparently proceeding in a satisfactory manner.

At the hearing to change custody Kathleen Bartley testified to a conversation she had with the appellant in the summer of 1974 at the home of appellant's parents. She testified that appellant then said she could not control the child and that she would give up the child if her parents wouldn't object — that she couldn't take pressure from her parents and friends. When questioned about this conversation appellant's response was "I don't remember saying that I would give up Joey to Joe. I don't remember saying that."

The record reflects that both parties are gainfully employed. Appellee's present wife works occasionally. Paul Cooper is self-employed and owns his home and a rental property in Dallas.

The record sustains the conclusion that both parties have affection for the child.

The applicable rules of law in this case are: A decree fixing custody of minor children will not be modified unless there has been a change of circumstance indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. Bennett v. Bennett, 189 Neb. 654, 204 N. W. 2d 379; Carper v. Rokus, 194 Neb. 113, 230 N. W. 2d 468.

In determining with which of the parents a child shall remain, the court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the child than the other. § 42-364, R. S. Supp., 1976.

While adultery does not, as a matter of law, deprive a parent of the custody of a minor child, it is a factor which may properly be considered by the trial court in determining what is in the best interests of the child. Chilese v. Chilese, 196 Neb. 784, 246 N. W. 2d 475.

It is clear from the record that a change of circumstance respecting custody has occurred since the decree was modified on January 30, 1974, permitting appellant

to move to Dallas with the child. Since that date she entered into a marriage which was short-lived and apparently so unpleasant that she requested appellee to keep the child for an extended period in 1975 over and beyond the visitation period provided by court order. At the conclusion of that marriage she moved with the child into the home of a man to whom she was not married and openly and continuously cohabited with him — a condition that continued up to and including the time of the custody hearing. The duration of this cohabitation was such as would expose its nature to the child. The record would also sustain the conclusion that she was ambivalent on occasion about wanting the child and that she was responding in some degree to family influence in her resistance to the change of custody. The record also shows that since the modification appellee has remarried and the marriage appears to be proceeding satisfactorily.

It should be noted that while both parties have cohabited out of wedlock since the dissolution, the record reflects that appellee remarried before the child again lived in his home. This is not the case with respect to appellant and Cooper.

The trial court at the conclusion of the hearing criticized the conduct of both parties, noting it made his task difficult; but he assessed the home of appellee as being more stable than that of the appellant, being one in which the child of the parties had the best chance for a satisfactory family relationship and that the best interests of the child required that appellee be given custody. The record supports this conclusion.

We note again the well-established rule that: "The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. * * * we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining the

best interests of children in custody proceedings." Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667. See, also, Chilese v. Chilese, *supra*.

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

AFFIRMED.

JANICE ALEXANDER ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 17 OF THURSTON COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ALSO KNOWN AS WINNEBAGO PUBLIC SCHOOLS, ET AL., APPELLANTS.
248 N. W. 2d 335

Filed December 22, 1976. Nos. 40647, 40648, 40649, 40650, 40651, 40652, 40653.

1. **Schools and School Districts: Statutes.** Substantial compliance with section 79-1254, R. S. Supp., 1975, is all that is required of a school district.
2. **Schools and School Districts: Statutes: Notice.** The notice required by section 79-1254, R. S. Supp., 1975, may be remedied by amendment if defective and where there is no prejudice to the parties involved an objection based on the original notice is without merit.
3. **Schools and School Districts: Statutes: Notice: Waiver.** Participation in the hearing required under section 79-1254, R. S. Supp., 1975, is ordinarily a waiver of any defect in the notice of the hearing.
4. **Schools and School Districts: Statutes: Continuances: Waiver: Time.** A party at whose request the hearing required by section 79-1254, R. S. Supp., 1975, was continued by agreement of counsel cannot later object that the hearing was held after the date specified in the statute.
5. **Judgments: Pleadings.** A judgment must respond to the pleadings.
6. **Public Meetings Act: Hearing: Time.** An issue concerning an alleged violation of the Public Meetings Act must be promptly and properly raised in the lower court or tribunal.
7. **Public Meetings Act: Hearing: Notice: Waiver: Time.** Any person who has notice of a public meeting and attends the meeting but fails to object at the meeting to the failure of the public body to give "publicized notice" of the meeting as re-

quired by section 84-1411, R. S. Supp., 1976, waives his right to object at a later date to formal action taken at the meeting on the ground that the public body failed to give the notice required by the statute.

Appeals from the District Court for Thurston County: WALTER G. HUBER, Judge. Reversed and remanded with directions.

Neil R. McCluhan of Kindig, Beebe, McCluhan, Rawlings & Nieland, for appellants.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

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

BOSLAUGH, J.

These cases which were consolidated for briefing and argument in this court, arise out of controversies concerning the termination of teachers' contracts. The plaintiffs are teachers who were employed by the defendant school district during the 1974-75 school year.

On April 11, 1975, the board of education of the defendant voted not to renew the plaintiffs' contracts for the next year. Letters dated April 14, 1975, were mailed to each of the plaintiffs advising them that their contracts would not be renewed. Each of the plaintiffs requested a hearing pursuant to section 79-1254, R. S. Supp., 1975. The defendant then notified the plaintiffs that the hearings would be held on April 24, 1975. These notices also contained a statement of the reason or reasons why each contract was not being renewed and a list of the witnesses who would testify for the defendant at the hearing.

On April 24, 1975, counsel representing the plaintiffs called the counsel for the defendant and requested that the hearing be "deferred to a later date." Counsel for the defendant agreed to this request and by agreement

between counsel the hearing was eventually held on June 24, 1975.

Case No. 40647 was filed June 18, 1975, to enjoin the defendant school district and the members of its board from holding a hearing and from interfering with the rights of the plaintiffs to continuing employment with the defendant district during the 1975-76 contract year. The trial court did not grant a temporary restraining order or a temporary injunction. At the hearing on June 24, 1975, the defendant's board heard evidence concerning each of the plaintiffs and then voted to terminate the contract of each plaintiff. The plaintiffs offered no evidence at the hearing.

Case No. 40648 through case No. 40653 are proceedings in error commenced in the District Court to reverse and vacate the actions of the defendant's board terminating the contracts of the plaintiffs. The trial court found generally for the plaintiffs and reversed and vacated the decision of the board terminating the contract of each plaintiff. The trial court found specifically that the actions of the defendant's board were in violation of article 14 of Chapter 84 of the Nebraska statutes and void. The trial court made similar findings in case No. 40647 and restrained the defendants from interfering with the rights of the plaintiffs to continued employment by the defendant school district. The defendants have appealed.

Section 79-1254, R. S. Supp., 1975, which is applicable to Class II and III districts, provides generally that the contract of a teacher who holds a certificate which is valid for a term of more than 1 year shall be deemed renewed until a majority of the members of the school board vote on or before May 15 to amend or terminate the contract. After a contract has been in force for 2 years a contract may not be terminated except for just cause. The secretary of the board is required to notify the teacher in writing not later than April 15 of any conditions of unsatisfactory performance or other con-

ditions which the board considers may be just cause. The teacher has a right to request a hearing before the board within 5 days of the receipt of the notice. If requested, an evidentiary hearing is to be held within 10 days and the decision of the board shall be based upon the evidence produced at the hearing.

The record shows substantial compliance with section 79-1254, R. S. Supp., 1975, by the defendant school district. The action on April 11, 1975, authorized the notice sent to each of the plaintiffs on April 14, 1975. Some of these notices failed to set out the conditions of unsatisfactory performance or other conditions which the statute now requires for nonprobationary teachers under contracts entered into after February 26, 1975. Prior to the 1975 amendment to section 79-1254, R. R. S. 1943, the contract of a teacher in a school district of this class could be terminated for any cause whatsoever, or for no cause at all. Schultz v. School Dist. of Dorchester, 192 Neb. 492, 222 N. W. 2d 578.

In any event, the letters sent to the plaintiffs after they had requested a hearing contained a statement of the reason or reasons why each contract was not being renewed and supplied any deficiency contained in the original notice and served as an amended or substituted notice. The hearing was not held until more than 60 days later and there was no prejudice to the plaintiffs resulting from any deficiency in the original notices.

It is generally held that participation in the hearing waives any defect in the notice. Schrader v. Cameron Township School Dist., 221 Iowa 799, 266 N. W. 473; Van Peursem v. Consolidated Ind. School Dist., 240 Iowa 1100, 38 N. W. 2d 615; Million v. Board of Education of City of Wichita, 181 Kan. 230, 310 P. 2d 917; Board of Education of City of Eureka v. Jewett, 21 Cal. App. 64, 68 P. 2d 404; Reagan v. Board of Directors, Republic School Dist. 309, 4 Wash. App. 279, 480 P. 2d 807.

The plaintiffs contend that the defendant board lost

jurisdiction because the vote which effectively terminated the contracts did not take place until June 24, 1975, long after the May 15 date specified in section 79-1254, R. S. Supp., 1975. The record shows that the hearing was originally scheduled for April 24, 1975, but was continued at the request of plaintiffs' counsel. The June 24, 1975, date was eventually fixed by agreement of counsel. Under these circumstances the plaintiffs cannot complain that the action by the board of the defendant school district was of no effect because it took place after May 15, 1975.

The problem with respect to the Public Meetings Act is complicated by the fact that the statute was changed between the date originally set for the hearing, April 24, 1975, and the date on which the hearing was held, June 24, 1975. Prior to May 27, 1975, the law provided that any formal action taken at a meeting other than while open to the attendance of the public shall be void. Former § 84-1405, R. R. S. 1943. There was no provision concerning the effect of a failure to give public notice of the meeting.

Laws of 1975, L. B. 325, effective May 27, 1975, repealed the old law and established new requirements. Section 84-1414(1), R. S. Supp., 1976, now provides that any formal action of a public body made or taken in violation of any of the provisions of the act shall be declared void by the District Court. A suit to void any final action shall be commenced within 1 year of the action.

Section 84-1414(3), R. S. Supp., 1976, provides that any citizen may commence a suit for the purpose of requiring compliance with or preventing violations of the act.

The petition filed in case No. 40647, the injunction case, was based on section 79-1254, R. S. Supp., 1975. The plaintiffs' theory of the case was that the defendant district had failed to comply with the terms of the continuing contract law and the plaintiffs were entitled to employment for the succeeding year. The petition

was filed 6 days before the date set for the hearing, there was no mention or reference of any kind to the Public Meetings Act, and the petition was never amended. The prayer asked that the defendants be restrained and enjoined from holding any hearings and from interfering with the rights of the plaintiffs to continuing employment. Because there was no issue raised concerning the Public Meetings Act, none of the parties introduced any evidence concerning the matter of public notice other than the minutes or transcript.

The petitions in error, filed in the other cases, similarly alleged a failure to comply with section 79-1254, R. S. Supp., 1975. There was no reference of any kind to the Public Meetings Act.

It is a general rule that a judgment must respond to the pleadings. This court has held that a judgment based upon an issue not pleaded is a nullity. See, Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 55 N. W. 218; Branz v. Hylton, 130 Neb. 385, 265 N. W. 16; Hallgren v. Williams, 146 Neb. 525, 20 N. W. 2d 499; Miller v. City of Scottsbluff, 155 Neb. 185, 50 N. W. 2d 824; Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913.

In Hardiman v. Dover, 111 N. H. 377, 284 A. 2d 905, the New Hampshire court pointed out that an issue concerning an alleged violation of a public meeting law "must be promptly and properly raised below, especially where it does not appear that the alleged violation was obvious, intentional, or prejudicial."

The plaintiffs, of course, had personal notice of the hearing on June 24, 1975. They attended, either in person or by counsel, and participated in the hearing. Although an objection was made to any proceedings in reference to continuing employment of the plaintiffs, no objection was made based upon a failure of the defendant to give "publicized notice" of the meeting as required by section 84-1411, R. S. Supp., 1976.

The defendants argue that the plaintiffs waived any

right to object to the lack of public notice of the meeting by appearing at the hearing and participating in it. We think this argument has merit. Any person who has notice of a meeting and attends the meeting should be required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. See Carter v. City of Nashua, 113 N. H. 407, 308 A. 2d 847. Since the plaintiffs had personal notice of the hearing and appeared and participated in the hearing, but made no objection concerning a lack of public notice, they cannot now complain that the defendant failed to comply with the Public Meetings Act.

The same rule is applicable in the other cases. Participation in the hearing without objection to the lack of public notice waived any right to object at a later date to the lack of public notice.

The judgment in each case is reversed and each cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. EDGAR L. NANCE, APPELLEE.

248 N. W. 2d 339

Filed December 22, 1976. No. 40682.

1. **Statutes: Criminal Law.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
2. ———: ———. It is not necessary that a penal statute be written so as to be beyond the possibility of more than one construction.

3. ———: ———. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served.
4. ———: ———. A penal statute must be given an interpretation which meets constitutional requirements if that can reasonably be done.
5. **Statutes: Criminal Law: Habitual Criminals.** Under section 29-2221, R. R. S. 1943, any person who has been twice previously convicted of crime, sentenced, and committed to prison for terms of not less than 1 year each, is deemed to be an habitual criminal, without regard to the state or states in which the convictions occurred, and without regard to whether the convictions were for a state or federal offense.

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

Donald L. Knowles and Daniel W. Ryberg, for appellant.

Frank B. Morrison and Joseph F. Bataillon, for appellee.

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

MCCOWN, J.

The defendant was charged on three separate counts of robbery, and an habitual criminal count. He was convicted on the three robbery counts. The District Court thereafter sustained a motion to dismiss the habitual criminal charge. Leave has been granted by this court to docket error proceedings challenging that ruling under the provisions of section 29-2315.01, et seq., R. R. S. 1943.

The habitual criminal charge against the defendant here was based upon one prior conviction and commitment in the State of Louisiana, and one prior conviction and commitment in the State of Missouri. Section 29-2221, R. R. S. 1943, provides in relevant part: "Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by

the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, * * *."

Our habitual criminal law does not set out a separate and distinct crime but provides for enhanced penalties for later felony convictions because of the repetition of criminal conduct. See State v. Losieau, 182 Neb. 367, 154 N. W. 2d 762.

It is contended that a strict and literal interpretation of section 29-2221, R. R. S. 1943, excludes a case such as the one now before us, in which one prior conviction was in one state and the other prior conviction was in a different state, and neither of those convictions was in the State of Nebraska. The argument is that the statute requires that there be two prior convictions in the same state or two prior convictions in the federal system. It is then argued that where there is only one conviction in any one state and not more than one conviction by the United States, then at least one of the convictions relied upon must have been in Nebraska. It is obviously possible to interpret the statute in that fashion but such an interpretation would lead to absurd, unjust, and unconscionable results. Such a literal construction of the statute would mean, for example, that a defendant with two prior convictions in the State of Kansas could be charged as an habitual criminal in Nebraska, while a defendant with one conviction in Kansas and one in Missouri could not be. It would also mean that a defendant with one prior conviction in Nebraska and one prior conviction in Kansas could be charged as an habitual criminal in Nebraska, while a defendant with one prior conviction in Kansas, and one prior federal conviction could not be. Even a defendant with 10 prior convictions in 10 different states, but none in Nebraska, could not be charged as an habitual criminal in Nebraska. Such results would not only be un-

reasonable, they would also pose serious constitutional objections.

It is a fundamental rule of statutory construction that if possible a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. State v. Saltzman, 194 Neb. 525, 233 N. W. 2d 914.

In a penal statute it is not necessary that it be so written as to be beyond the mere possibility of more than one construction. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served. Although a penal statute is required to be strictly construed, it should be given a sensible construction. It must be given an interpretation which meets constitutional requirements if that can reasonably be done. See State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569.

We believe that the Legislature intended to provide that any person who has been twice previously convicted of crime, sentenced, and committed to prison for terms of not less than 1 year each, is to be deemed an habitual criminal, without regard to the state or states in which the convictions occurred, and without regard to whether the convictions were for a state or federal offense. Any other interpretation distorts the meaning of the statute. This court has already held that the essential elements which an information must contain for a charge under the Habitual Criminal Act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms of not less than 1 year each. See State v. Harig, 192 Neb. 49, 218 N. W. 2d 884.

The dismissal of the habitual criminal charge herein was erroneous. The cause is remanded to the District

Court in accordance with the provisions of section 29-2316, R. R. S. 1943.

REMANDED.

NEBRASKA IM-PRUV-ALL, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. WILBERT THEODORE SASS, APPELLANT AND CROSS-APPELLEE.

247 N. W. 2d 924

Filed December 22, 1976. No. 40685.

1. **Contracts: Trial.** When a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law.
2. **Contracts: Trial: Evidence.** Where on the trial of an issue of fact proof relating to the disputed issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence.
3. **Contracts: Sales: Time.** Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods, despite any reservation of security interest.
4. **Witnesses: Fees: Parties.** A witness, not a party to a suit, is entitled to receive witness fees.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed as modified.

Hurt & Gallant and Daniel A. Smith, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Duane L. Stromer, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is a law action in which the Nebraska Im-Pruv-All, Inc., a corporation, plaintiff and a prime distributor for its franchiser, seeks to recover from the defendant

Sass, an area distributor of the plaintiff, on a written franchise agreement for products sold and delivered, and for the additional sum of $1,000 which the plaintiff advanced to the defendant against commissions to be earned by him. The defendant's counterclaim seeks recovery for credits due him on the agreement. At the conclusion of the evidence, the court directed a verdict for the plaintiff in the sum of $2,624.90 and costs, and a verdict for the defendant on his counterclaim in the sum of $390. Defendant appeals and plaintiff cross-appeals as to the judgment entered against it on the counterclaim. We affirm the judgment entered by the court on plaintiff's petition, and reverse the judgment entered on the defendant's counterclaim.

We briefly state the pertinent facts. Plaintiff was a franchisee of Im-Pruv-All, a Nebraska corporation, and was engaged in the business of selling micronutrients for the soil, vitamins and minerals for livestock, and preservatives for fermentable feed. Plaintiff as a prime distributor for its franchiser had the duty to secure and train area distributors and dealers in a prescribed territory in northeastern Nebraska. Area distributors were to have their own warehouses for storage of their products and to also sell as independent businessmen. Plaintiff and defendant entered into a written agreement on February 15, 1974, and accepted on March 5, 1974, which was called the franchise specification sheet, exhibit 2, by which defendant became an area distributor for the plaintiff.

The franchise agreement contained the provision that the defendant was "to receive $125.00 per week draw against commissions earned from sales of products for eight (8) weeks commencing March 1, 1974." Plaintiff performed its part of this provision of the contract by advancing said sums totaling $1,000 to the defendant, which amount has not been repaid by the defendant. The defendant did not receive any commissions for sales made to customers during this 8-week period, but

did the following month. The defendant's sales in accordance with this agreement entitled him to commissions of nearly $12,000. Defendant rented a warehouse to store products purchased from plaintiff pending sales to his customers.

The defendant was concerned from the beginning because of his lack of funds to operate his business. Plaintiff agreed in writing to repurchase products stored in defendant's warehouse in the event his business failed. Defendant was further allowed to sell products on credit. In July 1974, the defendant notified plaintiff that he would not continue to sell products on a full-time basis. He continued his sales on a part-time basis until he received a September 12, 1974, letter from plaintiff specifying his breach of the franchise agreement in a number of respects, and that his distributorship was canceled. Plaintiff thereafter refused to supply defendant with additional products to replenish his inventory. There is no issue on the right of plaintiff to terminate the franchise agreement. On November 25, 1974, plaintiff took possession of the products in defendant's warehouse and credited his account in the amount that he had paid for such products. Plaintiff brings this action to recover the remaining balance due for products sold defendant which was unpaid, and to recover the $1,000 advanced to defendant.

After the termination of the defendant's distributorship, the defendant booked orders from customers to be delivered in the following spring of 1975. Defendant secured similar products from a South Dakota franchisee for these sales. Plaintiff's president, Chris Young, made sales that spring to some of these customers, most of whom were originally customers of plaintiff. These sales occurred after the defendant's distributorship had been ended.

The first assignment of error is whether the defendant is indebted to the plaintiff for the $1,000 advanced to the defendant. The defendant contends that this

provision as to repayment of the money advanced is ambiguous and presented a question of fact as to whether repayment of the sums advanced to him required repayment only if commissions were earned by defendant during the 8-week period that he drew the advancements, and that this question of fact was for the jury to determine. We hold that this provision of the written franchise agreement was clear and unambiguous. The $1,000 advanced by plaintiff to the defendant was a loan which the defendant was legally obligated to pay whether or not he earned commissions during the period of 8 weeks he drew the advancements. The law is clearly established in this jurisdiction that where a provision in a written contract is not ambiguous, the court must determine its meaning as a matter of law. Grantham v. General Tel. Co., 191 Neb. 21, 213 N. W. 2d 439; Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581. The trial court was correct in directing a verdict for the plaintiff as to the sum of $1,000 advanced by plaintiff to the defendant.

The defendant further contends that he is entitled to credit for deliveries of the products made by plaintiff in the spring of 1975 to customers from whom the defendant had solicited sales the prior fall after the termination of the franchise agreement of the parties. There had been no completion of the sales of the products to the customers by the defendant. Such sales were made only when the customers accepted the product and paid for it. The booking of orders merely guaranteed the customers future delivery of the product at a specified price. Most of the sales were made by plaintiff to its former customers which it clearly had a legal right to do. After termination of the franchise agreement the plaintiff was entitled to resume business relations with not only its own former customers, but those of the defendant as well, and the defendant was not entitled to commissions on those sales. There was no longer any contractual prohibition for either party to

compete with each other. There was no restraint of trade clause in the terminated franchise agreement. Rambo v. Galley, 188 Neb. 692, 199 N. W. 2d 14; 28 A. L. R. 3d, 25, § 3. The trial court correctly denied the defendant any recovery on his counterclaim for sales made by plaintiff to its former customers where, after the termination of the franchise agreement, the defendant had solicited and booked orders from them.

The trial court entered judgment for the defendant on his counterclaim in the sum of $390 as damages as a result of the plaintiff's violation of the distributorship agreement. The trial court restricted the defendant's recovery to commissions on sales made by plaintiff to customers who had not been initially solicited by plaintiff. The defendant's motion for new trial does not challenge the termination of the franchise agreement by plaintiff for good cause in September 1974. The commissions allowed the defendant by the court were for customer orders booked by the defendant after the cancellation of the agreement and by reason of sales made to them by the plaintiff months later. The defendant's counterclaim alleges that he was damaged by reason of the plaintiff's violation of the distributorship agreement as to these particular sales which were made long after the agreement was canceled. The facts of this case preclude such recovery by the defendant for commissions due under the canceled distributorship agreement with the plaintiff. We hold the trial court should have denied any recovery for the defendant on his counterclaim.

The defendant further contends that he is entitled to credit for products sold to customers, which were subsequently returned to him. The provisions of the distributorship agreement do not sustain this assertion. Item 9 of the agreement (exhibit 2), required the defendant to purchase the products from the plaintiff and to have them shipped to his warehouse. The plaintiff did advance credit to the defendant by maintaining a

security interest in its products purchased by defendant. Section 2-401(2), U. C. C., provides that: "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with respect to physical delivery of the goods, *despite any reservation of a security interest* * * *." (Emphasis added.) The trial court was correct in denying the defendant credit for products sold to customers which were subsequently returned.

The last assignment of error of the defendant is that the District Court erred in allowing witness fees for Chris Young and Lillian Young who are the sole officers and owners of all the stock of the plaintiff corporation. They testified as witnesses in this case. Section 33-139, R. S. Supp., 1976, provides for the allowance of witness fees in the District Court as follows: "Witnesses before the district court * * * shall receive twenty dollars * * * each day actually employed in attendance on the court, * * *."

The foregoing statute contains no exceptions to the allowance of witness fees. The language of the statute is plain and unambiguous. No interpretation is required to ascertain its meaning. The trial court was correct in awarding witness fees to Chris Young and Lillian Young.

The trial court was correct in all respects in granting a directed verdict for the plaintiff on its amended petition and against the defendant in the sum of $2,624.90 and costs; and its directed verdict for the defendant on its counterclaim against the plaintiff is reversed and the counterclaim is dismissed.

AFFIRMED AS MODIFIED.

SCHOTT GRAIN COMPANY, A CORPORATION, APPELLANT, V. JOHN RASMUSSEN, APPELLEE.
248 N. W. 2d 42

Filed December 22, 1976. No. 40722.

Frauds, Statute of: Estoppel: Contracts: Waiver. Promissory estoppel will not lie against a plea of the statute of frauds, unless the alleged promise relates to the intended abandonment or waiver of a legal right then held or to be held by the promissor.

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

Judy L. Raetz, for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

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

KUNS, Retired District Judge.

This is an appeal from an order dismissing an action for the recovery of damages for breach of contract for the sale of 10,000 bushels of winter wheat. The appellant pleaded the alleged contract; the appellee pleaded that the contract was invalid under the statute of frauds of the Uniform Commercial Code. The appellant argues that the promise by appellee to deliver said grain estopped him from claiming that defense.

Taken in the light most favorable to the appellant, the evidence tends to show the following situation: After some preliminary conversations and negotiations, the appellee promised to sell 10,000 bushels of wheat to the appellant by an oral contract which was never reduced to writing nor performed by either party in whole or in part; and in the expectation of future performance by the appellee, the appellant then obligated itself to sell an equivalent amount of wheat to another buyer and suffered damage when appellee disavowed the oral contract. The trial court dismissed the action

for the reason that the evidence showed that the contract was invalid under the statute of frauds and that the evidence was insufficient to establish any estoppel against the application of the statute. The situation thus reflected is identical with that shown in Farmland Service Coop, Inc. v. Klein, 196 Neb. 538, 244 N. W. 2d 86 (1976). The opinion therein was adopted and filed during the pendency of the appeal in this case. It is not necessary to restate or to amplify the reasoning of that opinion. We adhere to it entirely.

Other assignments of error have been made but the consideration thereof becomes unnecessary in view of the foregoing determination.

The motion for dismissal was properly sustained. The judgment of the trial court is affirmed.

AFFIRMED.

AARON BERMAN, DOING BUSINESS AS BERMAN STEEL CO., APPELLEE AND CROSS-APPELLANT, V. THE UNITED STATES NATIONAL BANK, A NATIONAL BANKING CORPORATION, APPELLANT AND CROSS-APPELLEE.

249 N. W. 2d 187

Filed December 29, 1976. No. 40358.

1. **Uniform Commercial Code: Banks and Banking.** A draft which says it is "payable through" a bank has the effect of designating the bank as a "collecting bank." § 3-120, U. C. C. Ordinarily whether a draft is a "payable through" draft is determinable by an examination of the face of the instrument. However, where the face of the instrument is ambiguous, it is sometimes permissible, depending upon the facts of the particular case, to look behind the instrument to determine whether the bank was in fact performing the functions of a "collecting bank" or those of a "payor bank."
2. **Uniform Commercial Code: Banks and Banking: Words and Phrases.** A "payor bank" means a bank by which an item is payable as drawn or accepted, and "collecting bank" means any

bank handling the item for collection except the payor bank. § 4-105, U. C. C.

3. **Uniform Commercial Code: Banks and Banking: Notice.** A collecting bank has the duty of making presentment, but is not ordered or authorized to pay the instrument out of the drawer's account. It must exercise ordinary care in presenting an item, in sending notice of dishonor or nonpayment, and in returning an unpaid item.
4. **Uniform Commercial Code: Banks and Banking.** A payor bank may charge its customer's account for any items which are properly payable even though the charge may create an overdraft.
5. **Uniform Commercial Code: Banks and Banking: Time.** A payor bank is required to settle for a demand item provisionally by midnight of the day of receipt, or become accountable for the amount unless it returns the item on that day. However, if it has made timely provisional settlement, it may revoke the provisional settlement up until its midnight deadline, that is, midnight on the day following. §§ 4-301, 4-302, U. C. C.
6. ———: ———: ———. A payor bank which failed to return an item to its forwarder by the midnight deadline is accountable to its customer for the late return of the item. This means that it is liable for the amount of the item. § 4-302, U. C. C.
7. ———: ———: ———. A decision by the payor bank not to return a demand item by the midnight deadline makes provisional settlement final. § 4-302, U. C. C.
8. **Uniform Commercial Code: Banks and Banking: Time: Contracts.** Section 4-103, U. C. C., permits variation by agreement of some of the provisions of the Uniform Commercial Code. Section 4-103(2), which reads as follows: "Federal reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled," authorizes clearing agreements creating a deadline earlier than the "midnight deadline."

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

Robert C. Doyle of Morsman, Fike, Davis & Polack, and David J. Lanphier of McGill, Koley & Parsonage, for appellant.

Keith I. Frederick for Schmid, Ford, Mooney, Fred-

erick & Caporale, and Elmer Pybrum for Brunsky, Pybrum, Skemp & Ebey, for appellee.

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

CLINTON, J.

This is an action in seven causes against the defendant, The United States National Bank of Omaha (herein called "Bank"), brought by the plaintiff Berman, a dealer in metals and the payee of five drafts given by Aaron Ferer & Sons Co., another metal dealer, to Berman in payment of a number of carloads of metal sold by Berman to Ferer. The grounds of the first five causes of action were that the Bank failed to honor and pay the drafts when presented and failed to give timely notice of dishonor and nonpayment. The basis of the sixth cause was that, because of the failure of the Bank to give notice of dishonor of the five above-mentioned instruments, Berman was prevented from stopping shipment of a sixth purchase of metal for which payment had not been made and for which no draft was received. The seventh cause prayed for consequential damages on account of injuries to the health of Berman caused by the Bank's alleged bad faith refusal to pay the instruments described in the first five causes.

At the close of Berman's case the trial court sustained the motion of the Bank for dismissal of the seventh cause. At the close of all the evidence the court sustained the motion of the Bank for a directed verdict on the sixth cause and granted Berman's motion for a directed verdict on causes 1 through 5 for the amount of the drafts less the value of two carloads of metal which Berman was able to retrieve.

The Issues and Conclusions

The Bank appeals and makes three assignments of error. First, the trial court erred in directing the verdict for Berman on the first five causes. Second, the

court erred in admitting into evidence a certain clearing agreement between the Federal Reserve Bank, Omaha Branch, the defendant Bank, and certain other Omaha banks. Third, the court erred in refusing to receive the testimony of one Paul Yahnke, an employee of the Bank, whose name had been omitted by the Bank in its answer to Berman's interrogatories requesting the names of prospective witnesses.

The plaintiff cross-appeals, claiming the court erred in dismissing his sixth and seventh causes of action.

On the direct appeal the principal questions argued are whether the Bank was a collecting bank under the provisions of sections 3-120 and 4-105(d), U.C.C., whose obligation was limited to an exercise of reasonable care in the performance of functions and duties imposed upon it as a collecting bank by the Uniform Commercial Code and whose liability is only for the amount of the items handled, less any amount which could have been recovered by Berman in the use of ordinary care, or whether its status is that of a payor bank under section 4-105(b), U.C.C., making it accountable and liable for the face amount of the items by reason of having failed to return them within the time prescribed by law and for having failed to give notice of dishonor or nonpayment within the time prescribed by law. Alternatively, Berman argues that the items described in the first five causes were, in all events, "finally" paid and the Bank is liable for the face amount of the items regardless of whether its status is that of a collecting bank or a payor bank.

We conclude that the competent, material, undisputed evidence establishes that the Bank was a "payor bank" and was accountable when it did not return the items involved in the first four causes of action, and that it is therefore liable for the face amount of those items, less the amounts which Berman did recover by retrieving certain of the goods. We further find that the clearing agreement was properly received in evidence and that

the trial court abused its discretion in excluding the testimony of the witness Yahnke. As to the fifth cause, we find there is a factual dispute as to whether the item was returned within the time provided by law and remand for retrial on that issue only. As to the cross-appeal, we find that Berman's evidence was insufficient to require submission of the issues to the jury.

The Evidence

The substance of the evidence is as follows: The Bank and Chase Manhattan Bank (hereinafter called Chase) had been, for a number of years, financing the operations of Ferer, which dealt in metals on an international scale. Aaron Ferer, the chief officer of Ferer, was a director of the Bank. Ferer had been purchasing metals from Berman for a period of years and over a period of time had purchased from him metal of the value of about $4,000,000. For an undisclosed period of time prior to the transactions here involved, the sales by Berman to Ferer were handled as follows. Berman would notify Ferer of the fact that the shipment was ready for delivery and inform Ferer of the weight and price. Berman would then release the shipment to Ferer, either at Watsonville or Oakland, California. A few days later Ferer would send Berman a draft in payment. This delayed payment arrangement was agreed to by Berman after Ferer had informed him of a "cash flow" problem.

The draft involved in the first cause of action was in the following form:

AARON FERER & SONS CO.
809 ABBOTT DRIVE • PHONE 342-2436 A.C. 402
OMAHA, NEBRASKA 68102
ESTABLISHED 1864

27-5
1040

CK No. 1827

AMOUNT
***61,660.80*

PAY EXACTLY DOLLARS AND CENTS

DATE 4/9/74

PAY TO THE
ORDER OF Berman Steel Co.

THROUGH:
THE UNITED STATES
NATIONAL BANK OF OMAHA

AUTHORIZED SIGNATURES

VOID IF NOT CASHED WITHIN 90 DAYS

The subsequent drafts prepared by Ferer were in identical form except for date and amount. The signatures on the face of the draft were those of Ferer's officers. The second cause of action involved draft No. 1861, dated April 12, 1974, and was in the amount of $121,793.02. The draft involved in the third cause was No. 1843, dated April 10, 1974, and was in the amount of $80,971.95. The draft involved in the fourth cause was No. 1850, also dated April 10, 1974, and was in the amount of $116,089.69. The fifth cause of action involved draft No. 1844, also dated April 10, 1974, and was in the amount of $111,713.56.

Upon receipt of these drafts Berman endorsed and deposited them in his account in the Crocker National Bank in Salinas, California. The depository bank in turn endorsed and transmitted the drafts to the Federal Reserve Bank (herein referred to as Fed) in Omaha. The Fed, upon receipt of the drafts, charged them to the Bank's reserve account at the Fed and then forwarded them, together with other items, accompanied by a transmittal called a "cash letter," to the Bank for payment. The first four drafts were received by the Bank on Thursday, April 18, 1974, and the draft which is the subject of the fifth cause of action was received on Friday, April 19, 1974.

The Bank's procedure for handling such items was as follows. On the day of receipt the items were routed to the proof transit department where they were batched and prepared for data processing. They then went to the computer room where the micro encoding (magnetic ink character recognition) on the bottom of the check was read and they were sorted by the identifying bank numbers. Those items which bore the Bank's number were sorted from transit items which were items drawn on other banks. After sorting, the transit items, the "on us" items, were sorted and provisional postings were made by computer to each individual checking account. After this posting the "on us"

items were sent to the bookkeeping department so that personnel might check endorsements, signatures, and balances in accounts on which the instruments were drawn. In the event there was an overdraft or other problem, an officer of the Bank was notified and a determination was made by that officer whether that item was to be paid or not. The bookkeeping department performed the above functions on the day following the receipt of the item. Instruments not paid were customarily returned to the Fed by 3:30 p.m. the day after receipt by the Bank.

The Bank described instruments such as are here involved as "payable through" drafts and as to those a prelist was made on the day of receipt by the Bank. From the computer those drafts then went to a "payable through clerk" who balanced the prelist. On the day following receipt the payable through clerk balanced her work and prepared a credit to an account in the name of Ferer called the "payable through account." (The function of this account will be later described.) Ferer's regular account had at that time already been debited. At that point at about 8:30 or 9 o'clock a.m., the drafts, along with the prelists, were delivered to the bank officer having charge of commercial loans. This procedure was followed in the case of the drafts here in question. On Friday, April 19, 1974, Ferer, as was customary, picked up from the officer's desk the four drafts which had been received the preceding day, in this instance the drafts which are the basis of the first four causes. The bank officer in charge testified that a written acceptance of the drafts by Ferer was never required, that no conversation between Ferer and the officer needed to ever take place, and that after Ferer picked up the draft nothing remained for the Bank to do so far as Ferer was concerned.

It now becomes pertinent to examine how the financing of Ferer by the Bank and Chase was arranged and carried out. We will then return to the sequence of

events which led to this litigation. Ferer had executed with the Bank under date of April 30, 1970, a $1,100,000 revolving credit demand note by which it agreed to pay the principal amount of the note, "or the aggregate unpaid principal amount of all advances which the bank may hereafter make to the Borrower under this NOTE, whichever amount is less." The note provided for interest to be paid monthly. The note was secured by a security agreement. An appropriate financing statement had been recorded. The security agreement covered "Contract Rights, Inventory, Instruments, Documents of title, Chattel Paper, Accounts," and was given to secure certain described notes and "additional advances." There also existed another "Credit and Security Agreement" bearing date of April 22, 1970, between Ferer, Bank, and Chase. This agreement pertained to the "revolving credit . . . not exceeding $1,100,000" to Ferer from the Bank, and also to loans by Chase to Ferer for drafts which Chase might accept "not exceeding $5,000,000 at any one time outstanding." Among other things the agreement provided for the sharing by the Bank and Chase of loans, benefits of collateral, and payments received from Ferer. The agreement granted Chase, as agent for itself and Bank, a continuing security interest in collateral for "all indebtedness, obligations and liabilities of any kind." The agreement provided that neither Bank nor Chase would, without the consent of the other, make advances in excess of the amounts named. It provided that Chase and Bank would share in the credit and risks and the benefit of collateral and of payments in the proportions of 11/61 for the Bank and 50/61 for Chase. It provided that both Chase and the Bank open on their respective books a "collateral account in the name of Chase." It required Ferer "to deposit in the Collateral Accounts all amounts received by Ferer on account of the Accounts and all proceeds of sales of Inventory, [and that

it should] be held and applied by Chase in accordance with this agreement."

Chase and the Bank were authorized to terminate the credit arrangement at any time. This instrument was dated April 22, 1970.

Under date of February 15, 1973, the Bank and Ferer had executed an instrument called "Agreement as to Payable Through Items." It recited: "WHEREAS, Bank will receive in cash letters or collection letters various items drawn on Customer *for which Bank is required to make provisional settlement on the day of receipt and return or make final settlement on the day following receipt;*" (emphasis supplied), and that Ferer desired an opportunity to inspect and verify said items prior to paying or rejecting them. The agreement, among other things, provided that: "Customer shall make provisional settlement by accepting immediate charge to his account that same day or in lieu thereof by payment by check at the time of delivery. Said items or such as Customer refuses may be returned and the provisional settlement for such returned items revoked on the bank day following." By the terms of the contract *Ferer bound itself to hold the Bank harmless and reimburse it for any loss "in the event Bank incurs any liability on account of failure to return any items within the time permitted by law* or agreement *because of complying with the terms of this agreement."* (Emphasis supplied.)

At the Bank three accounts pertaining to the business of Ferer were maintained. One was the Chase-Ferer collateral account established pursuant to the agreement of April 22, 1970, above-described. In this account Ferer deposited the checks and drafts from sales of inventory. Ferer was not authorized to make withdrawals from this account. The second account was Ferer's general or checking account. This was the account against which Ferer's checks and drafts were charged. Deposits to this account were made by trans-

fers from the collateral account upon authorization by Chase, which was obtained daily by the officer of the Bank whose responsibility was to supervise the Ferer loans and accounts. The third account was the "payable through" account and this was simply a bookkeeping account to enable the Bank to keep an accurate and separate record of the drafts of Ferer received by the Bank under the payable through agreement. The Bank also kept a separate overdraft report on this account although it did not represent any funds deposited. The "overdrafts" on this account were not included in the general overdraft reports.

From at least April 1, 1974, forward, the Ferer general account was in a continuous state of overdraft. The drafts which are the basis of the first four causes of action, along with numerous other items, were debited to this account on April 18, 1974. The overdraft at the end of the day was $1,789,113.90. The draft involved in the fifth cause of action, along with numerous other items, was debited to the account on April 19, 1974. At the end of that day the overdraft in the account was $2,707,381.37. Debits to these accounts are not made by individual item, but in one total for a "batch." The balance in the collateral account at the corresponding times was $126,788.75 and $410,286.11. On both April 18th and 19th, Chase authorized transfers from the collateral account to the regular account which were made. On Monday, April 22nd, a deposit of $608,480.15 was made by Ferer to the general account. On April 22nd, Ferer deposited $2,076,243.69 to the collateral account. This, with other deposits to the account, made a balance at the end of the day in that account of $2,863,849.06. The $2,000,000 plus deposit was made by Ferer pursuant to a call from the officer of the Bank having charge of the Ferer loan and whose duty it was, among other things, to determine how much overdraft to permit in the Ferer general account.

This officer, who was called by Berman as a witness, we will hereafter refer to as V.P.

On April 19th, at about noon, as already noted, Aaron Ferer had picked up from the V.P.'s desk the drafts which had been received on the preceding day, including those here involved. The drafts received on April 19th, including that involved in the fifth cause of action, were ready for Ferer to pick up at noon on April 22nd. However, at that time Aaron Ferer was in New York and the draft which is the basis of the fifth cause was never picked up, nor was payment by Ferer ever refused.

The usual way for overdrafts in the general account to be met or reduced in part was by a transfer from the collateral account pursuant to the agreement of April 22, 1970, after approval by Chase.

Ferer had at no time during the history of the arrangement ever directed that a draft not be paid. As of noon on April 22nd, Ferer had already made the $2,000,000 plus deposit above described and V.P. then considered Ferer's account healthy and anticipated that the usual daily authorization from Chase to make transfers from the collateral account would be given. At 3:29 p.m. on April 22nd permission was refused.

At about 2:30 p.m. on April 22nd, V.P. was called to a meeting with other Bank officers. He was there informed, "Aaron Ferer was in a short position on the London Metal Exchange which could lose them, oh, approximately twenty to twenty-five million dollars . . . . Aaron Ferer was hopelessly in trouble." A decision was made at that time to "return everything we could and the legal question would be resolved later." V.P., pursuant to instructions from his superiors, then went to the Ferer place of business and asked for and received the drafts which had been received by the Bank on April 18th and delivered to Aaron Ferer on April 19th. Those drafts, as well as those of April 19th which Ferer had not picked up on April 22nd, were then marked in-

sufficient funds and were then given to a bank messenger for return to the Fed. The Bank was attempting to get the items to the Fed by a 3:30 p.m. deadline prescribed in the clearing agreement, the admittance of which into evidence is the subject of one of the assigned errors. Objection to the testimony of this messenger was sustained for the reason mentioned in the assignment of errors we earlier set forth. This ruling and other pertinent evidence we will discuss later.

On April 23rd the Bank sent to Berman telegraphed notice that the drafts had been dishonored. Also on April 23rd it reversed the charges of the drafts made to Berman's account on April 18th and 19th. On that day the Bank also decided to return to the payees the items of April 16th and 17th. This was done after apparently retrieving them from Ferer. However, these items were subsequently paid by the Bank as were all the items of the 18th and 19th except those involved in this litigation.

On April 24th the overdraft and note were substantially paid by charging the collateral account. Overdrafts at Chase were removed in similar fashion. The acknowledged purpose of returning the various items was to "protect the bank's position as far as its loan account and its overdraft account was concerned."

Berman's depository bank refused the return of the items because notice and return were untimely. Berman then began this action.

The Contention of the Parties

The Bank's basic position is that the items are "payable through" drafts and as a consequence it was a collecting bank liable only for the exercise of ordinary care in carrying out the obligations imposed upon it; and that if it was in fact negligent, the measure of damages is the face amount of the items reduced by any amount which could not have been realized by ordinary care. It contends that at best the issue of its negligence was a jury question and that since Berman pre-

sented no proof at all that anything could have been realized from Ferer, even if ordinary care had been exercised, it was entitled to a directed verdict because there is no proof of damages in accordance with the legal measure.

Berman's primary position is that the Bank was a "payor bank" under the provisions of the Uniform Commercial Code and, because it failed to return the items or give notice of dishonor or nonpayment before the deadline or the earlier deadline established by the clearing agreement, it was "accountable" under code provisions for the face amount of the items. He also takes the position that irrespective of the Bank's status as a collecting bank or a payor bank, final settlement had been made for the items and the Bank could not reverse the transaction after the deadline for return. We accept Berman's position.

Code Provisions

General

For reasons which will become apparent, we will treat the action of the trial court in the first four causes separately from its action in the fifth. We perceive several separate legal theories upon which the action of the trial court in the first four causes of action must be sustained. However, to found this opinion upon each of them would unduly extend what is already a very lengthy opinion. Nonetheless, some of the grounds are interrelated and some of the interconnections will be apparent as the statutory provisions are discussed.

Article 4 of the Uniform Commercial Code, dealing with bank deposits and collections and the pertinent portions of Articles 1 and 3, are, on their face, complex and their specific application to some factual situations is not readily apparent upon casual reading. In fact, the authorities state that the rules therein laid down are not intended to and do not cover every situation. It is up to the courts to fill in the interstices.

An understanding of our determination makes it nec-

essary to refer to various provisions of the Uniform Commercial Code. In making such references we will, in many instances, simply paraphrase the code provision, using only that part of the section or sentence which we deem pertinent under the factual situation before us, omitting parts which might have bearing in other factual contexts.

It is clear that the instruments here involved are demand instruments. These by definition include instruments payable at sight or at presentation. § 3-108, U.C.C. Such negotiable instruments, if drawn on a bank, are that form of draft known as a check. § 3-104(1)(2), U.C.C.

Section 3-120, U.C.C., provides that an instrument that says that it is "payable through" a bank has the effect of designating that bank as a "collecting bank" to make presentment, but does not of itself authorize the bank to pay the instrument. The comment to that section says: "The bank is not named as drawee, and it is not ordered or even authorized to pay the instrument out of the drawer's account or any other funds of the drawer in its hands. Neither is it required to take the instrument for collection in the absence of special agreement to that effect."

Section 4-105, U.C.C., gives names to the varying functions which banks in the collection chain perform. Among other things it provides that: ". . . unless the context otherwise requires," that "(b) 'Payor bank' means a bank *by which* an item is payable *as drawn or accepted*," and "(d) 'Collecting bank' means any bank handling the item for collection except the payor bank." (Emphasis supplied.)

Both collecting and payor banks are required to perform certain of the duties by a "midnight deadline." The " 'Midnight deadline' with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item." § 4-104(1)(h), U.C.C. " 'Customer' means any person having

an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank." § 4-104(1)(e), U.C.C.

The Collecting Bank

Section 4-202, U.C.C., imposes upon a collecting bank the duty to exercise ordinary care in presenting an item, in sending notice of dishonor or nonpayment, in returning an item, and in settling when the bank receives final settlement. In respect of return of an item, if a bank acts before its midnight deadline following receipt of an item, it acts seasonably. A reasonably longer time may be seasonable, but the bank has the burden of so establishing.

Presentment is a demand for acceptance or payment. § 3-504, U.C.C. Acceptance may be deferred until the close of the next business day following presentment, "but *payment must* be made in any event *before the close of business on the day of presentment.*" § 3-506 (2), U.C.C. (Emphasis supplied.) Where acceptance is required, the acceptance must be in writing by signature of the acceptor. § 3-410(1), U.C.C. Section 4-103 (5), U.C.C., makes the measure of damages the rule which is asserted by the bank, namely, "the amount of the item reduced by an amount which could not have been realized by the use of ordinary care." It also provides for consequential damages proximately caused if there has been bad faith.

A collecting bank which has made a provisional settlement (i.e., a settlement which is subject to revocation), but which itself fails to receive payment, may charge back the item if, by its midnight deadline or within a reasonably longer time after it learns of the facts, it returns the item or gives notice of the pertinent facts. The right to charge back terminates if and when a settlement received becomes final, § 4-212, U.C.C., because of final payment by the payor bank. § 4-213(3), U.C.C. The right to charge back must be exercised promptly. Comment 3, § 4-212, U.C.C.

The code places no duty upon a collecting bank to provisionally settle for an item when it is received for collection. Uniform Commercial Code Practice Handbook (4th Ed.), Bank Deposits & Collections, Clark, Bailey & Young, p. 71.

If a collecting bank receives a settlement that is or becomes final, the bank is accountable to its customer for the amount of any item and any provisional credit given becomes final. § 4-213, U.C.C. By court interpretation accountable means that it is liable for the amount of the item. Rock Island Auction Sales, Inc. v. Empire Packing Co., Inc., 32 Ill. 2d 269, 204 N. E. 2d 721.

The Payor Bank

A payor bank may charge its customer's account for any item which is properly payable even though the charge may create an overdraft. § 4-401(1), U.C.C. A payor bank is liable to its customer for damages proximately caused by a wrongful dishonor. § 4-402, U.C.C.

With respect to items payable on demand, the payor bank's duty to settle or to return the item is governed by section 4-302, U.C.C. It requires the payor bank to settle for the item provisionally by midnight of the day of receipt, or become accountable for the amount unless it returns the item on that day. However, if it has made timely provisional settlement, it may revoke the provisional settlement up until its midnight deadline, that is, midnight on the day following. § 4-301, U.C.C. This section assumes that final payment has not been made under section 4-213(1), U.C.C. If it has, then section 4-301, U.C.C., has no application. See Comment 5, § 4-301, U.C.C.

A payor bank has finally paid an item whenever it has settled for the item without reserving a right to revoke and without having that right under statute, clearing house rule, or agreement, or has completed the process of posting to the indicated account of the drawer, maker, or other person to be charged therewith, or where it has made a provisional settlement and

failed to revoke the settlement in the time and manner permitted by statute, clearing house rule, or agreement. § 4-213(1), U.C.C. *Upon such final payment it is accountable.* Rock Island Auction Sales, Inc. v. Empire Packing Co., Inc., *supra.*

A payor bank's right to exercise a setoff comes too late if it is exercised after the bank has "accepted" or completed the process of posting to the indicated account of the drawer, maker, "or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item," *or after it has become accountable for the late return of the item* by reason of the provisions of sections 4-213(1)(d) and 4-302, U.C.C. § 4-303(1), U.C.C.

Rationale

We now proceed to an application of the above principles to the facts before us. We do not believe that it is undisputably clear that the items are on their face "payable through" drafts. We call attention to the following: They bear the designation "CK" (checks); the form of the instrument does not make clear whether the drawee is the Bank, or Ferer, the maker. Drafts, as distinguished from mere checks, frequently bear the designation "To" before the name of the drawee. There is nothing on the face of the instruments which indicates that acceptance by Ferer or even presentment to Ferer is required; the notation at the bottom, "void if not cashed within 90 days," is more characteristic of a check than a draft since a draft ordinarily, at least, is for immediate presentment; the instruments do not bear the words "payable through," but simply the word "through" in small print followed by the name of the bank. Some courts have determined whether a draft was "payable through" by looking merely at the face of the instrument. See, e.g., Aetna Cas. & Sur. Co. v. Traders Nat. Bank & Trust Co., 514 S. W. 2d 860 (Mo. App.), 15 U.C.C. Rptng. Serv. 1112. Doubtless this is the way in which the determination must ordinarily be

made. However, where ambiguity exists we think another course is, depending upon the facts of the case, permissible. Wilhelm Foods, Inc. v. National Bank of North America, 382 F. Supp. 605, 15 U.C.C. Rptng. Serv. 456. In that case the instrument was ambiguous and the court admitted parol evidence and determined as a matter of fact that the Bank was a collecting and not a payor bank.

We think, therefore, that it is necessary to determine the function that the Bank was in fact performing in order to determine its status as either a "collecting bank" or a "payor bank." When we do this and compare the functions performed with those duties of collecting and payor banks described in the statute, we conclude that under the uncontradicted evidence the Bank was performing the functions of a "payor bank."

We first look at the "Agreement as to Payable Through Items" as well as to what the Bank and Ferer, in fact, did over a long period of time. The agreement itself seems to be a hybrid and would enable the Bank to take either position.

This agreement contemplated "provisional settlement" on the day of receipt and "final settlement" on the day following receipt. These acts refer to the Bank's function as the last agent in the chain of collection from the payee Berman to the maker Ferer. The record establishes that without deviation provisional settlement was made on the day of receipt and final settlement on the day following receipt. As to the maker Ferer, however, the agreement provided a different time schedule. The Bank could, on the day after the receipt, "present" to Ferer by messenger, or Ferer itself would "pickup at Bank." This latter procedure was the process in fact followed. "Pickup" by customer was regarded by the Bank as approval by Ferer to make an "immediate charge." The agreement mentioned payment by check but that was apparently never done. In fact, Ferer seemed to have no source of paying the Bank

by check because its income from sales went into the "collateral accounts" at the Bank or at Chase and which were controlled by Chase as agent for the Bank, with an apparent veto power in its own and the Bank's interest. The agreement recognizes the Bank's liability to its forwarder, the Fed, for late return and accepts Ferer's agreement to reimburse the Bank if it should be liable because of failure to return an item on time.

The Bank uniformly charged the items to Ferer's account even though it created an overdraft. These overdrafts were met or reduced by transfers from the collateral account at the bank after deadline for return of the items had passed.

If the Bank were merely a collecting bank its duties were to make a presentment, which means a demand for acceptance or payment. § 3-504, U.C.C. This it never did. It always paid the drafts by charging Ferer's account and accepting its obligation to pay or reimburse. The decision to pay was made by a bank officer, not by Ferer. This form of procedure follows that performed by a payor bank and not by a collecting bank.

A collecting bank is not required to give immediate credit for the item which it receives for collection. Uniform Commercial Code Practice Handbook (4th Ed.), Bank Deposits & Collections, Clark, Bailey & Young, p. 12. A collecting bank should demand an acceptance and obtain it in writing. §§ 4-202, 3-504, and 3-410(1), U.C.C. In this case the instrument needed no acceptance. It already bore the signature of Ferer and Ferer was already bound thereon to the payee, assuming no failure of consideration. When we consider the agreement and the practice together, the process was different from that used in paying checks only in that Ferer, by being able to pick up the drafts on the day after receipt, was given an opportunity to stop payment. If it did not affirmatively refuse the item, it was considered to be payable. This is analogous to the pro-

cedure for stopping payment on a check. § 4-403, U.C.C. Any decision thereafter, before the midnight deadline, was made by the Bank.

The Bank, of course, had the right not to pay the item if there were insufficient funds provided it chose to return before the midnight deadline. § 4-301, U.C.C. The effect of a decision not to return was to make the provisional settlement final. § 4-302, U.C.C. In connection with the items received on April 18th, we need not at this time consider whether the earlier deadline provided by the "clearing agreement" is applicable because no return was made as to those items before either deadline.

If we look at the situation from a little different perspective, the conclusion is fortified. Assume the same written agreement between the Bank and Ferer and the same course of conduct between them and the same course by the Bank in honoring Ferer's overdrafts. But assume further that at the time the items in question were received instead of having an overdraft there were, in the general account, sufficient funds to pay the items, or alternatively that there were no funds in the general account but adequate funds in the collateral account to pay and an unobligated note to secure any overdraft. Suppose then that Ferer had not come in on the 19th either to pick up the drafts or to exercise its right of refusal or to stop payment, and the Bank, before the midnight deadline (or the 3:30 p.m. deadline if it were applicable), returned the items to the Fed as it would be entitled to do if it were only a collecting bank. Would not in this case the Bank be liable to Ferer for wrongful dishonor by a payor bank under section 4-402, U.C.C.? If that were the question before us the answer would seem to be clear enough. It seems clear to us that the Bank's function was not a shifting one, that is, a collecting bank if Ferer was without funds and a payor bank if it had funds.

In connection with our determination, one item of

evidence should be mentioned. A Bank officer, not the one responsible for supervising the Ferer loan or determining how much overdraft should be permitted, testified by way of conclusion that the reason for having Ferer physically pick up the drafts and take them was for the purpose of giving it an opportunity of "honoring" or "dishonoring." It is apparent that the questions and answers put to this witness were hypothetical and not made with personal knowledge of the facts as they applied to Ferer. This testimony does not furnish the "more than a scintilla" of evidence necessary to create a fact question as to the Bank's status.

We hold that the Bank, as a payor bank, had until the midnight deadline, that is, midnight of April 19th, to return to the Fed the items received on the 18th, or if they could not be returned, to give notice of the facts. It did neither. It was accountable to its customer Berman.

At this point it is pertinent to note three of the specific contentions of the Bank. It contends, citing New York Commercial Code Practice Commentary, that its deadline was extended because the time for return began to run from the dishonor of the items by Ferer. Even assuming that the Bank was a collecting bank, the undisputed fact is that Ferer did not dishonor the draft. Indeed it had no reason to dishonor. It had received the goods at the point of shipment. The Bank likewise contends that it had an additional day by virtue of the provisions of section 4-108(1), U.C.C., to make a good faith effort to collect. Again there is no evidence that it was making a good faith effort to collect from Ferer. After 2:30 p.m. on April 22nd all its efforts were directed to putting itself in a position to exercise a setoff. This it could not do after the midnight deadline of April 19th. § 4-303(1)(e), U.C.C. Before that time it is clear that it intended to accept Ferer's credit. It likewise contends that as a collecting bank it had a right to charge back until settlement became final,

§ 4-212(1), U.C.C., and in connection therewith that section 4-211(3)(c), U.C.C., is the applicable statute. This subsection and others pertain to settlement by remittance instrument. The record clearly demonstrates that settlement was being made by debits and credits between the Bank and the Fed and on down the line to the depository bank. Comments to section 4-211, U.C.C., says that that section "does not purport to deal with 'cash items' . . . settlements merely by debits and credits in accounts between banks . . . or settlements between clearing houses."

Admission of the Clearing Agreement

Pursuant to congressional authorization and under the provisions of Regulation J issued by the Board of Governors of the Federal Reserve System pursuant to the statutes, Federal Reserve Banks are authorized to act as collecting banks.

Berman offered, and there was received in evidence over the Bank's objection, a certain "clearing agreement" between the Fed, the Bank, and other Omaha national banks. It provided that the banks establish reserve accounts at the Fed; that all items drawn on a bank would be charged against the reserve account of the bank on which drawn, providing various rules to be followed, among which was the following: "The drawee bank shall have the right to return all items handled by said Federal Reserve Bank hereunder, . . . to said Omaha Branch not later than 3:30 P.M. on the next business day following the date of receipt of the same"; that settlement on such items returned within the deadline was only provisional; and that upon expiration of the deadline without return the settlement was final. Such agreement altering the provisions of the Uniform Commercial Code are authorized by statute. § 4-103(1), U.C.C.

Objection was made to the admittance of the agreement on the grounds that it was irrelevant and immaterial because it did not pertain to "payable through"

drafts. This contention is, of course, not good if, as we have determined, the drafts were not payable through drafts.

Was the Item Received on the 19th Returned Before the Deadline?

By virtue of paragraph 9 of the clearing agreement previously mentioned, the Bank and the other national banks in Omaha agreed with the Fed on a time for returning items earlier than the midnight deadline, to wit, 3:30 p.m. It also provided that failure to return by the 3:30 p.m. deadline constituted final payment. Clearing agreements modifying deadlines, such as is here involved, seem to be the kind of agreement contemplated by section 4-103(2), U.C.C., which reads: "Federal reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled." See comment 3 to section 4-103, U.C.C. at pages 318, 319. Also, see, Uniform Commercial Code Practice Handbook (4th Ed), Bank Deposits & Collections, Clarke, Bailey & Young, pp. 21, 162, 194, 195; The Law of Bank Deposits, Collections and Credit Cards, Clark & Squillante, pp. 14 to 16.

There exists in the record a factual dispute as to whether the item received on the 19th was returned before this deadline. An employee of the Fed in charge of returned items testified that the items had not been returned when she left the Fed at 4:30 p.m. on the 22nd, a Monday, which was the next banking day following the 19th. She also testified that notice of return of the drafts was not given to the depository bank until April 23rd. An officer of the Bank testified that he handed the items to the messenger Yahnke at about 3:25 or 3:26 p.m. with instructions to return them to the Fed. Yahnke's testimony was excluded for failure of Bank to disclose in answer to interrogatories Yahnke's name as a prospective witness. The offer of proof was that

Yahnke received the drafts at a little before 3:25 p.m., that he proceeded at once to the Fed, and that when he arrived at the return desk of the Fed it was about 3:28 p.m.

We conclude that the trial court abused its discretion in excluding the offer of the testimony of Yahnke. An examination of the bill of exceptions leads us to the belief that long before trial Berman's attorney during pretrial discovery proceedings became aware of the existence of the messenger, but not of his name. Both sides thereafter failed to follow through on an understanding that the name would be obtained. Further, because of the ambiguous nature of the question and answer in the interrogatories which refer to persons who "in any way worked with or handled the A. F. Ferer & Sons account or have any knowledge of the items," we do not feel that a conclusion that the Bank intentionally withheld the name of the witness can be sustained.

The messenger was not one "handling" or "having knowledge" of the "account." As to his knowledge of "items," there is no evidence to show the messenger had any knowledge of the specifics of what he delivered. He would apparently only know that he made a delivery of the items entrusted to him. For the above reasons we reverse the court's finding on the fifth cause and remand it for retrial solely on the issue of whether the item received on the 19th, and which is the basis of the fifth cause of action, was returned to the Fed before the 3:30 p.m. deadline on April 22nd.

We conclude from an examination of the record that the evidence was insufficient to sustain Berman's sixth and seventh causes of action and affirm the action of the trial court in directing the verdict against Berman on these causes.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion

herein because I do not agree with its basic premise that the United States National Bank was a payor bank. I agree that the United States National Bank was a collecting bank in these transactions. The distinction is important as under the Uniform Commercial Code there are different provisions applicable to determine the proper deadline for return of items and for notification of dishonor. The same is true as to the measure of damages for the two types of transactions. The Uniform Commercial Code subjects collecting banks to less stringent return deadlines and damage provisions than it does payor banks.

Notwithstanding the fact the symbol "CK No." is printed on the instruments, they are drafts drawn by Ferer on itself, payable to the order of Berman Steel Company, with the legend printed on the face of the draft "through the United States National Bank of Omaha."

Section 3-120, U.C.C., provides as follows: "An instrument which states that it is 'payable through' a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument." The comment to § 3-120, U.C.C., reads in part as follows: "This section states the commercial understanding as to the effect of such language. The bank is not named as a drawee, and it is not ordered or even authorized to pay the instrument out of the drawer's account or any other funds of the drawer in its hands. Neither is it required to take the instrument for collection in the absence of special agreement to that effect. It is merely designated as a collecting bank through which presentment is properly made to the drawee."

In addition, section 4-105, U.C.C., defines the term "payor bank" as "a bank by which an item is payable as drawn or accepted." Comment 3 to that section states: "Items are sometimes drawn or accepted 'payable through' a particular bank. Under this section and

section 3-120 the 'payable through' bank (if it in fact handles the item) will be a collecting (and often a presenting) bank; it is not a 'payor bank.' "

I agree with the majority opinion as to the reversal on the fifth cause of action, and the affirmance of the action on the cross-appeal. I believe the judgment should also be reversed as to the first four causes of action.

BOSLAUGH, J., joins in this dissent.

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

249 N. W. 2d 200

Filed December 29, 1976. No. 40557.

1. **Criminal Law: Trial: Evidence.** It is a general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible.
2. ———: ———: ———. Where prior offenses of the accused are sufficiently similar to the one charged in the case on trial so that the evidence thereof has probity as to intent, motive, or knowledge, such evidence may be received, and the issue of whether such evidence should be received is generally one left to the discretion of the trial court.
3. **Criminal Law: Trial: Evidence: Statutes.** Evidence of another crime is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404(2), R. R. S. 1943.

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

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

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN, District Judge.

BRODKEY, J.

Defendant, James R. Moore, was convicted by a jury of robbery, rape, and sodomy of Margaret Anne O'Hara, the prosecutrix, and also of the use of a firearm in the commission of those offenses. He was sentenced by the court to serve a term of 15 to 30 years imprisonment on the robbery charge; and to 3 to 10 years imprisonment on the charge of using a firearm in the commission of a felony, those sentences to be served consecutively. Sentencing was deferred on the rape and sodomy convictions; and the District Court subsequently found the defendant to be a sexual sociopath who could not presently be benefited by treatment, and committed him indefinitely to the Nebraska Penal and Correctional Complex, subject to periodic evaluations. In this appeal, defendant asks this court to reverse his conviction and remand the cause for a new trial, his sole assignment of error being that the District Court committed reversible error by admitting into evidence the testimony of one Lorna Jean Nicholson regarding an independent robbery of her and her husband allegedly committed by the defendant approximately 1 month prior to the robbery and other events involved in this case. We affirm.

The facts of this case are not in dispute, and may be summarized as follows. At approximately 12:30 a.m., on June 27, 1975, the prosecutrix and Gregory O'Brien were in their home in Omaha, reading in bed. An intruder entered the house, confronted the two occupants with a gun, and demanded money and jewelry. After taking the money and jewelry the prosecutrix produced, the assailant forced O'Brien to lie face down on the bed, and bound him with the prosecutrix' pantyhose. He then removed the prosecutrix' clothing, forced her to lie face down on the bed, and anally raped her. The

suspect thereafter forced the prosecutrix to the living-room, where he again anally raped her and attempted normal intercourse. Finally, the intruder returned to the bedroom with the prosecutrix, again anally raped her, and also successfully completed vaginal intercourse. The assailant threatened the prosecutrix with a gun the entire time, sometimes holding it to her head, and advised her that her life depended upon her performance. The intruder then left, threatening to return and kill the victims should they call the police. The prosecutrix observed an automobile, described as a 1968 Oldsmobile or Pontiac with a bad exhaust system, being driven away from her house by one occupant.

The police were called after the prosecutrix and O'Brien went to the home of some friends, and the prosecutrix was taken to a hospital for an examination. The doctor who performed the examination found evidence of sperm in the vaginal area, and two parianal lacerations in the rectal area.

The victims of the crimes described their assailant as a short black man with enormous shoulders and a muscular build. They described him as wearing a bizarre tan cap which came down over the ears and forehead, checkered pants, and tennis shoes. The assailant's gun was described as having a cylinder and white handle. The property stolen included earrings, a small amount of money, and a number of pennies, which the intruder placed in one of O'Brien's white socks.

The description the victims gave fit that of the defendant, who was questioned by the police. A police officer obtained permission to search the defendant's apartment and the apartment of his girl friend the day after the crime. The officer found a gun with a white handle and cylinder, clothes which fit the description given by the victims, some earrings, and a white sock full of pennies. The victims subsequently identified the clothing as being similar to that worn by the assailant; identified the gun as being like that used against them;

positively identified the earrings as being those taken by the assailant; and identified the sock the pennies were in as being like that taken on the night of the robbery. The number of pennies in the sock was approximately the same number that was taken. The police officer also testified that the imprint of a tennis shoe found in the defendant's apartment matched a footprint found outside the prosecutrix' home.

A line-up was held the night after the crimes, and both the prosecutrix and O'Brien picked out the defendant as being similar in physical build and facial features to their assailant. They did not make a positive identification, however, both exhibiting concern that they did not wish to accuse the wrong man. At trial, both witnesses again stated that the defendant was similar to the men who committed the crimes, and the prosecutrix stated that she was "almost positive" the defendant was the man, although she was not "one hundred percent positive."

Other evidence at trial showed that the prosecutrix had picked out the defendant's automobile in a parking lot as being similar to the automobile she observed on the night of the crimes. The defendant's automobile had a bad exhaust system, as did the car which was driven from the scene of the crime.

Finally, Mrs. Lorna Jean Nicholson testified on behalf of the State, over the objection of the defendant. She stated that on May 6, 1975, a man entered her home in the early morning hours when she and her husband were preparing to retire. The man burst through the front door, entered the bedroom, and demanded money, threatening the Nicholsons with a gun and knife. The intruder, whom Mrs. Nicholson positively identified as the defendant, forced Mr. Nicholson to lie face down, and bound him with nylons taken from the dresser. He then forced Mrs. Nicholson to give him all the money in the house. Mrs. Nicholson identified the gun found in the apartment of the defendant's girl friend as being

similar to the gun used in the robbery committed against her. The State offered this evidence to show common design, motive, and intent on the part of the defendant in relation to the crimes charged in the present case.

The defendant's sole assignment of error in this case is that the District Court committed reversible error in denying his motion to exclude the testimony of Mrs. Nicholson regarding the independent robbery allegedly committed by the defendant. The defendant, in support of this contention, relies on the general rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Hoffman, 195 Neb. 200, 237 N. W. 2d 403 (1976); State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610 (1975). The reason for this rule is that such evidence is apt to prejudice the defendant in that the jury may convict a defendant because he has a propensity for crime in general, and not because of his specific guilt of the offense with which he is charged. State v. Casados, 188 Neb. 91, 195 N. W. 2d 210 (1972).

The general rule, stated above, is, however, subject to many well-recognized exceptions which have been established and followed in this state, as well as in most of the other states. We have held that evidence of a separate and distinct crime committed by the accused is admissible in the prosecution of a crime that has an element of a motive, criminal intent, or guilty knowledge. Sall v. State, 157 Neb. 688, 61 N. W. 2d 256 (1953). Where prior offenses of the accused are sufficiently similar to the one charged in the case on trial so that the evidence thereof has probity as to intent, motive, or knowledge, such evidence may be received, and the issue of whether such evidence should be received is generally one left to the discretion of the trial court. Sall v. State, *supra*. See, also, State v. Ray, 191 Neb. 702, 217 N. W. 2d 176 (1974); State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87 (1970); State v. Hoffmeyer, 187

Neb. 701, 193 N. W. 2d 760 (1972); State v. Rich, 183 Neb. 128, 158 N. W. 2d 533 (1968). Another exception to the general rule is that the evidence of another crime is admissible if it establishes a course of conduct, scheme, design, or intent. State v. Hoffmeyer, *supra*. Finally, evidence of another crime is admissible if it is relevant to establishing the identity of the accused. State v. Sharp, 184 Neb. 411, 168 N. W. 2d 267 (1969); State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973). The new Nebraska Rules of Evidence are in accord with these principles. Section 27-404(2), R. R. S. 1943, provides as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

We find that the testimony concerning the Nicholson robbery in this case was relevant and material, and was properly admissible under the exceptions to the general rule set forth above. The robbery in this case and the Nicholson robbery were similar in design, nature, and method of operation. In both, the robber entered a home in the early morning hours, demanded money at gun point, and bound the male victim with nylon stockings. In both the intruder threatened the victims with a gun. The evidence of the other crime in this case tended to establish the defendant's method of operation, use, and possession of a particular weapon, and identity.

The defendant contends that the sole purpose of the evidence of the Nicholson robbery was to bolster the State's case because the victims of the crime charged did not make an absolutely positive identification of the defendant. Even if this is true, evidence of other crimes committed by a defendant may be admitted into evidence if they are relevant to the issue of identity. See,

generally, State v. Sharp, *supra;* State v. Brown, *supra.* Other jurisdictions are in accord with this view. See Annotation, Admissibility, in robbery prosecution, of evidence of other robberies, 42 A. L. R. 2d 854, § 5, p. 861, and supplements thereto. In White v. State, 533 S. W. 2d 735 (Tenn. Crim. App., 1975), a robbery case, the court held that evidence of other similar robberies committed by the defendant was admissible to establish the identity of the defendant where the tactics in the other robberies showed a method of operation employed by that defendant. In Hicks v. State, 232 Ga. 393, 207 S. E. 2d 30 (1974), also a robbery case, the court upheld the admission of evidence of other similar robberies on the ground that it was relevant to the issues of identifying the defendant as the guilty party and showing motive, plan, scheme, bent of mind, and course of conduct. We believe these cases are sound, and support our conclusion in this case.

We hold, therefore, that the evidence of the Nicholson robbery was properly admitted into evidence in this case. In so holding, we are aware of the potential prejudice that such evidence creates in cases where the other crime is not similar to, and not relevant to, any of the elements of the crime charged. Our prior cases make clear that the general rule excluding evidence of crimes other than the one charged is to be followed unless the facts in the case clearly warrant application of the exceptions outlined above. See, State v. Atwater, 193 Neb. 563, 228 N. W. 2d 274 (1975); State v. Franklin, *supra;* State v. Casados, *supra.* In this particular case the exceptions do apply, and the judgment of the District Court must be affirmed.

AFFIRMED.

CLINTON, J., concurring in the result.

I concur in the result. I think the evidence of the other crime in this case was admissible because it was relevant in establishing the identity of the accused. I find the portion of the discussion in paragraph 10 of the

majority opinion, beginning with the words, "We have held" and concluding with the citation, "158 N. W. 2d 533 (1968)," wholly unnecessary and confusing because the opinion purports to rely upon all the "principles" discussed.

ALBIN E. KRACMAN ET AL., APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.
248 N. W. 2d 751

Filed December 29, 1976. No. 40589.

1. **Words and Phrases: Statutes: Eminent Domain.** "Attorneys of record" as used in section 76-715.01, R. R. S. 1943, can only mean the attorneys appearing in the specific action being appealed.
2. **Appeal and Error: Notice: Statutes: Eminent Domain: Time.** In an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

William S. Padley of Padley & Dudden, for appellants.

Stewart & Stewart, for appellee.

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

SPENCER, J.

The Kracmans, plaintiffs-appellants, appeal from the dismissal of their condemnation appeal for failure to give proper notice of the filing of the appeal in the District Court for Lincoln County under section 76-715.01, R. R. S. 1943. We affirm.

Plaintiffs appealed from the award of the appraisers in the county court of Lincoln County to the District Court for Lincoln County. The report of the appraisers was filed on August 6, 1975. Plaintiffs' notice of appeal and bond were filed September 2, 1975. An affidavit of service was filed on September 9, 1975, reciting that a copy of the notice of appeal was forwarded to the firm of Kelley & Wallace in North Platte, Nebraska, on September 6, 1975. The parties stipulated the firm of Stewart & Stewart of Lexington appeared of record as attorneys for the Nebraska Public Power District in this case. Kelley & Wallace, who were not the attorneys of record for Nebraska Public Power District in this case, sent the copy of the notice to Stewart & Stewart on September 11, 1975.

Section 76-715.01, R. R. S. 1943, so far as material herein, reads as follows: "The party appealing from the award for assessment of damages by the appraisers in any eminent domain action shall, within thirty days of the filing of the award, file a notice of appeal with the county judge, specifying the parties taking the appeal and the award thereof appealed from, and shall serve a copy of the same upon all parties bound by the award or upon their attorneys of record."

The statute is clear. Copy of the notice shall be served upon all parties bound by the award or upon their attorneys of record. Kelley & Wallace were not the attorneys of record in this case although they were representing the power district in other condemnations. "Attorneys of record" as used in section 76-715.01, R. R. S. 1943, can only mean the attorneys appearing in the specific action being appealed.

In Radil v. State (1967), 182 Neb. 291, 154 N. W. 2d 466, we held: "Section 76-715.01, R. R. S. 1943, provides that in an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all

parties bound by the award. These provisions are mandatory and are in addition to the undertaking required by section 76-716, R. R. S. 1943."

The motion to dismiss was properly sustained. The plaintiffs did not perfect their appeal. We note that even if Kelley & Wallace had been attorneys of record, the notice was served on the 31st day, rather than the 30th day, as provided by the statute. The 30th day in this instance was Friday, September 5, 1975. The notice was served Saturday, September 6. The judgment is affirmed.

AFFIRMED.

GERALD KING, APPELLANT, V. SCHOOL DISTRICT OF OMAHA, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

248 N. W. 2d 752

Filed December 29, 1976. No. 40620.

1. **Statutes.** Legislative intent is the cardinal rule in construction of statutes. To ascertain such intent, the court will not examine an operative provision without likewise examining the statute as a whole in the light of the object and purposes of the act.
2. **Statutes: Legislature.** The Legislature will be presumed to have known preexisting law when it enacted an amendment to a statute.
3. **Statutes: Legislature: National Guard: Salaries.** The provisions of section 55-160, R. R. S. 1943, providing a leave of absence for emergency National Guard duty, and for receipt by the guardsman of that portion of his public salary during such duty as will equal any loss suffered by him, is a separate and distinct provision from other leaves of absence provided in said statute and has application and effect exclusive of such other leave provisions.

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

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Alex M. Clarke of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee.

Heard before WHITE, C. J., McCOWN, and CLINTON, JJ., and STUART and RIST, District Judges.

RIST, District Judge.

This is an action for a declaratory judgment wherein the plaintiff seeks a construction of section 55-160, R. R. S. 1943, which would require the defendant, his employer, to pay his full salary for all working days while he was on active duty with the Nebraska National Guard during an emergency. The trial court determined that under the above statute plaintiff was entitled to receive from the defendant that portion of his salary or compensation as would equal the loss he might suffer while in such active service and entered its judgment accordingly. The plaintiff has appealed from that judgment.

This action was tried upon a joint stipulation of facts by the parties, the relevant portions of which are as follows: Plaintiff was a certified schoolteacher under employment contract with the defendant school district for the school year 1974-75 to teach for approximately 190 days. Plaintiff's salary was payable in 12 monthly installments.

Plaintiff was a member of the Nebraska National Guard and after a tornado struck the City of Omaha on May 6, 1975, was called to active service that date pursuant to a declaration of emergency by the Governor of Nebraska. Plaintiff's guard service for that purpose was from May 6, 1975, through May 13, 1975.

On June 23, 1975, defendant district advised plaintiff by letter that his salary from the district would be reduced by the amount of pay plaintiff received from the National Guard for those days plaintiff was on such active emergency service. Specifically, his salary was reduced on a per diem basis for only those days of

teaching duty during which he was on such active guard duty.

The plaintiff attended a regular summer training camp of the National Guard for 2 weeks during the summer of 1975, during which time he had no school duties to perform and thus missed no school duty days as a result of such attendance.

The parties agree that section 55-160, R. R. S. 1943, is the controlling statute with respect to school salary and National Guard service during emergency active duty.

Section 55-160, R. R. S. 1943, provides that: "All employees * * * of the State of Nebraska, or any political subdivision thereof, who shall be members of the National Guard * * * shall be entitled to leave of absence from their respective duties, without loss of pay, on all days during which they are employed with or without pay under the orders or authorization of competent authority in the active service of the state * * * for not to exceed fifteen work days in any one calendar year. * * * When the Governor of this state shall declare that a state of emergency exists, and any of the persons named in this section are ordered to active service of the state, an additional leave of absence will be granted until such member is released from active service by competent authority. During the additional leave of absence because of the call of the Governor, any * * * employee subject to the provisions of this section shall receive such portion of his salary or compensation as will equal the loss he may suffer while in active service of the state."

Section 55-104, R. R. S. 1943, provides that unless the context otherwise requires, the words "active service of the state" shall mean "service on behalf of this state, in case of public disaster, war, riot, invasion, insurrection resisting of process, or in case of imminent danger of the occurrence of any such events, whenever called upon in aid of civil authorities, at encampments whether ordered by state or federal authority, at periods of

drill and any other training or service required under state or federal law, regulations or orders, or upon any other duty requiring the entire time of the * * * person."

Section 55-114, R. R. S. 1943, provides in part: "The Nebraska National Guard shall encamp for instruction not less than fifteen days annually at such time, place, or places as may be ordered by the Governor."

Plaintiff's argument appears to be that the provisions of section 55-160 should be applied in consecutive order, that is, that the first 15 days of active service each calendar year are to be without any reduction in the employee's salary from his public employer, whether such service be of an emergency nature or otherwise, and thereafter, if an emergency is declared and the employee called to active service, he would receive from his employer during such emergency duty the difference between his normal employment salary and his National Guard pay.

Defendant's argument is that regular employment salary during emergency duty is governed specifically by the provisions requiring the employer to pay the difference between regular employment salary and National Guard pay regardless of when such service is rendered during the year and that the provision for 15 days regular employment pay without deduction applies to all other periods of active duty, exclusive of emergency duty, whenever such duty is performed. The trial court accepted this position.

The following rules governing statutory construction are applicable in this case: Legislative intent is the cardinal rule in the construction of statutes. Pettigrew v. Home Ins. Co., 191 Neb. 312, 214 N. W. 2d 920. To ascertain such intent, the court will not examine an operative provision without likewise examining the statute as a whole in the light of objects and purposes of the act. State v. Neal, 187 Neb. 413, 191 N. W. 2d 458. The Legislature will be presumed to have known

preexisting law when it enacted an amendment to a statute. Insurance Co. of North America v. County of Hall, 188 Neb. 609, 198 N. W. 2d 490.

In applying the foregoing rules we note that section 55-160 was enacted in its present form in 1969 when that portion of the section beginning with the words "when the Governor of this State * * *" was added by amendment. Prior to that date the statute was designated as section 55-156.01, R. R. S. 1943 (Reissue 1960), and provided in substance for 15 days leave of absence for active duty each year without loss of regular employment salary and with no further qualification. It was essentially the same as that part of section 55-160 preceding the portion added by amendment in 1969.

The amendment of 1969 added the provision that when a state of emergency is declared by the Governor and a guardsman is called to active service, he shall have an additional leave of absence and shall receive during such service that portion of his salary as will equal the loss he may have suffered while in such active service. It is clear that this means he will receive his regular salary during such service less his guard pay for that period. It is also clear that the Legislature intended this as an additional provision for leave and pay to that which previously existed.

We also note the 1969 amendment to section 55-114, R. R. S. 1943, which requires not less than 15 days annual encampment for training and instruction. This statute is still in effect and is mandatory in its terms. Under the rules of construction previously noted the Legislature is presumed to have known the provisions of this statute when it enacted the amendment to section 55-160.

It is also material to the interpretation of section 55-160 that it applies to *all* employees of the State and any political subdivisions thereof, not just to a person who teaches in the public schools. We take judicial notice of

the fact that most such employment is continuous throughout the year and not just for approximately 190 working days as is common for teaching employment. This circumstance must be assumed to have been known by the Legislature.

With the above facts in mind and taking into account the language used in section 55-160, it is clear that the Legislature intended that nonemergency duty result in no salary deduction for 15 days and that salary during emergency duty be adjusted as provided in the 1969 amendment so that the guardsman would suffer no financial loss insofar as salary is concerned. If it were otherwise and the statute interpreted as suggested by plaintiff, a guardsman could be called to emergency duty for 15 days or less early in the year before any other duty was required and receive his salary in full; but when he later reported for other duty under section 55-114 he would receive no part of his salary for any duty period beyond the initial 15 days for that year. We are satisfied this is not what the Legislature intended.

The statement of the introducer of the amendment noted by plaintiff in his brief is appropriate, namely, that it was necessary to keep up the morale of the guardsmen and reduce the sacrifice of the enlisted men when ordered to active duty. This end would not be accomplished under the usual employment of guardsmen unless emergency duty is treated as a separate and distinct leave of absence with the accompanying salary provisions there contained.

Plaintiff argues that section 55-104 (2), R. R. S. 1943, defines active service as including duty during cases of public disaster when so ordered and that this emergency service is within the meaning of active service as used in the first portion of section 55-160 providing for 15 days without any reduction of employment salary. While it is true that section 55-104 (2) so defines active service, it is also true that the Legislature has the right,

for purposes of salary consideration, to distinguish the types of service within the all-inclusive definition of this statute and when the language of the appropriate statute does so in clear fashion, as we find section 55-160 does, it cannot be ignored and must be given meaning and effect.

The trial court's decision was correct and is affirmed.

AFFIRMED.

LARRY G. BONNES, APPELLEE, V. DON OLSON ET AL., APPELLANTS.
248 N. W. 2d 756

Filed December 29, 1976. No. 40689.

1. **Motor Vehicles: Negligence.** The driver of an automobile entering an intersection is obligated to look for approaching automobiles and see any vehicle within the radius which denotes the limit of danger, and if he fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.
2. ———: ———. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner, and until he has such warning, notice or knowledge, he may govern his acts in accordance with such assumption.
3. **Motor Vehicles: Negligence: Proximate Cause.** It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury.

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

Timothy J. Pugh of Boland, Mullin & Walsh, for appellants.

William E. Gast and Ronald H. Stave of Emil F. Sodoro Law Offices, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action to recover damages arising from a collision of a motorcycle operated by the plaintiff and an automobile driven by the defendant Mardelle Olson and which was maintained as a family purpose automobile by the defendant Don Olson. The accident occurred on April 1, 1974, at the intersection of 99th and Maple Streets in Omaha, Douglas County, Nebraska. At the close of all the evidence the plaintiff's motion for a directed verdict on the issue of liability was sustained by the trial court. The trial court also overruled the defendants' motion for a directed verdict against the plaintiff and submitted the case to the jury on the sole issue of damages. The jury found for the plaintiff against the defendants and judgment was entered for the amount of the jury's verdict. The defendants' motion for new trial and for judgment notwithstanding the verdict were overruled. The defendants appeal, assigning as error the trial court's sustaining the plaintiff's motion for a directed verdict on the issue of liability, and the trial court's refusal to submit both the issues of the defendant driver's negligence and the plaintiff's contributory negligence to the jury. We hold that the trial court did not err in sustaining the plaintiff's motion for a directed verdict on the issue of liability and the judgment entered by the trial court is affirmed.

We briefly review the evidence as to the issue of liability. The plaintiff was proceeding home from work on his Honda motorcycle at about 4 p.m. on April 1, 1974. He made a right turn on Maple Street at the 102nd Street intersection, and at the time of the accident was traveling east on the north eastbound lane of Maple Street approaching the intersection of 99th and Maple Streets. Maple Street is a four-lane, concrete paved street that runs east and west in the City

of Omaha, Nebraska. It consists of two westbound lanes and two eastbound lanes each 26 feet in width, separated by a median also 26 feet in width. Ninety-ninth Street is a two-lane street running in a north-south direction. The street is designated 99th Street as it proceeds south from Maple Street but is called Maplewood Boulevard on the north side of Maple Street directly across from 99th Street. Maple Street is a favored arterial at this intersection and is protected by stop signs on 99th Street and Maplewood Boulevard.

The defendant Mardelle Olson, hereafter designated as defendant, testified that she was operating a 1967 Buick automobile in a southerly direction on Maplewood Boulevard and on reaching Maple Street stopped at the stop sign on the northwest corner of the intersection. The defendant then proceeded into the intersection crossing the westbound lanes of Maple Street into the median. The defendant stated that she did not come to a complete stop on the median but did slow her vehicle to about 2 or 3 miles an hour. As the defendant approached the eastbound lanes of Maple Street she stated she looked both to the west and to the east and did not see the approaching motorcycle of the plaintiff, whereupon she looked forward, placed her foot on the accelerator and proceeded into the north eastbound lane between 5 and 10 miles per hour until the impact occurred with plaintiff's motorcycle in about the middle of the north eastbound lane of Maple Street. Although there were no obstructions to her view to the west the defendant stated she never saw the plaintiff's motorcycle until the time of the actual impact.

The plaintiff testified that immediately prior to the accident he was operating his motorcycle in the inside or north eastbound lane of Maple Street at a speed between 30 and 35 miles per hour. His testimony from his deposition was that he was going "right around forty." An eyewitness to the accident fixed plaintiff's speed at 40 to 45 miles per hour. The speed limit on Maple

Street at this intersection was 45 miles per hour. The plaintiff further testified that he first saw the defendant's automobile when it was 10 to 20 feet away, and that it then suddenly accelerated from a stopped position into the intersection and into his path too late for him to avoid the collision.

Defendant contends that the intersecting streets at the scene of the accident consisted of but one intersection and that the defendant, having entered the intersection first when crossing the westbound lanes of Maple Street, possessed the right-of-way. Section 39-602 (37), R. R. S. 1943, provides that when two roadways of an intersecting highway are 30 feet or more apart, "then every crossing of two roadways of such highways shall be regarded as a separate intersection." The median between the eastbound and westbound lanes of Maple Street was 26 feet. We are of the opinion, however, under the facts of this case it is immaterial whether the median at this intersection is 26 feet or more than 30 feet. The usual rules of the road are to be applied in this case whether the defendant was attempting to cross one or two intersections. The crossing of the four-lane Maple Street arterial by the defendant imposed upon her continuing duties with respect to the traffic on the arterial street.

The evidence is uncontroverted in this case that the defendant was negligent in either failing to look for approaching vehicles eastbound on Maple Street within the radius of danger or, having looked, in failing to see the plaintiff's motorcycle. Our court has held in a well-established line of cases that if a driver "fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law." Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848. See, also, Cappel v. Reiner, 167 Neb. 375, 93 N. W. 2d 36; Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652. The duty of a driver of a vehicle to look for vehicles approaching on the highway implies the duty to see

what is in plain sight. Nichols v. McArdle, *supra.* The trial court did not err in failing to submit the issue of the defendant's negligence to the jury.

We now turn to the remaining issue raised by the defendant that the trial court erred in not submitting the issue of the plaintiff's contributory negligence to the jury. The evidence is uncontradicted that the plaintiff first saw the defendant's automobile when it was 10 to 20 feet away. Whether the defendant's car was stopped at that time, or was moving at approximately 2 miles per hour, the defendant suddenly accelerated her automobile into the intersection where it was too late for the plaintiff to avoid the accident.

Our court has held that a plaintiff cannot be contributorily negligent where he has no reason to anticipate the entrance onto an arterial of an automobile from an intersecting road and had no reasonable opportunity to avoid the ensuing accident. Nichols v. McArdle, *supra;* Colton v. Benes, *supra;* Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235; Van Ostrand v. Beccard, 188 Neb. 326, 196 N. W. 2d 385; Nistor v. Therkildsen, 181 Neb. 817, 151 N. W. 2d 443.

The plaintiff had the right to assume the defendant would use the highway in a lawful manner until he was given warning or notice to the contrary. The contention of the defendant that the plaintiff was negligent in not having observed the defendant for a greater period of time is rejected for the reason that he would have still seen the defendant in a near stationary position and was entitled to rely on the assumption that the defendant would yield the right-of-way to him.

It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury. Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201. The evidence in the record of this case clearly establishes that the sole proximate cause of the collision between the vehicles of the parties was the negligence

of the defendant and that the defense of contributory negligence is not sustained by the evidence. The trial court was correct in directing a verdict for the plaintiff on the issue of liability. We affirm the judgment entered by the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. WALKER, APPELLANT.

248 N. W. 2d 759

Filed December 29, 1976. No. 40750.

1. **Criminal Law: Manslaughter: Words and Phrases.** Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act.
2. **Criminal Law: Homicide: Instructions: Trial.** It is the duty of the court, in a trial for homicide, to instruct only on those degrees of homicide which find support in the evidence.

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

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

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

NEWTON, J.

Defendant, on a charge of first-degree murder, was convicted of second-degree murder. On appeal he assigns as error the failure of the court to instruct the jury on the crime of manslaughter and alleged excessiveness of the sentence to life imprisonment. We affirm the judgment of the District Court.

The defendant and his wife were separated. He intercepted her as she was leaving her place of employ-

ment in an automobile operated by her brother. She was killed while sitting in the automobile. Defendant admitted he had a gun but testified that in a tussle with his brother-in-law he dropped the gun and it discharged twice. He maintained he had no intention of shooting his wife and that what occurred was accidental. The automobile door had not been opened and apparently there were no bullet holes in it as there would have been if his wife had been killed by a discharge of the gun when it was dropped to the ground. Medical evidence showed she was shot four times, once with the gun held against her forehead as demonstrated by a ring of powder marks or burns.

The basis for the assertion that an instruction on manslaughter should have been given is the testimony of the defendant above outlined. This testimony was contradicted by the brother-in-law and the physical facts demonstrate that it is absolutely incredible. "Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act." State v. Worley, 178 Neb. 232, 132 N. W. 2d 764.

It is the duty of the court, in a trial for homicide, to instruct only on those degrees of homicide which find support in the evidence. See State v. Worley, *supra*.

In this instance the record fails to disclose any credible evidence of any nature which would support an instruction in regard to manslaughter. The killing was obviously premeditated, deliberate, and intentional. The evidence fails to disclose any extenuating circumstances but, on the contrary, would definitely support a conviction for first-degree murder had such been returned by the jury. Under such circumstances we cannot rule that the sentence is excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HOWARD LEVERN SNIDER, APPELLANT.
248 N. W. 2d 342

Filed January 5, 1977. No. 40582.

1. **Probation and Parole: Presentence Reports: Statutes.** Section 29-2261, R. R. S. 1943, does not require a second, or successive, presentence investigation before an order revoking probation is entered where a presentence investigation was made and considered following the original conviction and before the order of probation was entered. Whether a second, or successive, investigation and report are required rests in the sound discretion of the sentencing judge.
2. **Criminal Law: Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed as modified.

Joseph A. Shaughnessy, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, 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 a term of probation which had been imposed upon the defendant after he entered a plea of guilty to a charge of killing

a steer contrary to the provisions of section 28-550, R. R. S. 1943. Upon revocation the defendant was sentenced to a term of 1 to 2 years in the Nebraska Penal and Correctional Complex with credit being given for time spent in the county jail awaiting hearing.

On this appeal he makes the following assignments of error: (1) The court, previous to sentencing, failed to consider a presentence report as required by section 29-2261, R. R. S. 1943. (2) The court erred in modifying the sentence after it had been imposed. (3) The probation should not have been revoked because the probation officer charged with supervising the defendant did not properly perform his duties. We affirm as modified.

Section 29-2261, R. R. S. 1943, provides in part: "(1) Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation." The record shows: The violation of section 28-550, R. R. S. 1943, occurred in January 1975. The sentence of probation was imposed on March 28, 1975, and was preceded by a probable cause hearing before an impartial magistrate. Previous to imposition of the probation sentence, a presentence investigation was made and a written report thereof was considered by the court before the order was entered. In July of 1975 the defendant entered a plea of guilty to violation of the probation order. The court ordered a supplemental presentence investigation, received and considered it, and then entered an order continuing the probation. On December 5, 1975, the defendant was again (after a probable cause hearing before an impartial magistrate) before the District Court for violation of the order of probation. The charge of probation violation in this instance arose from a conviction in the county court for assault and battery. Before imposing the sen-

tence now before us, the court inquired of the probation officer whether a supplemental presentence investigation was indicated, the court already having again considered the two previous reports. The probation officer informed the court that he thought none was required as the defendant had been in jail for 3 of the 4 months since the supplemental report and there was nothing to report which was not known to the court by virtue of the transcript of the assault and battery charge which had been received in evidence. The court then made a finding that a presentence investigation was impractical and imposed sentence.

It is to be noted that section 29-2261, R. R. S. 1943, does not by its literal terms require a multiple presentence investigation in situations such as is before us. We hold that whether successive presentence investigations are necessary before the revocation of an order of probation is entered rests in the sound discretion of the sentencing judge.

The second assignment of error grows out of the following circumstances. Immediately after the court imposed the sentence the defendant left the courtroom and slammed the door behind him "almost breaking the glass." The sentencing judge then immediately ordered the defendant brought back into the courtroom, informed him that he was a "most unruly prisoner," and resentenced him to a term of 1 to 2 years without credit for the jail time which had been allowed in the previously announced sentence. It is to be noted that the change in this instance was not the clarification of an ambiguity or correction of a prior misstatement in announcing sentence. The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity. State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90. The modification of sentence after its imposition in this case was a nullity. The original sentence is reinstated. The question of whether the defendant's conduct above

described may have constituted contempt is not before us as it is clear that the court did not proceed to punish for contempt.

The defendant's third assignment is singularly unmeritorious. It is founded on the theory that the probation officer did not properly supervise the defendant because he did not require written reports from the defendant and did not make a direction to the defendant as to where he should live, both required by the terms of the order of probation. During 3 of the 4 months in question the defendant was serving a sentence in the county jail. Even if we were to assume that the foregoing showed a neglect of duty by the probation officer, it would scarcely require that probation be continued.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF LOUIS T. DAVIES, DECEASED. ELIZABETH DELONG DAVIES, EXECUTRIX OF THE ESTATE OF LOUIS T. DAVIES, DECEASED, APPELLEE, V. MARION R. REESE ET AL., APPELLANTS.

248 N. W. 2d 344

Filed January 5, 1977. No. 40599.

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

Leroy Shuster and Richard L. Schmeling, for appellants.

Knudsen, Berkheimer, Endacott & Beam, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and CANIGLIA and COADY, District Judges.

CANIGLIA, District Judge.

Marion R. Reese appeals from a ruling of the District Court for Lancaster County, Lincoln, Nebraska,

dismissing her claim against the estate of Dr. Louis T. Davies.

This is a malpractice suit resulting from the diagnosis and treatment of Mrs. Reese by Dr. Davies, during a period extending from April 8, 1970, to April 26, 1973. Dr. Davies died on October 11, 1974, and Mrs. Reese filed a claim against his estate alleging that he was negligent in diagnosing and treating a lump in her breast during approximately 20 consultations. Relying on section 25-222, R. S. Supp., 1974, the county court and subsequently, on appeal the District Court each denied the claim and ruled that the claim was barred by the statute of limitations as set forth in section 25-222, R. S. Supp., 1974.

A further statement of facts and dates is necessary. Section 25-222, R. S. Supp., 1974, provides as follows: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; Provided, if the cause of action is not discovered and could not be reasonably discovered within such two-year period then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; and provided further, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional services which provides the basis for the cause of action."

In order to apply the limitations in section 25-222, R. S. Supp., 1974, a further statement of facts and dates as alleged is necessary. On April 8, 1970, Mrs. Reese consulted the decedent Dr. Louis T. Davies, a practicing

physician in the City of Lincoln, Nebraska, concerning a growth in her left breast. Dr. Davies advised her without ever conducting a needle biopsy, mammography, or other pathological tests that the growth was not cancerous, but instead was mastitis. Thereafter, Mrs. Reese continued to consult with Dr. Davies during the next 18 months concerning the lump in her breast and consulted him 21 times between April 8, 1970, and November 9, 1972, and on each occasion, except as diagnosed on November 9, 1972, Dr. Davies' diagnosis, as previously stated, was that the growth was mastitis and was made without conducting the needle biopsy, mammography, or other medically recognized pathology tests.

On November 9, 1972, Dr. Davies advised Mrs. Reese that the growth was a tumor and would have to be removed. However, he did not indicate to Mrs. Reese that the tumor was cancerous nor did he perform any of the medical tests herein referred to and he did not indicate any cause or reason for immediate surgery. Appellant, however, took immediate steps to hospitalize herself and on November 13, 1972, a radical mastectomy was performed on her.

The appellant claims that the diagnosis and treatment on November 9, 1972, was negligent and that the statute of limitations commences to run from that date.

The appellee claims that the diagnosis and treatment of November 9, 1972, was not negligent; that the last negligent diagnosis and treatment occurred on September 15, 1972; and that the statute of limitations commences to run as of that date.

Accordingly, if the diagnosis and treatment made by Dr. Davies on November 9, 1972, was not negligent then appellant would have to rely on the September 15, 1972, diagnosis and treatment and her claim would have been barred as of the date of Dr. Davies' death on October 11, 1974; however, if the diagnosis and treatment on November 9, 1972, was negligent then the cause of action

would not have been outlawed until November 9, 1974, and was not barred on the date of Dr. Davies' death.

A discussion of the treatment of November 9, 1972, which appellant claims is the last negligent diagnosis and treatment is in order. On that date, November 9, 1972, Dr. Davies correctly diagnosed the growth as a tumor. However, he did not indicate to Mrs. Reese that the tumor was cancerous, he did not perform any of the medical tests herein referred to that are accepted and medically recognized pathological tests, and he did not indicate any cause for alarm or need for surgery. This continuing failure by Dr. Davies to utilize diagnostic techniques commonly employed and recognized was alleged to be negligence on his part, and his failure on November 9, 1972, to perform any of the tests was simply the last event in a course of treatment which could be found to be negligent.

It follows therefore that the last alleged negligent diagnosis and treatment by Dr. Davies was on November 9, 1972, and the suit for malpractice against Dr. Davies did not become outlawed until November 9, 1974, and conversely, was on October 11, 1974, within the statutory period of limitations.

It follows that the ruling by the District Court for Lancaster County was erroneous and is reversed.

REVERSED.

CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, V. FRANCIS P. MATTHEWS, JR., ET AL., APPELLEES.

248 N. W. 2d 761

Filed January 5, 1977. No. 40678.

1. **Property: Municipal Corporations: Damages.** Sanitary sewer connections running from private property to a city or district sewer main are privately owned and may not be appropriated or destroyed by the city without compensation to the owner.

2. **Property: Municipal Corporations.** The right to use district or city sewers is one common to all property owners and it cannot be denied unreasonably, arbitrarily, or discriminatorily.
3. **Property: Municipal Corporations: Damages: Torts: Actions.** When private property is damaged in the course of a public improvement, the owner may seek compensation by an action in inverse condemnation or in tort.

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

Herbert M. Fitle, Verne W. Vance, Roger R. Holthaus, and Donald L. Knowles, for appellants.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellees.

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and RONIN, District Judge.

NEWTON, J.

In this action plaintiffs seek to enjoin defendants from prosecuting an inverse condemnation action for alleged damages to their properties in the city of Omaha, Nebraska. Judgment was for defendants. We affirm the judgment of the District Court.

The defendants are the owners of two buildings on 19th Street between Farnam and Harney Streets in Omaha. The block directly to the east between 19th and 18th Streets was acquired by the Omaha-Douglas Public Building Commission created under Chapter 23, article 26, R. R. S. 1943. Defendants alleged that in building on the block acquired by the defendant commission, the sanitary sewer service running from their buildings to a sewer on 19th Street was disrupted and destroyed. Defendants filed an inverse condemnation action under sections 76-705 et seq., R. R. S. 1943, for the purpose of ascertaining and recovering damages. Injunction having been denied, plaintiffs appeal. They assign as error the finding that inverse condemnation is a proper remedy and that the judgment is not supported by the evidence.

Plaintiffs assert that defendants had no vested rights in the 19th Street sewer or in its use. Under Nebraska law a city of the metropolitan class may establish sewer districts, regulate the construction, repair, and use of the sewers, provide penalties for their injury and obstruction, issue permits for connections and require property owners to make such connections at their own expense, fix charges for use of the sewage system, and levy special assessments. See Chapter 14, article 3, R. R. S. 1943. Connections or laterals necessarily start in the property of the private owner, extend through or across such property, and into the public streets or alleys to the sewer mains constructed by the sewer districts. Property owners do not ordinarily acquire vested interests in the sewer mains or in their use in a given location or condition, but it is the duty of the city to keep them in repair and in useable condition except in the face of extraordinary or unusual conditions beyond its control and it may assess penalties for damage or obstruction of the sewers. Although an abutting owner does not have a vested interest in the location of a street or highway in a given location, or in its maintenance in a given condition, it is generally held that he is entitled to compensation if ingress and egress to the street is unreasonably restricted or if the street is vacated. See W.E.W. Truck Lines, Inc. v. State, 178 Neb. 218, 132 N. W. 2d 782. The situation presented is somewhat analogous. In this instance we deal with a public utility located in a street. Property owners are compelled to pay for its use and to use it. Connecting lines are installed by and at the expense of property owners. The disposal of sewage from these private properties is essential and impairment of the means of doing so definitely damages the private connections to the city sewer and the value of the properties. Ordinarily privileges acquired by license or permit are revocable under the police power without the payment of compensation. See 2 Nichols on Eminent Domain (3d Ed.), § 5.751, p.

5-241. No vested interests are acquired in such things as grazing permits and liquor licenses. Such licenses and permits simply confer a benefit on the recipient which he has sought. There is no element of compulsion, and deprivation of the privilege does not ordinarily affect property values. The situation is different here. Disposition of sewage collected on the plaintiffs' properties is an absolute essential. Owners are required to use the city sewer system and to install laterals of a private nature. The right to use district or city sewers is one common to all property owners and it cannot be denied unreasonably, arbitrarily, or discriminatorily. See, Rogers v. First Sewerage Dist. of City of Lake Charles (La. App.), 171 So. 2d 820; 11 McQuillin, Municipal Corporations (3d Ed.), § 31.30, p. 242. Except where a property owner fails to comply with reasonable regulations or the public welfare requires, this right cannot be denied or destroyed. No such situation appears here. On the contrary, the city has tortiously interfered with and destroyed the plaintiffs' sewer connection. It has, in essence, appropriated it without compensating the owners. To the extent of the right to use the sewer by means of the connections or laterals previously installed under the city's supervision, we hold that a property right can be and has been acquired which cannot be unreasonably destroyed without compensation. It is stated in 11 McQuillin, Municipal Corporations (3d Ed.), § 31.09, p. 193: "Private sewers and drains may become the property of the municipal corporation by purchase or by dedication duly accepted by the municipal authorities; also by annexation, or prescription; and in some cases private sewer lines are regarded as becoming municipal lines merely through connection and integration in the latter; however, they cannot be taken by the public, or damaged in the construction of other sewers by the municipality without compensation to such private owners, since such private sewers and drains are viewed as property within the

meaning of the constitutional provisions relating to the exercise of eminent domain." See, also, Zirkle v. City of Kingston, 217 Tenn. 210, 396 S. W. 2d 356; Bragg v. City of Rutland, 70 Vt. 606, 41 A. 578; Gunn v. City of Versailles (Mo. App.), 330 S. W. 2d 257.

Plaintiffs contend that an inverse condemnation action cannot lie because the Omaha-Douglas Public Building Commission did not have the power of condemnation. This assertion is erroneous. See § 23-2604 (1) and (4), R. R. S. 1943. It is also urged that it will not lie except in instances where a condemnation action by reason of the taking of property was permissible. The commission had the power of condemnation and it may be exercised whenever property is damaged for public use. An actual taking of property is not required. See, Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781; Patrick v. City of Bellevue, 164 Neb. 196, 82 N. W. 2d 274.

It is also asserted that an inverse condemnation action will not lie because defendants could have sued in tort for the damage done. They cite Nemaha Valley Drainage Dist. v. Marconnit, 90 Neb. 514, 134 N. W. 177, in support of this proposition. The case holds the contrary. It states: "But a drainage district * * * is a public corporation * * * and, as such, liable to pay for lands taken or damaged whether the obligation is enforced by condemnation proceedings or by civil action."

On review of the evidence submitted, we find that it is sufficient to sustain the judgment of the District Court. "Actions in equity on appeal to the Supreme Court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Pinney v. Hill, 191 Neb. 844, 218 N. W. 2d 212.

The judgment of the District Court is affirmed.

AFFIRMED.

DICK SCHAFFER ET AL., DOING BUSINESS AS ACTION AD OF IOWA-NEBRASKA, APPELLANTS, V. CITY OF OMAHA, NEBRASKA, ET AL., APPELLEES.

248 N. W. 2d 764

Filed January 5, 1977. No. 40683.

1. **Municipal Corporations: Statutes: Zoning.** Cities of the metropolitan class are authorized by statute to make and enforce police regulations required for the good government, general welfare, health, safety, and security of the city and its citizens, including zoning regulations.
2. **Municipal Corporations: Constitutional Law.** Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned.
3. **Municipal Corporations: Ordinances: Zoning.** The Omaha ordinances pertaining to signs appear to be reasonable in the light of the public welfare, health, safety, and security.
4. **Municipal Corporations: Ordinances: Courts.** The adoption of ordinances under the police power is a legislative act and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment.
5. **Municipal Corporations: Ordinances: Evidence.** Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence.
6. **Municipal Corporations: Burden of Proof: Ordinances: Evidence.** The burden is upon the party attacking an ordinance to show its invalidity by clear and unequivocal evidence unless it appears on its face to be so.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

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

Herbert M. Fitle and Allen L. Morrow, for appellees.

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

NEWTON, J.

This is an action for injunctive relief from the effect or enforcement of present ordinances of the city of Omaha regarding advertising signs and their use in various zoning areas as related to the type of signs offered by plaintiffs. The ordinances were adopted before the development of the type of signs belonging to plaintiffs and do not encompass regulations specifically pertaining to the construction and use of plaintiffs' signs. In essence, plaintiffs' complaint is the refusal of the city authorities to adopt an ordinance permitting their use. Judgment in the District Court was for the defendant city. We affirm that judgment.

Plaintiffs' signs are constructed on a base supported by two wheels rendering them of a mobile nature. When in use they are raised slightly off the wheels and supported by four steel legs. The tongue is removed. The signs have a row of flashing lights across the top portion of the display area and letters may be affixed below the lights. They weigh approximately 1,100 pounds, are 10 feet long, 6½ feet wide, and 8 feet 10 3/4 inches high with a ground clearance of 3 feet 1 inch. The panel measures approximately 50 square feet.

As to the ordinances, plaintiffs assert the signs come within the classification of an electric sign and a ground sign. They are too large to fall in the portable classification. Under the city's zoning ordinances, the signs are prohibited in all residential areas because they are too large, are lighted, and have insufficient ground clearance. In suburban areas their use is severely limited by set-back requirements and the nature of the lot uses permitted. In commercial areas the signs may not be used because of insufficient ground clearance, size, and light restrictions. In all industrial zones, except one, the use of these signs is severely limited by

lot-use restrictions, a restriction on the use of flashing lights, set-back requirements, etc. The signs may be used in areas zoned for parking lot purposes.

In use the signs are frequently hooked up to an electrical outlet with electric cords of 25, 50, or 100-foot lengths stretched along the ground across grassy areas, driveways, etc. The outlet is sometimes located inside buildings and the cord run through doors or windows. The evidence indicates that the means used to connect with electric energy is generally in conflict with the city and national electric codes and that the signs do not meet wind-pressure requirements under the city ordinances. It is asserted that the ground cords are dangerous as they may fray or be a tripping hazard. The city concedes, however, that these dangers could be avoided if the cords were properly strung overhead. It appears that the signs and plaintiffs' business are proper and legitimate if the signs are properly erected, hooked up, and used in conformity with the ordinances.

Plaintiffs assert that the ordinances are unconstitutional because they unduly restrict a legitimate business. We fail to observe any unlawful classifications or restrictions insofar as the ordinances go. The question is whether or not the city can arbitrarily refuse to act by ordinance to sanction this new type business in proper zoning areas where other large commercial signs are permitted.

Cities of the metropolitan class are authorized by statute to make and enforce police regulations required for the good government, general welfare, health, safety, and security of the city and its citizens, including zoning regulations. See §§14-102 (25) and 14-403, R. R. S. 1943. Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned in the statute. See 16 Am. Jur. 2d, Constitutional Law, § 283, p. 550. The regulations of which plaintiffs complain relate to set-backs, ground clearance, lights, size, electrical connections, wind re-

sistance, and lot-use restrictions in various zoning areas. The regulations appear to be justifiable from the standpoint of preventing traffic hazards, restrictions of view, interference with residential comfort, fire hazards, and the safety of the citizenry. The zoning restrictions appear to be reasonable in the light of the public welfare, health, safety, and security and it does not appear that any property owner has complained that the use of his property has been unreasonably restricted.

The adoption of ordinances under the police power is a legislative act and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment. The plaintiffs were necessarily aware of the Omaha ordinances before they attempted to set up their sign business in violation of them. They may continue the business if they revise their signs and erect them in compliance with the ordinance requirements. "Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence." Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635.

"A legal presumption exists in favor of validity, and unless the contrary appears upon the face of an ordinance the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law." City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543.

The ordinances in contention are not unreasonable on their face and plaintiffs have failed to prove that they are, in fact, unreasonable or discriminatory. They do not have the effect of confiscating plaintiffs' property or business. The ordinances were in effect when the plaintiffs attempted to set up their business in dero-

gation of the ordinances and the business, therefore, is operating unlawfully. The ordinances do provide for and permit portable, electrical, and ground signs subject to restrictions which have not been shown to be unreasonable. Plaintiffs are in the same position as any other individual who wishes to design and install signs which fail to comply with the ordinances as to size, type, lighting, location, etc. They have failed to sustain their burden of proof or overcome the presumption in favor of constitutionality.

Plaintiffs except to the appearance of a lawyer as amicus curiae by leave of court. An amicus curiae may be heard only by leave of court and the right to be so heard is entirely within the discretion of the court. See 4 Am. Jur. 2d, Amicus Curiae, § 2, p. 109.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD G. EVANS, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. HOWARD L. HADENFELDT, APPELLANT.

249 N. W. 2d 204

Filed January 5, 1977. Nos. 40783, 40784.

1. **Criminal Law: Rape: Sexual Assault: Statutes.** The sexual assault law defined new crimes and was not merely amendatory of the rape statutes.
2. **Criminal Law: Rape: Sexual Assault: Sentences: Statutes.** A defendant charged with rape or assault with intent to commit rape, which took place before the effective date of the sexual assault law, should be sentenced under the prior law and not under the sexual assault law.

Appeals from the District Court for Howard County: LLOYD W. KELLY, JR., Judge. Sentences vacated and causes remanded.

Thomas A. Wagoner, for appellants.

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

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

BOSLAUGH, J.

The defendants, Gerald G. Evans and Howard L. Hadenfeldt, were originally charged with forcible rape in violation of section 28-408, R. R. S. 1943. The offense was alleged to have occurred on August 16, 1975. Pursuant to plea bargains the State was granted leave to amend the informations to charge sexual assault in the second degree under section 28-408.04, R. R. S. 1943. The defendants then entered pleas of guilty to this charge. The record does not indicate that amended informations were filed.

An evidentiary hearing was held to determine whether the victim had sustained serious personal injury as a result of the assaults. The trial court found that the victim had suffered serious emotional and mental injury as a result of the assaults and sentenced each of the defendants to imprisonment for 3 to 5 years.

The defendants have appealed and contend that the trial court erred in finding that the victim had sustained serious personal injury and that the sentences imposed were excessive. We do not consider these assignments of error because of a plain error that requires the sentences be vacated and the causes remanded for further proceedings.

L.B. 23, Laws 1975, the sexual assault law, did not become effective until August 24, 1975, some 8 days after the assaults charged in these cases took place. We have held that the sexual assault law defined new crimes and was not merely amendatory of the rape statutes. State v. Country, 194 Neb. 570, 234 N. W. 2d 593. A defendant charged with rape or assault with intent to

commit rape, which took place before the effective date of the sexual assault law, should be sentenced under the prior law and not under the sexual assault law. State v. Trowbridge, 194 Neb. 582, 234 N. W. 2d 598. See, also, State v. Parker, 196 Neb. 762, 246 N. W. 2d 210.

The judgments are vacated and the causes are remanded for further proceedings.

SENTENCES VACATED AND CAUSES REMANDED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT M. SOTELO, APPELLANT.
248 N. W. 2d 767

Filed January 5, 1977. No. 40796.

1. **New Trial: Motions, Rules, and Orders: Time.** When the tenth day for filing a motion for a new trial is a Sunday or a holiday, filing on the next business day is within time.
2. **Searches and Seizures: Criminal Law: Probable Cause.** In the evaluation of the reasonableness of a search and seizure without a warrant, it is imperative that the facts be judged against an objective standard, to wit: The facts available to the officer at the moment of the search or seizure should warrant a man of reasonable caution to believe the action taken was appropriate.
3. **Searches and Seizures: Criminal Law: Motor Vehicles.** An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle.
4. **Instructions: Criminal Law: Trial.** The purpose of an instruction conference is to give the parties a chance to request proper instructions and not to provide a trap for the court.
5. **Instructions: Criminal Law: Trial.** In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses.
6. **Criminal Law: Controlled Substances: Evidence: Trial.** Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession.
7. ———: ———: ———: ———. Constructive possession may be proved by direct or circumstantial evidence, and may be

shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance.

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

C. Kenneth Spady and John O. Sennett of McGinley, Lane, Mueller, Shanahan, McQuillan & Gale, 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.

SPENCER, J.

Defendant was sentenced to a term of 1 to 4 years in the Nebraska Penal and Correctional Complex following a jury verdict of possession of marijuana with intent to distribute, deliver, or dispense. He alleges three assignments of error: (1) The trial court erred in overruling his motion to suppress evidence. (2) The trial court erred in failing to instruct the jury on lesser included offenses. (3) The trial court erred in finding the evidence sufficient to establish the necessary elements of possession. We affirm.

In the early morning hours of August 4, 1974, officer Hollis Compton of the Nebraska State Patrol stopped a camper eastbound on Interstate 80 near Ogallala Nebraska, for passing a car without the use of a turn signal. Before he left the patrol car, he observed the defendant making some moves in the vehicle. Defendant leaned forward in his seat and then clear to the right with his hand stretched out. Compton then started for the driver's window, but noticed that the driver was not in his seat, and went to the door on the right side of the vehicle. He knocked on the door and the defendant came out of the vehicle and closed the door behind him.

After the officer examined the driver's license of de-

fendant, he requested the vehicle registration papers, which defendant obtained after asking another occupant where they were. While the defendant was procuring these papers, the officer was standing on the pavement outside the car but positioned so he could see the interior. The door of the vehicle could not be closed because his body was between the car and the door. Defendant produced rental papers showing the vehicle had been rented by one of the two other occupants, Dennis Diaz. It showed Casa Sotelo as his employer. Pamela Critelli, a friend of Diaz, was the other occupant.

From his position outside the car, the officer noticed a strong odor of what he believed to be marijuana. He also heard a great deal of fan noise. When defendant produced the rental papers and handed them to the officer, defendant was inside the vehicle. Officer Compton flashed his light on the floor of the vehicle and observed what he believed to be marijuana seeds. He picked up one of them and asked whether there was any marijuana in the vehicle. Both defendant and Diaz said no.

Officer Compton testified he then asked if he could look in the vehicle. The defendant asked him where he wanted to look, and Compton told them he wanted to look in the front of the vehicle. Defendant and Diaz said okay. Both defendant and Diaz deny they gave permission to search the camper.

A search of the cab revealed a plastic bag directly in front of the driver's seat which the officer believed contained marijuana. He also found several pills in the glove compartment. He believed them to be amphetamines. He then placed the occupants under arrest.

Critelli was then observed throwing something out of the vehicle. The officer had it retrieved, and discovered it was a corncob pipe. After he arrested the parties, the officer discovered marijuana seeds on the pavement where they were standing. Compton then went to the rear of the vehicle and looked through some of

the cupboards. He found several brick-shaped packages. Other packages enclosed in large plastic bags were found in the shower. The vehicle was carrying in excess of 1,000 pounds of marijuana.

Defendant testified he had been living in Tucson, Arizona, in the summer of 1974. He met Dennis Diaz on two occasions as Diaz was a roommate of his brother. Diaz called, asking defendant to meet him at the Tucson airport. Defendant picked up Diaz at the airport, and took him to the rental agency where Diaz rented the Winnebago camper. Defendant had previously mentioned going to Michigan. Diaz asked defendant whether he still wanted to go to Michigan. Defendant accepted the ride and went home to pack. He taped a sign to his suitcase saying "Michigan" in case he had to hitchhike any distance to his destination.

Defendant further testified Diaz picked him up at his house about 4 or 5 hours after leaving the rental agency. Defendant paid some of the expenses for gasoline on the trip, and did some of the driving. He testified he never opened any of the cupboards or the shower stall where the marijuana was discovered. He testified also the airconditioner and the exhaust fans were running the whole trip and he did not notice the odor of marijuana. When defendant was arrested he told the officer that he had been hitchhiking and that Diaz had picked him up in Flagstaff. The "Michigan" sign was found taped to his suitcase.

Diaz offered a different version of how they came to be traveling together. He testified he received a phone call in California from an unidentified caller asking if he wanted to do some work driving. He was told to be in Tucson as soon as possible. Diaz had previously done some driving for defendant's sister, transporting pottery from Arizona to California. Diaz flew to Tucson where he called the number he had been given. Someone told him to go to a shopping center where he would be met. He was not told who would meet him. Defendant

picked Diaz up at the shopping center and drove him to the rental agency. Defendant told Diaz they were going to Chicago and Diaz was to rent the Winnebago. Defendant gave him the money for renting the camper.

After renting the camper, Diaz drove it back to the shopping center and defendant drove his own vehicle there. They separated for about an hour and a half, and Diaz ate lunch in the shopping center. He walked back to the parking lot and defendant was waiting for him. They started on their trip at that time. Diaz became aware of the marijuana in the vehicle after they had been traveling for a couple of hours. The only conversation between Diaz and defendant about the marijuana took place in Colorado when Diaz asked him how much it was worth.

Pamela Critelli joined Diaz and defendant in Colorado Springs. She was a friend of Diaz and had flown to Colorado Springs after Diaz called her and asked her to meet him there. She did not testify at the trial. Diaz and Critelli were allowed to plead guilty to a misdemeanor offense of possession of marijuana weighing less than a pound. Diaz testified for the State.

Before considering the defendant's assignments, we note that the State contends defendant's motion for a new trial was not timely. The motion was filed on the 11th day after the verdict. However, the 10th day was a Sunday. We have repeatedly held that when the 10th day for filing a motion for a new trial is a Sunday or a holiday, filing on the next business day is within time.

Defendant's first assignment of error is that the trial court erred in failing to suppress the evidence found in the search of the camper. While defendant denies a law violation, he does concede the officer, having observed one, had a right to stop the vehicle to obtain identification of the driver and determine the ownership of the vehicle. Defendant's contention is that the officer did not have a right to stand in a position so that the door of the van could not be closed when the driver

retrieved evidence of ownership of the van. Defendant concedes the officer's initial position outside the van was proper. The thrust of the defendant's argument is that when officer Compton's body blocked the closing of the door of the camper the officer was actually conducting a search. His entire argument is premised on the supposition that this was the point at which the search began.

Essentially, it is defendant's contention that the officer did not have a right to be where he could look into the camper and he could not have done so if his body had not been positioned so as to block the closing of the door. The question is not whether the state trooper had probable cause to begin a search at that point in time; rather, it is whether his position was reasonable under the circumstances. We determine that it was.

We find officer Compton had a lawful right to be standing where he was when he detected the strong odor of marijuana and saw the marijuana seeds. The officer's action was entirely reasonable. He positioned himself so that he could see what was transpiring in the vehicle, particularly what the defendant might be obtaining from the glove compartment or from the automobile. It is proper and often necessary that an officer keep the subject in view in such circumstances. As Mr. Justice Rehnquist observed in footnote 5 in United States v. Robinson, 414 U. S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973): "One study concludes that approximately 30% of the shootings of police officers occur when an officer stops a person in an automobile." See, also, Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

We determine the disputed position of the officer was not a search or seizure within the scope of the Fourth Amendment even though his position brought evidence of illegal activity within the range of his senses. The search did not begin until the officer actually entered

the vehicle which the State's evidence indicates was with consent. It is true, the issue of consent was disputed. On the record, however, it became a fact question which was resolved against the defendant.

Ignoring for a moment the question of consent, defendant argues the search was unreasonable without a warrant. We disagree. The officer was confronted with a vehicle that could be easily moved. He detected a strong odor of marijuana. He observed marijuana seeds in the car. Immediately after stopping the car, he had observed some suspicious circumstances on the part of the defendant. Additionally, when he became aware of the marijuana odor he also heard a great deal of fan noise. At that time, he placed the occupants of the vehicle under arrest. As we said in State v. Holmberg (1975), 194 Neb. 337, 231 N. W. 2d 672: "Subsequent to the stop, by the use of his senses, the trooper became aware of the presence of marijuana. At that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent, although he had consent in this case."

Probable cause for searching a motor vehicle is not treated the same as probable cause to search a fixed structure. The movability of the vehicle is an important factor. We have said many times that in the evaluation of the reasonableness of the search and seizure without a warrant, it is imperative that the facts be judged against an objective standard, to wit: The facts available to the officer at the moment of the search or seizure should warrant a man of reasonable caution to believe the action taken was appropriate. See State v. Romonto (1973), 190 Neb. 825, 212 N. W. 2d 641. In that case we said: "An officer is entitled to rely on his senses in determining whether contraband is present in a vehicle. If contraband is seen or smelled, the officer is not required to close his eyes or nostrils, walk away, and leave the contraband where he sees or

smells it. * * * Probable cause may result from the use of any of the senses. State v. Connor, 189 Neb. 269, 201 N. W. 2d 172."

Defendant's next assignment of error concerns the trial court's refusal to give an instruction on lesser included offenses. He requested an instruction which would give the jury alternatives of finding defendant guilty of possession of marijuana with intent to distribute, deliver, or dispense, or possession of marijuana in an amount less than 1 pound. The trial court refused to give the tendered instruction, holding it to be improper because it did not include the alternative of finding defendant guilty of possession of marijuana weighing more than 1 pound. The trial court then gave the defendant the opportunity to elect whether he wanted a proper instruction on lesser included offenses, or none.

The trial court said: "I believe that the defendant, if he desires to have the jury instructed on lesser-included offenses, that he should say so. If he refuses to make an election I then will give the instruction that simply gives the jury the alternative of finding him either guilty of the charge of possession of marijuana with intent to distribute, deliver or dispense, or not guilty, and will take it as an election on his part to refuse to request a lesser-included offense charge."

Defendant's counsel then stated that he would stand on the tendered instruction. The court stated he would take this as a refusal to elect to have a charge of a lesser included offense submitted to the jury. He then asked the defendant and his counsel individually if each of them understood the court's position. Both of them said they did, and the defendant said he joined with his attorney in his statement.

The instruction tendered by the defendant was not a proper instruction on the evidence adduced, and the defendant's attention was called to this fact. The purpose of the instruction conference is to give the parties

a chance to request proper instructions and not to provide a trap for the court. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Maxwell (1975), 193 Neb. 807, 229 N. W. 2d 195.

The trial court explained the alternatives to the defendant, and the defendant elected to stand on his instruction. If the crime of mere possession was involved, the defendant was guilty of possession of more than 1 pound, or was not guilty. The trial court properly interpreted defendant's conduct to require the restriction of the jury to finding defendant guilty of possession of marijuana with intent to distribute, deliver, or dispense, or not guilty.

Defendant's last assignment is that the evidence was insufficient to establish the necessary elements of possession. The applicable rules are stated in State v. Foster (1976), 196 Neb. 332, 242 N. W. 2d 876: "Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession.

"Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance."

In order to prove unlawful possession the evidence must show the defendant had physical or constructive possession with knowledge of the presence of the drug as well as its character as a drug. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the substance at the place where it was found. In this case, there is proof of more than mere presence of the defendant at the place where the marijuana was found. There is the testimony of Dennis Diaz which directly inferred that the more than 1,000

pounds of marijuana belonged to defendant and that defendant intended to dispose of it in another state.

Defendant argues the testimony of Dennis Diaz was unworthy of belief, as he was an accomplice who was allowed to plead guilty to a misdemeanor. However, the jury was properly instructed that the testimony of Diaz should be closely scrutinized for any possible motives for falsification. The weight of the testimony is for the jury to determine under proper instructions. The jury was properly instructed herein, and the defendant has not challenged that instruction. There is no merit to this assignment.

For the reasons given the judgment should be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED K. PHILLIPS, APPELLANT.
248 N. W. 2d 773

Filed January 5, 1977. No. 40824.

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

Gwyer Grimminger, for appellant.

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

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

BOSLAUGH, J.

The defendant pleaded guilty to third offense driving while under the influence of intoxicating liquor and was sentenced to 3 years imprisonment. A second charge of second offense driving on a suspended license was dismissed pursuant to a plea bargain. The defendant has

appealed and contends the sentence imposed was excessive.

The defendant is 36 years of age. He is single and has an 8th grade education. He has a long history of difficulty with alcohol. The presentence report shows approximately 175 arrests since 1957. The report further indicates he was committed to the Hastings Regional Center in 1972, and was voluntarily admitted again in 1975 for observation and treatment of alcoholism. The defendant's history indicates he is unable to manage his problem without being under rigid supervision.

The sentence which was imposed was the maximum possible under the statute. § 39-669.07, R. R. S. 1943. However, it is in legal effect a sentence of from 1 to 3 years imprisonment. § 83-1,110, R. S. Supp., 1976; State v. McMillian, 186 Neb. 784, 186 N. W. 2d 481. Under the circumstances of this case, the sentence was not excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD W. BLANKENBAKER, APPELLANT.
248 N. W. 2d 773

Filed January 5, 1977. No. 40850.

1. **Criminal Law: Judges: Guilty Plea: Plea Bargains.** It is not proper for a trial judge to permit the withdrawal of a plea of guilty unless such withdrawal is necessary to correct a manifest injustice.
2. **Criminal Law: Guilty Plea: Waiver: Indictments and Informations.** A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional, except the defense that the information or complaint is not sufficient to charge an offense.

Appeal from the District Court for Webster County: FREDRIC R. IRONS, Judge. Affirmed.

Andrew J. McMullen, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

CLINTON, J.

In September of 1975 the defendant pled guilty to a charge of assaulting or resisting a law enforcement officer with a deadly or dangerous weapon and on November 12, 1975, was sentenced to a term of 2 years probation. On March 25, 1976, a motion to revoke the probation was filed, charging that the defendant had violated certain of the conditions of the probation order. On April 12, 1976, he entered a plea of guilty to violation of the conditions of probation and was sentenced on the original charge to a term of 1 year in the Nebraska Penal and Correctional Complex. He appeals. We affirm.

The issue argued before us is that defendant had been deprived of his constitutional right to effective assistance of counsel in the probation revocation and earlier proceedings. That issue arises in the following way. Following imposition of sentence in this case the defendant employed new counsel who filed his motion for a new trial. A hearing was held and that motion was overruled. In that hearing the defendant attacked the competency of counsel who had earlier represented him. His attack focuses on the claim that counsel was incompetent in that he permitted the defendant, on or about March 6, 1976, to enter pleas of nolo contendere in the county court on charges of (1) resisting and abusing an officer, and (2) public intoxication; that his counsel improperly advised him that a plea of nolo contendere could not be used against him in any other proceeding; and that the charges and the pleas of nolo contendere entered in the county court constituted the ba-

sis of the motion to revoke probation. The status of the charges in the county court following the nolo contendere pleas are not shown by the record.

It is apparent that the District Judge, in ruling on the motion for a new trial, viewed the issue as one of whether or not the plea of guilty to the charge of violating the terms of the probation was intelligently, knowingly, and voluntarily made. He found it was and overruled the motion. Although the motion for a new trial did not specifically ask that the defendant be granted leave to withdraw his plea of guilty, it is apparent that the District Judge regarded it as such and we believe that is the posture in which this case is to be placed.

The pertinent rules are: It is not proper for a trial judge to permit the withdrawal of a plea of guilty unless such withdrawal is necessary to correct a manifest injustice. State v. Evans, 194 Neb. 559, 234 N. W. 2d 199. A plea of guilty embodies a waiver of every defense to the charge whether procedural, statutory, or constitutional, except the defense that the information or complaint is not sufficient to charge an offense. State v. Abramson, *ante* p. 135, 247 N. W. 2d 59.

The record before us indicates that the evidence wholly supports the finding of the District Court that the plea of guilty to the charge of violation of the order of probation was voluntarily, knowingly, and intelligently made. The record does not establish that withdrawal of the plea is necessary to correct a manifest injustice.

AFFIRMED.

DAVID BRESLOW, APPELLANT, V. CITY OF RALSTON, A MUNICIPAL CORPORATION ET AL., APPELLEES.
249 N. W. 2d 205

Filed January 12, 1977. No. 40618.

Estoppel: Municipal Corporations. Equitable 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 Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Rollin R. Bailey and A. Loy Todd, Jr., of Davis, Bailey, Polsky, Huff & Denney, for appellant.

Seb Caporale, and Steven J. Riekes of Beber, Richards, Riekes & Brown, for appellees.

Heard before WHITE, C. J., MCCOWN, and CLINTON, JJ., and STUART and RIST, District Judges.

STUART, District Judge.

The plaintiff appeals from the sustaining of demurrers to his amended petition.

A synopsis of plaintiff's petition is as follows:

That defendant City of Ralston acquired the northwest quarter of the southeast quarter of Section 2, Township 14 North, Range 12, Douglas County, Nebraska, in 1937 and in 1965 this defendant deeded a tract of this land to plaintiff's predecessor in title, the deed containing a description by metes and bounds including the words, "* * * to the west line of 75th Street, thence north along the west line of 75th Street for 936 feet to the south line of 'L' Street or the point of beginning." At the time of this sale the City of Ralston furnished an abstract of title including a plat of the tract deeded and also showing the location of 75th Street, which plat was also filed of record in 1965 with the register of deed's office of Douglas County, Nebraska. When this tract of land was later deeded to plaintiff, the same description was used.

The actions of the City of Ralston constituted a dedication of 75th Street as a public street, and plaintiff

acquired his tract of land relying upon 75th Street being a public street furnishing a means of ingress and egress to his property.

The City of Ralston leased 75th Street to defendant Lakeview, Inc., in 1967 and that Lakeview, Inc., in turn entered into an agreement with defendant National Advertising Company, whereby National Advertising Company erected an advertising sign in said street, immediately west of and adjacent to the property owned by the plaintiff.

Plaintiff prayed that 75th Street be declared dedicated for public use, the defendants be required to remove said sign, and defendants be enjoined from using 75th Street for any purpose inconsistent with a public thoroughfare.

Attached to the petition was a copy of the plat which insofar as 75th Street showed:

---- 75th ---------- CO. RD. 338 B -------- ST. ----
vacated

It should be particularly noted that the word "vacated" appeared upon the portion of the plat designated as 75th Street.

Plaintiff argues that there was a common law dedication through an estoppel in pais of the streets shown upon the plat, and in support thereof quotes Gregory v. City of Lincoln, 13 Neb. 352, 14 N. W. 423 (1882), as follows: "The act of filing the plat in connection with Lavender selling lots upon this street certainly was a dedication to the public of the street. No one but the owner of a fee can dedicate land to the use of the public; but where he has done an act with the intention of influencing the conduct of another as the filing of a plat of a street and selling lots fronting thereon, and such other person has thereby been induced to purchase such lots or some of them, the original owner will be estopped to deny the dedication."

A careful reading of this quotation of the law of es-

toppel shows that it requires reliance by the party claiming the estoppel. We have recently restated this rule in the case of Christian v. Geis, 193 Neb. 146, 225 N. W. 2d 868, as follows: "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."

In addition such reliance must be reasonably justified. "Only reasonably justified reliance will create an estoppel, * * *." 28 Am. Jur. 2d, Estoppel and Waiver, § 76, p. 712.

Clearly, the plaintiff could not have placed "A reliance in good faith" on there being a platted street when his so-called reliance was based upon a plat showing the street "vacated." In addition, the plaintiff alleged that there was an advertising sign erected on "75th Street" at the time he acquired his property. Certainly a reasonable person would have been put on notice when the plat of 75th Street recited that it was vacated, and when an inspection of the property would show the existence of the sign and the nonexistence of a street.

Since a reasonable interpretation of plaintiff's petition and the attachments thereto would positively negate the plaintiff's claimed reliance on the existence of "75th Street" as a public street, the District Court properly sustained the demurrers to plaintiff's petition, and its judgment is affirmed.

AFFIRMED.

DOROTHY M. MANGUM, APPELLEE, V. HARVEY P. MANGUM, APPELLANT.
249 N. W. 2d 207

Filed January 12, 1977. No. 40723.

1. **Divorce: Alimony: Husband and Wife.** The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances.
2. **Divorce: Parent and Child.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered.
3. **Divorce: Judgments: Parent and Child.** The decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed as modified.

Griffiths & Gildersleeve, for appellant.

Casey and Elworth, for appellee.

Heard before SPENCER, NEWTON, and BRODKEY, JJ., and HASTINGS, District Judge, and KUNS, Retired District Judge.

HASTINGS, District Judge.

This is an action for the dissolution of a marriage. The trial court dissolved the marriage, awarded child support and custody of Stephen, the 14-year-old minor child of the parties, to the petitioner, made a division of property, and granted petitioner alimony and attorney's fees.

The respondent has appealed and contends the trial court should not have awarded alimony, and that the property division was inequitable and the child support excessive.

The parties were married in 1949. Although two children were born to this couple, their daughter married and became emancipated prior to these proceedings and only their son, born November 5, 1962, was

involved in this action. He is in good health except that he has one artificial eye which requires an annual medical examination.

Petitioner is 53 years old, in good health, and has no special skills or training. She has operated a used clothing store during the last 9 years or so, handling merchandise on a consignment basis so that the asset value of the business is practically nil. She puts in about 4 hours per day, but hopes to expand the operation "after this is over." The last 2 years have been her best, both averaging about $2,500 per year net income.

Respondent apparently is 53 years old, but he has been an over-the-road truck driver most of his working life. In the year 1974 his gross wages were $14,427.22, out of which he had to pay his food and lodging on the road for 292 or 293 days amounting to $4,907. In 1975 his gross earnings were $13,537.36, and his road expenses were higher, but he didn't know how much.

The trial court awarded to the petitioner the family home valued at $10,000, subject to a $2,755 mortgage, household goods and furniture valued at $500, and a 1967 Ford automobile. In addition, respondent was ordered to pay $6,000 in alimony payable $100 per month for 60 months. Respondent was given a power lawn mower worth $50, a small motorcycle worth less than $300, a 1963 Buick automobile, and his clothing and personal effects. He was directed to pay $50 per week child support; to continue to provide medical insurance to include the minor son, which total insurance presently costs respondent $56.22 per month; to pay an Avco Finance bill of approximately $600; and to pay $350 to apply on fees to petitioner's attorney.

"The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances." Sullivan v. Sullivan, 192 Neb. 841, 224 N. W. 2d 542 (1975).

The only property of any substantial value was the family home which was awarded to petitioner. This is as it should be as it is the most practical and reasonable solution to the problem of providing a place in which she may raise the minor child. The rather modest income of the respondent affords no reasonable basis for additionally awarding alimony to petitioner and that portion of the decree should be eliminated.

"In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. * * * We have stated that the decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion." Lynch v. Lynch, 195 Neb. 804, 241 N. W. 2d 123 (1976).

Considering respondent's earnings and that of the petitioner, the award of child support was significant, but not excessive so as to constitute an abuse of judicial discretion.

AFFIRMED AS MODIFIED.

JERRY LEE HARVAT ET AL., APPELLANTS, V. CLEAR CREEK DRAINAGE DISTRICT ET AL., APPELLEES.
249 N. W. 2d 209

Filed January 12, 1977. No. 40732.

Property: Easements: Adverse Possession. The right to hunt and fish cannot be established by prescription where the use is not exclusive or its extent is too indefinite for a determinate description.

Appeal from the District Court for Saunders County: HOWARD V. KANOUFF, Judge. Affirmed.

William E. Pfeiffer of Spielhagen, Spielhagen & Pfeiffer, for appellants.

Charles E. Wright of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

Heard before SPENCER, McCOWN, and CLINTON, JJ., and MORAN and KELLY, District Judges.

MORAN, District Judge.

Jerry Lee Harvat and his hunting companions claimed a prescriptive right to hunt and fish on and off the east bank of the north half of the defendant district's island in the Platte River. The hunting area claimed extended approximately 300 yards east from the northern tip of the island to the thread of the river and a maximum distance of 200 yards east from the east bank at the center of the island. The trial court denied the plaintiffs' claims and granted the defendant's counterclaim barring plaintiffs from asserting any interest in the property and enjoining them from further trespass. Errors assigned by plaintiffs are that the decision is not sustained by sufficient evidence and is contrary to law. We affirm.

From 1961 to 1973 Jerry Lee Harvat and the other plaintiffs fished and hunted waterfowl in the area. It is not enclosed and not until 1972 did Harvat indicate the perimeters of his claim by stakes. Duck blinds and decoy sets were placed and moved up and down the river bank and in the river throughout the period to take advantage of good decoy water. Harvat hunted every day of duck season throughout the period except on weekends when "kids were running all over the place." He resisted attempts of other hunters to move into the area, but there was testimony that at times other hunters used the area claimed by plaintiffs. The defendant's officers also testified defendant had leased the island to others for hunting.

While hunting and fishing rights are property rights which may be acquired as are other property rights, plaintiffs' evidence falls short of establishing entitlement by prescription on at least two counts. Their use

was not exclusive, and the extent of their claim is too indefinite for a determinate description. See, Kuhlman v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768; Wemmer v. Young, 167 Neb. 495, 93 N. W. 2d 837.

The order and judgment are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES LYNN EDWARDS, APPELLANT.
248 N. W. 2d 775

Filed January 12, 1977. No. 40744.

1. **Criminal Law: Constitutional Law: Searches and Seizures.** A search by a person not a law officer does not violate the Fourth Amendment.
2. **Criminal Law: Controlled Substances: Searches and Seizures.** When marijuana fell under the permanent dominion of law officers, a seizure then occurred.
3. **Criminal Law: Constitutional Law: Searches and Seizures.** A warrantless seizure under exigent circumstances is valid.
4. **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.
5. **Criminal Law: Trial: Witnesses: Evidence.** When two defendants are tried together, each having separate counsel, the testimony of one against the other, subject to cross-examination, is not of such a prejudicial nature as to require a separate trial.
6. **Criminal Law: Controlled Substances: Evidence: Trial.** Proof of guilty knowledge may be made by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found.
7. **Criminal Law: Evidence: Witnesses: Jury.** In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.

8. **Criminal Law: Evidence: Verdicts: Jury.** The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.

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

Harley W. Shaver of Canges & Shaver, and Joseph Saint-Veltri of Davies & Saint-Veltri, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and CANIGLIA and COADY, District Judges.

NEWTON, J.

The defendant was found guilty by a jury on a charge of possession of marijuana with intent to distribute, deliver, or dispense it. Three assignments of error are presented dealing with denial of a motion for a separate trial, insufficiency of the evidence, and an alleged illegal search and seizure. We affirm the judgment of the District Court.

The marijuana was contained in a suitcase shipped at the Grand Island, Nebraska, airport by an individual giving a nonexistent address and apparently a false name. It was to be forwarded to Lyle Pelton, Jr., at North Platte, Nebraska. An employee at the Grand Island airport noticed the odor of marijuana emanating from the suitcase and opened it. On observing the marijuana a law officer was called, the suitcase reopened by an airport employee, and its contents displayed to the officer who noted and wrote down the information on the attached tag. The suitcase was then forwarded to North Platte the following day and two officers were alerted to watch for its arrival. In North Platte it was again opened by an airport employee and its contents were inspected by the employee and a law officer who marked the suitcase and watched it until

its later seizure. The defendant Edwards called at the airport and asked for a suitcase that had come in from Grand Island for Lyle Pelton. The suitcase was produced and defendant was asked if he was Mr. Pelton. Defendant said he was not and was then advised that Mr. Pelton would have to pick it up as the manner of shipping required identification on delivery. Edwards asked the employee to phone Pelton as he was at work and was advised that it could only be delivered to Pelton on a proper showing of identification. Edwards left and later returned with Pelton; Pelton went in, obtained the suitcase, and placed it in Edwards' van. They drove to the home of Edwards' parents where they were arrested and the suitcase seized.

Edwards did not testify at his joint trial with Pelton, but Pelton did testify. Pelton's evidence was that on Sunday, May 11, 1975, the day of the arrest, he was in bed when Edwards stopped at his home and asked him to go with him to get the suitcase. Pelton denied any knowledge of its contents, contending Edwards, who was a railroad brakeman making regular trips to or through Grand Island, had told him it contained some clothes of Edwards. Pelton's father also testified and stated that Edwards had said they were going to pick up a suitcase of his, Edwards'. Both men were convicted.

Defendant's contention that the seizure occurred on removal of the suitcase from Edwards' van is incorrect. Since the search was made by an employee at the airport and not by a law officer, the search was valid. In United States v. Ford, 525 F. 2d 1308 (10th Cir., 1975), it was held in an identical case: "Realistically, the contraband was seized by the officers in California before it was ever shipped to Oklahoma. See United States v. DeBerry, 487 F. 2d 448 (2d Cir. 1973). The California officers marked the package and placed a business card inside it. Upon receiving assurances of cooperation from Oklahoma City officers, they authorized

its shipment. This action constituted the initial act of control and dominion over the contraband, for without government authorization the airline officials could not have shipped the contraband. This official dominion continued unbroken because close surveillance followed the seized contraband, insuring that it remain within official possession. Actual physical control was in fact reasserted by the Oklahoma City police when the arrest process was completed. These material facts are indistinguishable from DeBerry, supra, and we adopt the analysis of that case in concluding that the official seizure of the contraband occurred in San Francisco when the government asserted dominion over it. The seizure must be judged against the Fourth Amendment as of that time and place. * * *

"The search was private, and the ensuing warrantless seizure was made upon probable cause under exigent circumstances. Neither the search nor the seizure violated appellant's Fourth Amendment rights."

Defendants had each moved for separate trials and the motions were denied. Section 29-2002, R. R. S. 1943, authorizes joint trials where the defendants are charged with acts based on the same act or transaction, as here, unless prejudice appears. In this instance the defendants were represented by different counsel and no confession or statement of either defendant was introduced in evidence. We have frequently held that: "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. Micek, 193 Neb. 379, 227 N. W. 2d 409. This record does not reflect that any evidence was introduced in support of the motion for severance or any prejudice shown to defendant Edwards. Defendant asserts that prejudice developed during the trial due to Pelton's testimony. In State v. Saltzman, 194 Neb. 525, 233 N. W. 2d 914, a statement of one defendant was admitted in

evidence. We there held: "The confrontation clause is not violated by admitting a codefendant declarant's out-of-court statement, so long as the declarant is testifying as a witness and is or has been subject to full and effective cross-examination. * * *

"In a joint trial, where an out-of-court hearsay statement of one defendant inculpating a codefendant is admitted in the prosecution's case-in-chief, the subsequent in-court testimony of the one who made the statement is sufficient to afford the prejudiced codefendant his right to full and effective confrontation and cross-examination, and the Bruton rule becomes inapplicable." In this instance Pelton testified and was subjected to cross-examination. His testimony cannot be subjected to any limitation not also applicable to a previously executed written statement. We conclude that the rights of the defendant Edwards were not prejudiced and no abuse of discretion occurred.

The final question pertains to the sufficiency of the evidence to sustain the conviction. The evidence reflects that Edwards attempted to claim the suitcase at the airport and persisted by requesting the employee in charge to call Pelton whom he stated was at work. This was a falsehood as the day was a Sunday and Pelton was home in bed. Apparently Pelton had not requested Edwards to get the suitcase, but, on the contrary, soon after Edwards failed to obtain delivery, he called and picked up Pelton and took him to the airport with the request that he obtain delivery of the suitcase. This Pelton did. There is also the evidence of Pelton's father that Edwards told him they were going to the airport "and pick up my suitcase." There was also further evidence that Edwards was frequently in Grand Island, the source of the shipment, and had told Pelton that he was having some clothes forwarded and that he had sent a suitcase which was at the airport. "Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the ac-

cused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the time and place where they were found." State v. Torrence, 192 Neb. 720, 224 N. W. 2d 177. There is evidence which, if accepted by the jury, was sufficient to sustain a finding that Edwards was aware of the contents of the suitcase and at least a part-owner of the marijuana. We have held that: "In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. * * *

"The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it." State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650. We find the evidence sustains the verdict.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE APPLICATION OF HARTMAN.

CARL HARTMAN, JR., ET AL., APPELLEES, V. GLENWOOD TELEPHONE MEMBERSHIP CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

249 N. W. 2d 468

Filed January 12, 1977. No. 40753.

1. **Statutes: Administrative Law: Public Service Commissions: Telecommunications.** The intent of sections 75-612 to 75-615, R. R. S. 1943, was to enable telephone users to petition the Public Service Commission for telephone service of exchanges other than the one in which they reside.
2. **Statutes: Public Service Commissions: Telecommunications.** The terminology set forth in section 75-613, R. R. S. 1943, acquires a new meaning limited to the context of that section, and definition of the statutory phrases must evolve, case-by-case.

3. **Statutes: Administrative Law: Time.** The provision in section 75-128, R. S. Supp., 1976, that the Public Service Commission shall file its decision within 30 days after the hearing is discretionary, not mandatory.
4. **Public Service Commissions: Administrative Law.** An order of the Public Service Commission will be affirmed if it acted within the scope of its authority, if its order is reasonable and not arbitrary, and if there is evidence to support its findings.

Appeal from the Nebraska Public Service Commission. Affirmed.

William G. Cambridge, for appellant.

Robert E. Vogler, for appellees.

Heard before SPENCER, BOSLAUGH, NEWTON, and BRODKEY, JJ., and BURKE, District Judge.

BRODKEY, J.

This is an appeal from an order of the Public Service Commission granting an application filed by appellees under sections 75-612 to 75-615, R. R. S. 1943, to obtain telephone service in an exchange service area adjacent to the area in which they now reside. Appellant telephone company, which operates in the territory in which the applicants-appellees reside, protested the application, and now appeals to this court. We affirm.

Carl and Phyllis Hartman, appellees herein, applied to the Public Service Commission on June 25, 1975, to obtain the telephone service furnished by the Guide Rock exchange of the Lincoln Telephone and Telegraph Company (LT&T), which is the exchange service area adjacent to the territory in which the Hartmans reside, which is in the Blue Hill exchange of the Glenwood Telephone Membership Corporation (Glenwood). Glenwood filed a nonconsent and protest to the application. A hearing was had before the Commission on September 30, 1975, and on December 11, 1975, the Commission granted the application on condition that the Hartmans pay Glenwood $173.73 as its loss of investment. On De-

cember 22, 1975, Glenwood moved for rehearing, and on March 1, 1976, the Commission denied the motion. Glenwood now appeals to this court.

The facts adduced at the hearing on September 30, 1975, are as follows. In January 1975, approximately 5 months before filing their application with the Commission, the Hartmans moved from one farm located in the Guide Rock exchange of LT&T, to another farm 4/10 of a mile west. The new residence is located in the Blue Hill exchange of the Glenwood service area, and all calls to Guide Rock from that residence would be long distance calls. The Hartmans object to paying long distance rates for calls to Guide Rock, and therefore have maintained an LT&T phone at the old residence, which they continue to lease. The Hartmans have not obtained, and do not intend to obtain, service from Glenwood in their new residence.

Mr. Hartman, a farmer, does his livestock and grain trading in Guide Rock, and conducts other business there. The parents of both Mr. and Mrs. Hartman live in Guide Rock, as does Mr. Hartman's brother. The Hartmans attend church in Guide Rock, and Mrs. Hartman belongs to the Eastern Star of Guide Rock. Activities in these organizations require that telephone calls be made to persons in Guide Rock. They have no close relatives and few friends in the Glenwood service area and the only real contact they have with Blue Hill is that their dentist is located there. The Hartmans live 15 miles from Blue Hill and 10 miles from Guide Rock and are located in the Guide Rock fire district.

The Hartmans now make calls to Guide Rock from their old residence, although this is obviously an inconvenience. They testified that they would not keep the LT&T phone in the old residence if their application is granted. If the application is not granted, they would still not use Glenwood service. Their sole objection to Glenwood service is the fact that long distance rates

would be charged when they make calls to Guide Rock. The Hartmans are willing to pay Glenwood for its loss of investment if their application is granted. LT&T has indicated by letter received by the Commission July 7, 1975, that it is willing to provide service to the Hartmans if their application is granted, and that no construction charges will be involved.

The statutes involved in this appeal, and under which the application was filed, were enacted in 1969 as L.B. 906. The reason for the enactment of the statute was made clear by Senator Rick Budd, Chairman of the Committee on Public Works, in the statement of intent for L.B. 906, where he states: "Under the present law, a telephone user is not able to petition the State Railway Commission for telephone service of another exchange or for service of any exchange if he is not within any telephone company's territory. The Nebraska Supreme Court has held that petitions of this kind under the present exchange territorial law may be made by telephone companies only. The telephone user, therefore, cannot have a 'day in court' and cannot have regulatory relief no matter what the merits of his situation will be. LB 906 will permit all telephone users, whether individuals, partnerships, corporations, or others, and whether they use residence service or business service to petition the Commission for a change of telephone service and to have hearings on their cases. * * * LB 906 * * * permits adjustments in the boundaries of established exchange territories where conditions warrant." L.B. 906 now appears in our statutes as sections 75-612 to 75-615, R. R. S. 1943. Section 75-612 provides that an individual or company may file an application with the Commission to obtain the telephone service furnished in the exchange service area adjacent to the territory in which the applicant resides or operates. Section 75-613 provides as follows: "Upon the completion of the hearing on such an application, if a hearing is required, the State Railway Commission

may grant the application, in whole or in part, if the evidence establishes all of the following: (1) That such applicant or applicants are not receiving, and will not within a reasonable time receive, reasonably adequate exchange telephone service from the company furnishing such service in the exchange service area in which the applicant or applicants reside or operate; (2) The revision of the exchange service area or areas required to grant the application will not create a duplication of facilities, is economically sound and will not impair the capability of the telephone company or companies affected to serve the remaining subscribers in any affected exchanges; (3) The community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved should include all the territory in its service area as revised by the commission's order; and (4) The applicant or applicants are willing and will be required to pay such construction and other costs and rates as are fair and equitable and will reimburse the affected company for any necessary loss of investment in existing property as determined by the State Railway Commission." In its order entered on December 11, 1975, the Public Service Commission found that the application should be granted because the evidence established that the appellees met the requirements of, and qualified under, each of the four subparagraphs of section 75-613.

Appellant's principal assignments of error, which it claims require a reversal of the order of the Commission and the vacation and setting aside thereof, are that the Commission erred (1) in finding that the revision of the exchange service areas would not create a duplication of facilities; (2) that the granting of the application was economically sound; and (3) that Glenwood's loss of investment as a result of the application being granted was only $173.73. Appellant also claims that the Commission erred in failing to make and file

its decision upon the application within 30 days of the hearing thereon, and in failing to make and file its decision on appellant's motion for rehearing within 30 days after the completion of the hearing upon said motion.

The testimony of appellant's witnesses may be summarized as follows. Clive O. Pulver, general manager of Glenwood, testified that Glenwood has 2,204 subscribers in 8 exchanges. It has 2.4 subscribers per mile of line, as compared to LT&T's 30 to 40 subscribers per mile of line. Subscribers in the Blue Hill exchange must, when calling Guide Rock, pay a long distance rate of 25 cents per minute during the day, and 16 cents per minute in the evening. The charge for 3 minutes is 51 cents during the day and 33 cents in the evening. The regular monthly charge for Glenwood service is $4.75. Pulver stated that Glenwood service is good and that it has had no complaints with its service.

Glenwood contends that there would be a duplication of service if the Hartmans' application is granted. Glenwood already has a "drop wire" extending from its main line to the Hartman residence, as the Hartmans' predecessor had Glenwood telephone service. If the application is granted, Glenwood would have to remove this drop wire, which is 2/10 of a mile long, and LT&T would have to extend its line 4/10 of a mile west from the old Hartman residence. Pulver stated that if Glenwood loses the Hartmans, its facilities serving the Hartman residence are rendered useless from the Hartman residence all the way back to its central office at Blue Hill. The party line serving the area would, of course, remain, but Glenwood would have four, rather than five, subscribers on that line, and therefore have equipment not being used to its full capacity.

Pulver testified that granting the application would impair the capability of Glenwood to serve its remaining subscribers because more people would want to be

released. He testified that the cost for LT&T to extend its line 4/10 of a mile was not economically sound, and speculated that LT&T might have to build additional facilities in the future if additional subscribers in the Glenwood area were allowed to transfer to the LT&T service area. This, stated Pulver, would be a duplication of services since Glenwood already has facilities to serve the subscribers in its area.

The accountant for Glenwood, also named Hartman, testified as to what Glenwood's loss of investment would be if the application were granted. In one calculation, he computed the loss as $531.57. He arrived at this figure by taking the total value of the Glenwood plant in service, less depreciation, and dividing that value by the total number of Glenwood subscribers.

He also made a second alternative calculation in which he computed the investment cost of poles and wire on each of the five sections of line that lead from Blue Hill to the Hartman residence. He divided that investment cost for each section by the number of subscribers that section serves, arriving at a cost per subscriber in each of the five sections. He added these together, arriving at $812.61. To that figure he added connection costs, central office equipment costs per subscriber, and the cost of removing the drop line extending from the main line to the Hartman residence. He then subtracted depreciation and salvage estimates on the equipment to be removed. The accountant arrived at a figure of $758.64 as representing Glenwood's investment loss, should the application be granted. The accountant acknowledged that his first calculation was an average, and did not show actual investment cost for any given customer. The second calculation was based on figures reflecting the current cost of the components involved at today's market prices.

Finally, the president of Glenwood, Douglas Zuellner, testified that if this application were granted, possibly 20 to 30 other Glenwood subscribers would desire to be

released. He noted that under Glenwood's mortgage to the United States government, it should seek to retain all the subscribers in its area. Glenwood has grown over its 17-year history, and the company has more subscribers today than when it was formed, although its growth has not been spectacular. Zuellner thought that the loss of the Hartmans would impair the capability of his company. Zuellner acknowledged on cross-examination that no other persons in the Glenwood area have yet actually applied for release, and also that he is not presently receiving any revenue from the Hartmans' station.

There would seem to be no serious question that the Commission was correct in finding that the Hartmans were not receiving reasonably adequate exchange service. The evidence is overwhelming that their "community of interest" was in Guide Rock; and most of their relatives, friends, and business contacts were there, notwithstanding the evidence adduced by appellant that the Hartmans also had connections in other neighboring localities, for which calls they would, of necessity, have to pay toll charges. The evidence also reveals that although the monthly service charge for Glenwood was somewhat less than the local service charge out of the Guide Rock exchange, nevertheless, Glenwood was unable to provide private line service to the Hartmans, and their charges were computed on the basis of multiple party use.

Glenwood next contends that granting the application in question would result in the duplication of facilities since it is now capable of serving the Hartman residence. It argues that even if the drop line to the Hartman residence is removed there is a duplication of facilities because the party line serving the area in which the Hartmans reside will not be used to full capacity, and therefore Glenwood will have idle facilities extending clear back to a central office in Blue Hill. Glenwood contends that such duplication of facilities is

not economically sound; and also contends that its loss of investment if the application is granted is more than $173.73 because its actual loss of investment should be calculated by determining the Hartmans' proportionate share of investment costs from their residence back to Blue Hill.

It would appear that the Commission's calculation as to investment loss was clearly reasonable. By the testimony of Glenwood's accountant, there are five sections of wire leading to the Hartman residence from Blue Hill. The Hartman residence is on the last section. The investment cost per subscriber on that section is $140.38. Connection costs for that section are $28.01. The Commission added together those costs, and subtracted depreciation at a rate (34%) in accordance with Glenwood's computation of depreciation. The Commission then added on $120, which is the cost of removing the drop line to the Hartman residence, but subtracted $57.41, the estimated salvage value of the equipment to be removed. The final figure the Commission arrived at was $173.73. This figure would be representative of Glenwood's actual investment cost for service at the Hartman residence.

Under Glenwood's theory, the Hartmans would have to pay investment costs for sections other than the one that serves the Hartmans, even though those sections remain fully intact and in use. Glenwood errs in its contention the Commission concluded that the only loss of investment would be the cost of the drop wire to the Hartman residence. The Commission included in its computation the cost of the drop wire as well as the Hartmans' pro rata share of the investment costs for the section of wire serving their residence.

We now consider Glenwood's contention that granting the application will result in a duplication of facilities. It is clear that there would be a duplication of facilities in the sense that Glenwood is able to serve a residence which LT&T will serve if the application is

granted. On the other hand, the Hartmans do not presently, and do not intend in the future, to receive Glenwood service. There is no actual duplication of facilities once the drop wire to the Hartman residence, now useless, is removed. Under Glenwood's theory, any time a telephone company has facilities to serve a resident in its area, that resident's application for other service under section 75-613, R. R. S. 1943, must be denied because granting the application would result in a duplication of facilities. Glenwood's interpretation of section 75-613 would permit granting an application only if the telephone company serving the applicant's territory did not have any facilities capable of serving that particular applicant. Such an interpretation would severely limit the applicability of section 75-613, and would give rise to difficult questions in future cases as to whether the telephone company serving the area of an applicant has facilities capable of serving that applicant when its wires run near, but not directly to, the applicant's residence.

Glenwood contends that the language of Radio-Fone, Inc. v. A. T. S. Mobile Telphone, Inc., 187 Neb. 637, 193 N. W. 2d 442 (1972), in reference to duplication of facilities should be applied in this case. This seems inappropriate since that case did not involve section 75-613, R. R. S. 1943, but rather involved an application of a telephone company to operate in a territory already occupied by another company. In Schoen v. American Communication Co., Inc., 189 Neb. 78, 199 N. W. 2d 716 (1972), this court stated that section 75-613 introduces a new concept, and that the phrases in that section acquire a new meaning limited to the context of the section. Radio-Fone involved section 75-604, R. R. S. 1943, not section 75-613, R. R. S. 1943, and therefore is not authority for the case at hand.

As stated, sections 75-612 and 75-613, R. R. S. 1943, were enacted in 1969, and have been interpreted by this court only one time since then, in the case of Schoen v.

American Communication Co., Inc., *supra*, a case strikingly similar factually to the present case. In Schoen, an individual residing in the Reynolds exchange of American Communication Company, Inc. (American), applied for telephone service from the Fairbury exchange of LT&T. To serve the applicant, LT&T had to extend its lines 1½ miles from its nearest subscriber in the Fairbury exchange. This extension would have been to a point only 2 miles from the base rate area of American. The applicant had refused American service since he moved to his home in 1957. The applicant's sole complaint was that he would have to pay long distance rates on calls from the American service area to Fairbury. The applicant's business acquaintances, children's schools, family friends, and church were located in Fairbury, and he had no community of interests in the Reynolds service area other than the fact that his farm was located there. The commission granted the application. This court upheld the Commission, stating: "It is possible to construe the statute of 1969 to provide a new remedy but otherwise to maintain the status quo. We think the statute introduces a new concept. An applicant may prevail without proving inadequacy of service or unfairness of rates in the tradition of public utility law. The concept that such relief furthers the public interest is new but not startling. See Trebing, op. cit. at 302 and 310. Such phrases as 'reasonably adequate service,' 'duplication of facilities,' 'public interest,' and 'community of interest in the general territory' acquire a new meaning limited to the context of §§ 75-613 and 75-614, R. R. S. 1943. Definition must evolve, case by case.

"The small independent companies worry that affirmance here will signal a trend toward erosion of their service areas. *The argument is wide of the mark.* We decline to conjecture future legislation on action of the commission as well as the impact of the technological revolution in communications." (Emphasis sup-

plied.) The Schoen case, itself, does not define the phrases it referred to in section 75-613, R. R. S. 1943, and does not explain how those phrases were applied in the case. It is clear, however, that those phrases acquire a new meaning limited to the context of section 75-613, and therefore prior cases construing different statutory provisions which use similar phrases are not dispositive in a section 75-613 case.

Under Schoen, the order of the Commission in the case at hand should be affirmed. In Schoen, as here, the applicant had a community of interests in a town outside his telephone service area, and had never received the service of the telephone company in the territory in which he resided. In Schoen, LT&T had to extend its lines 1½ miles to the applicant's residence, while here LT&T had to extend its line only 4/10 of a mile. In Schoen, as here, the sole objection of the applicant to service from the company serving his area was long distance rates to the town where he had a community of interests.

It appears that the real concern of Glenwood in this case is that it may have a "floodgate" effect of encouraging other residents in its area to apply for service from adjacent areas. The same concern was raised in Schoen, but dismissed by the court as "wide of the mark." Although Glenwood's concern is not frivolous, it appears to be largely speculative. In this case the appellees had always received LT&T service until they moved just 4/10 of a mile west from their old residence. They have refused service from Glenwood, and do not intend to obtain it even if their application is denied. They maintain an LT&T phone in their old residence despite the inconvenience. Their community of interests is clearly in Guide Rock, and they have little connection with Blue Hill or residents of the Glenwood service area.

The telephone company in Schoen also argued that granting the application would result in numerous sub-

sequent applications, yet we note that the present case is only the second one involving section 75-613, R. R. S. 1943, to reach this court. It does not appear that the Schoen case created an incentive for widespread granting of applications.

Glenwood also argues that the order of the Commission in this case is void because the Commission failed to file its decision within 30 days after the hearing. Section 75-128, R. S. Supp., 1976, provides that except for good cause shown, "a decision of the commission shall be made and filed within thirty days after completion of the hearing or after submission of affidavits in nonhearing proceedings."

The court has not heretofore decided as to the effect of a failure of the Commission to file its decision within 30 days of the hearing. In Ready Mix, Inc. v. Nebraska Railroads, 181 Neb. 697, 150 N. W. 2d 275 (1967), this court, in describing the statutory scheme, stated: "On any matter heard by an examiner a decision *should* be filed within 30 days after oral argument to the commission." (Emphasis supplied.) That case involved the question of whether oral argument in regard to challenges of commodity rates for intrastate transportation of cement set by the Commission was required, or whether written argument was sufficient. While the facts of the case are unclear, it appears that a final order of the Commission in that case was entered more than 30 days after an evidentiary hearing before an examiner. See 181 Neb. at 702.

In 1 Am. Jur. 2d, Administrative Law, § 46, p. 847, it is stated: "A common problem of statutory construction is the determination whether a provision is mandatory or merely directory, permissive or discretionary. * * * Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done,

that is, to matters of substance, are mandatory. * * * While the word 'shall' may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word 'shall' be construed as permissive rather than mandatory, such will be done. * * * Provisions governing the time for doing an act, or directing the doing of certain things within certain times without any negative words restraining the doing thereof afterward, are deemed to be directory." To the same effect see, State ex rel. Kobes v. Grimm, 115 Neb. 230, 212 N. W. 437 (1927); Barkley v. Pool, 102 Neb. 799, 805, 169 N. W. 730 (1918). We also point out that the purpose of section 75-128, R. S. Supp., 1976, is to insure that "all matters presented to the commission be heard and determined without delay." The delay in this case did not harm Glenwood; but if anyone was prejudiced it was the Hartmans.

It should also be noted that the motion for rehearing was filed on December 22, 1975, and the order overruling the motion for rehearing was not filed until March 1, 1976. Section 75-137, R. R. S. 1943, provides that "when the commission fails to enter an order ruling on a motion for rehearing within thirty days after such motion is filed, the appeal to the Supreme Court may be perfected by filing a notice of appeal before the commission enters an order ruling on the motion for rehearing, and the review by the Supreme Court shall be the same as if the commission had overruled the motion for rehearing."

Apparently, Glenwood was not particularly concerned that the Commission exceeded 30 days in ruling on its motion for rehearing, and did not seem to view the delay as prejudicial, for it made no attempt to appeal sooner as it might have done under section 75-137, R. R. S. 1943. We conclude that this assignment of error is without merit.

The standard of review in appeals from the Public

Service Commission is well established. The order of the Commission will be affirmed if the Commission acted within the scope of its authority and if its order is reasonable and not arbitrary. Nebraska Railroads of Omaha v. Nebco, Inc., 194 Neb. 322, 231 N. W. 2d 505 (1975); Dahlsten v. Harris, 191 Neb. 714, 217 N. W. 2d 813 (1974); Ruan Transport Corp. v. Herman Bros, Inc., 192 Neb. 343, 220 N. W. 2d 245 (1974); Radio-Fone, Inc. v. A. T. S. Mobile Telephone, Inc., *supra*. If there is evidence to sustain the findings of the Commission, this court cannot intervene. Ace Gas, Inc. v. Peake, Inc., 184 Neb. 448, 168 N. W. 2d 373 (1969).

We conclude that the Commission acted within the scope of its authority and that under the facts of this case, as disclosed by the record, its order was reasonable and not arbitrary. There is evidence in the record to sustain the findings of the Commission; and, therefore, under the foregoing rules, the order of the Public Service Commission must be affirmed.

AFFIRMED.

CHRISTOPHER ALLGOOD, BY AND THROUGH HIS FATHER AND NEXT FRIEND, LEE ALLGOOD, APPELLANT, V. NEBRASKA HUMANE SOCIETY, APPELLEE.
248 N. W. 2d 778

Filed January 12, 1977. No. 40766.

Appeal and Error: Statutes: Rules of Court. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court.

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

Norman Denenberg, for appellant.

Pilcher, Howard & Dustin, for appellee.

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

COLWELL, District Judge.

This action originated in the Omaha municipal court on plaintiff's petition alleging defendant's negligent failure to capture a cat suspected of having rabies. Defendant answered by general denial. Judgment was entered in favor of plaintiff for $1,500, plus attorney's fees and costs. Defendant appealed to the District Court for Douglas County where a transcript and bill of exceptions were timely filed. Upon trial de novo on the record, under section 24-541, R. R. S. 1943, evidence was received, including the bill of exceptions and municipal ordinances. The District Court found plaintiff failed to prove defendant negligent, reversed the municipal court judgment, and dismissed plaintiff's petition. Plaintiff appeals, asserting error of the District Court in finding the defendant not negligent. We affirm.

The record before us includes in the transcript the bill of exceptions from the municipal court; however, the record here does not include a bill of exceptions as required by the Revised Rules of the Supreme Court, 1974, Rule 7c 1, and section 25-1140, R. R. S. 1943.

In brief, the findings of the District Judge were that on April 16, 1975, at about 6 p.m., a stray cat bit Christopher Allgood age 4 years. His mother, Charlene Allgood, after consulting a doctor, telephoned defendant's office in Omaha that there was a cat in a neighbor's tree that should be captured to avoid the necessity of her son receiving rabies shots. An employee of defendant arrived about 9 p.m. and attempted to capture the cat. He left to obtain some poles, and returned about 1 hour later, again attempting unsuccessfully to capture the cat. A representative of the defendant telephoned the next day about 9 a.m., and Mrs. Allgood advised that the cat was still in the tree. When an employee arrived

at the scene about 11 a.m. the cat was gone and was not later located.

"A bill of exceptions, properly certified, has always been a necessary condition for review by this court of an order of the court below when the errors assigned require an examination of the evidence * * *. The reason for the rule is, and has been, to assure that this court reviews the case upon the evidence actually received and considered in the trial court. * * * When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the rules hereinbefore cited before it can be considered on appeal to this court." State v. Jacobsen, 194 Neb. 105, 230 N. W. 2d 219.

"In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court." Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50. See, also, Ratay v. Wylie, 147 Neb. 201, 22 N. W. 2d 622.

Having reviewed the record, including the pleadings, we conclude that the same supports the judgment entered by the District Court, and its judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD D. COLGROVE, APPELLANT.
248 N. W. 2d 780

Filed January 12, 1977. No. 40789.

Criminal Law: Lesser Included Offenses: Words and Phrases. A lesser included offense is one which is necessarily established by proof of the greater offense.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

James T. Hansen and Hugh L. Kenny, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

CLINTON, J.

The defendant was found guilty by a jury of the charge of operating a motor vehicle to flee in an effort to avoid arrest, contrary to the provisions of section 60-430.07, R. R. S. 1943, and was sentenced to a term of 6 months in the county jail. Upon appeal to this court the sole assignment of error is the refusal of the trial judge to give a requested instruction which would have permitted the jury to find the defendant guilty of "lesser included offenses" of speeding, failure to yield the right-of-way to an emergency vehicle, and failure to obey a lawful order of the law enforcement officer.

The assignment is patently unmeritorious. Section 60-430.07, R. R. S. 1943, defines the crime of which the defendant was convicted as follows: "It shall be unlawful for any person operating any motor vehicle to flee in such vehicle in an effort to avoid arrest for violating any law of this state." The elements of the crime are (1) to operate a motor vehicle, (2) to flee in such vehicle, and (3) in an effort to avoid arrest for violating any law of the state.

A lesser included offense is one which is necessarily established by proof of the greater offense. Fuller v. United States, 407 F. 2d 1199. To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Certain v. State, 261 Ind. 101, 300 N. E. 2d 345. In sum the lesser

included offense is one all the elements of which are necessarily included in the greater. See, State v. Jones, 186 Neb. 303, 183 N. W. 2d 235; State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152.

None of the offenses mentioned in the requested instruction are necessary elements of the crime charged any more than would assault and battery (or homicide) be included if that were the charge for which the defendant's arrest was sought.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP KUFELDT, APPELLANT.
248 N. W. 2d 781

Filed January 12, 1977. No. 40829.

Motor Vehicles: Negligence: Statutes. Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving. § 39-669.01, R. R. S. 1943.

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

Morgan & Morgan, for appellant.

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

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

PER CURIAM.

The defendant was found guilty in the county court on a charge of reckless driving in violation of section 39-669.01, R. R. S. 1943. On appeal to the District Court the judgment was affirmed. He then appealed to this court and asserts that the evidence is insufficient to

sustain the conviction. We affirm.

Section 39-669.01, R. R. S. 1943, provides: "Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving."

The record establishes that the evidence, if believed by the trier of fact, would support the following conclusions. The complaining witness, Karen Pickrel, was driving an automobile from Clarks, Nebraska, to Central City, Nebraska, during daylight hours. In the car with her were two brothers and a sister. The Pickrel car was traveling about 55 miles per hour and was in its own proper lane of traffic. The defendant, driving a pickup, was following the Pickrel car and he then began to pass that car on the left; and when his pickup was beside the Pickrel car with its rear wheels about even with the door of the Pickrel automobile, the defendant made a sudden right turn toward the Pickrel car and into its lane of traffic. In order to avoid a collision Pickrel was required to drive her car off the highway, and had she not done so a collision would have occurred. The evidence is sufficient to establish that the movement of the defendant's car was intentional, not required by any condition of the road or traffic, and was made by defendant with knowledge that such movement would probably have required the Pickrell car to leave the paved portion of the road.

The evidence is therefore sufficient to indicate on the part of the defendant "an indifferent or wanton disregard for the safety of persons." State v. Green, 182 Neb. 615, 156 N. W. 2d 724.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALAN REINERT, APPELLANT.
248 N. W. 2d 782
Filed January 12, 1977. No. 40852.

1. **Criminal Law: Witnesses: Trial: Evidence: Instructions.** An instruction that in weighing the testimony of regular law enforcement officers greater care should be exercised than in the case of disinterested witnesses is improper but not prejudicial to the accused.
2. **Trial: Evidence: Witnesses: Appeal and Error.** The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion.

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

Norris G. Leamer, for appellant.

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

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

NEWTON, J.

Defendant was found guilty of breaking and entering an automobile. On appeal he assigns error in the giving of an instruction, in permitting cross-examination on matters foreign to the direct examination, and in regard to questions relating to defendant's past criminal record, and asserts that the verdict is not sustained by the evidence. The judgment of the District Court is affirmed.

The instruction objected to cautioned the jury in regard to partiality against the defendant on the part of police officers when testifying. The accused is not entitled to such an instruction where the witnesses against him are regular public law enforcement officers and the instruction should not have been given. The instruction was beneficial to the defendant and the error is harmless. See State v. Gurule, 194 Neb. 618, 234 N. W. 2d 603.

Regarding the cross-examination of the defendant's witnesses, a careful perusal of the record fails to reveal any abuse of discretion. "The rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion." State v. Lytle, 194 Neb. 353, 231 N. W. 2d 681.

The defendant testified and on direct examination was asked if he had ever been convicted of a felony and admitted that he had. He was asked on cross-examination if he was currently serving time for that felony. Later he was asked: "You're sitting here telling me that you have never taken a C.B. radio out of a vehicle before?" Both questions were promptly objected to. The objections were sustained.

It is settled law that a witness may be impeached by showing his conviction of a felony. See State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87. The question regarding his present incarceration for the admitted felony, although improper, was not prejudicial as it added no additional detrimental information. The objection to it was sustained and the jury cautioned to disregard it. The question about a previous theft of a C.B. radio was also barred by the court. It dealt with an offense similar to the one with which the defendant was on trial and in view of the sustaining of the objection thereto, it could not have been prejudicial. Furthermore, in the instructions, the jury was instructed not to consider any evidence which was offered and rejected.

The record discloses evidence of police officers to the effect that the defendant was seen entering the locked automobile and that he was apprehended while in the automobile removing a C.B. radio which had been disconnected and was lying on the floor. Two other young men were with the defendant and they gave written statements corroborating the testimony of the officers. Both later verbally said that one of them, rather than

the defendant, entered the automobile and one so testified. The breaking and entering and the attempted theft were never denied by any of them. The credibility question was for the jury and if the evidence of the State was believed, it amply sustained the verdict.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES WALKER, APPELLANT.
248 N. W. 2d 784

Filed January 12, 1977. No. 41012.

1. **Post Conviction: Judgments: Constitutional Law.** Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.
2. **Post Conviction: Sentences.** Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.

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

Charles Walker, pro se.

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

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

BOSLAUGH, J.

The defendant was convicted of possession of a controlled substance with intent to distribute and was sentenced to 10 years imprisonment. The judgment was affirmed in State v. Walker, 192 Neb. 308, 220 N. W. 2d 235.

On June 29, 1976, the defendant filed a motion for post conviction relief, titled "Petition for Resentence," alleging that the sentence imposed in 1973 was void. The defendant's theory was that the 1973 amendment to section 28-4,125, R. S. Supp., 1972, which reduced the penalty from 5 to 20 years imprisonment to 1 to 10 years imprisonment invalidated his sentence. The trial court denied relief and the defendant has appealed.

Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoners such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Wade, 192 Neb. 159, 219 N. W. 2d 233.

The sentence which was imposed upon the defendant in this case was within the statutory limit both before and after the 1973 amendment. Unlike the 15-year sentence imposed upon Joseph Patterson, whose case was considered in this court at the same time as the defendant's appeal, the defendant's sentence did not exceed the maximum under the statute as amended. Consequently, there was nothing that required the defendant's sentence be vacated and the cause remanded for resentencing.

The order of the trial court denying post conviction relief was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUNEAL DALE PRATT, APPELLANT.
249 N. W. 2d 495

Filed January 19, 1977. No. 40553.

1. **Criminal Law: Evidence: Trial: Intent.** Evidence of similar

offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge.

2. **Criminal Law: Evidence: Trial.** The trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence.
3. **Criminal Law: Indictments and Informations: Witnesses.** The requirement that the names of the witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses.
4. **Criminal Law: Witnesses: Evidence.** In-court identification evidence is admissible where such identification is made on a basis independent of a tainted line-up.
5. ———: ———: ———. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant under circumstances free from taint.

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

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

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN, District Judge.

WHITE, C. J.

The defendant was charged with, and found guilty by a jury of, sodomy, forcible rape, and two counts of robbery. The District Court sentenced the defendant to a term of 5 to 10 years imprisonment in the Nebraska Penal and Correctional Complex on the sodomy count, 7 to 20 years on the rape count, and 10 to 30 years on each robbery count; and directed that these sentences be served consecutively to each other and consecutively to a 3 to 5 year term imposed upon the defendant for an unrelated conviction. See State v. Pratt, *post* p. 390, 249 N. W. 2d 500. The defendant appeals his conviction and sentences. We affirm the judgment and sentences of the District Court.

The defendant brings four assignments of error on appeal. His first contention is that the District Court committed error when it sustained an objection to an inquiry by the defendant's attorney into the recent sexual history of the rape victim.

At the trial, Dr. Robert Penn testified that he examined the rape victim, the prosecutrix, at the Nebraska University Hospital in the early morning hours of August 2, 1975, shortly after the rape occurred. He found tenderness and viscous secretions in the walls of her sexual organs. A microscopic examination of the secretions revealed the presence of nonmotile sperm. Dr. Penn testified that nonmotile sperm can be observed from 2 to 24 hours after sexual intercourse, and that even healthy males ejaculate some nonmotile sperm. Dr. Penn offered his opinion that the prosecutrix had engaged in sexual intercourse within a 12-hour period prior to his examination.

During cross-examination of the rape victim, the prosecutrix, the defendant's attorney asked: "How long before that incident was it between the last time you had sexual intercourse —." The prosecution objected on the ground that such inquiry was irrelevant, and the court sustained the objection. The defense was then given permission to argue, and the jury was excused. The defendant's attorney argued that he was attempting to explain the presence of nonmotile sperm found in the vagina of the rape victim shortly after the rape allegedly occurred. Again, the court sustained the objection.

In support of his contention, the defendant cites Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358 (1953); and Frank v. State, 150 Neb. 745, 35 N. W. 2d 816 (1949). We have reviewed these cases and find them inapplicable to the case at hand.

In Sherrick v. State, *supra*, the court held: "* * * in cases wherein defendant is charged with rape or assault with intent to commit rape of a female child under 15 years of age whose consent is immaterial, prose-

cutrix cannot ordinarily be cross-examined with regard to previous unchaste acts with others for the purpose of testing her credibility."

In Frank v. State, *supra,* the court, citing Redmon v. State, 150 Neb. 62, 33 N. W. 2d 349 (1948), held that the trial court committed prejudicial error when it sustained the State's objections to, and overruled the defendant's offer to prove by direct evidence, specific unchaste or immoral acts and conduct by the plaintiff with others. The court held: "* * * it was also prejudicial error to exclude any direct competent evidence not too remote in time, showing specific immoral or unchaste acts and conduct by her with others, not only for the purpose of being considered by the jury in deciding the weight and credibility of her testimony generally, but for the purpose of inferring the probability of consent and discrediting her testimony relating to force or violence used by defendant in accomplishing his purpose and her claimed resistance thereto."

The defendant was charged with forcible rape. He did not dispute at the trial the fact that the prosecutrix was raped. His sole defense to the prosecution was that he was elsewhere when these crimes were committed, and thus could not have been the perpetrator of these crimes. The rape victim's reputation for truth and veracity was not at issue, nor was her consent, nor was her testimony concerning force and violence used against her at issue. There was no issue concerning her chastity, or lack of chastity, or her motive for testifying.

Under these circumstances, the defense counsel's inquiry into the rape victim's recent past sexual conduct was totally irrelevant. The District Court was correct in sustaining the prosecution's objection to this inquiry.

The defendant next contends that the District Court committed reversible error when it overruled defense objections to the rebuttal testimony of Karla Ailayala. Miss Ailayala testified that on August 10, 1975, about 8 days after the crime committed against the prosecutrix

and her sister took place, she was assaulted and robbed in an elevator by a person whom she identified as the defendant, at the Imperial 400 Motel in Omaha, Nebraska, the location of the offenses herein.

The defendant argues that Miss Ailayala's testimony violated this court's decisions forbidding evidence of one offense to show commission of another. In State v. Siers, *ante* p. 51, 248 N. W. 2d 1 (1976), the applicable rule is stated: "Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged or where there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue."

In State v. Ray, 191 Neb. 702, 217 N. W. 2d 176 (1974), we held: "Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge." See, also, State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610 (1975); State v. Young, 190 Neb. 325, 208 N. W. 2d 267 (1973); State v. Mayes, 183 Neb. 165, 159 N. W. 2d 203 (1968).

The defendant was charged with two counts of robbery. Intent is an element of these crimes. The testimony was proper, going to the question of intent, motive, and knowledge.

The defendant argues that Miss Ailayala's testimony was improper rebuttal testimony. Section 29-2016(4), R. R. S. 1943, provides that after the State has produced its evidence and the defendant has produced his evidence, "the state will then be confined to rebutting evidence unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief." In State v. Keith, 189 Neb. 536, 203 N. W. 2d 500 (1973), we held: "The trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence." See, also, State v. Howard, 184 Neb. 461, 168 N. W. 2d 370 (1969); Hampton v. State, 148 Neb.

574, 28 N. W. 2d 322 (1947). The record shows that at the beginning of the trial, the prosecution was not sure whether it could locate Miss Ailayala in time to testify. The prosecutor had just found out which town she was in and was trying to locate her. The State rested its case on October 29, 1975, and the defense rested its case the same day. Miss Ailayala was the second rebuttal witness. She had just arrived in Omaha that day, after being first contacted by the prosecution the previous day. Additionally, the record indicates that the court had previously informed the defendant, prior to trial, of the possibility of this evidence coming in. Under the facts of this case, we find no error by the District Court in permitting Miss Ailayala to testify as a rebuttal witness.

The defendant points out that Miss Ailayala was not endorsed on the information. § 29-1602, R. R. S. 1943. What we had to say in Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701 (1953), disposes of this contention: "The defendant bases a contention of prejudicial error at the trial on the fact that two witnesses were called by the State and gave rebuttal testimony without their names being endorsed on the information. It has long been the rule in this state that the requirement that the names of the witnesses for the state must be endorsed upon the information has no application to rebuttal witnesses." See, also, Rains v. State, 173 Neb. 586, 114 N. W. 2d 399 (1962); Ossenkop v. State, 86 Neb. 539, 126 N. W. 72 (1910); Clements v. State, 80 Neb. 313, 114 N. W. 271 (1907).

The defendant next contends that the District Court committed reversible error in overruling the defendant's motions to suppress, and overruling his objections to the in-court identification testimony of the prosecutrix, her sister, and Miss Ailayala. On the basis of United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), the defendant argues that these in-court identifications should have been excluded. In

United States v. Wade, *supra,* the Supreme Court set up a rule to exclude courtroom identifications based upon post-indictment line-ups without notice to, and in the absence of, the accused's counsel. In this case, both the prosecutrix, her sister, and Miss Ailayala viewed the defendant in a line-up, *before* he was charged with a crime. Furthermore, both the prosecutrix, her sister, and Miss Ailayala testified that their in-court identifications of the defendant as their attacker was based upon their recollection and observations of the defendant, other than the line-up identification. There is no merit to the defendant's contention. The District Court was correct in admitting these in-court identifications into evidence.

Lastly, the defendant contends that his sentence is excessive. The defendant was convicted of sodomy, a crime carrying a maximum sentence of 20 years, section 28-919, R. R. S. 1943, and received a sentence of 5 to 10 years. He was convicted of rape, a crime carrying a maximum sentence of 50 years, former section 28-408, R. S. Supp., 1974, and received a sentence of 7 to 20 years. He was convicted of two counts of robbery, a crime carrying a maximum penalty of 50 years, section 28-414, R. R. S. 1943, and received a sentence of 10 to 30 years on each count. The District Court directed that each of these sentences be served consecutively, which means that the defendant will serve a minimum of 32 years, and a maximum of 90 years. In addition, the sentences in this case are to be served consecutively to a 3 to 5 year sentence imposed upon the defendant for a separate crime of which he was convicted. See State v. Pratt, *supra.*

Each of the defendant's sentences is within the prescribed statutory limits, and as such will not be disturbed on appeal absent an abuse of discretion. State v. Gillham, 196 Neb. 563, 244 N. W. 2d 177 (1976). The action of the District Court in directing that the sentences be served consecutively will not be disturbed on

appeal absent an abuse of discretion. State v. Chapple, *ante* p. 4, 246 N. W. 2d 714 (1976).

The presentence report discloses that the defendant was 20 years old at the time these offenses were committed. Between April 26, 1970, and August 11, 1975, the defendant was arrested on 76 charges. The offenses for which he was arrested varied and include: Suspicion of rape, petit larceny, suspicion of auto theft, destruction of property, burglary, assault and battery, carrying a concealed weapon, receiving stolen property, willful reckless driving, and resisting arrest, plus a variety of traffic violations. The presentence report shows that the defendant has little concern for the person and property of others. Despite repeated encounters with law enforcement authorities, he has refused to alter his course of conduct.

The fact that a sentence may be harsh does not mean that it is necessarily excessive. The lengthy incarceration, 32 to 90 years, which the defendant faces is the direct result of the multiplicity of offenses which the defendant committed. We find no abuse of discretion by the District Court in sentencing.

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

AFFIRMED.

CLINTON, J., concurs in the result.

REAGAN, District Judge, dissenting.

Although I agree the convictions of the defendant should be affirmed, I do not believe consecutive sentences should have been imposed for the two counts of robbery. The robbery of the two sisters involved a single transaction, and a double penalty by the way of consecutive sentences is not justified. I would modify the judgment of the District Court by providing the sentences imposed on the two robbery counts should run concurrently, principally for the reasons enunciated by the dissent in State v. Chapple, *ante* p. 4, 246 N. W. 2d 714 (1976).

STATE OF NEBRASKA, APPELLEE, V. JUNEAL DALE PRATT, APPELLANT.
249 N. W. 2d 500

Filed January 19, 1977. No. 40554.

1. **Instructions: Trial.** All instructions must be read together and if the instruction or instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
2. **Criminal Law: Trial: Sentences.** The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal absent an abuse of discretion.

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

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

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN, District Judge.

WHITE, C. J.

The defendant was charged with assault with intent to inflict great bodily injury and found guilty as charged by a jury. The District Court sentenced the defendant to a term of 3 to 5 years imprisonment in the Nebraska Penal and Correctional Complex, such term to be served consecutively to sentences imposed upon the defendant for other crimes of which he was convicted. See, State v. Pratt, *ante* p. 382, 249 N. W. 2d 495. The defendant appeals his conviction and sentence. We affirm the judgment and sentence of the District Court.

The factual background of this case is as follows: On September 3, 1975, the defendant was taken from the maximum security area of the Douglas County jail to the Douglas County Hospital for X-rays. The defendant was transported by deputy sheriff John J. Markise. At

the hospital, deputy Markise was advised that the defendant's handcuffs and leg irons would have to be removed. Deputy Markise followed the defendant into a dressing room, where he first removed the defendant's handcuffs and then proceeded to remove the defendant's leg irons. Deputy Markise had removed the right one, and was proceeding to remove the left one, when he was struck at least twice on the head by the defendant with a metal object. After being struck Markise attempted to pull the defendant off balance with the remaining leg iron and a scuffle ensued. Cries for help by Markise brought others to the scene, and the defendant was removed. That same day, X-rays were taken of Markise' head and 10 stitches were required. Markise missed about a month and a half of work as a result of his injuries.

The defendant's version of the incident was that he and Markise had an argument concerning the removal of the leg irons; that Markise got mad and yanked his feet out from under him; and that he then struck Markise.

At his trial, the defendant contended that he acted in self-defense. On appeal, the defendant alleges error in the instructions on self-defense given by the District Court, because, he asserts, that it is mandatory that the court give NJI No. 14.33 (1975 pocket part).

The test for jury instructions stated in State v. Ralls, 192 Neb. 621, 223 N. W. 2d 432 (1974), is as follows: "All instructions must be read together and if the instruction or instructions, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error."

Instruction No. 10, and instruction No. 4 in part, dealt with self-defense. We have examined these instructions and find that, taken together, they correctly stated the law on self-defense as applicable to the facts of this case, adequately covered the issues, and did not mislead the jury. That being the case, there can be no prejudicial

error based upon giving these instructions, rather than NJI No. 14.33 (1975 pocket part).

The defendant also contends that his sentence is excessive. The defendant's crime carried a maximum sentence of 20 years. § 28-413, R. R. S. 1943. He was sentenced to a term of 3 to 5 years, which is within the statutory limits, and as such will not be disturbed on appeal absent an abuse of discretion. State v. Williams, 196 Neb. 834, 246 N. W. 2d 480 (1976). The District Court also directed that the sentence be served consecutively to sentences imposed upon the defendant for other crimes he was convicted of. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal absent an abuse of discretion. State v. Chapple, *ante* p. 4, 246 N. W. 2d 714 (1976).

The presentence report shows that prior to this incident the defendant had been arrested on 76 separate charges in a 5½-year period. The charges are varied and include: Suspicion of rape, destruction of property, burglary, assault and battery, carrying a concealed weapon, receiving stolen property, willful reckless driving, and resisting arrest. We find no abuse by the District Court in either the sentence it imposed upon the defendant, or in its directions that the sentence be served consecutively to other sentences imposed upon the defendant.

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

AFFIRMED.

FIRST NATIONAL BANK OF BELLEVUE, APPELLEE, V. GEORGE P. ROSE ET AL., APPELLANTS.
249 N. W. 2d 723

Filed January 19, 1977. No. 40563.

1. **Uniform Commercial Code: Notice: Sales.** A secured party

has a duty to provide the debtor with reasonable notice of the intended disposition.

2. **Uniform Commercial Code: Proof: Notice: Sales: Time.** The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice.
3. **Uniform Commercial Code: Notice: Sales: Time.** A debtor must be given reasonable notice of an intended disposition of collateral which will provide him with sufficient time to take appropriate steps to protect his interest in the collateral, and ordinarily a minimum of 3 business days is required.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

George P. Rose, pro se.

Waldine H. Olson for Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

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

BRODKEY, J.

This is the second appearance of the case before this court, and it involves an action brought by appellee, plaintiff below, in the District Court to recover a deficiency judgment for the balance due on a promissory note executed by defendants George P. Rose and George Rose Sodding and Grading Corporation after a repossession sale of the collateral security by plaintiff First National Bank of Bellevue. The opinion in the first appeal will be found at 188 Neb. 362, 196 N. W. 2d 507 (1972).

After trial before a jury in January 1971, the District Court for Douglas County granted plaintiff's motion for a directed verdict, and awarded the plaintiff $9,422.88 plus interest. On appeal, this court reversed and remanded the cause for further proceedings on the ground that factual questions relevant to the issue of whether plaintiff's disposition of the collateral security was commercially reasonable should have been submitted to the

jury. First Nat. Bank of Bellevue v. Rose, *supra*. Retrial of the case commenced on October 21, 1975, before a District Judge sitting without a jury. The court entered judgment against the defendants in the sum of $3,033.82, plus interest and costs, after determining the total debt and expenses for which the defendants were liable; and after granting defendants credit for repayments on the loan received by plaintiff, and for the value of the collateral that plaintiff had repossessed and sold. Defendants have now appealed, contending that the District Court erred, in part, in assessing the value of the collateral security sold, in finding that the disposition of the collateral security was commercially reasonable, and in sustaining plaintiff's objection to questions regarding certain promissory notes executed by the defendants in favor of the plaintiff. We reverse and remand.

Defendants raise numerous assignments of error in this appeal, but in light of our disposition of the case we find it necessary to discuss only the issue of whether the plaintiff provided Rose adequate notice of the disposition of the collateral which the plaintiff repossessed and sold. The facts relevant to this issue are as follows. On April 19, 1969, Rose executed a promissory note in favor of the plaintiff, hereinafter referred to as the bank, in the sum of $22,200. This note represented a consolidation of two prior loans Rose had received from the bank and an additional $3,000 cash advance which Rose needed as working capital. Rose signed this note as president of George Rose Sodding and Grading Corporation, and also signed his own name as an individual. The note was secured by equipment which the corporation owned, and which had been security for the prior loans then consolidated into the April 19, 1969, note. Additional security which is unimportant to the disposition of this case was also provided in the note.

Rose subsequently defaulted on the loan after three repayments of $2,000 each. The bank notified Rose of

his default on September 8, 1969, and initiated a replevin action against Rose in October 1969. The collateral security was then located and repossessed, and in total the bank took possession of 12 items of equipment. One item of collateral equipment was never located.

On November 12, 1969, the bank notified Rose by certified mail that it had obtained bids on the repossessed equipment in an aggregate amount of $10,268.50, and that the collateral would be disposed of "at private sale * * * November 17, 1969." The notice advised Rose to furnish to the bank any bids which he may have on any or all the equipment. The $10,268.50 bid which the bank had received was from Robert Kouba Construction Company. On November 17, 1969, Rose' attorney brought to the bank another bid from Ernest C. Turley. This bid did not cover all the items of equipment, was much lower than the Kouba bid on the items it did cover, and was therefore rejected.

For some reason not disclosed in the record, the Kouba bid was never consummated, and the bank proceeded to sell the repossessed equipment item by item in a series of private sales. These sales commenced on November 20, 1969, and the last one was completed on June 1, 1970. Three of the items were never actually sold, but the bank credited Rose for the estimated value of these items. In total, the bank credited Rose for $10,268.50.

Rose was not notified of any of these private sales, which were made after the bank contacted 10 to 20 construction firms in the area and requested them to examine the equipment and bid on it. Of the nine items actually sold, two were sold on November 20, 1969; two were sold on November 25, 1969; one was sold on December 16, 1969; three were sold on February 27, 1970; and one was sold on June 1, 1970. Thus there was a total of five separate private sales. Each of the five sales was made to a different purchaser.

The money received from these sales was insufficient to cover the balance due on the promissory note, and

the bank brought this action for a deficiency judgment under section 9-504(2) of the Uniform Commercial Code. There was no dispute that Rose had defaulted on the note. The only evidence adduced at trial as to notice of the sales was that the bank had, on November 12, 1969, notified Rose of the Kouba bid and of its intention to dispose of the collateral at private sale on November 17, 1969. The trial court did not specifically make findings on the issue of whether this was sufficient notice under the provisions of the Uniform Commercial Code.

The trial court found generally that the repossession sales were conducted in good faith and in a commercially reasonable manner. The court, however, did specifically find that one of the sales of three items of equipment was not made in a commercially reasonable manner due to inadequancy of the sale price, and awarded Rose an additional $1,400 credit on these three items. The court also made a minor modification on the credit allowed to Rose on another item of equipment, and awarded Rose a total of $11,720.89 credit on the collateral, as compared to the $10,268.50 credited to Rose by the bank. After allowance for all credits and debits on the promissory note, the trial court found the balance due to be $3,033.82, and awarded the bank this amount, with interest thereon from January 5, 1972.

Section 9-504(3), U.C.C., provides among other things: "Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor,* * * *." (Emphasis supplied.) It is clear that under this section a secured party has the duty to provide the debtor with reasonable notice of the intended disposition. Bank of Gering v. Glover, 192 Neb. 575, 223 N. W. 2d 56 (1974). In the recent case of DeLay First Nat. Bank & Trust Co. v. Jacobson Appli-

ance Co., 196 Neb. 398, 243 N. W. 2d 745 (1976), we reaffirmed the holding of Bank of Gering v. Glover, *supra*, and further stated that "the burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice." Under the principles set forth in the above cases, the District Court judgment in the present case must be reversed for the reason that the bank failed to provide Rose with adequate notice of the disposition of collateral.

In DeLay, we found that to constitute reasonable notice of a private sale, the notice should be sent in such time that the debtors would ordinarily have a minimum of 3 business days to arrange to protect their interest.

In DeLay we held that the failure to give proper notice of the sales of the collateral is an absolute bar to the recovery of a deficiency judgment, citing Bank of Gering v. Glover, *supra*.

The notice given in this case did not comply with the requirements set forth in DeLay. It is undisputed the bank sent notice to Rose by certified mail on Wednesday, November 12, 1969, that it had received an aggregate bid on the collateral and intended to dispose of it by private sale on Monday, November 17, 1969. Although the record does not show when Rose actually received the notice, it appears that Rose probably had less than 3 business days to arrange to protect his interests since the notice was not mailed until some time on November 12, 1969. The mailing of notice on Wednesday of a sale to be held the following Monday would appear to make it difficult, if not impossible, for Rose to arrange financing or take other steps to protect his interest in the collateral, particularly if banks were closed on Saturday. In any event, the ordinary 3-day rule set forth in DeLay is a minimum requirement, and such notice is not necessarily sufficient in all cases. The purpose of giving reasonable notice to a debtor is to insure that he will have sufficient time to take appropriate steps

to protect his interest. See Comment 5, § 9-504, U.C.C. In this case we do not believe that Rose was given sufficient time to protect his interests, and we find that the notice that was given by the bank was unreasonable. See White & Summers, Uniform Commercial Code, § 26-10, pp. 986, 987 (1972).

A deficiency judgment may not be awarded to the bank in this case because it failed to sustain its burden of proof that sufficient notice of the disposition of collateral was given to Rose. Therefore the judgment of the District Court must be reversed, and the cause remanded to the District Court with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent for the reasons stated in my dissent in DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N. W. 2d 745.

McCOWN, J., joins in this dissent.

NEWTON, J., dissents.

FAUSS CONSTRUCTION, INC., APPELLANT, V. CITY OF HOOPER, APPELLEE.

249 N. W. 2d 478

Filed January 19, 1977. No. 40714.

Statutes: Appeal and Error: Courts: Judgments. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it.

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

Hurt & Gallant and Daniel A. Smith, for appellant.

Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellee.

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

COLWELL, District Judge.

Suit was brought by plaintiff, Fauss Construction, Inc., against defendant, City of Hooper, in the county court of Dodge County, Nebraska, to recover damages under a construction contract. Plaintiff recovered judgment for $2,731.84 and costs. Upon appeal to the District Court, the judgment was vacated and plaintiff's petition dismissed. Plaintiff appeals. The judgment is affirmed.

On November 3, 1971, plaintiff and defendant entered into a written contract for the construction of a nursing home at a cost of $384,386. Plans and specifications, in part, provided: "Interior Wood Doors. See Door Schedule, Dwg. A-3. *All interior wood doors shall be solid core or hollow core as shown on schedule,* plain red oak, or rotary cut Birch face veneers, as manufactured by Weyerhaeuser Roddis or equal." (Emphasis supplied.) Plaintiff furnished to defendant's architect shop drawings for the wooden doors showing proposed specifications of the 46 interior doors to be "solid core doors to be C-4000 standard, *particle board core doors* by Georgia-Pacific-Curtis Door Division, New London, Wisconsin." (Emphasis supplied.) These shop drawings were returned to plaintiff by the architect on June 8, 1972, marked "approved as noted." Plaintiff installed 46 particle core doors of the type described in the shop drawings. An inspector from the Nebraska State Fire Marshal's Office examined the building; he informed plaintiff the doors did not meet fire standards; and he advised defendant by letter that all 46 doors in question "shall be changed to a solid core wood door as called for on the blue prints." Thereafter, Ronald L. Fauss, president of plaintiff company, appeared before the defendant town council where plaintiff was directed

to comply with the order of the fire inspector. The written contract contained the usual provisions for "Changes in Work" by written order from the defendant and that claims by the contractor for increase in contract consideration were to be made by giving written notice within 20 days after the occurrence. There is no evidence of either a change order or a claim filed by plaintiff within the 20 days. Plaintiff replaced the 46 interior doors with solid core wooden doors. After about 60 days, plaintiff made a claim on defendant for the replacement costs which was denied.

A particle core door is constructed of wood chips or flakes glued together forming a solid core for the door. A solid core door is made up of small individual blocks of wood 2½ inches wide by random lengths, sometimes glued together and others fitted together, having different positional patterns. Both types of doors are faced with wood veneer. The evidence was that the particle core door costs about $4 less per door and it was less fire resistant.

The trial by the District Court was de novo on the record, as provided by section 24-541, R. R. S. 1943. We have said: "* * * it is the obligation of the court to reach an independent conclusion without reference to the decision of the county court * * *." Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, we examine the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. See Burhoop v. Pegram, 194 Neb. 606, 234 N. W. 2d 828.

Plaintiff contends: (1) That the original particle core doors furnished complied with the plans and specifications; (2) that there was an oral modification of the written contract; and (3) that the approval of the shop drawings by the architect was binding upon defendant.

It is clear that the evidence supports the finding of the District Court that the plans and specifications for the 46 interior doors required solid core wooden doors and not particle core doors.

There is little conflict in the evidence as to plaintiff's claim of an oral modification of the written contract. At most, the record shows that when plaintiff appeared before the Hooper town council he was asked the cost of replacing the doors which he estimated at $4,000. He was instructed to replace the doors as required by the State Fire Marshal. No change work order was either requested or issued. This was not an oral modification of the written contract.

Plaintiff urges that when defendant's architect approved the shop drawings, which described the 46 interior doors to be furnished as "particle board core doors," this was a modification of the written contract between the parties. The written contract between the parties provides in part: "The Architect will review and approve Shop Drawings and Samples with reasonable promptness so as to cause no delay, *but only for conformance with the design concept of the Project and with the information given in the Contract Documents.* * * * The Architect's approval of Shop Drawings or Samples shall not relieve the Contractor of responsibility for any deviation from the requirements of the Contract Documents unless the Contractor has informed the Architect in writing of such deviation at the time of submission and the Architect has given written approval to the specific deviation, * * *." (Emphasis supplied.) The architect had no authority to change or modify the specifications in the written contract. Carter v. Root, Inc., 84 Neb. 723, 121 N. W. 952. See, also, 2 A. L. R. 3d 620, § 29, at p. 686. The trial court could find from the evidence that the approval of the shop drawings was limited to design and did not modify the contract.

Plaintiff claims the District Judge abused his discretion in that he failed to consider the issue of oral mod-

ification of the contract as shown by his letter to plaintiff's counsel transmitting a copy of the judgment stating, in part: "The evidence convinces me that the doors originally installed did not meet the plans and specifications. The plaintiff was obligated under the contract to meet the plans and specifications and the burden was on the plaintiff to so perform." There is no merit to this contention. The letter was not a part of the judgment; it merely recited the judge's views on some of the evidence. Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19.

The record fully supports the judgment of dismissal made by the District Court.

AFFIRMED.

STEPHEN KOSOWSKI ET AL., APPELLANTS, V. CITY BETTERMENT CORPORATION, A NEBRASKA CORPORATION, APPELLEE.
249 N. W. 2d 481

Filed January 19, 1977. No. 40718.

1. **Actions: Summary Judgments.** The right of a party to sue as representative of a class may be raised by a motion for summary judgment.
2. **Actions: Parties.** The general rule is that a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them that the action might be brought by them jointly. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter.

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

Collins & Gleason, for appellants.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellee.

Heard before WHITE, C. J., McCOWN, and CLINTON, JJ., and STUART and RIST, District Judges.

WHITE, C. J.

The plaintiffs instituted this action in the District Court for Douglas County, Nebraska, on behalf of themselves and all those similarly situated who have purchased lottery tickets from the defendant and won nothing. The plaintiffs sought a temporary restraining order to restrain the defendant from disposing of any funds, an accounting, and a refund for all those who purchased lottery tickets and won nothing.

The defendant then moved for a summary judgment, seeking to have the class action portion of the plaintiffs' petition dismissed. The District Court sustained the defendant's motion for summary judgment, finding as a matter of law that the plaintiffs could not properly maintain their action as a class action. The class action portion of the plaintiffs' petition was dismissed by the District Court, but the plaintiffs were allowed to continue the action on their own behalf. The plaintiffs' motion for a new trial was overruled and the plaintiffs appeal. We affirm the judgment of the District Court.

The defendant, City Betterment Corporation, a Nebraska nonprofit corporation, commenced the operation of a lottery in the Omaha metropolitan area under the names of "Big Green" and "Big Gold." From October 2, 1975, until December 31, 1975, some 1,471,834 lottery tickets were sold generating $973,569 in revenue for the defendant. Out of this, $432,741 was paid out to the holders of winning lottery tickets. In January 1976, the District Court for Douglas County, in a separate action, determined that the lottery being conducted by the defendant was illegal and contrary to the statutes of the State of Nebraska. This determination is not yet final, being currently before this court on appeal. State v. City Betterment Corp., No. 40619. The District Court's decision, while finding the lottery illegal, permitted the

payment of reasonable expenses necessarily incurred in connection with the operation of the lottery by the defendant.

On appeal the plaintiffs contend that the District Court erred in allowing the defendant's exhibit 1 admitted into evidence over the plaintiffs' objection and in granting the defendant's motion for summary judgment.

The defendant's exhibit 1 was an affidavit by Michael Hinrichs. This affidavit was submitted in support of the defendant's motion for summary judgment. The plaintiffs contend that this affidavit does not meet the statutory requirements of section 25-1334, R. R. S. 1943, in that it contains hearsay, and that the affiant is not competent to testify to the matters stated therein. We have examined both these contentions and find them to be without merit. Mr. Hinrichs, as the defendant's administrative manager and in charge of the defendant's books and records, was competent to testify about the matters that he did; nor did the affidavit contain hearsay. See § 27-801 (3), R. R. S. 1943. There was no error in admitting this affidavit into evidence over the plaintiffs' objection; nor did the District Court commit error by granting the defendant's motion for summary judgment. The District Court dismissed the class action portion of the plaintiffs' petition but permitted the plaintiffs to proceed on their own behalf.

In Blankenship v. Omaha P. P. Dist., 195 Neb. 170, 237 N. W. 2d 86 (1976), this court held: "* * * the right of a party to sue as representative of a class may be raised by a motion for summary judgment." We further held in that case: "All the court need determine in granting a motion for summary judgment denying the plaintiff the right to proceed in a class action is that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which plaintiff asserts."

In Evans v. Metropolitan Utilities Dist., 185 Neb. 464, 176 N. W. 2d 679 (1970), we said: "The general rule

is that a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them that the action might be brought by them jointly. * * * Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter."

The plaintiffs sought to bring suit on behalf of all those who purchased lottery tickets and won nothing. Included in this class are those who concur in the goals of the defendant and who purchased tickets to aid in the redevelopment of downtown Omaha. Also in this class would be a number of the defendant's employees, agents, and suppliers who would stand to suffer if the plaintiffs' suit were successful in enjoining the defendant from disbursing any of the funds held by it for the payment of reasonable expenses incurred in connection with the lottery, or in recovering a judgment for the return of all funds realized from the sale of the lottery tickets. The potentiality of conflict of interest between the plaintiffs and various members of the class they seek to represent was sufficient reason for the District Court to grant the defendant's motion for summary judgment.

Also supporting the District Court's granting of the defendant's motion is the inherent unmanageability of the plaintiffs' proposed class action. A total of 1,471,834 lottery tickets were sold by the defendant. No records have been maintained as to the identity of purchasers of lottery tickets. Certainly a substantial number of those who purchased lottery tickets and lost have discarded their losing tickets. Should the plaintiffs ultimately be successful and an award be recovered, it would be extremely difficult and impractical, if not impossible, to satisfactorily reach and identify, and distribute the award to, those entitled to share in it.

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

AFFIRMED.

GENE E. GERDES ET AL., APPELLANTS, V. OLGA M. SPETMAN ET AL., APPELLEES, IMPLEADED WITH GLADYS FAIRHEAD ET AL., APPELLANTS.
249 N. W. 2d 210

Filed January 19, 1977. No. 40731.

1. **Summary Judgments: Motions, Rules, and Orders: Pleadings.** Where the evidence offered at the hearing on a motion for summary judgment shows there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained.
2. ———: ———: ———. The purpose of a motion for summary judgment is to pierce the allegations in the pleadings and show that the material facts are undisputed and otherwise than as alleged.
3. ———: ———: ———. When the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment should be granted.

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

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

Herbert M. Sampson, III, for appellees.

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

BOSLAUGH, J.

This is an appeal from an order sustaining a motion for summary judgment and dismissing a partition action. The land involved is the east half of Section 1, Township 24 North, Range 48 West of the 6th P.M. in Box Butte County, Nebraska.

The present record title holders are all descendants of John Fred Spetman and Eliese P. Spetman who had three children. Olga M. Spetman, a daughter, is the record owner of an undivided one-third interest. Gene E. Gerdes and Gladys Fairhead, children of Minnie S. Gerdes, a deceased daughter, are each record owners of an undivided one-sixth interest. Erwin Dye, Betty Leistritz, Frank Dye, and James Dye, children of Martha M. Dye, a deceased daughter, are each the record owners of an undivided one-twelfth interest. There is no dispute concerning who the record title holders are or the extent of their interest in the record title.

The plaintiffs are Gene E. Gerdes and his wife. The defendants are the other record owners and their spouses.

The petition alleged the parties were the owners of the property as their interests appear of record and prayed that partition be had. The defendants, Olga M. Spetman, Erwin Dye, Betty Leistritz, Frank Dye, and James Dye, filed an answer alleging that Olga M. Spetman had an equitable life estate in the property in addition to her undivided one-third interest in fee simple. The answer further alleged that after the death of John Fred Spetman in 1945, Olga M. Spetman remained upon the property with her mother, Eliese P. Spetman, for the purpose of caring for and maintaining the mother. Minnie S. Gerdes and Martha M. Dye, and their husbands, agreed that this arrangement was necessary and in return Eliese P. Spetman and Olga M. Spetman should have the use and enjoyment of the property for their natural lives. The answer finally alleged that Olga M. Spetman as the equitable life tenant objected to partition of the property. The prayer was that the petition be dismissed and the plaintiffs be enjoined from interfering with the use and enjoyment of the property by Olga M. Spetman.

Gladys Fairhead and her husband filed an answer admitting the allegations of the petition and denying

the allegations of new matter in the answer filed by the other defendants.

On October 23, 1975, the trial court ordered a pretrial conference be held by telephone. The report of the pretrial conference, filed November 11, 1975, made no mention of further pleadings other than a motion for summary judgment.

On December 18, 1975, the defendants other than Gladys Fairhead moved for summary judgment.

On January 12, 1976, the plaintiffs demurred to the answer filed by Olga M. Spetman and the defendants other than Gladys Fairhead.

The demurrer and motion for summary judgment were heard on January 27, 1976. The demurrer was overruled.

The defendants offered affidavits by Ogla M. Spetman and James Dye in support of their motion. The plaintiffs offered only the abstract of title to the property in resistance to the motion. The motion for summary judgment was sustained and the petition dismissed.

The affidavit of Olga M. Spetman stated that she had lived on the property since the death of her father in 1945; that she resided with her mother until the mother's death in 1957; that from 1945 to 1957 her mother was in failing health; that on or about May 22, 1946, she was a party to an oral agreement with her sisters, Minnie S. Gerdes and Martha M. Dye, and their husbands, whereby she and her mother were to have the use of the property during their lives; that after the death of her mother in 1957 the agreement was reaffirmed at a family gathering after the funeral; that she has rented the property to various tenants since 1954 with the knowledge and consent of the other owners and with no demand by them for any share of the rents and profits; that she has paid the taxes on the land for herself or her mother since 1957; that in reliance on the agreement she made numerous and substantial improvements on the property, which were described in detail, with the consent

of the other owners and without interference or demand from them.

The affidavit of James Dye stated that he was present at the family gathering in 1957 after the death of Eliese P. Spetman; that Martha M. Dye, Betty Leistritz, Olga M. Spetman, and George C. Gerdes were present; that all the owners present agreed that Olga M. Spetman was to continue in possession, use, and enjoyment of the property during her life; that the affiant had personal knowledge that Olga M. Spetman had leased the property since 1957, paid the taxes, maintained the premises, and generally treated the property as her own; and that affiant had always considered he held a remainder interest subject to the life estate of Ogla M. Spetman.

The abstract of title, offered by the plaintiffs, merely showed the state of the record title. The failure of the plaintiffs to offer any evidence in resistance to the affidavits introduced by the defendants left the defendants' evidence uncontroverted except by the allegations of the petition.

On February 2, 1976, the plaintiffs and the defendant, Gladys Fairhead, filed a motion for new trial. On February 10, 1976, the plaintiffs asked leave to file a reply. The reply tendered with the motion denied the allegations of the answer, alleged that the decrees in the various estate proceedings were res judicata, and alleged that Olga M. Spetman was guilty of laches.

At the hearing on the motions the plaintiffs and Gladys Fairhead offered the reply and the affidavits of Gene E. Gerdes and Gladys Fairhead. The affidavit of Gene E. Gerdes stated that the conversation alleged by Olga M. Spetman to have taken place on or about May 22, 1946, could not have taken place on that date because his sister and mother were in Denver on that date, and his father was in county court at Alliance on that date in connection with the John R. Spetman estate; that the affiant and his sister have never consented to the arrangement claimed by Olga M. Spetman; and that Olga

M. Spetman has not paid all the taxes since 1957. The affidavit also referred to numerous old records, some of which were filed with the affidavit in support of the motion for new trial but not separately identified and offered in evidence or otherwise explained in any way.

The affidavit of Gladys Fairhead was similar to that of Gene E. Gerdes and further stated that in 1975 a dispute arose concerning their share of the wheat; that they requested their share of the wheat be delivered to the Berger Plate Elevator, but instead it was placed in a bin on the Dye farm; and that Erwin Dye requested authorization to sell the wheat for the benefit of Olga M. Spetman but the affiant did not grant the permission.

The trial court overruled both motions. The plaintiffs and Gladys Fairhead and her husband have appealed.

With respect to the motion for summary judgment, the defendants were entitled to a summary judgment if there was no genuine issue as to any material fact, and the defendants were entitled to judgment as a matter of law on the facts. Kissinger v. School District No. 49, 163 Neb. 33, 77 N. W. 2d 767.

The defendants' theory of the case was that the other owners of the property had entered into an oral agreement with Olga M. Spetman in 1946 to the effect that if Olga remained upon the property with her mother and cared for and maintained her mother, Olga was to have a life estate in their share of the property. The affidavit of Olga showed that she would be able to testify as to the existence of the agreement and her performance of it. The affidavit of James Dye showed that he was prepared to testify to a reaffirmation of the agreement in 1957 by the then surviving principal owners of the property; and as to the performance of the agreement by Olga and her use of the property as a life tenant since 1957.

It is quite apparent that the plaintiffs relied upon the statute of frauds both for their demurrer and as their defense against the motion for summary judgment. An

oral agreement creating an interest in land is enforceable if the terms are clear, satisfactory, and unequivocal and the agreement has been performed. The performance must have been solely referable to the agreement and such that nonperformance by the other parties would amount to a fraud upon the party who has performed. Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287.

The statute of frauds was not a defense to the claim of Olga because the affidavits offered in support of the motion showed full performance of the agreement by her plus use and enjoyment of a life estate in the property since 1957. The terms of the agreement were clear and unequivocal and her performance was solely referrable to the agreement. The defendants' evidence was uncontradicted and fully supported the order of the trial court sustaining the motion for summary judgment.

After the motion for summary judgment had been sustained the plaintiffs sought leave to file a reply. The plaintiffs had been dilatory in filing any response to the answer of the defendants and the record shows no objection to the submission of the demurrer and motion for summary judgment on the same day. More importantly, an allegation in a pleading ordinarily will not overcome a factual showing. The object of a motion for summary judgment is to pierce the pleadings and show that there is no genuine dispute as to any material fact. Prairie View Tel. Co. v. County of Cherry, 179 Neb. 382, 138 N. W. 2d 468.

The affidavits of Gene E. Gerdes and Gladys Fairhead, offered in support of the motion for new trial, did tend to dispute the affidavits offered by the defendants at the hearing on the motion for summary judgment, at least in respect to the dates alleged. The plaintiffs alleged they had been unable to make this showing at the time of the hearing on the motion for summary judgment, but there was no satisfactory showing to support this claim.

The plaintiffs, of course, were bound by any agreement their mother had made and, apparently, were unable to directly dispute Olga's statement that their mother had been a party to the oral agreement. Minnie S. Gerdes predeceased her mother, Eliese P. Spetman, but, according to the affidavit of James Dye, George C. Gerdes was present at the family gathering in 1957 when the 1945 oral agreement was reaffirmed. Apparently, the plaintiffs were unable to directly dispute this statement. Although there was some reference in the affidavit of Gene E. Gerdes to the records which the plaintiffs produced, the records were not separately identified and offered in evidence or otherwise explained in any way.

On this state of the record it was within the discretion of the trial court to overrule the motion for leave to file a reply and the motion for new trial.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYLE JOE PELTON, JR., APPELLANT.
249 N. W. 2d 484

Filed January 19, 1977. No. 40743.

1. **Criminal Law: Evidence: Hearsay.** If an utterance is itself an operative fact, the utterance is not hearsay.
2. **Criminal Law: Evidence: Hearsay: Statutes: Trial.** An exculpatory statement made by an accused to the police the day after his arrest is a hearsay statement under section 27-801(3), R. R. S. 1943, and is not admissible in evidence unless it comes within the provisions of section 27-801(4) (a) (ii), R. R. S. 1943.
3. ———: ———: ———: ———: ———. Evidence of an accused's utterance as to his existing state of mind at the time he makes a statement does not come within the hearsay exception of section 27-803(2), R. R. S. 1943, unless his state of mind at the time he made the statement or utterance is material to the issues.
4. **Criminal Law: Evidence: Trial: Joinder.** The mere claim that

defenses of codefendants are antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts and would be proved by similar evidence.

5. **Criminal Law: Witnesses: Trial: Joinder.** The fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial.
6. **Instructions: Trial.** An instruction which does not correctly state the law should not be given.

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

Padley & Dudden, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

Heard before SPENCER, McCOWN, and CLINTON, JJ., and MORAN and KELLY, District Judges.

CLINTON, J.

The defendant, Lyle Joe Pelton, Jr., was convicted on a charge of possession of marijuana with intent to distribute or dispense, and was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. This is a companion case to State v. Edwards, *ante* p. 354, 248 N. W. 2d 775, and the two cases were tried together in the District Court. The essential facts are stated in our opinion in the Edwards case and we will not restate them in this opinion except as we find necessary to amplify them in the disposition of the assignments of error made by Pelton.

He assigns and discusses the following claimed errors: (1) The evidence is insufficient to sustain the jury finding of guilty; (2) the search and seizure were unconstitutional and the trial court erred in not suppressing the admission into evidence of the suitcase and the marijuana contained therein; (3) the trial court erred in not granting Pelton's motion for a trial separate from that of Edwards; (4) the court erred in refusing to admit

into evidence two certain airbills for shipment of a suitcase and a box respectively from North Platte to Tucson and from Tucson to North Platte; (5) the court erred in refusing to give the defendant's suggested amendment to instruction No. 4 given by the court; and (6) the sentence is excessive. We affirm.

The sufficiency of the evidence as applicable to Edwards was discussed in State v. Edwards, *supra*. As to the defendant Pelton we need add only this. The evidence showed that Pelton picked up the suitcase consigned to him at the North Platte air terminal; that he knew the suitcase was to be shipped to him; that when he took possession of the suitcase he carried it 400 feet to Edwards' van, which Edwards was driving, where he deposited it in the vehicle; and that found in the suitcase after his arrest was a paper containing the following calculation: "22 LBS. at 110

110
22

220
2200

2420 "

The evidence further showed that the weight of the marijuana contained in the suitcase was 22 pounds 3 ounces. The foregoing was sufficient to make a prima facie case that Pelton had knowledge of the contents of the suitcase. Pelton took the stand in his own behalf, denied that he knew what the suitcase contained, and explained that he had been told by Edwards that the suitcase would contain clothing belonging to Edwards and that he consented to have the suitcase consigned to him simply as an accommodation to Edwards because Edwards might not be in North Platte when the suitcase arrived. The cross-examination of Pelton rather clearly demonstrates the unreasonableness of Pelton's explanation. We need not give the details of the cross-examina-

tion. The partial import of it was that Pelton knew that Edwards was a brakeman for the Union Pacific Railroad Company; that his run was from North Platte to Grand Island; that he was in Grand Island regularly at the end of his run; and that there was simply no reason for Edwards to pay $12.60 to ship dirty clothing by air freight from Grand Island to North Platte when he could have transported the clothes himself on his regular run. The jury was not required to believe Pelton's explanation. The evidence is sufficient to sustain the conviction.

The search and seizure issue was determined in State v. Edwards, *supra,* and we need not discuss it further in this case. We simply point out that a search and seizure under almost identical circumstances was upheld in United States v. Issod, 508 F. 2d 990.

The issue of a separate trial for Pelton requires some further discussion because the situation of the two defendants was somewhat different. Pelton's contention that he should have been tried separately from Edwards is related to his contention that the court erred in refusing to admit certain evidence offered by him. We will therefore discuss these issues together. The basis of Pelton's motion was that if the two defendants were tried together certain undescribed evidence admissible against Edwards would be hearsay as to Pelton, and that cautionary instructions to the jury to disregard such hearsay evidence as to Pelton would be unavailing for the jury could not, as a practical matter, disregard such evidence. The only evidence offered and received which arguably could be characterized as hearsay was that of a conversation between Edwards and a Frontier Airlines employee which took place at the air terminal at North Platte at the time of Edwards' first attempt to pick up the suitcase. The substance of that conversation was that Edwards asked for the suitcase consigned to Pelton. The agent then asked Edwards if he was Pelton and Edwards said he was not. The employee then told Ed-

wards that the bill of lading required delivery to the consignee only and that the article would have to be picked up by the consignee who must furnish identification. Edwards then left. As our opinion in the Edwards case points out, Edwards later returned with Pelton who furnished identification and then took possession of the suitcase. At the time the conversation between Edwards and the airline employee was admitted, the airbill had already been received in evidence and testimony had already been adduced as to the fact of Pelton's later appearance with Edwards, the furnishing of identification by Pelton, the receipt of the suitcase by him, and the nature of the contents of the suitcase. At the time the conversation was admitted, foundation had been laid for the admission of the conversation as a part of the criminal transaction. It was substantive evidence relating to the corpus delicti and was admissible as such. The conversation by itself was not directly implicative of Pelton except in connection with and by reason of the prior foundation. Prima facie evidence of the crime in which both Pelton and Edwards were participating was already in. The evidence of the conversation was not hearsay, but was one of the operative facts evidencing the commission of a crime. The situation here is analogous to circumstances where the responsibility of one defendant as the driver of a get-away car in a bank robbery has been established and objection is later made to testimony that one of his accomplices said to the bank teller out of hearing of the defendant, "You didn't put all the money in the bag." No one could reasonably contend that the evidence was excludable as hearsay. If an utterance is itself an operative fact, the utterance is not hearsay. 4 Weinstein's Evidence (1975), pp. 801-59; Ristine v. Geigy Agricultural Chemicals, 188 Neb. 550, 198 N. W. 2d 199.

In this court Pelton offers some additional reasons why the joint trial was prejudicial to him and prevented him from having a fair trial. One contention relates

to the refusal of the court to admit Pelton's out-of-court statements exculpating him and incriminating Edwards, and another relates to the refusal of the court to admit the two airbills referred to in the third assignment of error. His contentions are not well taken.

Before Pelton took the stand in his own behalf, he sought to have introduced on cross-examination of one of the police officers the statement which Pelton had given to the officer the morning following his arrest. Its use by him would have the obvious advantages of getting his exculpatory statement before the jury and casting guilt solely on Edwards without subjecting Pelton to cross-examination unless he later chose to take the stand in his own behalf.

Such an out-of-court statement is inadmissible because it is hearsay and comes within none of the exceptions to the hearsay rule. Section 27-801, R. R. S. 1943, provides in part: "(3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; and

"(4) A statement is not hearsay if:

"(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive."

It is apparent that the statement is hearsay under subsection (3). It cannot be admitted under the terms of subsection (4) (a) (ii) for Pelton had not yet testified at the time the offer was made and no express or implied charge of recent fabrication had been made by the State in any evidence offered by it. Neither does the statement qualify under any exception to the hearsay rule.

It was not: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 27-803(1), R. R. S. 1943. It does not qualify under section 27-803(2), R. R. S. 1943, which states: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Pelton's state of mind or emotion at the time he gave the statement was not a material fact.

Pelton also contends that the refusal to grant him a separate trial was prejudicial because it led to the exclusion of exhibits 15 and 16 which are the airbills mentioned in assignment (4). Exhibit 15 bore the name of C. Edwards, North Platte, Nebraska, as shipper and Bill Murphy of Tucson, Arizona, as consignee, and related to the shipment of a 20-pound suitcase. Exhibit 16 bore the name of Verne Wisemon of Tucson as shipper and Charlie Edwards of North Platte, Nebraska, as consignee. This airbill pertained to a 32-pound "Box Records & tapes."

The foundation laid for exhibits 15 and 16 by Pelton was the testimony of the Frontier Airlines manager at North Platte that these two exhibits were the airline's copies of certain airbills. This witness could not identify either the shipper or the consignee, nor the persons who made the shipments or received them. No offer was made to show he knew the actual contents of the shipments. As to exhibit 16, Pelton elicited the testimony of one of the investigating officers. This officer was asked to testify as to the result of his investigation of the shipments evidenced by exhibits 15 and 16. It is apparent that hearsay testimony was being elicited and it is clear that the foundational offer made was insuf-

ficient in that the offer does not show the competency of the evidence. See State v. Fonville, *ante* p. 220, 248 N. W. 2d 27. It was not the fact that Pelton and Edwards were being tried together that made exhibits 15 and 16 inadmissible. It was the failure of Pelton to lay or offer a proper foundation to show the relevance and materiality of the facts. Pelton would have been entitled to show, if he could, immediately previous solo drug operations by Edwards as tending to show his co-defendant's sole responsibility in this case. The court did not err in sustaining the objections.

Pelton next contends that because the defenses of the two defendants were antagonistic a separate trial should have been granted. His position seems to be that where one defendant seeks to put the sole responsibility on the other, they are entitled to separate trials. The mere claim that defenses of codefendants are antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts and would be proved by similar evidence. United States v. Lebron, 222 F. 2d 531; United States v. Van Allen, 28 F.R.D. 329. See, also, State v. Rice, 188 Neb. 728, 199 N. W. 2d 480. Even if we were to assume arguendo that such a principle has legal merit, Pelton establishes no prejudice in this particular case. Edwards did not offer evidence attempting to place responsibility on Pelton. It may be that Pelton's contention is that had there been separate trials he might have been able to use Edwards as a witness. If so, the contention still lacks merit. Even if tried separately Edwards could have exercised his Fifth Amendment rights to refuse to testify, just as he did in this case. And, of course, if separate trials were granted, only one defendant could be tried first. The fact that one defendant wishes to use the other as a witness does not of itself entitle him to a separate trial. Gorin v. United States, 313 F. 2d 641. Pelton has not established that he should have been granted a separate trial.

Instruction No. 4 given by the court defined the elements of the crime. Among these elements was: "That such possession of marijuana occurred knowingly or intentionally." The amendment to the instruction proffered by Pelton would have added: "and with knowledge by the defendants of the controlled and chemical nature of the marijuana which they possessed."

Section 28-4,125, R. R. S. 1943, in part provides: ". . . it shall be unlawful for any person knowingly or intentionally: (a) To . . . possess with intent to . . . distribute, deliver, or dispense, a controlled substance." Section 28-4,117, R. R. S. 1943, lists the various controlled substances, including among them marijuana. Certain other statutes define who or under what circumstances persons may lawfully possess such substances. None of the statutes make any requirement that the defendant know "the controlled and chemical nature" of the substance. It seems apparent that by using the terms "knowingly" or "intentionally" the law intends to exclude innocent or unwitting possession. Even the most casual examination of section 28-4,117, R. R. S. 1943, evidences a legislative intent not to require knowledge of the chemical nature of the substance. If that were not true only a highly skilled and knowledgeable chemist could be properly charged under the Controlled Substances Act. What drug pusher, for example, would know the chemical nature of the opiates "alphacetylmethadol" or "ethylmethylthiambutene"? The requested amendment to instruction No. 4 did not correctly define an element of the crime and it was not error to refuse the request.

The possible sentences for the crime of which defendant was convicted are: ". . . imprisonment for not less than one year nor more than five years, . . . or a fine of not more than two thousand dollars," or "imprisonment in the county jail of not more than six months," or both fine and imprisonment. § 28-4,125(2) (b), R. R. S. 1943. Defendant has a rather lengthy history of

convictions for various misdemeanors and admits a substantial history of usage of various drugs. The trial court found that he was not a good risk for probation and that confinement in the county jail would not be conducive to reform. We cannot say that the sentence involved an abuse of discretion.

AFFIRMED.

WHITE MOTOR CREDIT CORPORATION, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. SAPP BROS. TRUCK PLAZA, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.
249 N. W. 2d 489

Filed January 19, 1977. No. 40760.

1. **Judgments: Evidence: Trial.** In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party, and he is entitled to the benefit of any reasonable inferences derived from it.
2. **Replevin: Property: Actions.** An action in replevin lies to recover possession of personal chattels that are unlawfully detained, regardless of whether the original taking was wrongful. It is founded solely on the claim that the defendant wrongfully withholds the property sought to be recovered.
3. **Security Agreements: Motor Vehicles: Process.** A security agreement noted on the certificate of title shall be valid as against the creditors of the debtor whether armed with process or not.
4. **Replevin: Property: Damages.** Subject to some qualifications, the party recovering possession of property by replevin is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.
5. ———: ———: ———. Where depreciation in the value of property is allowed as an element of damage in replevin, its measure is the difference between the value of the property at the date of commencement of wrongful detention and its value on the date on which it was delivered to the prevailing party.
6. **Replevin: Property: Pleadings: Proof.** When a defendant in replevin denies plaintiff's title and right of possession of property and pleads the right of possession thereof in himself and prays a return of the property, proof of demand before the

bringing of the action is unnecessary. The general rule is that demand is not required where it would be futile.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Crosby, Guenzel, Davis, Kessner & Kuester and Roberta S. Stick, for appellant.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn & Meusey, for appellee.

Heard before SPENCER, BOSLAUGH, NEWTON, and BRODKEY, JJ., and BURKE, District Judge.

SPENCER, J.

This is a replevin action to recover possession of a 1972 White Freightliner truck, and for damages. The trial court sustained plaintiff's motion for a directed verdict on the question of the right to possession and ownership of the truck. It sustained defendant's motion to dismiss on the issue of wrongful detention. It found negligence on the part of defendant after assuming custody and control of the truck, and awarded plaintiff damages in the amount of $6,000. Defendant appeals and plaintiff cross-appeals.

Defendant alleges the trial court erred in not sustaining its motion to dismiss on the issue of negligence, and in overruling its motion for a new trial. Plaintiff cross-appeals on the dismissal of its claim for wrongful detention. We sustain the plaintiff's cross-appeal, and reverse the judgment of the trial court in sustaining the motion to dismiss the issue of wrongful detention.

On December 31, 1971, White Motor Corporation sold to Missouri Minerals, Inc. ("Missouri"), a number of 1972 White Freightliner tractors, including the one in issue herein. The sale was made under a security agreement which was assigned the same day to the plaintiff herein, and filed with the county clerk of Douglas Coun-

ty, Nebraska. The agreement was also noted on the certificate of title as the first lien against the truck.

"Missouri" was in default on the payments due December 15, 1973, and thereafter, up to and including the one due on August 15, 1974. In August of 1973, defendant detained the truck at its truck plaza. Sapp placed a chain on it and refused to let it go until a bill of $8,973.80 was paid. At that time, Bill Sapp took possession, custody, and control of the keys to the truck for the defendant.

On August 24, 1973, Sapp brought an action in the District Court for Sarpy County, Nebraska, to collect money owed for fuel, labor, and services furnished to "Missouri." As a part of that action, Sapp filed an attachment proceeding against the truck. Plaintiff was not a party to that action. On October 5, 1973, an order of attachment was levied on the truck. Pursuant to this order, the sheriff of Sarpy County attached the truck, which was located at defendant's place of business. The sheriff left the truck in the custody and control of the defendant. Because of a defect in the attachment procedure, a subsequent order of attachment was issued on December 28, 1973, and executed by the sheriff.

In September of 1973, an action involving the truck was filed in the United States District Court for the District of Nebraska. In this action plaintiff claimed a superior interest in the truck and alleged its wrongful detention.

At the time of the December attachment, the sheriff had the truck appraised. The figure shown on the appraisal form is $6,000. However, the testimony of one of the appraisers was adduced. He testified that his appraisal of the tractor was $22,000. Because of a transposition, it was listed on the appraisal form at $6,000. The $6,000 figure was meant for a trailmobile trailer and the $22,000 figure for the tractor involved herein.

Subsequent to this appraisal, the defendant moved the truck to Blair, Nebraska, and put it in a fenced lot

it owned at that point. On the advice of its attorney, the truck was brought back to the truck plaza early in 1974.

On July 1, 1974, the truck was damaged at the truck plaza when a second truck rolled into the front of it. Subsequent to this, pilferage of parts of the truck began to occur. On January 1, 1975, the sheriff had Neff Towing take the truck to its lot. There was no estimate made of the value of the truck at that time. In May 1975, at the direction of plaintiff, the truck was appraised and valued at between $2,500 to $3,000. It was subsequently sold on June 18, 1975, for $4,100.

Plaintiff alleges that during the period following the December 28, 1973, attachment defendant exerted custody and control over the truck. It retained the keys to the truck. It determined where the truck would be parked. It winterized the truck in November of 1973, and ordered the truck moved to Blair and returned. It exercised these acts of dominion and control without the knowledge or consent of the sheriff.

Plaintiff further alleges defendant had knowledge of the deterioration occurring at all times while it exercised dominion and control over the truck. It abandoned the property and wholly failed to guard against deterioration. It was aware of the extensive pilferaging occurring to the truck during the period from February 1974, to January 17, 1975. It did not report the damage and pilferage to the sheriff until substantial damage had occurred. This defendant denies.

On December 15, 1973, prior to the attachment of the truck, "Missouri" was in default of its security agreement. In fact, it was in default in August of 1974. On September 11, 1974, plaintiff made demand upon defendant for the return of the truck by delivery of a copy of the affidavit in replevin, temporary restraining order, and summons upon William Sapp. Following the service of this demand, plaintiff alleges the deterioration con-

tinued until January 1975, when the sheriff removed the truck to Neff Towing for safekeeping.

Defendant does not contest the trial court's holding that plaintiff was entitled to possession and ownership of the truck. Plaintiff had a superior interest under section 60-110, R. R. S. 1943, since its lien was noted on the certificate of title.

Defendant does argue plaintiff was not the real party in interest until after the trial court gave plaintiff temporary possession of the truck on April 29, 1975, and urges that plaintiff can only recover damages occurring after that date. The evidence, however, is undisputed that "Missouri" was in default on December 15, 1973. Plaintiff had a contractual and statutory right to possession on that date. An appraisal of the truck was made on December 28, 1973.

Defendant further argues that when the sheriff executes an order of attachment on personal property, the attached property is considered to be in his custody and control. It argues further that it was the sheriff's duty to take the necessary steps to protect the attached personal property, not the defendant's duty. The fact that there may be liability on the part of the sheriff for what happened to the truck while it was constructively in his possession does not relieve the defendant.

Defendant had taken possession of the vehicle before its first attachment, by chaining the vehicle and taking possession of the key. When the sheriff levied the defective attachment, he left the property in the possession of the defendant, which was the attaching party. After the December attachment, he again left the truck in the possession and control of the defendant. Sapp was in the business of servicing and storing trucks and maintained a parking lot for that purpose. There is no question on this record the defendant, who had actual possession, exercised dominion and control over the truck from August 1973, to January 17, 1975.

Defendant owed a duty of reasonable care to prevent

damage and pilferage. It is undisputed that the damage which resulted occurred while the truck was in the defendant's custody. The evidence supports the District Court's determination that defendant's actual possession and negligent supervision was the sole proximate cause for the damage. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party, and he is entitled to the benefit of any reasonable inferences derived from it. Henkle & Joyce Hardware Co. v. Maco, Inc. (1976), 195 Neb. 565, 239 N. W. 2d 772.

In attempting to understand the trial court's ruling on defendant's motion to dismiss on the issue of wrongful detention, we assume it did so on the basis that the truck was seized at a time before plaintiff was entitled to possession. We deduce this from the fact that the trial court excluded all evidence of events prior to the attachment by the sheriff under the order of December 28, 1973.

As stated in 66 Am. Jur. 2d, Replevin, § 24, p. 850: "An action in replevin lies to recover possession of personal chattels that are unlawfully detained, regardless of whether the original taking was wrongful. It is founded solely on the claim that the defendant wrongfully withholds the property sought to be recovered." Stated otherwise, the issue is not whether defendant was wrong in seizing the truck from "Missouri," but whether plaintiff is entitled to possession as against defendant. Section 25-1093.01, R. R. S. 1943, does not require a wrongful seizure.

Generally the rights of an artisan making repairs to a chattel at the request of the possessor is subordinate to the rights of those having liens of which the artisan has constructive or actual notice. We have heretofore held that plaintiff had a superior interest under section 60-110, R. R. S. 1943. That section provides that a security agreement noted on the certificate of title "shall be valid as against the creditors of the debtor, whether

armed with process or not, * * *." See Allied Inv. Co. v. Shaneyfelt (1956), 161 Neb. 840, 74 N. W. 2d 723.

Damages are recoverable in a replevin action in Nebraska. The applicable statute is section 25-10,105, R. R. S. 1943, which provides: "In all cases where the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or an inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which with costs of suit, the court shall render judgment for plaintiff." Such damages are normally for interest or loss of use of the property. The statutory language is broad enough, however, to permit recovery for depreciation and deterioration where the property is returned to plaintiff, and we so find. Plaintiff in this case seeks only the special damages for deterioration and damage to the truck during the period of wrongful detention.

Damages allowed for wrongful detention are succinctly stated in Schrandt v. Young (1901), 62 Neb. 254, 86 N. W. 1085. Although that case involved damages recoverable by a defendant under the predecessor statute to section 25-10,103, R. R. S. 1943, the language is equally applicable where judgment is for the plaintiff. The court stated, so far as material herein: "He may recover, * * * (3) if loss, deterioration or depreciation occur while the property is withheld, then the amount of such loss, damage or depreciation, to be conditioned, however, upon return of the property, the alternative judgment for the value being fixed as of the date of the taking. Moreover, the damages for detention must be such as grow out of the detention and are connected with or incident to the contest over possession."

In 77 C. J. S., Replevin, § 271, p. 195, we find the following: "Subject to some qualifications, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful

detention." That same authority states the measure of damages as follows: "* * * where depreciation in the value of the property is allowed as an element of damage in replevin, it is estimated as the difference between its fair market value at the place and time of its wrongful taking or detention and such value at the time of the trial, * * *. In some cases the difference between the value of the property at the date of the commencement of the unlawful detention and its value on the date on which it was delivered to the prevailing party has been regarded as the proper measure of depreciation, * * *."

The appraised value of the truck on December 28, 1973, was $22,000. In May 1975, it was appraised at a top of $3,000. However, the property was sold in June 1975, for $4,100. This fact appears in the record but was not admitted in evidence. It should, however, be considered as the value of the property at the time it was delivered to the plaintiff. This would indicate deterioration in the value of the truck of $17,900. On the record this would appear to be the amount of loss sustained by the plaintiff, for which defendant would be liable.

Plaintiff, however, claims only a special interest in the property, so the measure of its damage is the amount of its lien with interest and costs within the value of the property. See Underwriters Acceptance Corp. v. Dunkin (1950), 152 Neb. 550, 41 N. W. 2d 855. Ten tractors were sold to "Missouri." While plaintiff argues that its balance due is far in excess of the amount involved herein, the evidence does not disclose the amount outstanding on the one tractor involved in this action. Exhibit 10 shows a balance of $70,396, but this appears to be for the 10 trucks. The amount due on the truck involved herein should be determined and the liability of the defendant is that amount up to $17,900.

Defendant has raised another issue. The plaintiff never made formal demand for the return of the tractor.

Formal demand was not necessary in this case. When a defendant in replevin denies plaintiff's title and right of possession of property and pleads the right of possession thereof in himself and prays a return of the property, proof of demand before the bringing of the action is unnecessary. Green Finance Co. v. Becker (1949), 151 Neb. 479, 37 N. W. 2d 794.

In the present case, defendant answered with a general denial and further asserted it had an artisan's lien on the truck. The general rule is that demand is not required where it would be futile. See 77 C. J. S., Replevin, § 71, p. 44. Defendant was put on notice that plaintiff claimed a superior interest in the truck. Plaintiff's lien was noted on the certificate of title. In September 1973, plaintiff filed an action in federal District Court against defendant. When the truck was moved to Blair, in January 1974, plaintiff demanded that it be returned to the location designated in the attachment order. Under these circumstances, there was no need to make a further demand on defendant for the return of the truck.

The judgment herein is reversed and the cause remanded with directions to make a determination of damages in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MID-CONTINENT PROPERTIES, INC., A CORPORATION, APPELLANT, V. FRANK A. PFLUG ET AL., APPELLEES.
249 N. W. 2d 476

Filed January 19, 1977. No. 40794.

1. **Frauds, Statute of: Contracts: Evidence.** The object of section 36-107, R. R. S. 1943, is to prevent frauds and perjuries, and, while certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute by the courts renders such contracts not void, but merely unenforceable for want of the evidence which the statute requires.

2. **Frauds, Statute of: Contracts: Brokers.** When a written contract for the sale of real estate entered into between vendor and purchaser provides for the payment of a real estate broker's commission, the broker is a third-party beneficiary and the contract is not within the purview of section 36-107, R. R. S. 1943.
3. **Contracts: Parties: Rescission.** The principal parties to a third-party creditor-beneficiary contract can rescind the contract or release one another from their obligations thereunder to the creditor-beneficiary if the rescission or release precedes the creditor-beneficiary's acceptance of the contract or change of position in reliance thereon.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Reversed and remanded with directions for new trial.

William E. Pfeiffer of Spielhagen, Spielhagen & Pfeiffer, for appellant.

Jay L. Welch of Rickerson & Welch, for appellees.

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

NEWTON, J.

This is an action by a real estate broker to recover a commission on the sale of real estate. The action was dismissed on the ground that the statute of limitations had run. We reverse the judgment of the District Court.

Plaintiff, a licensed real estate broker, negotiated a sale of defendants' property to Dowd Grain Company, Inc. Apparently plaintiff did not have a written broker's contract with defendants, but in the contract of sale executed by defendants and Dowd Grain Company, Inc., a provision was inserted as follows: "Sellers agree to pay Mid-Continent Properties, Inc. a commission of Five Per Cent (5%) computed on the total purchase price, but no commission is to be paid until sellers receive the $75,000.00 first payment from buyers." The contract was executed by vendor and vendee on June 17, 1970. The consideration was $300,000, payable $2,000 down,

$73,000 on June 15, 1971, and the balance in three equal annual installments. A dispute arose and was resolved by an action for specific performance. Decree of this court was entered for vendee April 10, 1975, and, meantime, vendee had made timely tender of all payments falling due. See Dowd Grain Co., Inc. v. Pflug, 193 Neb. 483, 227 N. W. 2d 610.

Plaintiff has brought this action as a third-party beneficiary under the contract above described but was not otherwise a party to it. The action is one on a written contract and may be brought within 5 years. See § 25-205, R. R. S. 1943. Whether the cause of action be deemed to have accrued on June 17, 1970, or on June 15, 1971, when the first $75,000 installment was due under the contract, it having been commenced on June 13, 1975, it was brought within the 5-year period and is not barred by the statute of limitations.

A second problem presented arises under the terms of section 36-107, R. R. S. 1943. The contract complied fully with the requirements of this section except that it was not signed by the broker, plaintiff herein. Since plaintiff was a third-party beneficiary, we deem the statute inapplicable. In Mohr v. Rickgauer, 82 Neb. 398, 117 N. W. 950, this court held that although an oral promise to pay a broker's commission on a sale of real estate was unenforceable, it constitutes a sufficient consideration to support a promissory note given in payment of the commission. The court stated: "The object of the statute is, as we have seen, to prevent frauds and perjuries; and, while certain contracts are by the terms thereof declared void, the uniform construction placed upon the statute by the courts renders it not void, but merely unenforceable." See, also, Morrison v. Gosnell, 84 Neb. 275, 121 N. W. 236.

In Pierce v. Domon, 98 Neb. 120, 152 N. W. 299, it was held that present section 36-107, R. R. S. 1943, is simply an extension of the statute of frauds having as its object the prevention of recovery by false testimony

and that where a written contract was entered into after the sale was entered into, the reason for the law had been fulfilled.

In Svoboda v. De Wald, 159 Neb. 594, 68 N. W. 2d 178, it was held that an oral contract with a broker for the sale of real estate was not against public policy and could be carried out by the parties; and when it is reduced to writing before suit is brought, the object of the statute is fulfilled. The court stated: " 'The object of the statute of frauds is to prevent frauds and perjuries, and, while certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute by the courts renders such contracts not void, but merely unenforceable for want of the evidence which the statute requires.' "

In this case we deal with a contract which complies with all the requirements of the statute save for the lack of the broker's signature. It is not a direct contract between broker and landowner, such as the statute contemplates, but a contract in which the broker is a third-party beneficiary. Clearly and indisputably there was an understanding between the broker and the landowner for the commission sought to be recovered. No reliance on oral testimony is required; the agreement is definitely established and the object of the statute of frauds complied with.

In its petition plaintiff alleges that the original contract has been superseded, presumably since resolution of the action for specific performance, by a later agreement between vendor and vendee which failed to provide for plaintiff's commission. "* * * the principal parties to a third-party creditor-beneficiary contract can rescind the contract or release one another from their obligations thereunder to the creditor-beneficiary if the rescission or release precedes the creditor-beneficiary's acceptance of the contract or change of position in reliance thereon." 97 A. L. R. 2d 1266. See, also, Annotation, 97 A. L. R. 2d 1262.

Since the District Court acted on a demurrer or motion and no evidence was taken pertaining to plaintiff's acceptance of the contract or change of position in reliance thereon, this judgment must be reversed and the cause remanded with directions for a new trial to resolve the question.

REVERSED AND REMANDED WITH DIRECTIONS FOR NEW TRIAL.

ROSELLA NABER, ADMINISTRATRIX OF THE ESTATE OF GLEN NABER, DECEASED, APPELLANT, V. CITY OF HUMBOLDT, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
249 N. W. 2d 726

Filed January 26, 1977. No. 40612.

Municipal Corporations: Political Subdivisions: Statutes: Appeal and Error. On appeal to this court of an action under the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed unless clearly wrong.

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

C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler and Donald E. Benton, for appellant.

M. J. Bruckner and Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and CANIGLIA and COADY, District Judges.

COADY, District Judge.

This tragedy includes a cast of 3 lifeguards and, at least, 60 persons of minor age. The Humboldt municipal swimming pool opened on Sunday. On the following Friday, June 1, 1973, the pool opened at 1 o'clock, p.m., and approximately 98 children entered the pool in the next 2½ hours according to the pool records. Among

the children attending were Glen Naber, age 10, his younger brother and two younger sisters. They were attending for the first time and were in the charge of a 13-year-old female baby sitter. The baby sitter and the Naber children could not swim.

The pool was 82 feet in length. The width was 40 feet at the center. The north and south sides tapered from the center to each end so that both the east and west ends were 29 feet wide. At the east end there was a separate wading pool. At the west end there were two diving boards, a 1-meter board towards the north, and a 3-meter board towards the south. The west end was overlooked by a high, steel lifeguard chair located on the south side of the pool and approximately at the center of the diving area. That chair was unoccupied. There was a second high, steel lifeguard chair on the south side near the center of the pool which was occupied. From that position a guard could see the entire pool, including the bottom of the diving portion. On the north side, there was a building containing the pool entrance, bathhouse, and office.

The pool was cleared of swimmers at 3 o'clock p.m., and remained closed for 15 minutes. At that time, a 52-year old lifeguard-operator testified that she visually checked the bottom of the pool. This lifeguard was the pool manager or operator and will be hereinafter referred to as the operator. After the 3 o'clock break, a 17-year-old female lifeguard took a mobile position, called walking duty, on the north side of the pool and will hereinafter be referred to as the north guard. A 21-year-old female lifeguard climbed and seated herself in the chair located at the center of the pool and on the south side. She will hereinafter be referred to as the south guard. The operator had a senior Red Cross life saving certificate and a pool operator's certificate from the State of Nebraska. Both the north and south guards were holders of the Red Cross senior life saving certificate.

At approximately 3:15 o'clock p.m., the break was

ended and the children resumed swimming. Sometime thereafter, the operator adjusted an umbrella above and for the south guard so that the south guard need not take her eyes from the pool. The brother and sisters of Glen Naber were located in the wading pool and being supervised by their baby sitter. Marty, an 11-year-old boy, was located at the bottom of the 3-meter diving board where he let Glen Naber climb ahead of him. At the top, Glen inquired as to the depth and let Marty go ahead of him after being told. Marty jumped off the board and into the pool.

Marty climbed the high board a second time. From the board he looked over the diving area in front of him and saw what he thought was someone near the drain and under 10 to 12 feet of water. He jumped off and climbed out on the south side of the pool near the unoccupied lifeguard chair. He told his 10-year-old friend, Steve, who dove twice from poolside to determine if it really was someone.

The boys told the operator and the south guard. The operator and the south guard yelled to the north guard then located near the northeast corner of the diving area. The north guard dove, retrieved the body of Glen Naber, and brought it to the south side. After yelling to the north guard, yelling to the office for a doctor to be called, and seeing the body brought up, the operator went to the office to complete the emergency call.

The south guard lifted the boy from the water and laid him on his back. The guards looked for signs of life and, finding none, completed one push or stroke of the chest pressure method of artificial respiration. The operator returned and applied six or seven movements of the back pressure arm lift method. A medical doctor arrived after driving 5 or 6 blocks on a motorcycle. He checked for vital signs and he ordered the operator to apply mouth to mouth respiration. She administered four or five breaths at which time the emergency squad arrived with oxygen. All these events were reported

by the witnesses to have happened in terms of seconds. In any case, Glen Naber's body was not revived.

This is an action brought under the Nebraska Political Subdivisions Tort Claims Act to recover damages by reason of negligence. On trial to the court, judgment was entered for the defendant. We affirm the judgment of the District Court.

Plaintiff argues that the lifeguards were inattentive. There was evidence that the guards were attentive and watchful. There was evidence that the deceased acted in such a way that his act should have been noticed and caused alarm. The trial judge specifically stated that he did not believe the principal sources of this latter evidence and set forth adequate reasons.

Plaintiff argues that the guards should have immediately used mouth to mouth respiration. A reader of the bill of exceptions will have no good idea as to whether anything could have been done for the deceased when his body was pulled from the pool. We concede that time is critical in lifesaving. There was evidence that the mouth to mouth approach is the preferred method. There was evidence that the methods first applied were standard and acceptable methods. There was evidence that foam, mucus, and blood came from the mouth of this poor boy.

Because negligence is relative and the plaintiff has the burden of proof, the findings of the trial court will not be disturbed. On appeal to this court of an action under the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed unless clearly wrong. Buttner v. Omaha P. P. Dist., 193 Neb. 515, 227 N. W. 2d 862 (1975).

AFFIRMED.

WANDA G. GOTTSCHALK, APPELLEE, V. CHARLES E. GOTTSCHALK, APPELLANT.
249 N. W. 2d 502

Filed January 26, 1977. No. 40629.

1. **Divorce: Property: Appeal and Error.** This court is not inclined to disturb the division of property made by a trial court in marriage dissolution proceedings unless it is patently unfair on the record.
2. **Divorce: Alimony: Property.** Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

Tedd C. Huston, for appellant.

Stephen O. Stumpff of Stumpff, Schwasinger & Washburn, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and HAMILTON and WINDRUM, District Judges.

WINDRUM, District Judge.

This is an appeal from a decree dissolving the marriage of the parties. The only issue to be resolved here concerns the division of property between the parties and assessment of costs, as all other issues, such as the dissolution of the marriage and the custody and support of the children of the parties, were resolved by the District Court to the satisfaction of both parties.

The parties were married on March 2, 1958. Each was of the age of 18. Neither party brought property of any significance to the marriage. Throughout the marriage of the parties, petitioner in essence fulfilled her duties as housewife and mother. However, during the marriage, the petitioner did work in the store in which respondent owned an interest. Petitioner

worked in said store in the meat department or as a checker, part time, from the date of marriage until 1969. Petitioner has no other skill, except that in 1974 she took a course in typewriting, and during 1975 she earned as high as $90 per week as a bookkeeper.

The record indicates that the respondent has been in the grocery business for more than 20 years. During 1974, respondent earned in salaries and bonuses, $14,812.57. In addition, the corporation of which he was a part owner, made a profit. In 1975, the respondent was earning a salary of $180 per week and in addition was to receive $8,826 as his share of the manager's bonus. During the year 1975 the corporation expanded the business by opening another grocery store in Wyoming. The respondent is also an owner of a 50 percent share of a partnership engaged in the ranching industry. Further, respondent for many years, together with his family, had the use of the house located upon real estate of which he and petitioner were the owners of one-half, which constituted an additional source of income. Nothing appears in the record indicating any history of profits or loss from the farm partnership.

It shall now be necessary for the petitioner to find other living quarters for herself and the children of the parties, who shall be hereafter described. Petitioner contributed some of the support of the family by working in the family store, but in the main, she performed the normal duties of a housewife and mother. The marriage has lasted for 16 years, during which time petitioner was unable to expand her earning power by the obtaining of further experience, necessary contacts, or education with the exception that she, during the last year of the marriage, learned to type. At the time of trial, petitioner was unemployed.

The parties are the parents of three children now aged 15, 14, and 12. Custody of said three boys was awarded the petitioner. However, the court ordered

respondent to pay only $90 per month per child for their support.

As of the date of the filing of the petition, respondent was the owner of a one-third interest in IV-G Corporation. The corporation was engaged in the grocery business in Broken Bow, Nebraska. At various times, petitioner attempted to obtain relevant information concerning the net worth of such corporation. On May 15, 1975, the District Court appointed a master and ordered him to determine the financial status of said corporation as of December 31, 1974.

The master duly filed his report which was received as an exhibit at a pretrial conference held September 26, 1975. Trial on the issues was had on October 9, 1975. On December 9, 1975, the court ordered the division of property and assessed costs. On December 15, 1975, the court modified its order to some extent. Thereafter a motion for new trial was filed which was duly argued on January 16, 1976, and overruled.

The Court ordered the property of the parties to be divided as follows:

Wanda G. Gottschalk, petitioner and appellee:

(1)	1973 Pontiac Automobile	$ 3,500
(2)	Household Goods, furniture, major appliances, carpets, curtains, and drapes	6,000
(3)	Boat, motor, and trailer	300
(4)	Bedding, linens and small appliances	No value
(5)	Money judgment	38,600
	TOTAL	$48,400

Charles E. "Bud" Gottschalk, respondent and appellant:

(1)	1/3 interest in IV-G Corporation, stock	$40,950
(2)	1/3 interest in accrued manager's bonus	8,826
(3)	½ interest in farm (real estate) net	28,425

(4)	½ interest in machinery and cattle	4,915
(5)	Horse	150
(6)	Saddles	150
(7)	1974 Ford pickup	3,500
(8)	Old pickup truck	50
TOTAL		$86,966
Less money judgment		(38,600)
		$48,366

Respondent was ordered to pay the money judgment in 10 equal annual installments, the first being due in December of 1975. Said "judgment" was to draw interest at the rate of 8 percent per annum on the unpaid balance.

Respondent advances several assignments of error. Respondent does not object to the awards of the specific personal property to petitioner and the specific personal property to the respondent as above described. Respondent objects to the amount of the "judgment" to be paid in installments. First, respondent objects to the valuation of a bonus as hereinafter related.

Among the assets accumulated by the parties during their marriage was a one-third interest in IV-G Corporation. The master reported, and the court so found, that as of December 31, 1974, said corporation owed respondent a manager's bonus in the sum of $8,826. The court considered as an asset owned by respondent as of December 31, 1974, the manager's bonus. However, respondent attempted to show by evidence, which was not received by the court, that after the date of the filing of the petition, the IV-G Corporation, which operated a grocery store in Broken Bow, Nebraska, expanded to the extent that it opened a new store in Wheatland, Wyoming, and the respondent loaned his manager's bonus to said corporation to assist in said expansion. As of the date of the trial the new store in Wheatland, Wyoming, had suffered a loss from the date

of opening to the date of trial in the approximate sum of $22,000, one-third thereof being attributed to respondent, and thus the respondent had nearly dissipated the $8,826 bonus. Thus, respondent maintains the court should not have considered the manager's bonus as an asset. The record indicates that repeated efforts were made by petitioner to obtain relevant financial information concerning the IV-G Corporation without success. The loss of the Wheatland store is of no consequence unless accompanied by evidence of the profit and loss of all the corporate activities, including the Broken Bow store. Therefore, the court rightly rejected said evidence.

It is interesting to note that upon motion for new trial, the attorney for respondent stated that the figures for the operation of the corporation for 1975 were then available and that the respondent was in error in his previous assessment of the loss, and that the actual share of the loss for the entire corporation for the year 1975 attributable to respondent's third was in the sum of $2,336.59. However, there is no evidence to that effect, and in so stating, the respondent's attorney neglected to state whether or not the 1975 records reflected any manager's bonus.

Secondly, respondent claims there should have been deducted from the total value of all assets, before any division thereof was to have been made, the following items:

Extra bills and expenses	$1,956.37
Outstanding farm bills	2,100.00
Personal indebtedness	1,200.00
Bank note accrued but not due interest, farm	696.00
Real estate contract accrued but not due interest	425.00
Total	$6,377.37

It has been recently held in Abbott v. Abbott, 196

Neb. 97, 241 N. W. 2d 527, that this court is not inclined to disturb the division of property made by a trial court unless it is patently unfair on the record.

Although alimony and property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and the circumstances may require that they be considered together to determine whether the court has abused its discretion. Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618.

The court overlooked the items of farm bills and interest. The omission was brought to the court's attention on the hearing on respondent's motion for a new trial, however, and from then on the court chose to disregard same and in effect did not then inadvertently overlook them. The court had good reason not to deduct all the other items, but for reasons hereinafter stated, no useful purpose would be served by reciting the details thereof.

Assuming arguendo the total of $6,377.37 should have been deducted prior to a division, by not so doing, petitioner was awarded, counting the "judgment," 53.546 percent of the property. In view of the above-recited facts, this court cannot state that such a division would be unfair. Further, we do not find that all the above items should have been so first deducted.

Lastly, at the hearing on the motion for new trial, respondent attempted to introduce evidence concerning the loss incurred by the farm partnership for the year 1975, upon the theory that said evidence was not available at the time of the trial. In the first place, evidence of the financial condition of the partnership was obviously available at the time of the trial. Secondly, insofar as the division between the parties is concerned, the evidence of the loss of the partnership was not relevant as the court in dividing property valued the net assets of the partnership as of the date of the hearing,

and any profit or loss to the date thereof should then of necessity be disregarded. No error was committed for refusing to receive such evidence.

The judgment of the District Court is affirmed. The petitioner is awarded $500 for the services of her attorney in this court.

AFFIRMED.

JOEL M. KATLEMAN, APPELLEE, V. U. S. COMMUNITIES, INC., A DELAWARE CORPORATION, ET AL., APPELLANTS.
249 N. W. 2d 898

Filed January 26, 1977. No. 40654.

1. **Escrows: Agency: Contracts.** Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit, and charged with a strict execution of the duties assumed.
2. **Escrows: Agency: Negligence.** If an escrow agent violates instructions or acts negligently he is ordinarily liable for any loss occasioned by his breach of duty.
3. **Escrows: Agency: Estoppel.** From the time an escrow holder informs the seller that the buyer has put a payment in escrow, and the seller relies and acts on that information, the escrow holder is estopped to deny that the represented sum is on deposit.
4. **Trial: Appeal and Error.** In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.

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

William J. Lindsay and Robert G. Decker, and James F. Kasher of Brady, Kasher and Pavel, for appellants.

Mark L. Laughlin of Zwieback & Laughlin, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and RONIN, District Judge.

McCOWN, J.

The plaintiff, Joel M. Katleman, brought this action against the defendants, U. S. Communities, Inc., and Pioneer National Title Insurance Company, for the recovery of liquidated damages for breach of a contract for the purchase and sale of real estate. The District Court entered judgment in favor of the plaintiff and against the defendants in the sum of $15,000, and the defendants have appealed.

On September 6, 1973, the plaintiff, Joel M. Katleman, and the defendant, U. S. Communities, Inc., executed a contract in which Katleman agreed to sell, and U. S. Communities, Inc., agreed to purchase, 11.3 acres of industrially zoned land in Douglas County, Nebraska. Title was to be conveyed by warranty deed, free and clear of all liens and encumbrances except certain easements and restrictions. The contract provided that the transaction was conditioned upon Katleman causing Burt Avenue east of 107th Avenue to be vacated at his expense on or before closing. The purchase price was $550,000. The contract recited that U. S. Communities, Inc., simultaneously with the execution of the agreement, would deposit the sum of $25,000 with Pioneer National Title Insurance Company to be held by it in escrow. Upon closing Pioneer was to pay that sum to Katleman as a portion of the payment then due. Closing was to take place December 10, 1973. The contract provided that if U. S. failed or refused to consummate the transaction contemplated for any reason other than for specified reasons, one of which was failure to furnish marketable title, "then all amounts paid and deposited with (Pioneer) pursuant to this agreement shall, at the option of (Katleman), be forfeited to (Katleman) as liquidated damages for (U. S.'s) failure to carry out the purchase. If (Katleman) is unable to show marketable title to the property described in Paragraph 1 hereof, subject to easements and restrictions of record, and to fulfill the other

conditions hereof, * * * all monies paid and deposited with (Pioneer) shall be refunded to (U.S.)."

On September 7, 1973, U. S. executed its draft on Bank of America in the sum of $25,000 payable to the order of Pioneer. The draft was delivered to Pioneer on September 10, 1973, and Pioneer issued its receipt, which read: "This is to confirm that Pioneer National Title Insurance Company in relation to the above real estate holds a good and sufficient draft in the amount of **$25,000.00, delivered to it by U. S. Communities Inc."** Pioneer never presented the draft for payment, and the inference from the record is convincing that the draft was no longer good at the time of trial.

On November 14, 1973, the parties executed a substantially similar contract replacing and superseding the contract of September 6, 1973. One change material to the issues involved here was that the closing date was changed from December 10, 1973, to February 15, 1974. The replacement contract also stated: "It is understood and agreed that (U. S.) has heretofore deposited the sum of $25,000.00 with (Pioneer), to be held by it in escrow and to be used in connection with the closing * * *." An assistant vice president of Pioneer signed the contract and Pioneer received a copy. On January 31, 1974, the parties deleted certain provisions of the agreement not material here, and reduced the purchase price to $510,000.

After the November 14, 1973, contract was executed, Katleman proceeded to take steps to vacate Burt Avenue. Recommendation from the city planning board was made December 4, 1973, and by February 12, 1974, the county board had voted to vacate the street. While these matters were proceeding, U. S. was having difficulty in obtaining financing. On February 13, 1974, to obtain an extension of the closing date to March 15, 1974, U. S. deposited with Katleman $10,000 to apply to the purchase price under the contract and $5,000 to be retained by Katleman as consideration for the extension. On

February 19, 1974, the county board passed the official resolution to vacate Burt Avenue.

On March 11 or 12, 1974, U. S. was still having financing difficulties and proposed converting the purchase contract to an option arrangement, but Katleman rejected the proposed option. On March 14, 1974, Katleman sent a telegram to U. S. confirming that he was ready to close, but there was no closing on March 15, 1974. On March 22, 1974, an attorney for U. S. wrote Katleman demanding the return of the $15,000 paid to Katleman on February 13, 1974, and the release to U. S. of the sum of $25,000 deposited with Pioneer. The basis for the claim involved alleged defects in title arising out of the Burt Avenue vacation proceedings. Katleman made demand on Pioneer for payment of the escrow money to him, but Pioneer refused. On April 12, 1974, Katleman brought this action against U. S. and Pioneer. The case was tried to the court without a jury. The court found that Katleman was entitled to receive the sum of $25,000 held in escrow but U. S. was entitled to credit for the sum of $10,000 paid to Katleman on the purchase price on February 13. The District Court entered judgment against the defendants jointly and severally in the sum of $15,000.

Both Pioneer and U. S. contend that Katleman was not entitled to the benefit of the liquidated damage provisions of the contract on the ground that Katleman was unable to close on March 15, 1974, because there was a cloud on the title. The claimed defects involved possible utilities easements allegedly reserved or created under the language of the county board resolution of February 19, 1974, vacating Burt Avenue. While there is some conflict in the evidence generally, an officer of Pioneer, who was empowered to make such a decision, testified that upon receipt of the necessary instruments of conveyance and a release signed only by Katleman, or Katleman and his wife, Pioneer would have issued its title insurance policy on the closing date.

The trial court specifically found that whatever deficiencies of title were indicated in the evidence, they were all matters that were readily or easily curable at or about the time of closing. The trial court also specifically found that the sole and only reason the transaction was not closed on March 15, 1974, was a lack of financing ability on the part of the defendant, U. S. Communities, Inc., at that time. The court also found that the title objections of the defendants were positions adopted after the fact. These findings are fully supported by the evidence in the record.

Pioneer contends that the contract provided for the escrow of merely the $25,000 draft and not the escrow of $25,000 in money or cash. It asserts that it should only be required to endorse over to Katleman the $25,000 draft, and should not be jointly and severally liable with U. S.

The trial court made some findings of fact as to Pioneer's relationship with U. S. in areas beyond that of an escrow agent. Pioneer's liability here is established on the basis of its liability as the escrow agent, and other findings and additional grounds for liability are unnecessary.

While escrows traditionally involve documents, it is no longer open to question that money may also be delivered in escrow. See, 28 Am. Jur. 2d, Escrow, § 2, p. 6; Restatement, Agency 2d, § 14-D, comment (a), p. 67.

Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement. If he violates instructions or acts negligently, he is ordinarly liable for any loss occasioned by his breach of duty. See 28 Am. Jur. 2d, Escrow, § 16, p. 24, and § 18, p. 27.

Pioneer's assertion that the contract only required it to hold the $25,000 draft and deliver or return it at clos-

ing is destroyed by the terms of both the contract and the draft. If the draft was to be held by Pioneer, and either delivered to Katleman or returned to U. S., the draft should have been made payable to Katleman. Instead, it was made payable to Pioneer. The contract recited that "the sum of $25,000" was "to be used in connection with the closing." Under certain contingencies "all or part of said sum" was "to be paid" to Katleman. The contract also refers to "all amounts paid or deposited with Pioneer" or "all monies paid and deposited with Pioneer," in providing for the payment or refund of the escrowed funds in the event of failure or refusal to consummate the transaction. Pioneer's receipt for the $25,000 draft in September 1973, acknowledged that Pioneer held "a good and sufficient draft in the amount of $25,000.00." There is evidence that on at least one occasion when Pioneer was asked if it had $25,000 deposited under the contract, an officer advised Katleman that Pioneer had $25,000. The only reasonable conclusion on the basis of this record is that the $25,000 deposit in escrow was to be in cash or its equivalent, and that under the facts shown by the record here Pioneer should be estopped to deny that the sum of $25,000 was, in fact, on deposit. It was the duty of Pioneer, under the facts here, to cash the draft and hold the money, or promptly advise the principals if the draft was not paid. An undue or unreasonable delay in presenting the draft for payment would be negligence which might give rise to liability to the principals for any resulting loss.

In a case dealing with a very similar factual situation in which the escrow agreement called for the escrow agent to hold the sum of $10,000, a check for that amount was delivered to the escrow agent but was never cashed, and the agent represented to the party that cash was held, the court said: "It was the duty of the defendant in the circumstances to cash the check and hold the money. * * * the escrow company * * * admitted that it was exactly as responsible to the plaintiffs as if the

money had in fact been deposited in cash." The court also said: "From and after the time defendant informed the plaintiffs that the $10,000 deposit had been made and plaintiff relied and acted upon that information, the defendant was estopped to deny that the sum of $10,000 was in fact on deposit. * * * Defendant was then obligated to pay the sum of $10,000 in cash to plaintiffs upon full compliance with the terms of the escrow." Mefford v. Security Title Ins. Co., 199 Cal. App. 2d 578, 18 Cal. Rptr. 877.

Pioneer breached its duty as an escrow agent in holding the draft instead of cashing it and holding the money. Where a breach of that duty resulted in a loss to one of the principals through the negligence of Pioneer, Pioneer is liable to its principal as if the money had in fact been deposited in cash. The evidence in this record fully supports the findings and judgment of the District Court against both defendants.

In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Insurance Co. of North America v. Hawkins, *ante* p. 126, 246 N. W. 2d 878.

AFFIRMED.

FRANK B. LIENEMANN ET AL., APPELLANTS, V. HERMAN LIENEMANN ET AL., APPELLEES.
249 N. W. 2d 902

Filed January 26, 1977. No. 40741.

Statutes: Trial: Courts: Judgments: Time. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943.

Appeal from the District Court for Sarpy County:

RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Dixon G. Adams, for appellants.

No appearance for appellees.

J. Patrick Green of Eisenstatt, Higgins, Kinnamon, Okun & Stern, amicus curiae.

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

SPENCER, J.

This is an appeal from an order of the trial court modifying its judgment in partition after the final adjournment of the term of court at which its judgment was rendered. We reverse and reinstate the original judgment.

This is a partition action commenced by four of the children of August Lienemann, deceased, and the wife who is sole devisee of a deceased child of August Lienemann. Defendants are a sixth child and his spouse, and the spouses of three of the plaintiffs.

Defendants Herman Lienemann and wife filed an answer alleging the property was involved in a trust created between their father and Frank Lienemann, as trustee; that the trust was terminated; and that partition was not available to the plaintiffs. Over the objection of Herman, plaintiffs were permitted to file an amended and supplemental petition, attaching a copy of the trust document and alleging that the trust was terminated.

The trust, which was entered into on March 2, 1963, was to terminate upon the happening of one of the following contingencies, whichever event occurred first: (1) At the end of a period of 5 years from the date of creation of this trust; (2) upon the death of either George Lienemann or Frank B. Lienemann; or (3) at such time as all the then beneficiaries of the trust shall

unanimously agree in writing to terminate the trust. The trust was to terminate unless its existence was extended for a further period by a unanimous vote of the then beneficiaries.

By its terms, the trust terminated at the end of a period of 5 years, which would have been March 2, 1968. The partition action was filed December 20, 1974. The question of the termination of the trust was specifically made an issue in the partition action. On the day of the partition hearing, June 27, 1975, a stipulation was filed in the action by both the plaintiffs and the defendants, stipulating and agreeing that the action proceed to judgment in partition and for the appointment of a referee as prayed for in the original petition and the amended and supplemental petition of the plaintiffs. The stipulation was entered into by all the beneficiaries of the trust. Judgment was entered in partition. It determined the trust had terminated. Judgment was entered in conformity with the stipulation.

A referee was appointed and qualified. He reported the land could not be partitioned in kind. The court ordered a sale. Sale was held on October 20, 1975, and on November 7, 1975, the court confirmed the sale and ordered the referee to convey.

Prior to the conveyance, but after the final adjournment of the term at which the judgment was rendered, on March 2, 1976, the court on its own motion issued an order to show cause why its judgment in partition should not be modified, attaching thereto its proposed modification. The court had its order to show cause served on some of the parties or their attorneys and scheduled hearing on the order for March 5, 1976. All parties resisted the court's proposed modification. On March 5, 1976, in the absence of the attorney for the plaintiffs, the court held a hearing in chambers on its order to show cause and entered an order finding that its proposed order modifying the judgment in partition was correct, but delayed the entry thereof.

On March 15, 1976, the court held another hearing at which the attorney for the plaintiffs was present. On March 17, 1976, the court entered an order captioned "Modification of Judgment Declaratory Judgment Appointment of Referee." This order did the following: (1) Set aside the judgment of June 27, 1975. (2) Quieted title in the trustee. (3) Held that the trust was terminated. (4) Confirmed the shares of the parties. (5) Reconfirmed and ratified its order of June 27, 1975, as to the appointment of the referee. (6) Reconfirmed and ratified all actions of the referee pursuant to his appointment including the sale and confirmation. (7) Substituted the trustee as plaintiff. (8) Ordered all parties and the trustee to convey to the purchaser at the sale. (9) Ordered the referee to convey to the purchaser at the sale.

By March 17, 1976, two terms had passed since the entry of the judgment in partition on June 27, 1975. The trial court purported to enter the judgment in accordance with subsection (3) of section 25-2001, R. R. S. 1943, presumably based upon the fact that the trustee could have sold the property under the trust instrument after its termination and that partition was unnecessary.

The trustee, who was one of the plaintiffs, had 6½ years to sell the property. He failed, neglected, or was unable to do so. The termination of the trust was a specific issue in the original action, and all the beneficiaries joined in requesting judgment in partition. The trust provided that upon termination of the trust the real estate was to be sold by the trustee and the net proceeds divided equally among the beneficiaries. In the event of the death of a beneficiary prior to the termination of the trust and sale of the trust property, the share of such deceased beneficiary was to be paid to the lawful heirs, devisees, or legatees of such deceased beneficiary.

Ordinarily, where the sale of lands and distribution

of the proceeds among designated persons are expressly directed or impliedly required by the provisions of an instrument, the land is considered as converted thereby into personalty, and no suit for partition of the lands can be maintained. It has been held, however, that a partition sale may and should be ordered by the court where there has been inaction for an unreasonable length of time and no sale has been made or attempted to be made. 68 C. J. S., Partition, § 43, p. 63. Further, although land is directed to be converted into personalty, it is a general rule that all the persons entitled to the property and to participate in the proceeds in the event of its sale may elect to treat it as real estate, in which event it is reconverted into realty and subject to partition as such. 68 C. J. S., Partition, s. 43, pp. 64, 65.

The trust document was before the court at the time of the entry of the judgment in partition. Six and one-half years is an unreasonable length of time to wait for a sale, and the stipulation by all the beneficiaries to reconvert the personalty into real estate justified the judgment in partition. On the record, we do not believe section 25-2001, R. R. S. 1943, was applicable herein.

Our law is well settled. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Meier v. Nelsen (1953), 156 Neb. 666, 57 N. W. 2d 273. There is no need to consider the other assignment of error.

We find the trial court was without power in this proceeding to modify its judgment, rendered at the previous term. We therefore reverse the judgment of the trial court and remand the cause with directions to reinstate the previous judgment herein.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF JEFFREY R. VOGLER, DECEASED. LAWRENCE D. AND VIRGINIA E. GILBERT, CO-ADMINISTRATORS OF THE ESTATE OF MARCIA D. GILBERT, DECEASED, APPELLANTS, V. SHARON L. VOGLER, ADMINISTRATRIX OF THE ESTATE OF JEFFREY R. VOGLER, DECEASED, APPELLEE.
249 N. W. 2d 729

Filed January 26, 1977. No. 40742.

1. **Motions, Rules, and Orders: Pleadings: Judgments.** An order sustaining a motion to strike an allegation from a pleading, without further judicial action, is not a final order and is not appealable.
2. **Equity: Pleadings: Demurrer.** A general demurrer admits all the allegations of fact of the pleading to which it is addressed, which are issuable, relevant, material, and well-pleaded.
3. **Pleadings: Trial.** In actions not involving a prayer for extraordinary remedies, pleadings are to be construed liberally in favor of the pleader.
4. **Pleadings: Demurrer: Waiver.** The filing of a demurrer to a petition is a waiver of the right to insist that the allegations thereof be made more definite and certain.
5. **Pleadings: Actions: Wrongful Death: Damages.** In an action to recover damages sustained on account of wrongful death, allegations of plaintiff's capacity to sue, death of a person caused by the wrongful act, neglect, or default of the defendant, and the identity of next of kin and that they sustained damage from such wrongful death sufficiently state a cause of action.

Appeal from the District Court for Webster County: FREDRIC R. IRONS, Judge. Reversed and remanded with directions.

Robert E. McKelvie, Thomas P. McNally, and William H. Stowell, for appellants.

Conway & Connolly, for appellee.

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

KUNS, Retired District Judge.

This is an action to recover damages for wrongful

death under section 30-809, R. R. S. 1943. The appellants, Lawrence D. Gilbert and Virginia E. Gilbert, as coadministrators of the estate of Marcia D. Gilbert, deceased, filed their claim for damages for the wrongful death of their decedent in the estate of Jeffrey R. Vogler, deceased, in the county court of Webster County, Nebraska. An objection was filed to the allowance of the claim, and when no evidence was offered in support thereof at the hearing on claims, the claim was disallowed. The order of disallowance was appealed to the District Court for Webster County, Nebraska. After the trial court dismissed the fourth amended petition on appeal, an appeal was taken to this court. We reverse and remand the cause for further proceedings.

The case never proceeded beyond the pleading stage and the only questions presented relate to rulings upon motions and a demurrer. Appellants filed a petition on appeal, with allegations of their representative capacity, their status as heirs of the deceased, her death resulting from the wrongful act, neglect, or default of Jeffrey R. Vogler, deceased, and damage to them by reason thereof. A motion to make the allegation of the wrongful act, neglect, or default more definite and certain was sustained. In a first amended petition, appellants added a narrative of the circumstances alleged to have occurred during the period from the evening of September 15, 1974, and ending with the discovery of the body of the decedent 5 days later together with a statement of the suspicions and conclusions of the appellants and their argument that such matters constituted a circumstantial showing that Jeffrey R. Vogler, deceased, had committed some wrongful act. A motion to strike was sustained, ordering in part that paragraph 4 (f) relating to statements of Jeffrey R. Vogler be stricken. A second amended petition was then filed and a general demurrer thereto was sustained. Next, a motion to strike was filed against a third amended petition and sustained as to an allegation of a dollar amount

of general damages. Finally, a general demurrer was sustained to a fourth amended petition. When appellants failed to amend within the time allowed, the trial court dismissed the petition. A motion for a new trial assigned error as to the two orders sustaining motions to strike the allegations above mentioned and in the sustaining of the demurrer to the fourth amended petition and the dismissal thereof. The trial court overruled the motion for new trial and appellants argue the same assignments here.

Following the rulings as to each of the motions to strike, the appellants proceeded to file further amended petitions and complied with the orders of the court by not repeating the stricken allegations. No further action was taken by the court in this connection and none was necessary. An order sustaining a motion to strike some of the allegations of a pleading, without further judicial action, is not a final order and is not appealable. Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303; State ex rel. Sorensen v. State Bank of Omaha, 131 Neb. 223, 267 N. W. 532. No assignment of error will lie against the rulings.

Turning next to the question of the sufficiency of the allegations of the fourth amended petition to state a cause of action, it should be noted that the appellants repeated in each of their amended petitions the basic allegations concerning their capacity to sue, their status as next of kin to the deceased, her death by the wrongful act, neglect, or default of Jeffrey R. Vogler, deceased, and the damage to them by reason of such wrongful death. It is true that a lengthy narration of evidence, some of which would have been of dubious admissibility, together with argument concerning the probative effect of the evidence had been added by amendment. This material, being poorly pleaded, was probably not admitted by the demurrer. The rule is usually stated that a general demurrer admits all the allegations of fact of the pleading to which it is ad-

dressed which are issuable, relevant, material, and well-pleaded, but does not admit the pleader's conclusions of law or fact; a general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the well-pleaded facts. Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717; Martindale v. State, 181 Neb. 64, 147 N. W. 2d 6; Krause v. State Farm Mut. Auto. Ins. Co., on rehearing, 184 Neb. 638, 169 N. W. 2d 601; Kuester v. State, 191 Neb. 680, 217 N. W. 2d 180. We have also said that the court, in considering a demurrer " '* * * must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor hear evidence on the questions involved, nor consider what evidence may be introduced at the trial.' " Griffin v. Gass, 133 Neb. 56, 274 N. W. 193. See, also, State ex rel. Warren v. Kleman, 178 Neb. 564, 134 N. W. 2d 254; Clark & Enersen, Hamersky, S. B. & T., Inc. v. Schimmel Hotels Corp., 194 Neb. 810, 235 N. W. 2d 870. This is not a situation in which there is a conflict between general and specific allegations; if there were such a conflict, of course, the specific allegations would control. Sickler v. City of Broken Bow, 143 Neb. 542, 10 N. W. 2d 462. It was also pointed out in that case that in ordinary actions, not involving extraordinary writs, pleadings should be construed liberally.

The appellee had other alternatives available in addition to the general demurrer to the fourth amended petition. It would have been proper to move to strike the allegations which amounted to mere evidence, argument, or conclusions of fact or law. A motion to strike the petition or to dismiss the action for failure to comply with the orders of the court sustaining the motions to make more definite and certain might have been filed. As it was, appellee elected to demur generally and thereby waived any right which she had to insist that the allegations of the petition be made more

definite and certain. Van Etten v. Medland, 53 Neb. 569, 74 N. W. 33.

In City of Friend v. Burleigh, 53 Neb. 674, 74 N. W. 50, it was held that a petition for recovery under the Lord Campbell Act which alleged that the defendant by his wrongful act, neglect, or default caused the death of a person, whose personal representative acts in behalf of the next of kin who were damaged, stated a cause of action against a general demurrer. The ultimate facts alleged in the pleadings in this case meet this standard. The general demurrer should not have been sustained and the petition should not have been dismissed. When the issues have been made up and the actual evidence has been submitted, it will then be an appropriate time to decide any questions of the adequacy or sufficiency of the evidence.

The judgment is reversed and the cause is remanded to the trial court with directions to overrule appellee's general demurrer and to proceed in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

The fourth amended petition alleged the plaintiffs' decedent died on September 15, 1974, as the result of a massive skull fracture. The circumstances alleged in the petition support an inference that Jeffrey R. Vogler may have been present at the time the fatal injury occurred.

In paragraph 5 the petition alleged: "5. Claimants allege that Marcia D. Gilbert died as a result of the wrongful act, neglect or default of Jeffrey R. Vogler. The exact manner in which said Jeffrey R. Vogler caused the death of Marcia D. Gilbert is not known to the petitioners. But whether her death was caused by the willful and malicious act of Jeffrey R. Vogler or other wrongful neglect or default on the part of Jeffrey R. Vogler the claimants assert that the conduct of the said Jeffrey R. Vogler, coupled with the circum-

stances related herein, indicate that he was culpable in the death of Marcia D. Gilbert, and that his wrongful act, neglect or default proximately caused her wrongful death."

It seems to me the petition alleged only a conclusion that Jeffrey R. Vogler caused the death of the plaintiffs' decedent and did not allege the facts as to how he caused her death. In my opinion the demurrer was properly sustained.

IN RE APPLICATION OF DILTS TRUCKING, INC.
DILTS TRUCKING, INC., APPELLANT, V. PEAKE, INC., ET AL., APPELLEES.
249 N. W. 2d 732

Filed January 26, 1977. No. 40757.

1. **Public Service Commissions: Administrative Law: Carriers.** Under section 75-311, R. S. Supp., 1976, an applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission.
2. **Public Service Commissions: Administrative Law: Evidence: Appeal and Error.** Where the evidence is in conflict, the weight of the evidence is for the determination of the Public Service Commission, and this court will not disturb an order of the Commission unless its order is illegal, arbitrary, capricious, or unreasonable.
3. **Public Service Commissions: Administrative Law: Evidence: Carriers.** Although past operations, standing alone, are not conclusive proof of a public need for their continuance, they are, where not conducted in willful disregard of the law, entitled to consideration in determining whether, on balance, the public convenience and necessity require authorization of such operation.
4. **Public Service Commissions: Administrative Law: Carriers.** A carrier who previously operated under a certificate of public convenience and necessity issued by the Interstate Commerce

Commission, under the mistaken belief that he was performing services in interstate commerce and did not need a Nebraska certificate for his deliveries in Nebraska, was acting under "color of authority" where his previous operations were conducted openly, without defiance, and without knowledge that he was acting without proper authority.

5. ———: ———: ———. An applicant for a certificate of public convenience and necessity who has been operating under color of authority need not make the same showing under section 75-311, R. S. Supp., 1976, that an applicant for new or extended authority must make, and there is a presumption that the proposed service is or will be required by present or future public convenience and necessity.

Appeal from the Nebraska Public Service Commission. Reversed and remanded for further proceedings not inconsistent with this opinion.

Arlyn L. Westergren of Stern, Harris, Feldman, Becker & Thompson, for appellant.

James E. Ryan, and Rodney Peake of Peake & Navis, for appellees.

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

BRODKEY, J.

This is an appeal from an order of the Nebraska Public Service Commission denying an application of a trucking company for authority to transport anhydrous ammonia from a pipeline terminal at Greenwood, Nebraska, to all other points in Nebraska.

On May 14, 1975, Dilts Trucking, Inc., the appellant herein, applied to the Nebraska Public Service Commission for authority to transport anhydrous ammonia, in bulk, from the pipeline terminal of MAPCO, Inc., located near Greenwood, Nebraska, to all points in Nebraska. Proper notice was given to all interested parties on May 19, 1975. On May 27, 1975, Becker & Sons, Inc., Peake, Inc., and Ruan Transportation Corporation filed a formal protest to the application. On June 5,

1975, Bulk Carriers, Inc., Central Transport Co., Wheeler Transport Service, Inc., Wynne Transport Service, Inc., and Herman Bros., Inc., also filed a formal protest to the application. All the protestants hold the authority sought by Dilts in its application.

A hearing was held on the application on July 17, 1975, at which time the application was amended such that it was restricted to traffic transported for the accounts of Olin Corporation ("Olin") and Cominco American, Inc. ("Cominco"). On December 4, 1975, the Commission entered an order denying the application, finding that Dilts had failed to meet its burden of proof regarding public convenience and necessity under section 75-311, R. S. Supp., 1976. On December 18, 1975, Dilts moved for a rehearing and after a hearing on January 5, 1976, the Commission overruled the motion on March 22, 1976. In its order, the Commission reviewed the evidence adduced at the hearing on July 17, 1975, and made a specific finding that Dilts had engaged in the unauthorized and illegal transportation of anhydrous ammonia in bulk from a pipeline terminal at or near Greenwood, Nebraska, to specified places in Nebraska since 1975, and stated with regard thereto as follows: "It is the opinion of this Commission that here the Applicant's illegal operation cannot go unnoticed and, in fact without penalty. A grant of this application would in fact reward the Applicant for its illegal acts. To do so would only encourage a breakdown in this Commission's administration and enforcement of the Motor Carrier Act." In its order the Commission also distinguished the case of Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (N. H., 1964), on remand, 96 M.C.C. 583, a case relied upon by Dilts in support of its position that its transportation of anhydrous ammonia in Nebraska had been under "color of authority" because it held a certificate of public convenience and necessity issued by the Interstate Commerce Commission on September 25, 1969, and

had at all times believed that the involved traffic was moving in interstate commerce for which transportation it held the necessary authority, and that its operations had not been conducted in willful defiance of law. The Commission specifically found that Dilts was not operating under any "color of authority" issued by the Commission and concluded that a public need had not been established for applicant's proposed service as required by section 75-311, R. S. Supp., 1976. Commissioner Eric Rasmussen filed a dissenting opinion to the order of the Commission, in which he disagreed with the conclusion of the Commission that Nashua could be distinguished from the Dilts case; and expressed the opinion that Dilts is a "color of right" case and the evidence of past operations should be utilized in determining whether public convenience and necessity require the continuation of such operations. He concluded that it did; and stated that, based on legal precedent and the facts of the Dilts case, a sustaining of applicant's motion to reconsider was warranted. Dilts then perfected its appeal from the orders of the Commission. We reverse and remand for further proceedings.

The testimony adduced at the hearing before the Commission may be summarized as follows. Clifford D. Dilts, the president and sole stockholder of Dilts Trucking, Inc., testified on behalf of the applicant, and filed a prepared statement. Dilts Trucking, Inc. ("Dilts"), currently holds a certificate of public convenience and necessity, issued by the Interstate Commerce Commission on September 25, 1969. This certificate grants Dilts authority to carry anhydrous ammonia, in bulk, from the pipeline terminal of MAPCO, Inc., located near Greenwood, Nebraska, to other points in Nebraska and adjoining states.

Dilts began transporting anhydrous ammonia for Olin and Cominco from the Greenwood terminal to points in Nebraska in 1972, and did so until April 1975.

At that time Dilts was informed by the Commission that its operation involved intrastate commerce, and that it must obtain appropriate authority from the Commission to make such shipments. Dilts immediately ceased its transportation of ammonia from Greenwood to other points in Nebraska, and Dahlsten Trucking took over the traffic which Dilts would have otherwise handled. Dilts leased Dahlsten Trucking six vehicles to assist Dahlsten in its operation, and these leases were approved by the Commission.

Clifford D. Dilts testified that prior to April 1975, he had believed that his ICC certificate granted him the lawful authority to conduct the operations in question. He believed the traffic was interstate commerce because there is no actual storage facility at Greenwood, except a small "bullet" tank for transferring the ammonia to trucks, and the terminal at Greenwood appeared to be used soley for that purpose. The ammonia Dilts shipped originated from outside Nebraska. Dilts does not now contest the Commission's interpretation of the intrastate nature of the shipments in question, but contends that its explanation of its belief that the shipments were interstate commerce shows that it had operated in good faith, and under the reasonable belief that its operation was a legitimate and lawful enterprise. Prior to April 1975, Dilts had never been advised that its transportation of traffic from Greenwood to points in Nebraska was unauthorized.

In 1974, Dilts handled a total of 94 shipments of ammonia for Olin to points in Nebraska. From January to April 1975, Dilts handled a total of 73 shipments for Olin. During the same period, Dilts handled 4 shipments for Cominco. Dilts relies on these figures as evidence of the public need for the proposed service, and these facts also have import in regard to whether this is a "color of right" case.

Mr. Stephen E. Storc and Mr. Floyd Craig, employees of Olin and Cominco respectively, testified in support

of Dilts' application. Both stated that Dilts' service had been outstanding, and that their companies would not be able to obtain the service they required if the application were denied. Craig testified that his experience with the protestants was that they were simply not interested in providing the equipment and service his company required, and Storc stated that he at most got only vague promises of assistance when he approached some of the protestants for service prior to each year's seasonal movement of ammonia. Olin has occasionally tendered business to some of the protestants, but never to a significant degree; while Cominco used two of the protestants to handle shipments of ammonia in 1974 and 1975. Craig and Storc acknowledged that the limited service the protestants have provided to their companies had been satisfactory, and that service at the Greenwood terminal has generally been adequate. Both Olin and Cominco have primarily relied on carriers which are not protestants in this case since Dilts terminated its operations in May 1975.

Evidence was also received from witnesses testifying on the behalf of the protestants, Becker and Sons, Inc., Wheeler Transport Service, Inc., Ruan Transportation Corporation, Herman Bros., Inc., Wynne Transport Service, Inc., and Bulk Carriers, Inc. Summarizing, the evidence of the protestants was that they all have made significant investments in motor carrier equipment; that their equipment is not being utilized to its full capacity; that some of them have solicited Olin and Cominco business with no success; that some of them have satisfactorily provided Olin and Cominco with service prior and subsequent to May 1975; that all are desirous and capable of serving Olin and Cominco in the future; and that all of them currently hold appropriate certificates of public convenience and necessity which authorize the transportation of anhydrous ammonia from Greenwood to other parts in Nebraska.

Although the Commission found that Dilts is fit,

willing, and able to properly perform the service proposed and to conform to the Commission's rules and regulations, as previously stated, it denied the application on the grounds that Dilts failed to meet its burden of proof regarding public convenience and necessity; that Dilts is not a "color of right" case; and that Dilts' illegal operation "cannot go unnoticed and, in fact without penalty."

In its brief on appeal, Dilts raises several assignments of error, but its principal contention is that the Commission erred in failing to find that the present and future public convenience and necessity requires a grant of its application; and argues that this case is a "color of right" case, and that a finding of inadequacy of existing service is not a prerequisite to the grant of authority for which Dilts has applied. It also contends that the Commission erred in denying the application in order to penalize Dilts for its past operations.

Section 75-311, R. S. Supp., 1976, sets forth the requirements for the issuance of a certificate like that applied for in this case: "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

The only statutory requirement at issue in this case is whether the proposed service "is or will be required by the present or future public convenience and necessity," inasmuch as the Commission found that Dilts had met the other statutory requirements. In Ruan Trans-

port Corp. v. Herman Bros., Inc., 192 Neb. 343, 220 N. W. 2d 245 (1975), we held that the purpose of the Motor Carrier Act was to regulate common carriers for the public interest, and not to stifle competition, but to foster it. In that case we also held that the burden is on the applicant to show that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is "peculiarly within the discretion and expertise" of the Commission.

As set forth in Ruan, considerations deemed relevant to the issue of public convenience and necessity are: (1) Whether the operations proposed will serve a useful purpose responsive to public demand or need; (2) whether this purpose can or will be served as well by existing carriers; and (3) whether or not the purpose can be served by applicant in a specified manner without endangering or impairing the existing carriers contrary to the public interest. See, also, Wells Fargo Armored Service Corp. of Nebraska, Inc. v. Banker's Dispatch Corp., 186 Neb. 261, 182 N. W. 2d 648 (1971). It is also well established that where the evidence is in conflict, the weight of the evidence is for the determination of the Commission and not this court. Neylon v. Petersen & Petersen, Inc., 183 Neb. 813, 164 N. W. 2d 452 (1969). This court will not disturb an order of the Commission unless the Commission's order is illegal, arbitrary, capricious, or unreasonable. See Canada v. Peake, Inc., 184 Neb. 52, 165 N. W. 2d 587 (1969).

Ordinarily, the foregoing principles would dispose of the case at hand and mandate affirmance of the Commission's orders. In this case, however, an additional issue is presented which requires consideration. As will be hereinafter demonstrated, different rules are applied in "color of right" cases than in ordinary applications for certificates of public convenience and necessity. If the Commission erred in its conclusion that Dilts was not a "color of authority" case and neglected or refused to apply the law applicable to such cases, then it would

appear that the Commission erred in the determination of what law was applicable in the instant case, and its order would be illegal and entitle the applicant to a further hearing before the Commission for a reconsideration of the evidence in the light of the correct principles of law.

Dilts has operated as a carrier since at least 1972 under the assumption that its ICC certificate authorized it to do so, and therefore contends that this is a "color of right" case. A number of Nebraska cases, as well as federal cases, have recognized the principle that applicants who have previously operated under "color of right" need not make the same showing under section 75-311, R. S. Supp., 1976, as an applicant who proposes a completely new service.

We discuss first the leading federal case on the subject, which is Nashua Motor Express, Inc. v. United States, *supra*. In Nashua, a carrier applied for a grandfather certificate in 1936 which was not issued until March 1942, which he believed granted him certain authority. The carrier operated openly and without challenge until 1960, when it was advised that its operations exceeded the authority granted in the grandfather certificate. The ICC denied the carrier's application for extended authority to conform with its operations, or for a new certificate granting it the proper authority, despite the fact that the carrier's past operations were conducted under a misapprehension as to the scope of its certificate. The denial of the ICC was based on its finding that no inadequacy was shown in the protestants' services.

The federal District Court overruled the ICC, finding that "the absence of a finding of inadequacy is not alone sufficient to bar the issuance of a certificate when other factors justify a finding of public convenience and necessity. The element of inadequacy is thus not a controlling one, but is to be considered along with the other factors * * *." 230 F. Supp. at 653. On remand,

the ICC granted the carrier's petition stating: "Petitioner has conducted the considered operations for a substantial period of time. Although past operations, standing alone, are not conclusive proof of a public need for their continuance, they are, where not conducted in willful disregard of the law, entitled to consideration in determining whether, on balance, the public convenience and necessity require authorization of such operations. Petitioner has provided a highly satisfactory service which has attracted a substantial volume of traffic from a number of shippers. Those supporting the application have used petitioner's service in the past, have come to rely on the superiority of its service, and strongly express their need for its continuance. Protestants cannot be said to rely upon such traffic, and we do not believe they will be injured seriously by a grant of authority enabling petitioner to continue such service.

"Upon these facts, we do not believe that we can disregard the need expressed by shippers for the superior transportation service provided by petitioner. On balance, therefore, we believe that the demonstrated needs of shippers for petitioner's superior service outweigh any adverse effect which a grant of authority might have on protesting carriers. We are satisfied that a need has been established for the proposed service to the extent indicated in our findings." 96 M.C.C. 583, at 586 (1964).

The holding of the Nashua case to the effect that a showing of inadequacy of existing service is not a prerequisite to the issuance of a certificate or a grant of additional authority has been adhered to in subsequent cases. See, Lemmon Transport Co., Inc. v. United States, 393 F. Supp. 838 (W. D. Va., 1975); Union Mechling v. United States, 390 F. Supp 391 (W. D. Pa., 1974). The Nebraska Commission attempts to distinguish Nashua on the basis that the carrier in Nashua was operating under a grandfather certificate, where-

as Dilts had no certificate at all for the particular operation in question from the Nebraska Public Service Commission. We do not believe the distinction is valid, as will be subsequently demonstrated in this opinion.

We now review Nebraska cases which we believe are pertinent and persuasive. In Preisendorf Transport, Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865 (1960), a carrier applied for a certificate to transport petroleum products after it was discovered that an earlier certificate granted to it was void. The carrier had operated for 10 years with the understanding that its certificate was proper, and an erroneous judgment of the Commission was the cause of the carrier's understanding that it had proper authority to operate. The Commission granted the carrier's application for a proper certificate, and this court affirmed the Commission's order. This court held that it was proper to admit evidence of past operations of an applicant when it is shown that those operations were conducted under color of right. The court stated: "In cases where new or extended original authority was sought, we have held that: 'In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.' In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603. See, also, In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507; Christensen v. Highway Motor Freight, 158 Neb. 601, 64 N. W. 2d 99; Houk v. Peake, supra; Miller v. Consolidated Motor Freight, Inc., supra. Appellants offered evidence in support of each of these issues. *However in cases such as now before the court, where the applicant seeks to obtain a lawful certificate to continue in a business which it has*

been operating under color of authority, we do not think it controls. Here it is apparent that this same business has been operated long enough that the original authority therefor from the commission was under a 'Grandfather' certificate. True the subsequent transfers of the authority were void but the various owners thereof continued to operate the business thereunder in good faith and, it is apparent, are still doing so. Six customers of the appellee testified that they had been using appellee's services for various periods of time, that such services were very satisfactory, and that they would like to see appellee continue in business so they could use its services in the future. Under this situation we think the following quotations have application:

"'*Successful operation in the past creates a presumption that public convenience and necessity require a continuance of such operation.*' Dougherty Storage & Van Co. Common Carrier Application, 3 M.C.C. 427." (Emphasis supplied.) The principles enunciated in Preisendorf in regard to the color of right principle have been recognized and adhered to in subsequent cases. See, Canada v. Peake, Inc., *supra;* Neylon v. Petersen & Petersen, Inc., *supra;* Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584 (1966).

This court has very recently decided a case which is pertinent to the question before us. In Groenewold v. Building Movers, Inc., *ante* p. 187, 247 N. W. 2d 629, the Commission granted a certificate of authority to an applicant for the moving of houses. The applicant had conducted prior operations without a certificate of any kind. We affirmed the decision of the Commission and held it proper to consider evidence of past illegal operations of the applicant where there is no willful and intentional violation. The analogy to Dilts is apparent, and clearly negates the attempt of the Commission to differentiate Nashua on the basis that Nashua was operating under a "grandfather" certificate, and hence

under "color of right." In Groenewold the applicant had not operated under any type of certificate whatever. The same was true in Wells Fargo Armored Service Corp. of Nebraska, Inc. v. Bankers Dispatch Corp., 188 Neb. 584, 198 N. W. 2d 195 (1972). In this case, Dilts had authority from the ICC to operate, and could reasonably have believed that he was performing services in interstate commerce. Dilts did misinterpret his certificate from the ICC, but did so openly, without defiance, and apparently without knowledge that he was acting without the proper authority. We think it is clear that the Commission should have treated this case as a "color of authority" case, and that it erred in interpreting Nashua as it did. The fact that Dilts misinterpreted an ICC certificate, rather than a Nebraska certificate, should not prevent the Commission from properly considering Dilts' past operations. See W. C. McQuaide, Inc., Extension—Air Freight, 108 M.C.C. 24 (1968), where a carrier misinterpreted a stated certificate such that the carrier thought he was conducting *intrastate* operations rather than *interstate* operations. That case was treated as a "color of right" case when the carrier applied for an ICC certificate after discovery of error. Here, the Commission not only refused to treat the case as a "color of right" case, but also stated that Dilts' illegal operation "cannot go unnoticed and, in fact without penalty." It seems clear that the Commission not only refused to consider Dilts' application in light of its previous color of authority, but punished it for its prior actions.

We are of the opinion that under the facts of this case the action of the Commission was illegal, arbitrary, and unreasonable in light of the fact that it did not consider the application in accordance with applicable principles of law, which are that an applicant who has been operating under color of authority need not make the same showing that an applicant who has never operated must make, and that there is a presumption that

the proposed service is or will be required by the present or future public convenience and necessity.

We, therefore, reverse and remand this cause for a reconsideration by the Commission under the evidence as a "color of right" case.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

KUNS, Retired District Judge, dissents.

STATE SURETY COMPANY, A CORPORATION, APPELLANT, V. WILLIAM E. PETERS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

249 N. W. 2d 740

Filed January 26, 1977. No. 40773.

1. **Contracts: Principal and Surety.** The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict, as the statute forms a controlling part of every such agreement.
2. ———: ———. Courts construe the contract of a surety company, acting for compensation, and of any other surety for hire, most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect.
3. **Words and Phrases: Contracts: Bonds.** The words "due and to become due" express a clear legislative intent to impose liability for all sums due when the bond is filed.
4. **Statutes: Bonds.** A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute. Accordingly, in view of the fact that the public has an interest in official and other statutory bonds, such bonds should be liberally construed to effect the purpose for which they were given and the ordinary rules of construction give way.

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

Edward F. Carter, Jr., of Barney & Carter, for appellant.

Paul L. Douglas, Attorney General, Ralph H. Gillan, and G. Michael Wiseman, for appellees.

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

SPENCER, J.

This is an action for a declaratory judgment for a determination of the liability of State Surety Company, appellant, upon a special fuel tax bond. The issues tried below and presented here are: (1) Does the bond have retroactive effect? (2) If not, do payments of $8,405.16 made in June 1970, apply against the principal's prebond liability, or should they be applied to reduce appellant's liability? (3) Was the liability of appellant fixed and determinable on November 8, 1972, so as to impose liability for interest? The court found the liability of appellant to be retroactive, and rendered judgment for the face amount of the bond, $15,000, with interest at the rate of 7 percent from November 8, 1972. Plaintiff-appellant appeals. We affirm.

On or about May 27, 1969, Larry L. Thompson commenced the sale of fuel in Fremont, Nebraska. He sold fuels which are subject to special fuel tax under the provisions of the special fuel tax act, sections 66-601 to 66-639, R. R. S. 1943. From that date through June 7, 1970, he continued said business without being licensed or bonded and without remitting to the State of Nebraska special fuel use tax due upon the sale of said fuels.

Larry L. Thompson applied for a Nebraska special fuel dealer's license and the same was granted to him on June 8, 1970, upon his posting a bond as required by section 66-609, R. R. S. 1943. This bond was issued by Nebraska Surety Company in the penal sum of $15,000. Nebraska Surety Company was thereafter acquired by, merged into, and became a part of the appellant, State Surety Company.

Beginning in June 1970, Thompson started filing reports of special fuel sales, generally accompanying his reports with checks in the exact amount of the tax shown due for the months reported. Additionally, in June 1970, he also remitted two checks in the total amount of $8,405.16, the application of which is disputed by the parties.

The parties have stipulated that the disposition of this case is entirely dependent upon application of the law to the undisputed facts of taxes due and payments made so that one of the following three conclusions apply:

"i. If the court determines the bond to have retroactive effect so as to render plaintiff liable for the principal's gas tax indebtedness incurred prior to June 8, 1970, then and in that event the court should find plaintiff obligated unto the State of Nebraska in the principal sum of $15,000, which amount is the full face amount of the bond, together with such interest and costs as may be prescribed by law. Interest at 7% on $15,000 from November 8, 1972 to November 4, 1975 is $3,138.81.

"ii. If the court determines that the bond does not have retroactive effect so as to render plaintiff liable for the principal's gas tax indebtedness incurred prior to June 8, 1970, and if the court determines that all payments made by the principal after June 8, 1970 apply against the liability incurred during the term of this bond, then and in that event the court should find that the plaintiff has no liability to the State of Nebraska upon its bond; and

"iii. If the court determines that the bond does not have retroactive effect so as to render plaintiff liable for the principal's gas tax indebtedness incurred prior to June 8, 1970, and if the court determines that all payments made by the principal after June 8, 1970, except:

"(a) the June 19, 1970 payment of $5,000.00 appearing at Exhibit 2, page 209; and

"(b) the June 24, 1970 payment of $3,405.16 appearing at Exhibit 2, page 209;

then and in that event the court should find plaintiff obligated unto the State of Nebraska in the principal sum of $7,612.44 plus interest and penalties to 11-4-75 of $5,333.26 together with such interest on the judgment and costs as may be prescribed by law."

The bond is executed on a form provided by the State. It is silent on the question of the surety's liability for the principal's past indebtedness. It simply provides that the surety and principal are jointly and severally bound in the penal sum of $15,000, and if the principal "shall make reports, pay all motor fuel taxes, penalties and interest which may be assessed or imposed against said principal, and maintain adequate records all of which are required by the provisions of the laws of the State of Nebraska and the regulations promulgated pursuant thereto, as the same now exist or may hereafter be enacted or amended, in the way and manner and at the times provided in such laws, then these presents shall be void, otherwise the same shall be and remain in full force and effect."

Because this is a statutory bond, however, the language of the bond is not necessarily controlling. "The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict, as the statute forms a controlling part of every such agreement." Stearns, Law of Suretyship (5th Ed., 1951), § 2.4, p. 14.

In Sun Ins. Co. v. Aetna Ins. Co. (1959), 169 Neb. 94, 98 N. W. 2d 692, we said: "The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein."

In that same case, we said: "Courts construe the

contract of a surety company, acting for compensation, and of any other surety for hire, most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect."

The question then is how the statute in effect at the time the bond was executed may affect the instrument. The statute, section 66-609, R. R. S. 1943, provided: "No special fuel dealer's license shall be issued to any person or continued in force unless such person has furnished a surety bond in such form and amount as the motor fuel tax administrator may require, but in a sum not less than one thousand dollars and not more than fifteen thousand dollars, to secure his compliance with the provisions of sections 66-601 to 66-640, and the payment of any and all taxes, including interest and penalties *due and to become due* under the provisions of sections 66-601 to 66-640. The amount of bond shall be fixed and determined by the motor fuel tax administrator, in approximately two times the average monthly tax liability of the applicant." (Emphasis supplied.)

It is readily apparent that the words "due and to become due" are the controlling words herein. It is apparent to us that the words "due and to become due" express a clear legislative intent to impose liability for all sums due when the bond is filed. The District Court so held.

Appellant argues the general law of the land has uniformly been that suretyship agreements take effect from the date of their execution. That may be true. However, here the statutory language is a part of the surety bond. It specifically provides that the bond, at the time it is executed, covers the payment of any and all taxes, including interest and penalties, due and to become due. To accept appellant's interpretation would be to construe this language out of the statute. This we refuse to do.

Appellant further argues the word "due" must be in-

terpreted together with the words "or continued in force." It suggests the statute is drafted to apply to both the issuance and the renewal of special fuel dealers' licenses. The surety argues the language for licenses issued is prospective for tax, interest, and penalties to become due. For a license continued in force, it assures compliance by requiring payment of taxes, including interest and penalties due and to become due. That is a possible interpretation, but we do not believe it to be the applicable one in this instance. We interpret the language "due and to become due" to apply to original as well as continuing bonds.

In Sun Ins. Co. v. Aetna Ins. Co. (1959), 169 Neb. 94, 98 N. W. 2d 692, we said: " 'A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute, * * *. Accordingly, in view of the fact that the public has an interest in official and other statutory bonds, such bonds should be liberally construed to effect the purpose for which they were given, and the ordinary rules of construction give way.' "

We believe the Legislature did not by the inclusion of the words "continued in force" intend to restrict the application of the word "due" to such continued bond. Those words refer to the license, not the bond. They intend the cancellation of the license if a bond expires or for any reason is canceled. The license will not be continued in force unless a valid surety bond is on file.

We find the bond construed in the light of the statute provides for retroactive effect. The surety is liable for the full amount of its bond and in accordance with the stipulation, plus interest since the date of the demand November 8, 1972.

This resolution of the case eliminates any necessity to discuss the other issues raised. We affirm the judgment of the trial court.

AFFIRMED.

FRANCIS L. RICHARDS ET AL., APPELLEES, V. RONALD E. BYCROFT ET AL., APPELLEES, IMPLEADED WITH CRANDELL DEVELOPMENT CORPORATION, APPELLANT.
249 N. W. 2d 743

Filed January 26, 1977. No. 40778.

Contracts. The interpretation given a contract by the parties themselves while engaged in the performance of the contract is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced.

Appeal from the District Court for Buffalo County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Munro & Munro, for appellant.

Ross, Schroeder & Fritzler, for appellees.

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

BOSLAUGH, J.

This case arises out of a controversy concerning a contract for the sale of a tract of land in Kearney, Nebraska. The contract was in the form of an offer to purchase by Crandell Development Corporation accepted May 4, 1973, by Ronald E. Bycroft, one of the sellers and as agent for the other sellers. Bycroft owned an undivided one-half interest in the property.

The contract provided for a purchase price of $75,000 of which $7,500 was earnest money deposited in escrow, with the balance to be paid on final settlement. The contract further provided the sellers agreed to pay the expense of relocating a high pressure gas line which ran diagonally through the property. The contract provided the parties agreed to "close said purchase" within 90 days after the abstract of title was furnished for examination. In the event there were legal defects in the title of the sellers which could not be cured within a reasonable time the $7,500 downpayment was to be

refunded. In the event the buyer failed to perform, the deposit was to be retained by the sellers as liquidated damages.

On January 3, 1974, the sellers agreed to extend the closing date to February 10, 1974, in consideration of the deposit by the purchaser of an additional $2,500 as earnest money. On February 21, 1974, the parties entered into a memorandum agreement which extended the closing date to April 10, 1974. This agreement provided the purchase price would be increased to $77,000 and the buyer would deposit an additional $3,000 with Lowe & Company, the seller's real estate agent. The agreement further provided that in consideration for the extension of time the buyer "hereby authorizes Lowe & Company to pay off the mechanic's lien" resulting from the moving of the gas line "out of monies which have been previously deposited by the Buyer with Lowe & Company." The lien, which amounted to $7,556.48, was paid by Lowe & Company leaving a balance of $5,443.52 in the hands of the seller's agent.

On March 29, 1974, a judgment in the amount of $8,016 in favor of Raymond Siebke, Jr., executor, was entered against Bycroft which became a lien on his interest in the property. On April 1, 1974, the interest of Bycroft was attached by the Federal Deposit Insurance Corporation in a suit concerning the Elm Creek State Bank.

On April 13, 1974, the buyer requested additional time in which to close the transaction. On April 20, 1974, Crandell assigned its interest in the property to Motel 6, Inc.

On April 24, 1974, a judgment in the amount of $15,000 in favor of Anna L. Johnson, administratrix, was entered against Bycroft which became a lien on his interest in the property. On the same date Bycroft wrote to Lowe & Company requesting the balance on deposit less the agent's expenses be paid to the sellers'

attorney as liquidated damages. On April 26, 1974, John K. Hammer, acting in his own behalf and for the owners other than Bycroft, wrote to Lowe & Company stating that the owners other than Bycroft wished to proceed with the sale.

On May 2, 1974, a judgment in the amount of $166,041.99 in favor of the United States National Bank was entered against Bycroft which became a lien on his interest in the property. Although the record is not clear, apparently this judgment related to a mortgage from Bycroft to the bank. The amount of the mortgage, which was a lien on Bycroft's interest, is not shown in the record.

On May 9, 1974, the sellers other than Bycroft were notified that Motel 6, Inc., had deposited the balance of the purchase price in the bank and was ready to close when satisfied with the title. On May 15, 1974, Bycroft again wrote to Lowe & Company demanding the net balance of the downpayment be sent to the seller's attorney.

Between April 20, 1974, and June 26, 1974, counsel for the sellers other than Bycroft and counsel for Crandell and Motel 6, Inc., attempted to work out an agreement with the lienholders that would permit the sale to be completed. On June 26, 1974, counsel concluded no agreement could be reached. Motel 6, Inc., reassigned its interest to Crandell who then demanded the earnest money be refunded to him.

This action was commenced by the sellers other than Bycroft to partition the property. Bycroft, Crandell, and the lienholders were joined as defendants. The only matter now in controversy is the disposition of the earnest money deposited by Crandell. The trial court held that the sellers were entitled to retain the $7,556.48 expended to move the gas line, and the balance of $5,443.52 should be refunded to Crandell. Crandell has appealed. There is no cross-appeal.

The plaintiffs argue that time was of the essence of

the contract. The contract did not expressly provide that time was of the essence and the conduct of the parties shows that they did not so consider it. See Dowd Grain Co., Inc. v. Pflug, 193 Neb. 483, 227 N. W. 2d 610. The interpretation given a contract by the parties themselves while engaged in the performance of the contract is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced. Westbrook v. Masonic Manor, 185 Neb. 660, 178 N. W. 2d 280.

Apparently, the sellers regard the sale as an advantageous one and readily agreed to extensions when Crandell had difficulty with financing the purchase. When Bycroft demanded the balance of the earnest money, the other sellers disavowed his claim and advised Lowe & Company that they wished to proceed with the sale. On April 10, 1974, there were three liens against Bycroft's interest. The mortgage to the bank, the Siebke judgment, and the attachment suit. Bycroft was then unable to perform and was in no position to declare a forfeiture. It is a fair inference from the record that Bycroft was merely trying to salvage what he could when he attempted to declare a forfeiture and obtain the balance of the earnest money from Lowe & Company.

The remaining question is the construction to be placed on the memorandum agreement dated February 21, 1974. In this agreement Crandell "authorized" Lowe & Company to use the $13,000 he had deposited as earnest money to pay off the mechanic's lien for moving the gas line.

The original contract provided the sellers would pay the expense of relocating the gas line. The memorandum agreement did not provide that Crandell agreed to assume this expense and if the sale to Crandell had been completed the expense would have been paid by the sellers.

The entire contract was subject to the condition that

the sellers "have good, valid and merchantable title in fee simple." The memorandum agreement did not purport to modify this condition. The land has now been sold and the sellers have realized whatever benefit resulted from moving the gas line. It would be unreasonable to place the expense of moving the gas line upon Crandell, without regard to whether the contract was ultimately performed, in the absence of a clear and specific agreement to that effect.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment for Crandell Development Corporation in the amount of $13,000 on its cross-petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. EDDIE ADDISON, APPELLANT.
249 N. W. 2d 746

Filed January 26, 1977. No. 40781.

1. **Criminal Law: Trial: Continuances.** The matter of granting a continuance in a criminal case is peculiarly within the discretionary judgment of the trial court.
2. **Criminal Law: Constitutional Law: Right to Counsel: Continuances.** The right to counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay.
3. **Criminal Law: Habitual Criminals: 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.
4. **Statutes: Criminal Law: Public Officers and Employees.** It must necessarily be presumed in the absence of any evidence to the contrary that the directions of the statute (§ 29-2401, R. R. S. 1943) were carried out by the public officers involved.

5. **Pleadings: Evidence: States.** In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented this court will presume the common law or statutes of such other jurisdiction to be the same as ours.

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

Charles Plantz, for appellant.

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

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

SPENCER, J.

Defendant was convicted of the crime of uttering a forged instrument. He alleges three assignments of error. (1) The insufficiency of the evidence to sustain a conviction. (2) The refusal to allow the public defender to withdraw, and denying a continuance so defendant could have other counsel. (3) In finding defendant to be an habitual criminal. We affirm.

On May 29, 1975, a person alleged to be the defendant purchased a case of beer at Harry's Off Sale in Whiteclay, Nebraska. He gave Harry Heffron, the manager, a check in the amount of $36, received the case of beer worth $6.50, and the balance in cash. The check was payable to Eddie Addison, signed by Freeman Rapp, and bore the notation, "For Wages." It was dated May 29, 1975, and drawn on the Stockmans National Bank, Rushville, Nebraska. It was returned by that bank with the notation, "no account."

Heffron identified the defendant as the person who had cashed the check, and testified defendant told him the check was for wages for work done for Freeman Rapp. Heffron did not know anyone named Freeman Rapp, but his partner told him over the phone that Freeman Rapp's checks were good. The partner testified that he had accepted Freeman Rapp's checks be-

fore and that he did not know any other person in the area by the name of Freeman Rapp other than the one whose checks he had cashed.

Freeman Rapp testified that he had not drawn the check. It did not bear his signature and he did not have an account in the Stockmans National Bank. He further testified he had not authorized anyone to draw checks in his name. He lived in South Dakota about 60 miles from Rushville, Nebraska, and he had no knowledge of anyone else in the vicinity with the name of Freeman Rapp. He also testified he did not believe he had ever met the defendant.

The assistant cashier of the Stockmans National Bank testified no Freeman Rapp had an account in the bank on May 29, 1975, and that she did not know anyone by the name of Freeman Rapp. The deputy sheriff, who had served the subpoena on Freeman Rapp, testified that he knew no other Freeman Rapp in the area.

Defendant was arraigned and bound over to the District Court on July 21, 1975. The public defender was appointed to represent him. Defendant pled not guilty and trial was set for September 22, 1975. Defendant failed to appear at that time. Trial was rescheduled for February 2, 1976. An amended information was then filed, charging defendant with being an habitual criminal.

On January 26, 1976, the public defender filed a motion requesting leave to withdraw. On February 3, 1976, prior to the selection of a jury to try the defendant, defendant, through the public defender, presented a motion for a continuance. After inquiry of the parties, the court overruled the request for a continuance. A jury was then empaneled with one alternate juror, and the court continued the trial to the jury to February 12, 1976.

Before the commencement of the trial on February 12, 1976, defendant's counsel moved for a continuance.

He stated the defendant wished to obtain counsel of his own choice who would handle the case but would need a continuance because the new counsel was not ready to go ahead. The motion for continuance was overruled and the case proceeded to trial.

We first consider the overruling of defendant's motion for a continuance. The only reason the defendant gave for his dissatisfaction with the public defender was his belief that the public defender was not interested in his welfare. The matter of granting a continuance in a criminal case is peculiarly within the discretionary judgment of the trial court. State v. Coleman (1973), 190 Neb. 441, 208 N. W. 2d 690. Defendant made no showing as to any reason for his dissatisfaction with appointed counsel. What we said in State v. Coleman, *supra,* is particularly apt herein and is controlling: "This case directly raises the issue of the right of a criminal defendant to seek substitute counsel on the very eve of trial without demonstrating a good cause therefor, when the record shows that he has been represented throughout by court-appointed counsel in a diligent and competent manner. We hold that the right of counsel, accorded under the Sixth Amendment, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. Requests for the appointment of new counsel on the eve of trial should not become a vehicle for achieving delay. United States v. Llanes, 374 F. 2d 712 (2d Cir., 1967), cert. den., 388 U. S. 917. See, also, Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921."

We next consider defendant's motion to dismiss on the sufficiency of the evidence. The check was payable to the defendant. It bears his purported endorsement. The State's witness positively identified the defendant as the person who passed the check. Defendant attempted to discredit this identification on the basis that the witness could not remember details about

what the person was wearing, whether he was alone, what day of the week it was, or whether there were other customers in the store. These, of course, all go to the credibility of the witness. A jury question was presented. The jury resolved the question against the defendant by finding him guilty. The State's evidence was ample to support the finding.

Defendant's third assignment related to the habitual criminal proceedings. Records of three prior felony convictions were introduced. The court relied on two of those convictions in finding the defendant to be an habitual criminal, because the third one was then pending in this court on appeal. That appeal was from the same court on another conviction for uttering a forged instrument. We have since affirmed that conviction. It is found at 196 Neb. 768, 246 N. W. 2d 213 (1976). We note that reference was made therein to another case of like nature involving the defendant, 191 Neb. 792, 217 N. W. 2d 468 (1974), in which we reversed and remanded a similar charge for a deficiency in the proof.

The other two convictions which were considered by the District Court were a 1963 conviction in Scotts Bluff County, Nebraska, which involved a forged instrument, and a 1969 conviction in Pennington County, South Dakota, for third-degree forgery.

In the Scotts Bluff County conviction, the defendant on February 11, 1963, was sentenced in the District Court for Scotts Bluff County as Edison Clown Horse to 3 years in the Nebraska Penal Complex after a plea of guilty. This record includes the fingerprint records of Edison Clown Horse, which were identified as matching those of the defendant.

Defendant objected to the introduction of exhibit 5, which was the certified copy of his conviction, certified by the clerk and authenticated by the seal of the office. The objection was properly overruled. In State v. Micek (1975), 193 Neb. 379, 227 N. W. 2d 409, we

said: "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."

Exhibit 7 is a certified copy of the conviction in South Dakota. It shows that on the 31st day of October 1969, the defendant, Eddie Addison, also known as Edison Clown Horse, entered a plea of guilty to a charge of third-degree forgery. He was sentenced to a term of 4 years in the South Dakota State Penitentiary. There is no objection to the introduction of this exhibit in the record.

The defendant states in his brief: "There is no question as to the State's having established twice convicted and twice sentenced. The defendant contends, however, that it was not adequately established that he was the person who was so convicted and sentenced." There was positive proof that Eddie Addison, the defendant herein, was also one and the same person as Edison Clown Horse. Additionally, as noted above, the fingerprints of both defendant and Edison Clown Horse were compared and testimony was adduced that they matched and were made by one and the same person. It borders on the frivolous to argue that defendant was not one and the same person as the defendant covered in the records to prove the habitual criminal charge.

The defendant further argues that the record does not contain proof that the defendant was actually twice committed to prison. Defendant's argument has previously been answered in State v. Bundy (1966), 181 Neb. 160, 147 N. W. 2d 500. In that case we stated: "In Rains v. State, 142 Neb. 284, 5 N. W. 2d 887, this court in its opinion stated: 'Defendant urges that proof of commitment, as required by the habitual criminal law, was lacking. We think not. Another statute, section 29-2401, Comp. St. 1929 (now section 29-2401, R.

R. S. 1943), provides that within 30 days after sentence, unless execution thereof be suspended, the convicted person shall be delivered to the warden of the penitentiary, together with a copy of the sentence of the court, there to be kept until the sentence is served or a pardon granted. If sentence is suspended and the conviction subsequently affirmed, the same procedure is prescribed. It must necessarily be presumed in the absence of any evidence to the contrary that the directions of the statute (section 29-2401, R. R. S. 1943), were carried out by the public officers involved. We think the proof offered is in all respects sufficient to sustain the finding of prior convictions within the meaning of section 29-2217, Comp. St. Supp. 1939 (now section 29-2221, R. R. S. 1943).' The Illinois statutes on this point are not shown, but: 'In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours.' Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431. The defendant's contention that the trial court erred in finding him a habitual criminal and sentencing him as such has no merit."

The record does not sustain defendant's contentions with respect to any of the errors urged by him. The judgment is affirmed.

AFFIRMED.

FREDERICK W. BODE ET AL., APPELLANTS, V. FLOBERT INDUSTRIES, INC., A CORPORATION, ET AL., APPELLEES.
LEONARD HOEFER ET AL., APPELLANTS, V. FLOBERT INDUSTRIES, INC., A CORPORATION, ET AL., APPELLEES.
249 N. W. 2d 750

Filed January 26, 1977. Nos. 40785, 40786.

1. **Property: Deeds: Conveyances.** A conveyance must be construed with a view to carrying into effect the true intent of

the parties so far as it can be ascertained from the whole instrument and is consistent with the rules of law.

2. **Property: Conveyances: Easements: Railroads: Carriers.** A conveyance to a railroad company of a right-of-way with a provision that the land shall revert in the event of the abandonment of its use for railroad purposes ordinarily conveys only an easement.
3. **Conveyances: Chain of Title: Records: Property.** A right or interest in a duly recorded conveyance will be effective as against all who derive title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abrogate or destroy such exceptions.
4. **Actions: Quiet Title.** In an action to quiet title a recovery by a plaintiff must be based upon the strength of his own title and not upon any weakness in the title of his adversary.
5. **Conveyances: Property: Severance.** An exception in a conveyance operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description, which was in esse at the time of the conveyance and which until such conveyance and the severance thereby was comprised in the thing granted.
6. **Property: Conveyances: Intent.** The courts with practical unanimity agree that the use of the technical word exception or reservation will not be allowed to control the manifest intent of the parties, but that such words will be given a fair and reasonable interpretation looking to the intention of the parties, which is to be sought from a reading of the entire instrument, and, when their intention is determined, it will be given effect, provided no settled rules of law are thereby violated.

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

Stanley J. Oliverus, for appellants.

Robert M. O'Gara of Marti, Dalton, Bruckner, O'Gara & Keating and Robert W. Smith, for appellees.

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

PER CURIAM.

We have before us two cases which were consolidated

for trial and for hearing in this court. Both involve title to abandoned railroad rights-of-way. One will be referred to as the Hoefer case and the other, the Bode case. In each instance former owners executed conveyances to the Fremont, Elkhorn and Missouri Valley Railroad Company. The conveyances were identical except for the description of the land crossed by the rights-of-way. The conveyance to the Hoefer land was dated November 8, 1886, and to the Bode land, November 22, 1886.

The substance of the two conveyances is as follows except for a variation in the description and amount of consideration in the Hoefer case: "This Indenture, Made this 22d day of Novr. in the year of our Lord one thousand eight hundred and eighty-six * * *, Witnesseth: That whereas, the said Fremont, Elkhorn and Missouri Valley Railroad Company, party of the second part, is now constructing a railroad, * * *, and the said party of the first part being desirous of the constructon of said railroad, and to aid the same by the grant herein made, in consideration of the premises and of the sum of Four Hundred & no/100 Dollars, * * *, have *given, granted, bargained, sold, conveyed and confirmed,* and by these presents *do give, grant, bargain, sell, convey and confirm,* to the said party of the second part, *and to its successors and assigns forever, for the purpose of constructing a railroad thereon,* and *for all uses and purposes connected with the construction and use of said railroad, a strip of land one hundred feet in width being fifty feet in width on each side of the center line of said railroad, wherever the same has been or may be definitely located* over and across the West half of Section Thirty-six (36) Township Twenty-three (23) North, Range Seven (7) West of the sixth principal meridian. * * * *To have, hold, and enjoy* the lands above conveyed with the appurtenances and privileges thereto pertaining, *and the right to use the said land and material of whatsoever*

kind within the limits of the said one hundred feet above conveyed, * * * unto the said party of the second part, * * *, *and its successors and assigns, forever, for any and all uses and purposes connected with the construction, preservation, occupation and enjoyment of said railroad.*" (Emphasis supplied.)

The instrument also provides for a release by grantors of "all costs, expenses and damages" then or in the future sustained by reason of the construction and use of the railroad; that second party may remove earth or deposit earth "outside of said limits." It provides that in the event of the failure to locate and construct said railroad within 10 years, or of its abandonment or change of route, "the land hereby conveyed, and all rights in and to the same, *shall revert*" to grantors, their heirs, and assigns. Grantors covenant that they are the owners and *"lawfully seized and possessed"* of said premises, that they are *free from encumbrance,* and that they will *warrant and defend* said lands against all lawful claims and demands. (Emphasis supplied.)

The title to the Bode land, being school land, was derived from the State of Nebraska. It had been purchased on contract and conveyance to the railroad company made prior to receipt of title by the purchaser. On February 18, 1887, the State deeded the railroad right-of-way containing 12 10/100 acres, in fee simple, directly to the railroad company. On January 10, 1902, the State conveyed the principal tract, less the 12 10/100 acres deeded to the railroad company, to the assignee of the original contract purchaser. An assignee of the original purchaser conveyed to the railroad company on November 22, 1886, before receipt of title from the State. It is evident that the Bode predecessors in title did not at any time acquire more than an equitable interest in the railroad right-of-way land, title having remained in the State until the direct conveyance to the

railroad company. Under such circumstance, the plaintiffs Bode cannot recover.

In the Hoefer case the original owner derived title by patent from the United States. The patentee conveyed to the railroad company by an instrument similar to the one above mentioned. The patent was to 160 acres and this land was conveyed as 160 acres to the second party in the chain of title, thereby conveying also any interest retained in the railroad right-of-way. The next two conveyances were for only 154 acres and presumably did not cover the railroad right-of-way. At this point the land was transferred by will and simply described the quarter section as a whole. The next conveyance of the land stated "except for railway right of way." The next conveyance, which was to the plaintiffs Hoefer, stated "except railroad."

The right-of-way through both the Hoefer and Bode properties was conveyed to the defendant Flobert Industries, Inc., by the railroad company.

If the original conveyance of the right-of-way across the Hoefer land is a deed in fee simple determinable or conditional, the Hoefer claim of reverter is barred by section 76-107 and sections 76-299, et seq., R. R. S. 1943. We are constrained to hold, however, that only an easement was transferred. The conveyance must be construed with a view to carrying into effect the true intent of the parties so far as it can be ascertained from the whole instrument and is consistent with the rules of law. See Carr v. Miller, 105 Neb. 623, 181 N. W. 557. We held in that case that a conveyance "for terminal and railway purposes and uses" without a provision for reversion was a conveyance in fee simple.

In Blakely v. Chicago, K. & N. Ry. Co., 46 Neb. 272, 64 N. W. 972, a grant "for right of way and for operating its railway only" was held to be only an easement.

To the same effect is George v. Pracheil, 92 Neb. 81, 137 N. W. 880. That case contained the same provisions as in the deed we deal with here relative to reverter

in the event of failure to construct the railroad or abandonment of it. It is stated therein: "The intention of the grantor and grantee would seem to be that if the road is not built the title shall revert, or if it is abandoned then the title shall revert. The conveyance is apparently for the purpose only of enabling the road to occupy the strip for right of way alone, and that can give no more than an easement." See, also, Annotation, 6 A. L. R. 3d 973. It therefore appears that since the railroad company acquired only an easement through the Hoefer land, on abandonment of the railroad, the Hoefers would have a right of reentry if title to the railroad land is vested in them; otherwise the reversion would be to the heirs of Budd D. Tuttle who was the last to receive a conveyance of the entire quarter section. "A right or interest reserved in a duly recorded conveyance will be effective as against all who deraign title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abrogate or destroy such exceptions." 23 Am. Jur. 2d, Deeds, § 268, p. 303.

"In an action to quiet title a recovery by a plaintiff must be based upon the strength of his own title and not upon any weakness in the title of his adversary." Seidel v. City of Seward, 178 Neb. 345, 133 N. W. 2d 390. As heretofore noted in the chain of title, there are two deeds for limited acreages and two others *excepting* the railroad right-of-way. "* * * an 'exception' operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description, which was in esse at the time of the conveyance and which until such conveyance and the severance thereby was comprised in the thing granted." 23 Am. Jur. 2d, Deeds, § 262, p. 297.

"The courts with practical unanimity agree that the use of the technical word 'exception' or 'reservation'

will not be allowed to control the manifest intent of the parties, but that such words will be given a fair and reasonable interpretation looking to the intention of the parties, which is to be sought from a reading of the entire instrument, and, when their intention is determined, it will be given effect, provided no settled rules of law are thereby violated." 23 Am. Jur. 2d, Deeds, § 274, p. 309. See, also, Kozak v. State, 189 Neb. 525, 203 N. W. 2d 516. Although there was some dissension voiced in regard to the Kozak decision, in the present instance the rule seems clearly applicable.

In view of the fact that two grantors in the chain of title conveyed only 154 acres out of the 160-acre tract, it would appear that the later grantors never acquired title to the reversionary interest held by the first two owners and that the term "exception" necessarily included the reversionary interest in the railroad right-of-way. We conclude that the plaintiffs Hoefer have failed to show a title sufficient to permit them to prevail in this action.

The judgments of the District Court are affirmed in both cases.

AFFIRMED.

WHITE, C. J., dissenting.

I dissent in Hoefer v. Flobert Industries, Inc., No. 40786, for the reasons stated in my dissent in Kozak v. State, 189 Neb. 525, 203 N. W. 2d 516.

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

STATE OF NEBRASKA, APPELLEE, V. DONALD MANFORD TOWLE, APPELLANT.
249 N. W. 2d 754

Filed January 26, 1977. No. 40804.

1. **Criminal Law: Statutes: Courts: Work Release.** Section 47-406, R. R. S. 1943, permits the court by written order to dis-

burse funds collected on work release. It may order the funds applied to a prisoner's board, travel expense, and other incidental expenses.

2. **Criminal Law: Words and Phrases.** Lodging is a major, not an incidental expense.
3. ———: ———. The term "board" has many connotations and is frequently held to include "lodging."
4. **Municipal Corporations: Jails and Jailers: Costs.** When a county and a city unite in the construction and maintenance of a jail, as is true in this instance, the cost of maintenance shall be divided equally except for the cost of providing food for prisoners.
5. **Work Release: Statutes: Costs.** Section 47-404, R. R. S. 1943, provides that a prisoner having work-release privileges shall be liable for such costs incident to his confinement as the court deems appropriate and reasonable, if such are specifically set forth in the order granting work release.
6. **Criminal Law: Jails and Jailers: Costs.** The expense of lodging, including the outlay for guards, laundry, lights, etc., is not a cost incident to confinement.

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

Leonard Dunker, for appellant.

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

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

NEWTON, J.

This action involves monetary charges made against the defendant under a work-release program. Included in the charges was a sum amounting to $5.53 per day for lodging. We modify the order of the District Court to dispense with this item.

Defendant had been sentenced on a burglary charge to serve 60 days in the county-city jail and was granted work release. The jail is the joint property of the county of Lancaster and the city of Lincoln but is operated by the city. The county has contracted to reimburse the city on a daily-rate basis for each prisoner

in order to meet its share of the expense of administration. County prisoners on work release are charged $5.53 per day for lodging but this charge is not made to city prisoners.

The statute, section 47-406, R. R. S. 1943, permits the court by written order to disburse funds collected on work release. It may order the funds applied to a prisoner's board, travel expense, and other incidental expenses. Lodging is a major, not an incidental expense. The term "board" has many connotations and is frequently held to include "lodging." See, Black's Law Dictionary (4th Ed.), p. 219; Heron v. Webber, 103 Me. 178, 68 A. 744; Pollock v. Landis, 36 Iowa 651; In re Doubleday, 159 N. Y. S. 947, 173 App. Div. 739. Its interpretation is often dependent upon statutory construction. It is noted that section 47-307, R. R. S. 1943, provides that when a county and a city unite in the construction and maintenance of a jail, as is true in this instance, the cost of maintenance shall be divided equally except for the cost of providing food for prisoners. It further provides that the cost for city prisoners shall be provided by the city and the cost of county or state prisoners by the county.

Section 47-404, R. R. S. 1943, provides that a prisoner having work-release privileges "shall be liable for such costs incident to his confinement as the court deems appropriate and reasonable," if such are specifically set forth in the order granting work release.

Expenses incurred in the maintenance and administration of a county or city jail are fixed expenses which have no relationship to the number of inmates. These are permanent, major expenses entirely unrelated to the confinement of an individual with work-release privileges. Consideration of the statutes cited leads us to the conclusion that the Legislature intended charges to be made only for items directly attributable to increased expense due to the confinement of the individual prisoner, including such things as food, travel ex-

pense, laundry, etc. The charges made for lodging and administrative expense are unauthorized and the judgment therefor must be reversed.

REVERSED.

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

STATE OF NEBRASKA, APPELLEE, V. RODNEY L. STEWART, APPELLANT.
250 N. W. 2d 849

Filed February 2, 1977. No. 40329.

1. **Criminal Law: Constitutional Law: Homicide: Statutes: Death Penalty.** The Nebraska death penalty statute, sections 29-2519 to 29-2546, R. R. S. 1943, is not in violation of the Constitution of the United States or the Constitution of Nebraska.
2. **Criminal Law: Confessions: Minors: Parent and Child.** The confession of a minor to the police is admissible in evidence when, on the totality of circumstances, it is knowingly, intelligently, and voluntarily made. Ordinarily it is not required that the minor be warned that he could be prosecuted as an adult, nor that his parents be notified prior to taking his statement, for his confession to be deemed voluntary.
3. **Criminal Law: Statutes: Courts: Jurisdiction: Minors: Automatic Review in Supreme Court.** The District Court may properly refuse to waive jurisdiction over a minor to juvenile court where it complies with the provisions of sections 29-1816, R. R. S. 1943, and 43-202.01, R. S. Supp., 1974, and where it makes a statement of its findings which provides sufficient specificity to permit meaningful review by this court.
4. **Criminal Law: Courts: Plea Bargaining: Guilty Plea.** A criminal defendant has no absolute right to have his guilty plea accepted, and the trial court may reject such a plea in the exercise of sound discretion.
5. **Criminal Law: Courts: Plea Bargaining.** The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements.
6. **Criminal Law: Courts: Indictments and Informations.** Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained.
7. **Criminal Law: Homicide: Courts: Evidence.** The general rule is that admissibility of photographs of a gruesome nature rests largely in the discretion of the trial court; and although

the probative value of such evidence should be weighed against its prejudicial effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome.

8. **Criminal Law: Homicide: Courts: Instructions.** It is the duty of the court, in a homicide case, to instruct the jury only on those degrees of homicide as find support in the evidence.
9. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Death Penalty: Automatic Review in Supreme Court.** The procedure to be followed in applying the aggravating and mitigating factors of section 29-2523, R. R. S. 1943, is not a mere counting process of those factors, but rather a reasoned judgment as to what factual situations require the imposition of death, and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.
10. **Criminal Law: Statutes: Aggravating and Mitigating Circumstances: Proof.** The facts on which the finding of an aggravating circumstance referred to in section 29-2523, R. R. S. 1943, is based, must be proved beyond a reasonable doubt.
11. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Time.** Subsection (1)(a), of section 29-2523, R. R. S. 1943, should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose.
12. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances.** Subsection (1)(b), section 29-2523, R. R. S. 1943, is applicable where the purpose of the murder was to conceal a theft, or to conceal the defendant's identity as a thief.
13. ———: ———: ———: ———. Subsection (1)(c), section 29-2523, R. R. S. 1943, applies only to the hired gun, the hirers of the gun, and to murder motivated by a desire for pecuniary gain, as in the case of the murder of an insured by the beneficiary, or the murder of a testator by a legatee or devisee.
14. ———: ———: ———: ———. Subsections (1)(b) and (1)(c), section 29-2523, R. R. S. 1943, are separate and distinct circumstances, and will be construed so as not to overlap.
15. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Words and Phrases.** The term "heinous, atrocious, or cruel" as set out in subsection (1)(d), section 29-2523,

R. R. S. 1943, is to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim, and the words "or manifested exceptional depravity by ordinary standards of morality and intelligence" are applicable only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The standard encompasses acts which are totally and senselessly bereft of any regard for human life.

16. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances.** Subsection (1)(e), section 29-2523, R. R. S. 1943, applies only when the defendant actually committed another murder, and not when the defendant only attempted to commit another murder.

17. ———: ———: ———: ———. Subsection (1)(f), section 29-2523, R. R. S. 1943, applies to those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or other like situations.

18. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Minors.** Subsection (2)(d) of section 29-2523, R. R. S. 1943, should be applied as a mitigating circumstance to a 16-year-old defendant who has no criminal record nor significant history of prior criminal activity.

19. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Death Penalty.** Under section 29-2522, R. R. S. 1943, a sentence of death should not be imposed where the weight of the mitigating circumstances approaches, or equals, the weight of the aggravating circumstances. It is not required that the mitigating circumstances outweigh the aggravating circumstances.

20. **Criminal Law: Homicide: Statutes: Death Penalty: Automatic Review in Supreme Court.** The remedy provided by section 29-2308, R. R. S. 1943, is an additional remedy, which may be employed by this court in cases involving capital offenses. The provisions of sections 29-2519 to 29-2523, R. R. S. 1943, are not exclusive.

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

Frank B. Morrison, Stanley A. Krieger, David E. Kendall, Peggy C. Davis, and Anthony G. Amsterdam, for appellant.

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

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

BRODKEY, J.

This is an appeal from the verdict of a jury, finding the defendant guilty of both first-degree murder and of shooting with intent to kill, wound, or maim; and also from the sentences imposed.

On January 30, 1975, the defendant was charged under a Grand Jury indictment which alleged in count I that he "did purposely and of his own deliberate and premeditated malice kill Thomas Ehlers," and in count II that he "did maliciously shoot Daniel Evans with the intent to kill, wound, or maim Daniel Evans." The defendant plead not guilty to both charges on February 6, 1975.

Trial was had commencing July 29, 1975, and the jury returned a verdict of guilty on both counts on July 31, 1975. On August 20, 1975, the trial court, after a hearing pursuant to sections 29-2519 et seq., R. R. S. 1943, sentenced the defendant to death on the charge of premeditated murder, and to 15 to 50 years imprisonment on the charge of shooting with intent to kill, wound, or maim. The defendant has now appealed his convictions and sentences to this court. We modify and affirm.

During the summer of 1974, the defendant, a 16-year-old high school student, became acquainted with Thomas Ehlers and Daniel Evans. In July or August 1974, Evans and Ehlers began to supply marijuana to the defendant, who agreed to sell it for them under an arrangement whereby the defendant was to pay the two suppliers a specified price for the marijuana he sold, and retain any excess money he received from the sales.

In one instance, Evans and Ehlers gave the defendant 12 bags of marijuana to sell for $10 per bag. The

defendant was to pay them a total sum of $100 on the transaction. The defendant sold seven bags, and gave Ehlers and Evans $70, but kept the remaining five bags for himself, telling the two suppliers that he had been arrested and that the five bags had been confiscated by the police. When Ehlers and Evans discovered this was not true, they confronted the defendant, but continued to supply him with marijuana. The defendant would return marijuana that he did not sell, but began to "pinch" some from the unsold bags that he returned. The defendant stated that he began to pinch some of the marijuana because he felt that he was not receiving adequate compensation for his sales.

Ehlers and Evans became angry over the defendant's deception and his failure to pay them the money he owed at that time, about $50; and confronted him on Thursday, January 16, 1975, approximately 10 days before the shootings involved in this case. Evans testified that he and Ehlers were "pretty mad," and that they yelled at the defendant on this occasion. Evans told the defendant that he did not want a fight to arise out of the situation. The defendant's version of this confrontation was somewhat different. He stated that Evans and Ehlers at that time threatened him with wrenches, and that Ehlers threatened to kill or beat him. The defendant told them that he would pay them some money on his indebtedness on the following Tuesday.

According to Evans, the defendant telephoned him on Sunday, January 19, 1975, and told him that he, the defendant, had a buyer for 2 pounds of marijuana, and that the profit from such sale would make up what the defendant owed to Evans and Ehlers. The defendant stated that Evans initiated this proposed transaction, although on cross-examination he testified that he was unsure who made the initial suggestion. In any event, the proposed sale was discussed during the following week, and Evans located a person who could

provide 2 pounds of marijuana. A compromise was reached on a rendevous, which was to take place Saturday evening, January 25, 1975. Evans did not want to meet the ultimate buyer, and the defendant wanted to meet no one but Evans and Ehlers. The two suppliers agreed to meet the defendant and drive him to a place near the buyer's house; the defendant would then get the money from the buyer, and come back to retrieve the marijuana. The proposed sale price for the marijuana was $600.

The defendant had not, in fact, located a buyer, and he stated that he simply intended to "rip them (Evans and Ehlers) off for whatever I could get." Defendant testified that prior to the meeting, he decided to take a gun to protect himself because he knew the two suppliers were angry with him, and he decided to take a can of gasoline so that he could cover up any shooting which might occur. Evans and Ehlers met the defendant in Ehler's van at 7:30 p.m., on January 25, 1975, and the defendant told them that the gasoline was for a friend he was meeting after the sale was completed. The defendant directed the two suppliers to Rose Avenue, near 16th and Boyd Streets, in Omaha and told them to stop the van.

Evans testified that when the van finally stopped, he suddenly felt as though he had been hit in the back of the head. He stated he heard two shots, that no warning was given before the shots were fired, and that no conversation took place when the van stopped. The defendant fatally shot Ehlers, who died instantaneously, and wounded Evans. Evans fell to the floor of the van, and observed the defendant spreading gas in the van and igniting it. Evans then jumped out of the van and rolled in the snow to extinguish his burning clothing. Evans had been shot through the right eye, and suffered first and third degree burns on the body.

The defendant's version of the shootings differed in some respects. He stated that he had placed a bag of

marijuana under his coat while in the van, and that he intended to leave with the bag, telling Evans and Ehlers that he was going to get the money from the buyer. When the van stopped, Evans allegedly told the defendant that he was not going anywhere, and reached into his left pocket and pulled out something with a square handle that resembled a gun. The defendant pushed Evans forward, and Evans told Ehlers to grab the defendant. The defendant shot Ehlers, and then shot Evans. He then spread the gasoline, ignited the van, took the other bag of marijuana, and left. Evans stated that he had no gun on the night of the shootings, and that neither he nor Ehlers had threatened the defendant prior to the shootings. No weapon was found in the van after the shootings. Evans advised the police at the hospital that Rodney Stewart had shot him.

Police officers went to Stewart's home shortly after the discovery of the crimes. The defendant was not home at that time, but the defendant's father discovered that his revolver, five shells, and his gasoline can were missing. The defendant's parents brought him to the police station at about 10 p.m. that night, where he was questioned and subsequently confessed to the shootings. Additional facts will be subsequently referred to in connection with the discussion of specific issues.

The defendant lists 11 assignments of error which may be summarized as follows: (1) The Nebraska death penalty statute is unconstitutional under both the federal and Nebraska Constitutions in that capital punishment is cruel and unusual punishment, it does not comply with the standards set forth in Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and fails to provide for a jury determination of mitigating and aggravating circumstances; (2) the aggravating and mitigating circumstances contained in section 29-2523, R. R. S. 1943, are unconstitutionally

vague and indefinite, and were misapplied in this case; (3) the District Court committed reversible error in (a) overruling the defendant's motion to suppress the confessions of the defendant, (b) denying defendant's motion to transfer the case to juvenile court, (c) refusing to accept the defendant's plea of guilty to count I and refusing to dismiss count II of the indictment, (d) admitting into evidence photographs of the deceased, and (e) refusing to instruct the jury on the crime of mansalughter; and (4) that the sentence was excessive. These assignments of error fall into three main groups: (1) Those referring to the validity of the convictions because of alleged errors occurring in pretrial proceedings, and in the trial itself; (2) those referring to the application of the Nebraska death penalty statute in this case; and (3) those challenging the constitutionality of the Nebraska death penalty statute on various grounds.

In the assignments falling in the latter group, the defendant contends that the Nebraska death penalty statute is unconstitutional under both the federal and Nebraska Constitutions for the reasons that capital punishment is cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and under Article I, section 9, of the Bill of Rights, of the Nebraska Constitution; that it violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in failing to provide for a jury determination of mitigating and aggravating circumstances; and that the aggravating and mitigating circumstances contained in section 29-2523, R. R. S. 1943, are unconstitutionally vague and indefinite. The assignments of error all involve constitutional challenges which have been considered, discussed, and disposed of, contrary to the defendant's contentions, by this court in State v. Rust, *post* p. 528, 250 N. W. 2d 867, and State v. Simants, *post* p. 549, 250 N. W. 2d 881, and therefore need not again be dis-

cussed in this opinion. For the reasons given in those cases, we hold that the defendant's attack on the constitutionality of the Nebraska statute is without merit, and proceed to discuss the defendant's other assignments of error separately, beginning with those regarding the validity of his convictions.

We first consider his claim that the District Court committed reversible error in not suppressing the confessions of the defendant. The relevant facts are that two statements or confessions were given by the defendant to the police following their interrogation of him at the police station. The first was given on the night of the crime after the defendant's parents brought him to the police station; and the second was given in the afternoon of the next day. Only the second statement, exhibit 22, was received in evidence at the trial itself.

The defendant acknowledged in the suppression hearing that prior to giving both statements, he was given the required Miranda warnings, and that his statements were voluntary and not given as the result of any coercion, promises, or inducements. The defendant contended that he was under the influence of marijuana when he gave the first statement, but admitted that he was not under the influence of alcohol or drugs at the time the second statement was given. The latter statement was typed by a police officer as the defendant answered questions and gave his version as to what had transpired. After the statement was typed, the defendant read it, initialed each page, signed it, and indicated that he understood what it contained. The trial court found that the totality of circumstances indicated knowing, voluntary, and intelligent confessions on the part of the defendant.

The defendant contends that his second confession was taken without first notifying his parents, and that it was therefore involuntary and inadmissible. He also relies on the case of State v. Pike, 516 S. W. 2d 505 (Mo.

App., 1974), in support of his proposition that before the confession of a juvenile can be deemed voluntary, the juvenile must be warned that he could be prosecuted as an adult. That case and other Missouri cases do stand for that proposition. See State v. McMillian, 514 S. W. 2d 528 (Mo., 1974). Finally, the defendant argues that his first confession was involuntary because he was under the influence of marijuana at the time he made it.

Three recent Nebraska cases indicate that the defendant's contentions are without merit. State v. McDonald, 195 Neb. 625, 240 N. W. 2d 8 (1976); State v. Lytle, 194 Neb. 353, 231 N. W. 2d 681 (1975); State v. Russell, 194 Neb. 64, 230 N. W. 2d 196 (1975). Those cases follow the well-established rule that a confession is admissible when it is knowingly, intelligently, and voluntarily made; and in all three this court followed a "totality of circumstances" test, under which the age and mental condition of the defendant, the role of the defendant's parents, and other factors are merely circumstances to consider in regard to the question of whether a minor's confession is knowing, intelligent, and voluntary. In each case the court upheld the admission in evidence of the confession of a minor either 16 or 17 years of age. Those cases indicate that there is no requirement in Nebraska that a juvenile must be warned that he can be prosecuted as an adult before his confession can be deemed voluntary, nor that the juvenile's parents be notified prior to taking his statement. In this case, unlike the cases on which the defendant relies, the police officers did not indicate to the defendant that he would be prosecuted as a juvenile, but gave him standard Miranda warnings. The defendant's parents were with him prior to his giving his first statement, and he acknowledged in his second statement that he had spoken to his parents prior to giving that statement. In reviewing the record, our conclusion is that, on the totality of circumstances, the defendant's state-

ments were clearly knowing, voluntary, and intelligent, and the District Court did not commit error in overruling defendant's motion to suppress his confessions, and in admitting the second confession into evidence in the trial.

Defendant next contends that the District Court committed reversible error in denying his motion to transfer the case to Juvenile Court. This motion was filed pursuant to the provisions of section 29-1816, R. R. S. 1943, which provides that a juvenile may move the District Court to waive jurisdiction in his case to the Juvenile Court, and also requires a hearing on the motion. That section also provides: "After considering all the evidence and reasons presented by both parties, pursuant to section 43-202.01, the case shall be transferred unless a sound basis exists for retaining the case," and requires that the court shall set forth findings for the reason for its decision. The trial court in this case did set forth its reasons for retaining jurisdiction of the case, specifically mentioning five factors. Defendant contends that the trial court abused its discretion in not considering all the criteria as set out in section 43-202.01, R. S. Supp., 1974.

Defendant's argument is without merit. In Kent v. United States, 383 U. S. 541, 560, 561, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), the Supreme Court, in reviewing a District of Columbia statute which permitted juvenile courts to waive jurisdiction over minors to adult criminal courts, stated that the juvenile court must accompany its waiver order with the statement of the reasons or considerations therefore and that such a statement "must set forth the basis for the order with sufficient specificity to permit meaningful review." Also in Breed v. Jones, 421 U. S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975), the court stated: "However, the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court."

Thus the Supreme Court has never established standards which the states must apply in determining whether a person should be tried as a juvenile or as an adult. It has only held that a hearing must be had; that the reasons for the decision must be given with sufficient specificity to permit meaningful review; and that a person cannot be tried in both juvenile and adult court. It is to be noted that the Nebraska statute provides for a hearing, sets forth relevant considerations, and provides for an ultimate judicial determination on the issue of transfer. Nebraska law is clear that juvenile courts do not have the sole and the exclusive jurisdiction of children under 18 years of age who have violated law. State v. Grayer, 191 Neb. 523, 215 N. W. 2d 859 (1974). See, also, § 43-202(3)(b), R. S. Supp., 1974; and State v. Lytle, *supra*. The question presented, therefore, is whether the trial court complied with the statutory scheme, set forth above; and whether or not it abused its discretion.

The written findings of the trial court in regard to waiver of jurisdiction to the juvenile court refer to five of the eight considerations listed in section 43-202.01, R. S. Supp., 1974. That section requires the *consideration* of the enumerated items, but nowhere does the statute require that the court refer to all eight considerations in its findings. Section 43-202.02, R. S. Supp., 1974, only requires that the court "set forth findings for the reason for its decision." The defendant contends that the trial court did not consider all the items listed in section 43-202.01, R. S. Supp., 1974, because its written order does not refer to all those items.

While it would have been preferable for the trial court to refer to all the considerations set forth in section 43-202.01, R. S. Supp., 1974, in its order, the statute in question does not require the court to do so. In this case, the court did make a separate statement of its findings which appears to comply with the statute and which provides sufficient specificity to permit mean-

ingful review by this court. We conclude that the trial court substantially complied with the statutory scheme set forth above, and that it did not abuse its discretion in concluding from the evidence that a "sound basis exists for retaining this case."

We now consider defendant's claim that the court erred in refusing to accept defendant's plea of guilty to first-degree murder, as charged in count I of the indictment, and in refusing to dismiss count II of the indictment. The facts underlying this assignment of error are that on July 21, 1975, the county attorney moved to dismiss count II of the indictment (shooting with intent to kill, wound, or maim) for the reason that a plea bargain had been reached whereby the defendant would plead guilty to count I (first-degree murder). Both the county attorney and the defendant's attorney supported this motion. The trial court refused to sustain the motion for a number of reasons, including the following: (1) The plea would not save time or money because defendant could challenge the plea in subsequent proceedings; (2) a court should only rarely accept a plea of guilty in a first-degree murder case; (3) the jury could find the defendant not guilty; (4) a guilty plea would not save time because a full trial is required to determine whether the death penalty should be imposed; and (5) that the court had doubts whether the defendant could voluntarily, intelligently, and knowingly tender a plea of guilty. On July 28, 1975, the defendant and counsel for both sides again appeared before the court and again tendered a plea of guilty to the murder charge. After further discussion, the court again refused to accept the plea bargain, essentially for the same reasons previously referred to. The court further stated: "I cannot see how this Court could commit anything but error by entering into a plea bargain. And that's what it is, you can call it what you will. It's a plea bargain in which the Defendant and his counsel, in conjunction with the deputy

county attorney, are entering into a deal whereby they can fix the penalty and take all discretion from the court." The court further expressed the fear that if it accepted the plea a higher court would reverse its acceptance of the plea, and the case would come back "after all the evidence has been dissipated or gone."

Although the issue raised in this assignment of error involves two aspects, the first being whether a trial court must accept a guilty plea because a defendant wishes to so plead, and the second being whether the court must dismiss a second count in an indictment under a proposed plea bargain, these issues are interrelated and will be discussed together.

The law is well established that a criminal defendant has no absolute right to have a guilty plea accepted and that a trial court may reject a plea in the exercise of sound discretion. Santobello v. New York, 404 U. S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Lynch v. Overholser, 369 U. S. 705, 719, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962). See, also, North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The defendant admits in his brief that he had no absolute constitutional right to plead guilty, but he nevertheless argues that since he was not allowed to plead guilty to count I, his conviction should be reversed. While it is generally true, as stated above, that a court may reject a plea of guilty in the exercise of sound judicial discretion, that is not to say that there is *no* limit on the trial court's right to refuse to accept a constitutionally valid guilty plea. See, for example, United States v. Ammidown, 497 F. 2d 615 (D. D.C., 1973); United States v. Maggio, 514 F. 2d 80 (5th Cir., 1975), cert. den. 423 U. S. 1032. We do not believe that it is necessary at this time to discuss exhaustively the scope of the discretion of a trial court to refuse to accept a guilty plea tendered by a defendant. Suffice it to say that under the facts of this case, although we may not agree with all the reasons stated

by the trial court in refusing to accept Stewart's guilty plea, and although some of the court's reasons may be a matter of dispute, we cannot say that the trial court abused its discretion in so doing.

The problem arising from the motion of the county attorney to dismiss count II has been disposed of in the case of State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504 (1974), where we held that before a county attory can dismiss an information, it is first necessary that he obtain approval of the court to do so.

In State v. Evans, 194 Neb. 559, 234 N. W. 2d 199 (1975), this court discussed and quoted extensively from sections 1.8 and 3.3 of the ABA Standards Relating to Pleas of Guilty. Section 3.3(c) of those Standards provides as follows: "When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8." In the above opinion this court stated: "In the area of sentencing the defendant should be fully informed that the trial judge will not be bound by any agreement. He should understand the recommendation is no more than a recommendation to be considered under the principles set out in section 1.8 of the ABA Standards Relating to Pleas of Guilty." It is clear that in deciding whether or not to accept a plea bargain arrangement involving guilty pleas, the trial court is afforded a large measure of discretion, although such discretion is not unlimited. United States v. Cowan, 524 F. 2d 504 (5th Cir., 1975). We conclude, therefore, that the trial court did not commit reversible error in not honoring the plea bargain agreement between the county attorney and defendant's counsel, and in refusing to accept defendant's plea of guilty to the charge of murder and refusing to grant the motion of the county attorney to dismiss

count II of the indictment pursuant to the terms of the plea bargain.

During the course of the trial, two gruesome photographs of the deceased, Thomas Ehlers, being close-up shots of his charred body taken at the morgue, were received in evidence as exhibits 15 and 16. Defendant alleges prejudicial error on the part of the trial court in so doing. The general rule is that admissibility of photographs of a gruesome nature rests largely in the discretion of the trial court. State v. Wilbur, 186 Neb. 306, 182 N. W. 2d 906 (1971); State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443 (1970).

The admission of the photographs in evidence in this case was for the purpose of identification, to show that the body on which the autopsy was performed was the same body found in the van. In admitting the exhibits into evidence, the court stated that grotesqueness alone was not enough to render the photographs inadmissible; and it cautioned the jury in its instructions to consider them solely for the limited purpose of such identification.

Although it is true that the probative value of such evidence should be weighed against its possible prejudicial effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. State v. Robinson, *supra*; Washington v. State, 160 Neb. 385, 70 N. W. 2d 378 (1955). Since the purpose of the admission was for identification of the body, we believe the photographs in question were properly admissible for that purpose under the sound discretion afforded the trial court. State v. Blackwell, 184 Neb. 121, 165 N. W. 2d 730 (1969). In any event, in view of the overwhelming evidence against the defendant adduced at the trial, including his own confession and description of the shooting and killing of Ehlers, the admission of the photographs in question was, at most, harmless

error under section 29-2308, R. R. S. 1943. Under either approach, the admission of the photographs in this case was not reversible error.

Finally, the defendant contends that the District Court committed reversible error in refusing to instruct the jury on the crime of manslaughter. The defendant offered a proposed instruction which included an instruction on manslaughter. The court refused to give this instruction, finding that there was not "one iota" of evidence that there was a sudden quarrel, or that the shootings were unintentional. The court did give an instruction on murder in the second degree, and also gave an instruction as to the defendant's theory that his acts were justified and in self-defense.

The crime of mansalughter is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; * * *" § 28-403, R. R. S. 1943. The following rules of law apply. It is the duty of the court, in a homocide case, to instruct only on those degrees of homicide as find support in the evidence. State v. Worley, 178 Neb. 232, 132 N. W. 2d 764 (1965). Where the evidence is such that different conclusions may properly be drawn therefrom as to the degree of the crime, it is the duty of the trial court to instruct the jury on such degrees of homicide as find support in the evidence. Washington v. State, *supra;* Clown Horse v. State, 170 Neb. 336, 102 N. W. 2d 625 (1960); Denison v. State, 117 Neb. 601, 221 N. W. 683 (1928). The court is only required in instructions to state the law applicable to the facts proved and those which the evidence tends to prove. Veneziano v. State, 139 Neb. 526, 297 N. W. 920 (1941). It is the duty of the court upon request of the accused to instruct the jury upon the theory of the case, if there is evidence to support it. State v. Matejka, 186 Neb. 454, 183 N. W. 2d 917 (1971).

Under these principles, the question arises whether in this case there is any evidence tending to support or prove manslaughter. The case which most closely resembles this case is Veneziano v. State, *supra*. In that case there was testimony that at the time of a shooting the deceased threatened to kill the defendant and that he had his hand in his pocket, which purportedly had in it a gun. The defendant contended that he killed the deceased in order to save his own life. The court found the evidence insufficient to disclose a sudden quarrel which would meet the statutory conception of manslaughter, and found that the evidence disclosed that the shooting was unprovoked. The court concluded that the deceased never displayed a gun at the time, nor said anything to warrant any one in believing that he had a gun.

In the instant case, the defendant testified that Evans pulled something, which resembled a gun, from his pocket prior to the shootings. Evans denied doing this, stated that the shootings were unprovoked, and claimed that no quarrel precipitated the shootings. No gun was found on Evans, Ehlers, or in the van. Even the defendant's testimony does not indicate that a quarrel took place prior to the shootings. Rather, the defendant stated that he was about to leave the van with the marijuana, that Evans told him he wasn't going anywhere, and that Evans then pulled something from his pocket which resembled a gun. The defendant stated that he then shoved Evans, who told Ehlers to get the defendant. The defendant then shot both victims.

Even if the facts described above could be viewed as a "quarrel," the trial court was undoubtedly correct in stating that the evidence did not really show facts constituting manslaughter. This view is supported by the fact that the jury was instructed on murder in the second degree, yet returned a verdict of guilty of premeditated murder. In view of alleged prior threats

by the victims, the defendant's version of the events is more supportive of a claim of self-defense, on which the jury *was* instructed, than it was a description of facts constituting the crime of manslaughter. Further, we note that the defendant did not claim that Ehlers did anything, or said anything, at the time the van was stopped, and also that the defendant was charged with the murder of Ehlers, not Evans. The assignment is without merit.

After carefully examining the defendant's alleged assignments of errors relating to the validity of his conviction, as discussed above, we conclude that no reversible error was committed by the trial court, and that defendant was properly convicted of the crimes with which he was charged.

We turn now to a consideration of whether the death sentence imposed upon the defendant by the court was a proper sentence under the facts and circumstances of this case.

Following the issuance of the opinion of the United States Supreme Court in Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Nebraska Legislature, in an effort to conform with the requirements for validity of death penalty statutes set forth in Furman, revised Nebraska's statute, and in 1973 enacted L.B. 268, R. R. S. 1943, which now appears as sections 29-2519 to 29-2546, R. R. S. 1943. Section 29-2520 of the new Nebraska statute provides that whenever any person is found guilty of a violation of section 28-401, R. R. S. 1943, which defines murder in the first degree, the District Court shall within 7 days fix a date for hearing on the determination of the sentence to be imposed and further provides that the determination shall be made by the judge who presides at the trial or who accepted the plea of guilty; or a panel of three District Judges including the judge who presided or accepted the plea; or a panel of three District Judges named by the Chief Justice of the Supreme

Court. In the instant case the hearing was held and the determination made by the judge who presided at the trial, rather than a panel of three judges. Section 29-2521, R. R. S. 1943, provides that at the hearing evidence may be presented as to any matter that the court deems relevant to the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523, R. R. S. 1943. However, the sections we deem most material for a determination of the issue before us are sections 29-2522 and 29-2523 which we set out verbatim below: Section 29-2522, R. R. S. 1943, provides: "After hearing all of the evidence and arguments in the sentencing proceedings, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

"In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination."

Section 29-2523, R. R. S. 1943, provides: "The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

"(1) Aggravating Circumstances:

"(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

"(b) The murder was committed in an apparent ef-

fort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

"(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

"(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

"(e) At the time the murder was committed, the offender also committed another murder;

"(f) The offender knowingly created a great risk of death to at least several persons;

"(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

"(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

"(2) Mitigating Circumstances:

"(a) The offender has no significant history of prior criminal activity;

"(b) The offender acted under unusual pressures or influences or under the domination of another person;

"(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

"(d) The age of the defendant at the time of the crime;

"(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

"(f) The victim was a participant in the defendant's conduct or consented to the act; or

"(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of

law was impaired as a result of mental illness, mental defect, or intoxication."

The State of Florida has adopted a statute which is very similar to the Nebraska statute, at least so far as the application of aggravating and mitigating circumstances is concerned in the determination of whether the death penalty should be applied. See West's F. S. A., § 921.141. The Supreme Court of Florida has had occasion to interpret its statute as to the manner it is to be applied. In State v. Dixon, 283 So. 2d 1 (Fla., 1973), that court stated: "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all."

In Alvord v. Florida, 322 So. 2d 533 (Fla., 1975), the Supreme Court of Florida further elaborated on State v. Dixon, *supra*, stating: "There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See State v. Dixon, supra. The law does not require that capital punishment be imposed in every conviction in which a

particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

"The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case." We believe the approach and reasoning of the Florida Supreme Court is correct, and adopt it in this case.

We also note that the Nebraska statute specifically provides: "That the rational imposition of the death sentence requires the establishment of specific legislative *guidelines* to be applied in individual cases by the court." (Emphasis supplied.) § 29-2519, R. R. S. 1943. The Nebraska statute specifically requires that the judge or judges in determining to fix the sentence at either death or life imprisonment shall weigh the aggravating and mitigating circumstances. §§ 29-2519 and 29-2522, R. R. S. 1943. The word "weigh," as defined in Webster's Third New International Dictionary (Unabr.), p. 2593, means "To consider or examine for the purpose of forming an opinion or coming to a conclusion: consider carefully, esp. by balancing one quality, aspect, or thing against another in order to make a choice, decision, or judgment."

Finally, with reference to the question of what burden of proof must be met before an aggravating circumstance is proven to exist, we have this day disposed of that issue in State v. Simants, *post* p. 549, 250 N. W. 2d 881, where we adopted the rule that the facts on which the finding of an aggravating circumstance referred to in the Nebraska act is based must be proved beyond a reasonable doubt. To the same effect, see, Alford v. State, 307 So. 2d 433, 444 (Fla., 1975).

With the above as a backdrop, particularly keeping in mind the requirement that the existence of an aggravating circumstance must be established by proof beyond a reasonable doubt, let us now examine the findings and conclusions of the trial judge, who, sitting alone, conducted the section 29-2520, R. R. S. 1943, hearing, and concluded that the death penalty should be imposed upon the defendant in this case.

We first consider the aggravating circumstances set out in section 29-2523(1), R. R. S. 1943. It is not clear from the written findings of the judge whether he applied (1)(a) of the above section. The record is clear that the defendant had no prior criminal record whatsoever, as the trial court acknowledged, but in its comments on the circumstances, the court referred to the defendant's attempt to kill Evans, evidently considering the fact relevant in regard to the applicability of that subsection. If the trial court did apply this circumstance, it would clearly be erroneous. We have this day held in State v. Rust, *post*, p. 528, 250 N. W. 2d 867, and State v. Holtan, *post*, p. 544, 250 N. W. 2d 876, that (1)(a) should be applied only to criminal activity conducted prior to the events out of which the charge of murder arose. The killing of Ehlers and the wounding of Evans occurred at the same time and arose out of the same events. Subsection (1)(a) clearly is not applicable in this case.

The trial judge found that (1)(b) was applicable, stating that the murder was committed in an apparent

effort to conceal the commission of the crimes and to conceal the identity of the defendant as the perpetrator. In his confession introduced into evidence as exhibit 22, the defendant stated: "* * * I planned on ripping them off and was only taking the gun along with me in case I needed it for protection. I was just taking the gas along in case I had to use the gun on them then I would use the gasoline to set the truck on fire to cover up me shooting them if this came down that way." In the same statement he was asked why he took the gasoline along with him on the buy, and replied: "Because I was going to use it to set the truck on fire to cover up if I had to shoot them, to make it look like an accident, or just a fire." It is clear that the defendant had a dual motivation in what he did, and his purpose was both to conceal the theft of the marijuana, and also his identity as the thief. Even without considering what additional motive he may have had in killing Ehlers, it is clear that the trial court was correct in applying circumstance (1)(b) to this case.

The trial judge also found that (1)(c) was applicable because the murder was committed for the purpose of gaining possession of marijuana from the deceased and Evans, and hence was for "pecuniary gain." We have this day held in State v. Rust, *post*, p. 528, 250 N. W. 2d 867, that subsection (1)(c) applies only to the hired gun, the hirers of the gun, and to murder motivated by a desire for pecuniary gain as in the case of the murder of an insured by the beneficiary, or the murder of a testator by a legatee or devisee, etc. It would clearly not apply where, as in the instant case, the murder itself was not primarily committed to attain the pecuniary gain, but was intended to be used, if necessary, to cover up the commission of the crime or his identity as the perpetrator.

We also note that were subsection (1)(c) to be construed to apply to murder committed in the course of a

robbery, it would appear that defendants who commit such murders would, from the outset, have two aggravating circumstances applied to them, (1)(b) and (1)(c); whereas in the case of a premeditated murder, neither circumstance would apply. We do not believe the Legislature intended to treat persons who commit murder in the course of a robbery more harshly than those who commit premeditated murder. We also find that subsections (1)(b) and (1)(c) are separate and distinct circumstances and should be construed so as not to overlap. Subsection (1)(c) does not apply to the facts of this case.

The trial judge also found that subsection (1)(d) also applied and that the murder was especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence. We have discussed and defined the meaning of this circumstance in State v. Simants, *post,* p. 549, 250 N. W. 2d 881, and in State v. Rust, *post,* p. 528, 250 N. W. 2d 867, and shall not repeat that discussion here. Suffice it to say, that although all murders may be characterized as "heinous," by the use of the word "especially" in the subsection under consideration, our Legislature intended something more than the fact that there had been a murder. In State v. Dixon, 283 So. 2d 1 (Fla., 1973), the Supreme Court of Florida defined the term "heinous, atrocious, or cruel," as set out in its comparable statute, to be directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. We agree with this definition as to the words referred to. The Nebraska Legislature has, however, added the words "* * * or manifested exceptional depravity by ordinary standards of morality and intelligence." In State v. Simants, *post,* p. 549, 250 N. W. 2d 881, we defined the additional words quoted above as applicable "only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence." The standard

encompasses acts which are totally and senselessly bereft of any regard for human life.

We must, therefore, determine whether under the evidence in the record the murder of Ehlers was a conscienceless or pitiless crime which was unnecessarily torturous to the victim, and also whether the murder exhibited depravity to such an extent to obviously offend all standards of morality and intelligence. In this case, the medical testimony is uncontradicted that Ehlers death was instantaneous, by reason of a gun shot wound to his head; and that he was not tortured. However, the fact that the defendant thereafter set fire to the van for purposes previously stated in this opinion, resulting in the burning of Ehlers body, was indeed gruesome and could be interpreted as manifesting exceptional depravity. However, we think it is clear from the confession of the defendant, that his setting fire to the van was for the purpose of concealing the commission of the crimes or the identity of the perpetrator, and not for the purpose of causing further harm to the victims, who the defendant thought were dead. Under this construction of the facts, it is possible to conclude that in igniting the van, the defendant did not exhibit "exceptional depravity," particularly where the evidence indicates that death was instantaneous and the victim was not tortured. In our opinion (1)(d) was not proved beyond a reasonable doubt, and should not be applied.

The trial judge apparently applied (1)(e) in this case. This was clearly error, for by its terms that subsection is to apply only when the defendant committed another murder. Here the defendant did not commit another murder, but only attempted to commit one. The language is clear, and we hold that (1)(e) is not applicable in this case.

The trial judge also found that aggravating circumstance (1)(f) did exist, stating: "The defendant knowingly created a great risk of death to Daniel Evans as well as having accomplished the murder of Thomas

Ehlers." In State v. Simants, *post*, p. 549, 250 N. W. 2d 881, in considering the above subsection, we stated: "We interpret it to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations." Subsection (1)(f) is inapplicable to this case.

Finally, in its written order and findings, the trial judge did not apply, or for that matter even discuss, the application of aggravating circumstances (1)(g) and (1)(h), obviously considering them not to be applicable.

We now consider the mitigating circumstances as set out in subsection (2) of section 29-2523, R. R. S. 1943. In his written findings, the trial judge applied no mitigating circumstance other than (2)(a) which was clearly applicable in view of the fact that the defendant had no criminal record, nor significant history of prior criminal activity. We also agree with the trial court's conclusion that there is no evidence in the record to support a finding that (2)(b), (c), (e), (f), or (g), are applicable.

However we disagree with the conclusion of the trial court that (2)(d), which lists as a mitigating circumstance "the age of the defendant at the time of the crime" should not apply. In discussing the application of this circumstance in his written findings, the trial judge discusses the growing tendency of persons under 17 years of age to commit crimes, observed that he had noticed the calmness and deliberateness with which the defendant conducted himself in the courtroom, referred to the defendant's cool and deliberate planning of the murder and its execution, and concluded with the statement: "While the Court fully considers the age by years of the Defendant the Court is impelled to determine that age cannot *excuse* heartless, diabolical conduct." (Emphasis supplied.) The issue is not whether his age "excuses" the murder. Obviously it does not,

and defendant has been convicted of premeditated murder. Rather the issue is whether in the determination of the application of the death penalty, the mitigating factor of the defendant's youthful age should not be considered along with the other aggravating and mitigating factors to determine whether he should be put to death. The statute mandates consideration of this mitigating circumstance. Are we to say that because of the increase of juvenile crime, every 16-year-old person who has been found guilty of murder is not to have his age considered in the weighing and balancing of the aggravating and mitigating circumstances? We believe not. The statute does not set a definite age as a cutoff point for this purpose, but we believe that a person 16 years of age should receive the benefit of this circumstance.

In this connection we note that section 210.6 of the American Law Institute's Model Penal Code specifically provides that when a defendant is found guilty of murder the court shall impose sentence for a felony of the first degree, rather than the death penalty, if it is satisfied that "* * * (d) the defendant was under 18 years of age at the time of the commission of the crime; * * *." To the same effect see section 3603(a) of the Study Draft of a New Federal Criminal Code, by the National Commission on Reform of Federal Criminal Laws (1970). We do not adopt the arbitrary age as determinative of the application of that mitigating circumstance, but merely point out that there is reputable authority espousing an even higher age than in the instant case. Stewart's actions on the night of January 25, 1975, are in no way to be considered as a defense to the crime of murder of which he has been convicted, but they do not preclude consideration of his youthful age at the time of the shooting as a mitigating circumstance in this case under subsection (2)(d), and we so hold.

In summary, therefore, it appears that of the eight

aggravating circumstances referred to in section 29-2523, R. R. S. 1943, only one, (1)(b), or at the very most two, if we were to consider the application of (1)(d), are applicable; whereas of the seven mitigating circumstances, (2)(a) and (2)(d) are applicable.

Section 29-2522, R. R. S. 1943, specifically provides that in determining whether the sentence shall be death or life imprisonment, the judge or judges shall consider, in addition to whether sufficient aggravating circumstances exist to justify the imposition of a sentence of death, "whether sufficient mitigating circumstances exist *which approach or exceed the weight given to the aggravating circumstances.*" (Emphasis supplied.) Under our statute, a sentencing judge may properly impose a sentence of life imprisonment, rather than a sentence of death, where the mitigating factors only approach or equal the weight given to the aggravating circumstances. They need not "outweigh" the aggravating circumstances.

That situation exists in this case. Here the defendant was not "crime-wise" in the sense that previous conflicts with the law had made him a sophisticated criminal. He had no prior criminal record and he had never been arrested. He resided with his parents, and there is nothing in the evidence to indicate that this was other than a stable family. The school records introduced in evidence indicate that his school grades were average and improving at the time of the crime. His conduct and character were favorably spoken of by at least some of his teachers and counselors. He had no particular disciplinary problem, although it is true that he was once suspended briefly from school for possession of a marijuana cigarette.

After weighing the aggravating and mitigating circumstances in this case we conclude that the defendant's age at the time of the crime and the absence of any significant criminal record mitigate strongly against the imposition of the death penalty upon Rodney Stew-

art; and that the public will be served and justice done by sentencing him to a term of life imprisonment. We modify the sentence of the court accordingly.

In view of our decision to reduce the defendant's sentence to life imprisonment upon a consideration of aggravating and mitigating circumstances, it is unnecessary for us to discuss defendant's assignment of error that the sentence of the defendant to death was excessive and should be reduced to life imprisonment pursuant to the authority of section 29-2308, R. R. S. 1943. In this connection, we point out that section 29-2524, R. R. S. 1943, specifically provides that: "Nothing in sections 24-342, 28-401, 28-417, and 29-2519 to 29-2546 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce the sentence of death to a sentence of life imprisonment *in accordance with the provisions of section 29-2308,* nor shall it limit the right of the Board of Pardons of commute any sentence of death to a sentence of life imprisonment." (Emphasis supplied.) It appears clear, therefore, that by express language of the Legislature, the remedy provided by section 29-2308, R. R. S. 1943, is also available and may be employed where the court determines that a sentence is excessive and should be reduced, and that the provisions of sections 29-2519 to 29-2523, R. R. S. 1943, are not exclusive.

We add that we have compared the cases of State v. Rust, *post,* p. 528, 250 N. W. 2d 867, State v. Simants, *post,* p. 549, 250 N. W. 2d 881, and State v. Holtan, *post,* p. 544, 250 N. W. 2d 876, with this case, and with each other and incorporate herein the pertinent rules announced therein.

For the reasons heretofore stated in this opinion, we affirm the conviction of the defendant for the offenses charged in the indictment, but modify the sentences im-

posed upon him by reducing his sentence to death under count I to a sentence of life imprisonment.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JOHN EDWARD RUST, ALSO KNOWN AS JOHN DEWITT, APPELLANT.
250 N. W. 2d 867

Filed February 2, 1977. No. 40451.

1. **Criminal Law: Constitutional Law: Homicide: Death Penalty.** The death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and sections 3 and 9 of the Bill of Rights of the Constitution of Nebraska.
2. **Criminal Law: Constitutional Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Death Penalty.** Neither the Constitution of the United States nor the Constitution of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R. R. S. 1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional.
3. **Criminal Law: Constitutional Law: Homicide: Statutes: Aggravating and Mitigating Circumstances.** The definitions of aggravating circumstances in section 29-2523, R. R. S. 1943, are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional.
4. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Words and Phrases.** The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1) (a) of section 29-2523, R. R. S. 1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts.
5. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances.** A murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed.
6. ———: ———: ———: ———. A murder is committed for

pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds.

7. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances: Legislature.** The definition of aggravating factors in section 29-2523, R. R. S. 1943, will be construed so as not to overlap, that is, the same essential facts should not be construed to constitute two or more aggravating circumstances. It is the apparent legislative purpose that each of the definitions convey a different concept.

8. **Criminal Law: Homicide: Statutes: Aggravating and Mitigating Circumstances.** A murder is especially heinous, atrocious, cruel, or manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of aggravating circumstance subsection (1)(d), of section 29-2523, R. R. S. 1943, when it involves torture, sadism, sexual abuse, or the imposition of extreme suffering. This circumstance applies only to the murder charged and not to collateral or subsequent circumstances. This circumstance is also satisfied where the killing is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life.

9. ———: ———: ———: ———. A conviction for another murder within the meaning of aggravating circumstance subsection (1)(a), of section 29-2523, R. R. S. 1943, does not include an attempt to commit murder.

10. **Criminal Law: Homicide: Death Penalty: Automatic Review in Supreme Court.** This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate.

11. **Criminal Law: Homicide: Police Officers and Sheriffs: Aiders and Abettors.** In Nebraska an accomplice in a robbery is not accountable for felony murder in the death of one of his fellow participants who is shot and killed by the police during the robbery or during flight.

12. **Criminal Law: Homicide: Aggravating and Mitigating Circumstances.** Knowingly creating a risk of death to several persons includes the circumstance of shooting at several persons.

13. ———: ———: ———. Murder which is committed as part of an attempt by robbers to escape and avoid apprehension by law enforcement officers is committed to disrupt or hinder the enforcement of laws within the meaning of aggravating circumstance subsection (1)(h), of section 29-2523, R. R. S. 1943.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, HERBERT A. RONIN, and MERRITT C. WARREN, Judges. Affirmed.

Frank B. Morrison, Stanley A. Krieger, David E. Kendall, Peggy C. Davis, and Anthony G. Amsterdam, for appellant.

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

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

CLINTON, J.

The defendant, John Edward Rust, also known as John DeWitt, was found guilty by a jury of the following charges: (1) The killing of Michael Kellogg in the perpetration or attempt to perpetrate a robbery; (2) maliciously shooting at Russell Wolf with intent to kill, wound, or maim said individual; (3) maliciously shooting at George E. Allen with intent to kill, wound, or maim the said individual; and (4) maliciously shooting at Joseph Nepodal with intent to kill, wound, or maim said individual. He was sentenced by the trial judge on the last three charges to concurrent terms of not less than 16 2/3 and not more than 50 years in the Nebraska Penal and Correctional Complex. In accordance with the provisions of section 29-2520, R. R. S. 1943, a panel of three District Judges, including the judge who presided at the trial, was convened for the purpose of determining the sentence on the murder charge and, after notice and hearing as provided by section 29-2521, R. R. S. 1943, the defendant was sentenced to death for the murder. At the sentencing hearing evidence was adduced by both the State and the defendant. Following the hearing and argument, the sentencing panel made findings in writing in accordance with the provisions of sections 29-2522 and 29-2523, R. R. S. 1943. Automatic review of the death sentence

has come to this court on the murder charge under the provisions of sections 29-2525 and 29-2524, R. R. S. 1943. No appeal has been taken on the other three counts.

Killing in the perpetration of or the attempt to perpetrate a robbery is murder in the first degree and is punishable by death or imprisonment during life. § 28-401, R. R. S. 1943. That statute provides that the punishment shall be determined in the manner provided by sections 29-2520 to 29-2524, R. R. S. 1943.

Defendant is represented by counsel in this court and on his behalf they make the following assignments of error: (1) The death penalty provided by section 28-401, R. R. S. 1943, is unconstitutional in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, sections 3 and 9, of the Bill of Rights, of the Constitution of Nebraska, because such sentences are arbitrarily and capriciously imposed in violation of the mandates of Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346. (2) Capital punishment constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, section 9, of the Bill of Rights, of the Constitution of Nebraska, irrespective of the manner of imposition or how determined. (3) Capital punishment is unconstitutional because a jury determination of the applicability of the aggravating and mitigating factors under sections 29-2522 and 29-2523, R. R. S. 1943, is not mandated by our statute. (4) The panel of sentencing judges misapplied the aggravating and mitigating factors in this case. (5) The statutory definitions of aggravating and mitigating factors under section 29-2523, R. R. S. 1943, are so vague and indefinite as to be unconstitutional. (6) The death sentence is excessive in this particular case. (7) The trial court erred in (a) not separating the jurors during their voir dire examination; (b) in not sequestering the

jury during trial; (c) in denying a request for a continuance; and (d) in denying a request for change of venue.

Assignments (1), (4), and (5) are melded in defendant's argument and all must be covered here even though an assignment comparable to (1) has been covered in State v. Simants, *post*, p. 549, 250 N. W. 2d 881. Assignments (2) and (3) have been adequately dealt with in Simants, and the opinion of the United States Supreme Court in Gregg v. Georgia, 428 U. S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859, fully answers these contentions and they need not be further discussed in this opinion. Determination of the other assignments requires that we briefly summarize the evidence and other pertinent background.

On February 21, 1975, the defendant and two companions, Ronald Raymond Ell and Donald D. Fread, robbed at gunpoint employees of the Hinky Dinky store at 30th and Weber Streets in Omaha, Nebraska. The robbers fled in an automobile. Almost immediately police were alerted and a chase ensued, during which Rust was observed firing at the police cruisers. Two cruisers were struck by the bullets. The cruiser driven by officer Allen was hit by two bullets which passed through the front windshield. Another cruiser driven by officer Nepodal was hit by a bullet which passed through the left rear quarter panel and backseat, and lodged in the right rear door. During the chase the robbers' car became trapped on a residential street when police vehicles blocked both forward progress and retreat.

At that time the robbers' car became stuck in a snowbank. Fread, who was the driver of the get-away car, was shot and killed by the police near the point where the car stopped. Rust and Ell left the car on foot. Police officers Wolf, Allen, and Nepodal, who were the victims named in counts 2, 3, and 4, and others pursued them. Rust continued the fire fight and shot Kellogg,

a civilian who had come to the aid of the police. Officer Wolf was severely wounded by Rust. Officer Allen suffered a slight wound. The evidence showed that Ell hid in some bushes adjacent to a residence and surrendered when ordered to do so. Rust took refuge in a backyard and continued to fire at the officers until he was himself wounded. The evidence, both eyewitness and ballistic, showed that Kellogg was killed by Rust and that the bullet which came from his gun was the one that lodged in the police cruiser driven by Nepodal. Kellogg was shot by Rust four times and he was observed to be shooting into Kellogg's body after Kellogg had fallen as a result of an earlier shot fired by Rust.

The sentencing hearing was held in two stages. At the first stage documentary evidence was introduced, including copies of the record of the trial and a record of Rust's conviction and sentence in 1969 in South Dakota on charges of assault with intent to do great bodily harm and of grand larceny. The conviction arose out of a brutal assault with a tire iron and placing a chain about the victim's neck. Rust served about 5 years of a 10-year term on these two charges and was then paroled. Before the second stage, the trial record was read by the two judges who were not present at trial.

At the second stage of the sentencing hearing, Rust's mother testified on behalf of the defense. The substance of this testimony was to place blame for Rust's antisocial attitude upon events occurring during an unhappy childhood. The mother testified that as a small child Rust suffered from any eye defect and during his early years was rather clumsy. At about the age of 5 he suffered a fall and lost the sight of one eye completely. As a consequence of this accident and his previous eye impairment, he had difficulty in school and was abused by other children. At about age 10 while Rust was still in grade school, a younger brother, who

at the time was under Rust's charge, was struck and killed by an automobile while crossing a street. Apparently Rust's father, to whom young Rust was much attached, admonished him and Rust thereafter blamed himself for his brother's death. Shortly thereafter his father died. Rust had indicated to his mother that he felt responsibility for his father's death as well. Rust dropped out of high school in his junior year. At the time of commitment on the South Dakota charges he was about 18 years of age and on February 1, 1975, his age was apparently approximately 23 years and 6 months.

We first direct our attention to assignments (1), (4), and (5). The defendant argues that the Nebraska death sentence procedure cannot and, in fact, does not eliminate discriminatory, arbitrary, and capricious decisions by judges, and that the result is that the application of the guidelines cannot be sanctioned under the principles established by the Supreme Court of the United States in Furman v. Georgia, *supra*. This argument is founded upon the contention that the definitions of aggravating and mitigating circumstances are vague and indefinite. Defendant points to alleged different and conflicting interpretations made by various District Judges and panels of judges in applying the statutes in the various capital cases now before us as well as in other cases where capital punishment might have been imposed but was not. He makes special reference to the case of Ronald Ell, one of Rust's accomplices, who received only a life sentence. See State v. Ell, 196 Neb. 800, 246 N. W. 2d 594.

As pointed out in Simants, section 29-2522, R. R. S. 1943, provides that after evidence and argument the judge or panel of judges shall fix the sentence either at death or life imprisonment and shall base its determination upon whether the specified aggravating circumstances exist to justify the imposition of the sentence, or whether mitigating circumstances exist which

approach or exceed the weight given to aggravating circumstances. Section 29-2523, R. R. S. 1943, defines eight aggravating circumstances identified by the letters (a) through (h) inclusive and seven mitigating circumstances identified by letters (a) through (g) inclusive.

Aggravating circumstance (a) is as follows: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity." § 29-2523, R. R. S. 1943. The sentencing panel found that (a) applied in this case because of the defendant's conviction in South Dakota of the assault with intent to inflict great bodily harm. In State v. Ell, *supra*, the sentencing judge found that aggravating circumstance (a) did not apply. The defendant claims there is an inconsistency in the findings. There is none. The record establishes that Ell had not been convicted of any crime of violence. The record in that case merely showed that he was *wanted* in South Dakota on such a charge. There was in the Ell case no proof of actual guilt. Defendant also notes that the court pointed out in Ell that Ell fired at police officers during an attempt to escape. He claims that this is inconsistent with the findings in the present case. The acts described are clearly terrorizing acts, but they were part of the acts of which Ell was then being tried. We interpret "*substantial history* of serious assaultive or terrorizing criminal activity" to refer to events and incidents prior to and not part of the events out of which the current charge arises. The use of the term "history" clearly implies earlier events. See State v. Holtan, *post*, p. 544, 250 N. W. 2d 876. As so interpreted we believe that the definition of aggravating circumstance (a) is clear. The panel did not misapply that aggravating circumstance in this case, nor in Ell.

The defendant next asserts that the sentencing

judge in State v. Stewart, *ante,* p. 497, 250 N. W. 2d 849, in discussing the first aggravating circumstance, seemed to consider activities which were part of the events charged as "history of serious assaultive or terrorizing activity," because it considered the attempt of Stewart to kill another individual at the time he killed the victim of whose murder he was convicted. Pursuant to the construction of the term "history" adopted in this case and in Holtan, we have this day held in Stewart that aggravating factor (a) was not applicable in that case.

The defendant says that his contention of vagueness of definition and arbitrariness of application as applied to aggravating circumstance (a) is supported by inconsistent interpretations and contrary applications by the sentencing judge in Simants and the sentencing panel in Holtan. Whatever merit this contention may have had has now been removed by our opinions in those cases and in this one. In Simants we have today upheld the finding of the sentencing judge that aggravating circumstance (a) did not exist. In that case the sentencing court applied the construction which we have here approved, that is, that activities associated with the crime in which sentence is being imposed is not "history." Today in Holtan we have eliminated consideration of the associated offense of shooting with intent to kill, wound, or maim which occurred in connection with the murder. There existed, however, in Holtan previous convictions of crime involving violence and threats of violence to persons and so, as the opinion in Holtan points out, the finding of the panel was supported by the evidence.

In this case the panel found that aggravating circumstance (b) did exist, that is, "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." § 29-2523, R. R. S. 1943. In the case before us the robbers were masked, they were ap-

parent strangers in the neighborhood, and the murder was part of the attempt to escape and so part of the effort to conceal their identity. The finding of the panel on circumstance (b) was correct. However, we think that the panel was wrong in finding that the murder was committed to conceal the commission of another crime. The murder could not have concealed the commission of the crime or of the assaults because it did not destroy or was not an attempt to destroy evidence of those crimes. Their discovery could not have possibly been prevented by the murder of Kellogg. The other crimes were, in fact, already known. We hold that a murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed as, for example, in a case where murder by arson is committed in an effort to conceal the evidence of commission of another crime, e.g., another murder or burglary, or where the murder of a witness is likely to prevent the discovery of a prior crime not otherwise likely to be discovered.

In this case the panel found that aggravating circumstance (c) did not exist. That is, that the murder was not committed for hire, or for pecuniary gain, nor had the defendant hired another to commit the murder for the defendant. The panel properly applied this criteria and its finding was correct. The defendant argues, however, that in Stewart the sentencing judge applied an interpretation of the definition which is inconsistent with that applied in this case. That is, it determined that since part of the motivation for the crime was to avoid having to pay for a quantity of marijuana, aggravating circumstance (c) existed. This contention is answered by our finding today in Stewart that this aggravating circumstance did not exist in that case. We construe this factor to apply (1) to the hired gun, (2) to the hirers of the gun, and (3) to murder motivated primarily by a desire for pecuniary gain as in the case

of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds, or the murder of a testator by a legatee or devisee to secure a legacy or a devise. Where, as here, the murder was committed as part of an attempt to escape or to conceal the identity of the perpetrator, we do not consider the murder was committed for a pecuniary gain even though the result could possibly have been to enable Rust to keep the proceeds of the robbery. We think it is not reasonable to construe the definitions in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances.

We believe the Legislature intended by each definition to convey a different concept, at least to the extent that some added different and important element, e.g., motive or purpose, is included in each separate definition even though some fact or facts in a particular case may pertain to more than one of the definitions, e.g., pecuniary gain may be the result. This principle is also illustrated by our holding in Simants where the multiple murders satisfy aggravating circumstance (e), but are not construed to also include circumstance (f), i.e., "created a great risk of death to at least several persons."

In this case the court found that aggravating factor (d) did not exist. That factor is: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." The sentencing panel in its findings stated: "We recognize that all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed, but by the use of the words 'especially' and 'exceptional' the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual

abuse, or the imposition of extreme suffering. Here the murder was effected by three bullets causing almost instantaneous death and the imposition of extreme suffering on the victim was not involved. It is a close question as to whether this particular aggravating circumstance exists. In view of our foregoing interpretation of the application of this aggravating circumstance, we find this aggravating circumstance does not exist." We think the panel properly interpreted and applied the definition in this case. See Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913, where the United States Supreme Court approved a similar construction of substantially the same guideline by the Supreme Court of Florida and said: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." The defendant argues, however, that the sentencing court in Stewart applied a contrary interpretation and made finding inconsistent with the interpretation. In Stewart, death was instantaneous by reason of a gunshot wound to the head. The circumstances surrounding the murder were gruesome, that is, the attempt to burn the body of the victim as well as of an unconscious person who recovered consciousness and escaped. Had the attempt to commit the second murder in Stewart succeeded and the victim died an agonizing death by burning, then no doubt as to the second murder a finding that circumstance (d) existed would have been supportable. Circumstance (d) by its literal terms applies only to the murder actually committed and we so construe it.

Today in Holtan we have also said that aggravating circumstance (d) exists where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life.

The panel found that aggravating circumstance (e) did not exist. That circumstance is: "At the time the

murder was committed, the offender also committed another murder." § 29-2523, R. R. S. 1943. The finding was proper. The standard is unambiguous and needs no construction. The defendant argues, however, that the sentencing judge in Stewart construes circumstance (e) to pertain to *attempts* to murder committed at the same time as the murder for which the sentence was imposed. We agree such a construction is improper. We have this day set aside the death sentence in Stewart and in so doing pointed out that the trial court misconstrued aggravating circumstance (e) in that case.

The defendant also argues that the imposition of the death sentence in his case is arbitrary and discriminatory because in State v. Ell, *supra,* only a life sentence was imposed, yet Ell was, as an aider and abettor, guilty not only of the murder of Kellogg, but also of the murder of Fread, his accomplice, who was killed by the police. The defendant apparently relies upon a rule which we find in an opinion of the Supreme Court of Pennsylvania, Commonwealth v. Thomas, 382 Pa. 639, 117 A. 2d 204, where it was held that a participant in a robbery was accountable for felony murder in the death of an accomplice shot by the victim of the robbery during the escape. There are at least two responses to this contention. (1) This court has never adopted any such theory of felony murder and it is not likely to. Such a theory would constitute an extension of the statute and no act is a crime in Nebraska unless made so by statute. (2) The Supreme Court of Pennsylvania has since disapproved its previous holding. Commonwealth v. Redline, 391 Pa. 486, 137 A. 2d 472. It appears that only one state follows any such theory. Taylor v. Superior Court, 91 Cal. Rptr. 275, 477 P. 2d 131.

Additionally in State v. Ell, *supra,* there existed another mitigating factor. Ell, after leaving the auto, abandoned the fight and surrendered when ordered to

do so. He was guilty of the murder of Kellogg only as an aider and abettor. He did not actually kill anyone. Although he was equally guilty with Rust in the robbery, his participation in the actual killing was relatively minor. See mitigating factor (e), § 29-2523, R. R. S. 1943.

The sentencing panel found that aggravating circumstance (f) did exist. That circumstance is: "The offender knowingly created a great risk of death to at least several persons." § 29-2523, R. R. S. 1943. As the previously recited facts show, this finding was proper. The defendant shot at at least three police officers, wounding two of them. Further elaboration is not required. See our construction of definition (f) in State v. Simants, *supra*. The defendant's argument founded upon an inconsistent interpretation of (f) in State v. Stewart, *supra*, has been dealt with in our opinion in that case.

The sentencing panel found that aggravating circumstance (g) did not exist. Circumstance (g) is: "The victim was a law enforcement officer or a public servant having custody of the offender or another." § 29-2523, R. R. S. 1943. The victim Kellogg was not a police officer. The language is unambiguous. It requires no construction or interpretation.

The panel found that circumstance (h) did exist. That definition is: "The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws." § 29-2523, R. R. S. 1943. As the sentencing panel pointed out in its findings, the murder of Kellogg was committed in an attempt to avoid capture and this was part of an attempt to prevent the apprehension and arrest by law enforcement officers of the defendant and his companion Ell. It is the fact that the murder of Kellogg was a part of the defendant's resistance to his capture and arrest which makes circumstance (h) applicable in this case. Such an act, in our judgment, clearly comes with-

in the definition of aggravating circumstance (h). Defendant points out, however, that the sentencing judge in Stewart construed the murder alone as an attempt to conceal the crime, thus satisfying definition (h). We have this day dealt with that matter in the Stewart opinion and need not mention it again here.

We now turn to a consideration of the defendant's contentions with reference to the findings by the panel on the mitigating factors. The panel found that mitigating circumstances (a), (b), (d), (e), (f), and (g) did not exist. The defendant does not challenge these findings.

The panel did find that mitigating circumstance (c) did exist, that is, "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance." § 29-2523, R. R. S. 1943. In this connection the panel pointed out that events of the defendant's childhood had contributed to a basic emotional instability in the defendant; that at the time of the murder of Kellogg the defendant was cornered and trapped and had been shot at by Kellogg; and that the defendant's basic emotional instability and the existing circumstances made the crime one of strong emotion and not one of cold calculation. The evidence supports such a fact finding.

The defendant argues, however, that the definition of mitigating circumstances is subject to the same indefiniteness which he claims for the aggravating factors and he bolsters his argument insofar as it pertains to circumstance (d), the age of the defendant, by pointing out that in Stewart the sentencing judge imposed the death penalty and that in State v. McDonald, 195 Neb. 625, 240 N. W. 2d 8, involving a similar crime, the defendant received life imprisonment. In one case sentencing authority found age was a mitigating factor and in the other case it found that it was not. In this case the defendant was fully matured and 23 years of age. Any force that the defendant's argument has with

reference to the Stewart and McDonald cases has this day been removed by our reducing the sentence in Stewart to life imprisonment and our finding that age was a mitigating factor in that case.

We fully agree with the sentencing panel that the existing aggravating factors in this case clearly outweigh any mitigating factor. We further conclude that the death penalty under the facts in this case is not excessive and is not disproportionate to that imposed in the other cases before us.

We now turn to the defendant's last assignment relating to the overruling of various motions. Rust and his accomplice Ell were tried together in the District Court. Substantially the same motions were made by both defendants. The record applicable to these motions as to both defendants is the same identical record. There was no difference in the facts as to either defendant. These motions were thoroughly considered and determined in Ell. The result must be the same in this case. Defendant's last assignment is not meritorious.

We have today held in Simants, in response to a constitutional challenge, that the facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt. We are satisfied from our review of the evidence in this case that the facts upon which the finding of the existence of each aggravating factor depends was proved beyond a reasonable doubt and so find. In making such finding we have applied the same standard of reasonable doubt as applicable to the burden of proof in criminal cases. NJI No. 14.08. See, State v. Rice, 188 Neb. 728, 751, 199 N. W. 2d 480; Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A. L. R. 3d 1065.

AFFIRMED.