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REPORTS OF CASES

DECIDED BETWEEN

MARCH 16, 1977 and JULY 12, 1977

IN THE

Supreme Court of Nebraska

JANUARY TERM 1977

VOLUME CXCVIII

MARVIN L. GREEN

OFFICIAL REPORTER

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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. RAYMOND E. ERICH, APPELLANT.

251 N. W. 2d 381

Filed March 16, 1977. No. 40581.

Criminal Law: Rape: Sexual Assault: Evidence. It is 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. One exception to this general rule is that in prosecutions for sexual assault, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value.

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

Richard E. Gee, 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.

The defendant was charged with and found guilty by a jury of first degree sexual assault. The District Court sentenced him to a term of 3 to 5 years' imprisonment in the Nebraska Penal and Correctional Complex. The defendant appeals his conviction and sentence. For the reasons stated below, we reverse the judgment of the District Court.

The information alleged that on or about September 2, 1975, the defendant, who was 36 years of age,

did subject a 14-year-old female child to sexual penetration. At trial, the female child, the defendant's stepdaughter, testified that on September 2, 1975, she returned home from school, fixed supper, and watched television with the defendant. She testified that between 8:30 and 9 p.m., she and the defendant had sexual intercourse. The defendant testified that he was not at home when the alleged carnal act took place. Several witnesses corroborated his story.

In accordance with the rule that evidence of criminal acts of a similar nature occurring before or after the act charged is admissible to explain the act or corroborate the testimony of the victim, see, e.g., Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380 (1952), evidence was introduced at trial that the defendant and his stepdaughter had engaged in sexual intercourse on several occasions prior to the alleged September 2, 1975, incident. The defendant's stepdaughter testified that she first had intercourse with the defendant when she was 11 years old when the family lived in Arizona. She testified that after the family moved to Alda, Nebraska, in June or July 1975, she and the defendant would engage in sexual intercourse in the early morning hours, two or three times per week. She also testified as to several occasions outside the family home when she and the defendant had sexual relations.

The defendant assigns as error instruction No. 10, given to the jury by the trial court. Instruction No. 10 reads as follows: "It is not necessary that the evidence shall prove that the alleged offense was committed on the precise date charged in the information. Insofar as the time of the alleged offense is concerned it is sufficient if you find that the evidence establishes beyond a reasonable doubt that such offense was committed on some day or time, but in any event it must have been committed, if such you find, within three years prior to October 20.

1975, the date of the filing of the complaint herein; and unless you so find, your verdict will be 'not guilty'."

The defendant objects to this instruction on the ground that, in light of the testimony present concerning previous acts of sexual intercourse between the defendant and his stepdaughter, it was misleading and prejudicial.

We are persuaded by this argument. Under the circumstances of the case, there was a significant possibility that the jury was misled or confused by instruction No. 10. If this was the case, then the practical effect would have been to render the defendant's alibi defense ineffectual.

Had there been no evidence at trial of prior acts, or had the instruction read "on or about" the date alleged in the information, the possibility of confusion would have been nonexistent or minimal. Given, however, the evidence of prior acts, it is quite possible that the jury could have misconstrued instruction No. 10 to the effect that it could find the defendant guilty if it were convinced that the defendant had had carnal knowledge of his stepdaughter at any time within a 3-year period prior to October 20, 1975.

The State draws our attention to instruction No. 8, also given to the jury, which reads as follows: "Evidence was received in this case relative to alleged similar acts committed by the defendant, to-wit: sexual intercourse with [his stepdaughter] on earlier occasions. Such evidence was received solely for the limited purpose of showing the inclination of the accused to commit the particular act charged, to-wit: sexual penetration on September 2nd, 1975. You must not, therefore, consider such evidence for any other purpose."

The State argues that when the two instructions are read together, they correctly state the law and there is no possibility of confusion. We keep in

mind, however, that we are dealing with a lay jury. It is important, especially in a criminal proceeding of this nature, that each instruction, in and of itself, be correct and as free as possible from ambiguity.

In conclusion, we believe that the possibility the jury was, under the circumstances, misled and confused by instruction No. 10, is sufficient to warrant reversal of the defendant's conviction. Other alleged errors raised by the defendant have been examined and are found to be without merit.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

DANIEL R. HARRINGTON, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

251 N. W. 2d 653.

Filed March 16, 1977. No. 40680.

1. **Workmen's Compensation: Attorneys at Law: Fees: Appeal and Error.** If attorney's fees should be, but are not, allowed by the Workmen's Compensation Court, and the issue is properly preserved on appeal, the District Court has the power to remedy the error of the compensation court and award such fees.
2. **Workmen's Compensation: Attorneys at Law: Fees.** Where the employer appeals to the District Court from the award of the Workmen's Compensation Court and fails to obtain any reduction in the amount of the award, the District Court ordinarily should allow the employee a reasonable attorney's fee.

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

Paul L. Douglas, Attorney General, Harold S. Salter, and William Orester, for appellant.

Noyes W. Rogers, Walter, Albert, Leininger & Grant, and Charles H. Rogers, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and RONIN, District Judge.

WHITE, C. J.

In this case the sole question presented is the State's contention that the District Court, on appeal, was without authority to award an attorney's fee in the sum of $2,000 for the services rendered the claimant in the initial hearing before the one judge court and on appeal and trial before the three judge Workmen's Compensation Court. We affirm the judgment of the District Court allowing the attorney's fee.

This case has one rather unusual aspect. Despite the denial of compensation by the one judge court and on rehearing to the compensation court, the State now freely concedes that the District Court's award of compensation was correct, concedes that the plaintiff suffered an accident and injury within the terms of the act, and does not dispute the amount of compensable disability. That part of the judgment is conceded to be correct and the final and sole issue on appeal here is the authority to award an attorney's fee in the amount of $2,000.

The right to an award of attorney's fees in a compensation case is purely statutory. The applicable statute relied upon by the District Court, in pertinent part, is as follows: "Whenever the employer *refuses* payment, or when the employer *neglects* to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court. In the event the *employer* files an application for a rehearing before the compensation court en banc from an award of a judge of the compensation court or appeals to the district court from the award of the compensation court, or any judge thereof, and *fails to obtain any reduction in the amount of such award,* the compensation court sitting en banc or the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for each such rehearing

or appeal, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court." (Emphasis supplied.) § 48-125, R. R. S. 1943.

The State takes the position that the plaintiff herein made no claim for any allowance under the provision of the statute permitting an award of attorney's fees before the initial hearing. This position is untenable. The record shows that the plaintiff-appellee herein had requested the award of fees based upon such "refusal or neglect," from the outset by requesting the same at the initial hearing, and has *preserved that position at every stage of the proceedings.* It cannot be asserted that the District Court, on appeal, did not have the power to review and overturn erroneous findings by the one judge court or the rehearing before the compensation court.

In this case, undisputedly, the plaintiff was injured on August 6, 1974. He received no compensation or reimbursement for medical expenses until January 20, 1976, nearly 18 months later. The refusal of the State to pay benefits is clearly established. The District Court, in its formal judgment, found: "That the Workmen's Compensation Court in entering said final order of Dismissal On Rehearing acted in excess of its powers and contrary to law and that the findings of fact by said Court are not supported by the record, and therefore such final order of dismissal * * * should be reversed and set aside." These determinations by the District Court are final and not challenged on appeal and become, therefore, the law of this case. It is clear that this determination alone, from which no appeal was taken, would be sufficient to support the award of an attorney's fee.

The State suggests that no fee could be allowed because there was a "reasonable controversy" with respect to the plaintiff's claim. But it does not support such contention with argument or fact. It is abundantly clear from the record that the medical

bills to the date of the hearings were submitted at both the initial hearing and the rehearing before the compensation court. Neither the propriety nor the reasonableness of those charges have ever been disputed. The State first admitted the injury and its occurrence within the course and scope of plaintiff's employment. In a situation that is not clear from the record, the State was then permitted to retract that admission over the objections of counsel, by an amended answer filed *after* the trial. The transcript of the proceedings upon rehearing reveals that the State was unable to present any evidence that the plaintiff was not injured in the course and scope of his employment. The record shows that the plaintiff was examined by a physician chosen by the State, but the State never presented any medical testimony at any time. Finally, after the hearing in the District Court, at the time for arguments on the appeal from the compensation court, counsel for the State admitted liability, and the District Judge ruled in favor of the plaintiff from the bench. Further review of the evidence is unnecessary. It is apparent that there was ample evidence to sustain the District Court's finding, from which no appeal was taken, that the findings of the compensation court were not supported by the record.

Nevertheless, the State contends that the statute, section 48-125, R. R. S. 1943, does not authorize the District Court to grant the plaintiff an allowance for the services of his attorney on an employer's appeal to the three judge compensation court. The statute provides that in the event the employer files an appeal "and fails to obtain any reduction in the amount of such award," then the employee may be allowed a reasonable attorney's fee. The plaintiff has come within the strict wording of this provisions of the statute, since there was no reduction of any award on appeal to the three judge compensation court. The argument that the statute is not applicable, since the

employer could not and did not intend to obtain any reduction in the award, is answered by our holding in Neeman v. Otoe County, 186 Neb. 370, 183 N. W. 2d 269. In that case, there was no dispute, on appeal, as to the amount of compensation to be paid to the employee and there was no request for any reduction in the award. That appeal was taken to decide the question of which of two insurance carriers was responsible for the payment of compensation. The District Court awarded the employee a reasonable attorney's fee for services in the District Court. This court, on appeal, affirmed that award saying: "On the facts before us, the district court was correct in allowing a reasonable attorney's fee when the award of the compensation court was not reduced in amount on appeal to the district court."

It is true the Neeman case was an appeal from the compensation court to the District Court; but the reasoning and the statutory authority is the same as to a rehearing before the compensation court and an appeal to the District Court. We further note in this case that implicit in the District Court's judgment was a holding that the compensation court should have entered an award to the plaintiff. There was strict compliance with both the rhetorical wording and true meaning of the statute. Construed as a whole, the statute means if there is no reduction in the award on an appeal by the employer to the three judge compensation court, or if there should have been an award, or an increase in the award in that court, then the plaintiff is entitled to an award of reasonable attorney's fees for services of his attorney in the compensation court. The District Court, therefore, was correct in entering judgment for fees for plaintiff's attorney for services before the one judge court and on rehearing in the compensation court.

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

AFFIRMED.

STATE OF NEBRASKA EX REL. WILLIAM GOOSSEN ET AL., APPELLANTS, V. BOARD OF SUPERVISORS OF GAGE COUNTY, NEBRASKA, ET AL., APPELLEES.

251 N. W. 2d 655

Filed March 16, 1977. No. 40759.

1. **Mandamus: Evidence.** Findings of fact by the trial court in a mandamus proceeding will not be disturbed on appeal unless they are clearly wrong.
2. **Mandamus: Public Officers and Employees.** An action in mandamus is an appropriate remedy to compel public officials to perform duties imposed on them by law, which exist at the time of the application for the writ and when such duty to act is clear.
3. **Counties: Public Officers and Employees: Highways.** A county board has discretion to determine the character of repairs to be made to bridges, and, when there are not sufficient funds for all, to decide which bridges shall be repaired.
4. **Mandamus: Public Officers and Employees.** A writ of mandamus will be granted to compel a particular discretionary act by public officials only when their decision not to act is unreasonable, arbitrary, or capricious.

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

Fredrick L. Swartz and James H. Porter, for appellants.

Everson, Noble, Wullschleger, Sutter & Fischer, for appellees.

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

KUNS, Retired District Judge.

This is an application for a writ of mandamus against the Board of Supervisors of Gage County, Nebraska, and the individual members thereof as respondents. The action was brought on the relation of seven landowners and residents to compel the respondents to rebuild a bridge on a county highway across the Big Blue River. An alternative writ was issued and answered by the respondents. When the case was tried, the court dissolved the alternative

writ and dismissed the action. The relators appeal. We affirm the judgment of the trial court.

The record, although voluminous, discloses no controverted matters of fact. The highway in question is a farm-to-market graveled road, originally established on July 27, 1880, on the boundary between Rockford and Riverside townships in Gage County, Nebraska. A pony truss bridge, known as the Humpback Bridge, was constructed across the Big Blue River in the year 1900 or thereabouts. Both the highway and the bridge have been in continuous use since the dates mentioned. The posted capacity of the bridge was 3 tons. It had been utilized by persons living or having business in the neighborhood for the following purposes: The movement of farm equipment; the hauling of farm produce and supplies; the operation of school bus and mail delivery routes; the answering of fire alarms by the rural fire department; the trucking of crushed rock; and general passenger car travel. Much of the traffic other than passenger cars involved loads substantially in excess of the posted limit of the bridge. In October 1973, a severe flood of the Big Blue River washed out the approaches to the bridge and damaged the main structure thereof. The same flood caused substantial damage to 30 other bridges of more than 1,427 bridges in the county and washed out 26 miles of county highways. The county engineer thereupon barricaded the highway on each side of Humpback Bridge and posted notices that it was closed. Public use of the portions of the highway remaining open has continued. The relators by petition and personal appearance at board meetings have urged the restoration of Humpback Bridge.

In November 1973, an inspection was made by a damage survey team of the Federal Disaster Assistance Administration. The report thereof showed that the amount of damage caused by the flood was

the amount of $15,598 and that a grant of such amount should be made available either for the repair or reconstruction in lieu of repair, if Gage County made application therefor. After receiving opinions from both the county engineer and a consulting engineer that the bridge was structurally obsolete, that it would not be feasible to rebuild it to current safety standards, and that no amount of repair could make it strong enough for a load limit of more than 4 tons, the respondents, on December 14, 1973, voted to replace Humpback Bridge with a new structure at a cost of $200,000 provided a federal disaster grant of $160,000 could be secured. The record is silent as to any steps taken to carry out this decision, but apparently the desired grant was never obtained. At a meeting held April 5, 1974, the respondents voted to dismantle Humpback Bridge, as being unfit for repair; and county employees dismantled and removed the bridge on April 8 and 9, 1974. A new 15-ton capacity bridge is now being constructed across the Big Blue River at a site 1½ miles below the Humpback Bridge location. Access to such bridge on present road locations would require some users to travel more than the 1½ mile distance.

Some evidence concerning the status of bridge construction funds and amounts which might be raised if the mill levies were increased to the maximum permitted by law was received; however, there was not any evidence of the overall needs of Gage County for the maintenance and operation of its system of highways and bridges. The respondents had determined that there were not sufficient funds available for the rebuilding of Humpback Bridge.

The trial court found specifically that the decision of the respondents to dismantle and not rebuild Humpback Bridge was reached in the light of full information concerning the costs of repairing or replacing the bridge, the available funds, the overall

county needs and plans for roads generally in the county; and that the evidence did not show any unreasonable, arbitrary, or capricious conduct or abuse of discretion, but rather that said decision was reasonable under the circumstances, as they existed both at the time the decision was made and at the time of the application for the writ. This finding is based upon the trial court's consideration of the testimony and of the witnesses. A finding of fact in a mandamus proceeding will not be disturbed on appeal unless it is clearly wrong. State ex rel. Lackey v. Gering & Ft. Laramie Irr. Dist., 129 Neb. 48, 260 N. W. 568. The relators do not contend that the respondents acted arbitrarily, capriciously, or in bad faith. They do contend that the respondents and the trial court were under an absolute duty to repair or rebuild Humpback Bridge so long as the highway of which it was a part had not been relocated, abandoned, or vacated as provided by sections 39-1722 to 39-1726, R. R. S. 1943.

There is no question that an action in mandamus is an appropriate remedy to compel public officials to perform duties imposed on them by law, which exist at the time of the application for the writ and when such duties to act are clear. State ex rel. Herbert v. Anderson, 122 Neb. 738, 241 N. W. 545; State ex rel. Johnson v. Goble, 136 Neb. 242, 285 N. W. 569; State ex rel. Cashman v. Carmean, 138 Neb. 819, 295 N. W. 801. When the duty involves the exercise of judgment, a writ of mandamus will not extend to the control of the discretion of public officials. State ex rel. Davis v. Hoctor, 98 Neb. 15, 151 N. W. 923; State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26.

With reference particularly to the duty of county boards regarding damaged bridges, we have held: "In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will

not control the discretion of county commissioners, unless there is a clear abuse of discretion." State ex rel. Ellis v. Switzer, 79 Neb. 78, 112 N. W. 297. Writs of mandamus have been granted to compel the building or restoration of bridges on public highways only when the court found that the decision of the county board against such building or restoration was capricious or arbitrary. State ex rel. Enerson v. County Commissioners, 102 Neb. 199, 166 N. W. 554; State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556.

Although the relators contend that sections 39-1722 to 39-1726, R. R. S. 1943, require that bridges on public highways must be constructed or kept in repair unless such public highways are vacated or abandoned, these sections do not support the contention. In section 39-1725, it is provided that the county board shall take such action "as in the judgment of the board the public good may require." Action under the Rural Mail Route Act, Chapter 39, article 10, R. R. S. 1943, depends upon the availability of sufficient funds to permit the program of improvement and maintenance of rural mail routes. Article 21 of Chapter 39, R. R. S. 1943, contemplates that the planning of highway improvements and the standards thereof shall be continuous; and nothing in that article indicates that the location of any highway or bridge shall be permanent, but rather subject to reevaluation and change.

Even though access to and from the relators' farms and travel throughout the vicinity may be less convenient than it was before the occurrence of the October 1973 flood, the record does not go to the extent of showing that such inconvenience is unreasonable or that respondents have discriminated against the relators. No one has been isolated nor has traffic to and from the area been cut off completely. The relators have not carried their burden of showing that the respondents have failed to perform a

clear duty to act. The trial court was correct in dissolving the alternative writ of mandamus and in dismissing the action.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES W. BENSON, APPELLANT.

251 N. W. 2d 659

Filed March 16, 1977. No. 40764.

1. **Criminal Law: Searches and Seizures: Stop and Check: Probable Cause: Motor Vehicles.** A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message.
2. **Criminal Law: Searches and Seizures: Police Officers and Sheriffs: Stop and Check: Probable Cause: Statutes.** Under section 60-435, R. R. S. 1943, a law enforcement officer when in uniform may stop a motorist for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law.
3. **Criminal Law: Searches and Seizures: Probable Cause: Police Officers and Sheriffs: Motor Vehicles.** Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Patrick W. Healey of Healey, Healey, Brown & Wieland, 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.

PER CURIAM.

Defendant was charged on four felony counts: Possession of marijuana; possession of ampheta-

mines; possession of codeine; and carrying a concealed weapon. A motion to suppress evidence on each count was filed based on a claim of unlawful detention and search and seizure of defendant's motor vehicle. The District Court denied the motion after an evidentiary hearing. The motion to suppress was renewed and overruled at the trial, which was had to the court without a jury. Defendant was found guilty on all four counts and sentenced to probation for a period of 2 years and fined a total of $550 on the four counts.

At approximately 5:30 p.m., on October 16, 1974, Officer Hogue of the Nebraska State Patrol was proceeding south on U. S. Highway No. 77, some 7 or 8 miles south of Wahoo, Nebraska. He heard a radio broadcast from the sheriff's office in Wahoo requesting officers to watch for a white or cream-colored Volkswagen van bearing California license plates and pulling an orange and silver U-Haul trailer. The van was reported possibly southbound on Highway No. 77 or westbound on State Highway No. 92. Officer Hogue proceeded south on Highway No. 77 to Interstate 80 and west on Interstate 80. At about 6 p.m., Officer Hogue saw a white or cream-colored Volkswagen van pulling a U-Haul trailer proceeding westbound on Interstate 80 ahead of him. He called the state patrol and requested that it check with the sheriff's office in Wahoo to determine whether any warrants had been issued for the occupants or any contents and what action was desired. At about 6:05 p.m., he was advised that there were no warrants issued for the subjects or the vehicle but the sheriff's office wanted the vehicle stopped and checked for a possible involvement in the theft of some antique furniture. Officer Hogue then passed the van and noticed that the front of the van had a California license plate but that it had no renewal sticker for 1974. He then called for assistance. Officer Lundy,

a plainclothes investigator with the drug division of the state patrol, was close behind Hogue and responded. When Lundy caught up, the officers stopped the van. Two occupants of the van got out. The officers identified themselves and Hogue proceeded to check the driver's license and vehicle registration and inquire about the absence of a current sticker on the front license plate. Meanwhile, Lundy walked around the van and trailer in order to check the license plates. When he approached the rear of the trailer he smelled a strong odor of marijuana. He returned to Hogue and the occupants of the van and asked defendant for permission to look in the trailer. Defendant said he didn't know the combination of the lock. Lundy then advised the defendant that he believed there was marijuana in the trailer and advised defendant that he would proceed to call the county attorney to obtain a search warrant. Lundy left the scene for that purpose at about 6:15 p.m., and as he was leaving two other state patrolmen arrived at the scene. The two additional officers made a further inspection of the back of the trailer and found marijuana seeds, stems, and a leaf on a ledge under the back doors of the trailer. The officers then ran a car key under the ledge of the door to obtain a sample of the loose material there. Meanwhile Lundy had called the county attorney's office and was informed that no search warrant was needed and he therefore returned to the scene. Hogue then arrested the defendant and his companion and read the Miranda warnings to them. They were frisked and the van was searched. Amphetamines were found in the defendant's shirt pocket and a gun was found in a box by the front seat of the van. The van and the trailer were towed into Lincoln and the trailer was broken into and searched. The search disclosed 119 pounds of marijuana and some codeine tablets.

The defendant contends that the detention of a citi-

zen is constitutionally justified only upon the existence of specific articulable facts justifying such detention, and that arrest is justified only upon probable cause. The argument is that the radio broadcast had no factual foundation and that the stop of defendant's vehicle was, therefore, illegal, and the evidence should be suppressed. At the evidentiary hearing on the motion to suppress there was no evidence as to any information or facts which were relied on as the factual foundation for the broadcast message. The foundation for the broadcast message, if any, could have been supplied by any officer or officers whose observations and information generated the suspicion. The radio message to Officer Hogue standing alone does not prove the existence of reasonably founded suspicion. An apparently valid directive from one officer to another to stop a person or a vehicle insulates the complying officer from assuming personal responsibility and liability for his act done in obedience to the direction. But the radio message standing alone does not furnish legal cause for the detention any more than the fact of detention supplies its own justification. If it did, the complete absence of any valid grounds for a stop could become valid grounds by the issuance of a radio directive to make the stop. A radio message alone would thus instantly transform an illegal arrest or detention into a legal one. If this case rested solely upon the foundation of the radio message to Officer Hogue with no evidence or proof that a factual foundation for the message existed, the legality of the detention here could not be supported. A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971); United States v. Robinson, 536 F.

2d 1298 (9th Cir., 1976); Barton v. State, 328 So. 2d 353 (Miss., 1976).

The general rule is that a detention stop violates the Fourth Amendment unless specific articulable facts taken together with rational inferences from those facts reasonably warranted a founded suspicion that a person is engaged in criminal activity. United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607; United States v. Mallides, 473 F. 2d 859 (9th Cir., 1973); Brewer v. Wolff, Jr., 529 F. 2d 787 (8th Cir., 1976); Commonwealth v. Swanger, 453 Pa. 107, 307 A. 2d 875 (1973).

This court, however, has specifically rejected the rule requiring specific articulable facts to support an investigatory or detention stop. In State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, based upon section 60-435, R. R. S. 1943, this court held that a law enforcement officer when in uniform may stop any motorist on the public highways of Nebraska for the purpose of checking his operator's license and vehicle registration without any articulable reason to suspect that the motorist has violated any law.

There was, therefore, authority for the stop of defendant's vehicle aside from the radio direction. While Officer Hogue was checking the licenses and registration, Officer Lundy examined the trailer and smelled marijuana. Officer Lundy was an investigator with the drug division of the state patrol with ample expertise in the field and the ability to identify marijuana by smell. The great majority of courts which have currently passed upon the issue have held that the smell of marijuana was alone sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to expertise. See, State v. Wood, 195 Neb. 353, 238 N. W. 2d 226; United States v. Soloman, 528 F. 2d 88 (9th Cir., 1975); People v. Cook, 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P. 2d 148 (1975); Gordon v. State, 259 Ark. 134, 529 S. W. 2d 330

(1976); United States v. Garza, 539 F. 2d 381 (5th Cir., 1976); United States v. Bowman, 487 F. 2d 1229 (10th Cir., 1973); State v. Bidegain, 88 N. M. 384, 540 P. 2d 864 (1975).

Under current Nebraska law the detention stop here was valid, the officers had a right to be where they were, and when Officer Lundy smelled marijuana there was probable cause for the arrest and search. The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

For the reasons set forth in my dissent in State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, I am convinced that the Holmberg case should be overruled.

MATHEW E. PELZER, JR., APPELLANT, V. CITY OF BELLEVUE ET AL., APPELLEES.

251 N. W. 2d 662

Filed March 16, 1977. No. 40777.

1. **Political Subdivisions: Municipal Corporations: Elections: Statutes: Census.** When any city, village, county, or school district elects members of any governing board by districts, such districts shall be substantially equal in population, as determined by the most recent federal census. § 5-108, R. R. S. 1943.
2. **Courts: Legislature: Statutes.** The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect.
3. **Legislature: Statutes.** If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.
4. **Statutes: Public Officers and Employees: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered as mandatory and it is particularly so considered when the statute is addressed to public officials.
5. **Statutes: Words and Phrases: Census.** The language in section 5-108, R. R. S. 1943, "the most recent federal census," refers to the most recent federal census available to the particular locality, either the regular decennial one or a special census.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded.

D. L. Pelton, for appellant.

John E. Rice, for appellees.

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

WHITE, C. J.

This case involves the validity of a redistricting ordinance passed by the city council of Bellevue, Nebraska. The ordinance, No. 1150 as amended by ordinance No. 1165, changed the boundaries of the city's four voting districts, or wards, from what previously existed. The plaintiff, a citizen, voter, and taxpayer of the City of Bellevue challenged the validity of the redistricting by filing suit on December 3, 1975. The plaintiff contended that the redistricting ordinance violated the equal protection clause of the Fourteenth Amendment and that the city failed to comply with the provisions of section 5-108, R. R. S. 1943. The plaintiff also alleged gerrymandering, but this contention has been dropped on appeal. The plaintiff sought to enjoin the defendants, the City of Bellevue, its mayor, members of the city council, and the Sarpy County election commissioner, from conducting any municipal elections under the redistricting ordinance.

Trial was held on February 26, 1976. At the close of the plaintiff's evidence, the defendants moved to have the plaintiff's petition dismissed. In granting the defendants' motion and dismissing the plaintiff's petition, the District Court held as follows: That the constitutional requirement of one man, one vote required substantially equal population in political districts; that while section 5-108, R. R. S. 1943, requires the use of the most recent federal census to determine the apportionment of population, it is not the sole and only criteria which may be used; that the provision in section 5-108, R. R. S. 1943, "as determined by the most recent federal census" is di-

rectional and not mandatory, and other factors may be used to show population and population distribution; and that if the above-quoted language were mandatory, section 5-108, R. R. S. 1943, would be unconstitutional as in violation of the one man, one vote principle. The District Court also found: That plaintiff's evidence failed to show that the districts were so unequal in population as to be a violation of one man, one vote; and that plaintiff's evidence was not sufficient to overcome the presumption that the defendants acted in good faith in the apportionment of political districts in Bellevue. The plaintiff moved for a new trial, his motion was denied, and he now appeals. We reverse the judgment of the District Court and remand the cause for further proceedings in accordance with this opinion.

Section 5-108, R. R. S. 1943, the statutory provision which this dispute revolves about, as is relevant to this appeal, provides: "When any city, village, county, or school district elects members of any governing board of districts, *such districts shall be substantially equal in population, as determined by the most recent federal census.*" (Emphasis supplied.)

The record shows that the redistricting was prompted by the annexation of several areas to the City of Bellevue. The largest of these was an area known as Twin Ridge II, which had an estimated population of between 1,000 and 1,500.

At the time of the redistricting, the city had in its possession a 1974 special census. This special census showed the population of Bellevue to be 21,145. This census was protested by the city because it showed a slight decrease in the population of the city. Prior to redistricting, the city council appointed a committee to determine the population of the City of Bellevue, and to draft various redistricting plans. This committee determined the population of the city in 1975 to be 27,584. This was approximately 5,500 per-

sons more than the 1972 revision of the 1970 census, also in the city's possession at the time, which showed a population of 21,953, and about 6,500 persons more than shown in the 1974 special census.

The city council committee, which proposed the redistricting plan adopted by the city, used the 1970 census, portions of the 1972 revision, and an estimate obtained from counting building permits issued since 1970. The city administrator multiplied the number of building permits by a factor of 3.81, a figure representing the average number of persons per household obtained from the metropolitan area planning association. A city directory was also consulted. The city administrator testified that he did not know whether structures for which building permits were issued were in fact constructed or completed, or that there was even a structure on the location, or whether the premises were occupied. He testified that he had no idea whether a particular apartment complex counted was fully occupied, or what the percentage of occupancy was. He merely took the number of units and multiplied it by 3.81.

From the record, it is clear that, in determining the population of the city, for the purpose of redistricting, the 1974 special census, available to the city, was not used.

Initially, we note that there is no question about the applicability of section 5-108, R. R. S. 1943, to the facts of this case. The division of the City of Bellevue into election districts or wards, for the election of members to its city council, is precisely the situation the statute was designed for.

The question presented in this appeal is whether section 5-108, R. R. S. 1943, is mandatory, in that the substantial equality of political districts must be "determined by the most recent federal census," or whether it is directory, allowing localities the use of other factors and figures when determining the substantial equality of political districts. Section 5-108,

R. R. S. 1943, does not directly compel the use of a federal census when drawing up political districts. However, if section 5-108, R. R. S. 1943, is mandatory, and requires that the substantial equality of political districts be ascertained solely by the most recent federal census, then for all practical purposes it compels the use of federal census figures when drawing up political districts.

"The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect.

"If the language of the statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the legislature." Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N. W. 2d 838 (1960).

The predecessor of the current section 5-108, R. R. S. 1943, was L. B. 368, section 1, enacted in 1971. That law provided that any city, village, county, or school district which elected members to any governing board would be required to redistrict by January 1, 1972. If such body did not redistrict, then candidates were to be elected at large thereafter, until such time as redistricting was accomplished. Senator Terry Carpenter, the introducer of the bill, stated the purpose behind this law thusly: "LB 368 has as its purpose putting into operation the United States Supreme Court decisions relating to one man, one vote. This applies to all local subdivisions of government and unless the areas involved are redistricted, as provided in the bill, all people seeking election from that time on will be required to run at-large, rather than by district." L. B. 368, Introducer's Statement of Purpose, 1971 Nebraska Legislature.

In 1973, section 5-108, R. S. Supp., 1972, was amended by L. B. 549, section 1, to assume its present form. L. B. 549 was one of several bills

drafted by the Secretary of State's office. Hearings on these bills were held on April 12, 1973, before the Government and Military Affairs Committee of the Legislature. The general thrust of the testimony at the hearing on that date was that these bills were technical bills, designed to put into effect various United States Supreme Court decisions. Senator Chambers, Chairman of the Government and Military Affairs Committee, explained the provisions of L. B. 549, to his colleagues thusly: "* * * this bill relates to one which was passed last session which stated that any governing board which elects * * * by the district method which does not reapportion itself according to census figures and changes in population, would go from an, a district to an at-large basis and it would provide that this method could be retained if the people voted to keep it this way and it would also allow it to go from district to at-large or at-large to district if the people petition to do so." Floor Debate, 1973 Nebraska Legislature, pp. 3462-3463 (remarks by Senator Chambers).

The legislative history of section 5-108, R. R. S. 1943, indicates that the Legislature was concerned with complying with the decisions of the United States Supreme Court on one man, one vote; and that section 5-108, R. R. S. 1943, was designed to implement these decisions as a matter of state law.

"As a general rule, in the construction of statutes, the word 'shall' is considered as mandatory and it is particularly so considered when the statute is addressed to public officials." State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297 (1950). See, also, Trobough v. State, 120 Neb. 453, 233 N. W. 452 (1930). Generally, the word "shall" appearing in a statute implies that whatever "shall" be done is mandatory. Minden Beef Co. v. Cost of Living Council, 362 F. Supp. 298 (D. C. Neb., 1973). See, also, Thomas v. Sternhagen, 178 Neb. 578, 134 N. W. 2d 237 (1965).

We hold that section 5-108, R. R. S. 1943, is mandatory in its provisions, and not directory; that the substantial equality of political districts in the state must be ascertained by using the most recent federal census; and that local governments cannot disregard the most recent federal census when drawing up political districts and use instead another method or basis for apportionment, even though ostensibly rational.

In addition to the plain language of the statute, there are several compelling policy reasons to support this holding. First, the federal census is generally viewed as being a highly reliable source of information concerning population. See, generally, 14 Am. Jur. 2d, Census, § 10, pp. 768, 769; State ex rel. Blessing v. Davis, 66 Neb. 333, 92 N. W. 740 (1902). The federal census is conducted by the Bureau of the Census, whose primary concern is the accurate ascertainment of data. It is not influenced or swayed by local politics, prejudices, or notions concerning size and prosperity. Second, federal census figures provide an objective standard against which the average citizen and the courts can measure the equality of political districts.

We also hold that the language in section 5-108, R. R. S. 1943, "the most recent federal census," refers to the most recent federal census available to the particular locality, either the regular decennial one, or, as in this case, a "special census." See City of Bisbee v. Williams, 83 Ariz. 141, 317 P. 2d 567.

The defendants cite the case of Ludwig v. Board of County Commissioners, *supra,* to support their contention that factors other than the federal census may be used in apportionment. In answer, we need only point out that section 5-108, R. R. S. 1943, had not been enacted when Ludwig v. Board of County Commissioners, *supra,* was decided.

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

if, according to the most recent federal census, the election wards of Bellevue are substantially equal in population in accordance with the principle of one man, one vote.

REVERSED AND REMANDED.

JAMES CROSSLEY, APPELLEE, V. PACIFIC EMPLOYERS INSURANCE COMPANY, APPELLANT.

251 N. W. 2d 383

Filed March 16, 1977. No. 40791.

1. **Motor Vehicles: Insurance: Contracts.** A vehicle which has liability insurance coverage effective and applicable to it at the time of an accident in limits not less than the amounts required by section 60-509, R. R. S. 1943, is not an uninsured motor vehicle within the meaning of section 60-509.01, R. R. S. 1943.
2. **Motor Vehicles: Torts: Insurance: Jurisdiction.** In an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will ordinarily be applied, and that law governs not only the amount of recovery but also the right to recover.
3. **Motor Vehicles: Torts: Insurance: Contracts.** Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorist to the insured for the personal injuries sustained.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and dismissed.

Robert L. Matthews, Jr., and William J. Brennan, Jr., for Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

James R. Coe of Matthews, Kelley, Cannon & Carpenter, for appellee.

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

MCCOWN, J.

The plaintiff brought this action in the District Court for Douglas County, Nebraska, for personal in-

juries against the insurer under the uninsured motorist provisions of the insurance policy on an automobile owned by plaintiff. The personal injuries resulted from an automobile accident which occurred in the State of Colorado, while plaintiff was riding as a passenger in an automobile owned and driven by his stepson. The driver of the other vehicle was a resident of Colorado. The District Court held as a matter of law that the automobile driven by the Colorado resident was an uninsured motor vehicle, and the jury returned a verdict for the plaintiff in the sum of $6,632.40, and the court assessed attorney's fees of $1,500. The defendant insurance company has appealed.

On April 12, 1974, plaintiff was a passenger in a car owned and driven by his stepson. The automobile was entering an entrance ramp to Interstate 80 near Denver, Colorado, when it stopped because of traffic ahead of it. While the automobile was stopped it was struck from behind by an automobile driven by a Colorado resident and the plaintiff hit his knee on the dashboard. Plaintiff was taken to Denver General Hospital, X-rayed, and released with instructions to see his doctor when he got home. Plaintiff visited an Omaha orthopedic surgeon about 3 weeks later on May 8, 1974, and on two occasions thereafter, the final visit being on November 19, 1974. The doctor testified that at that time the injury had healed but the ligament in the knee was not as solid as before the injury, predisposing the plaintiff to future injury. Other than that, there was no permanent impairment. The plaintiff lost a few days from work, and the total medical costs were $118.26.

At the time of the accident, the plaintiff had an automobile insurance policy with the defendant, Pacific Employers Insurance Company, providing $10,000 uninsured motorist coverage to the insured. Under the terms of the policy the defendant was ob-

ligated "To pay all sums which the Insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury, * * * sustained by the Insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle; * * *." The driver of the Colorado automobile had an automobile insurance policy with Farmers Insurance Group providing liability insurance of $15,000 each person, $30,000 each occurrence, for bodily injury; and $10,000 each occurrence property damage coverage.

At the time of the accident, Colorado had enacted a no-fault Auto Accident Reparations Act. Under that act no person is permitted to recover against an owner or driver with the required insurance except where there was (1) death; (2) dismemberment; (3) permanent disability; (4) permanent disfigurement; (5) reasonable need for medical services having a reasonable value in excess of $500; or (6) loss of earnings beyond a 52-week period not compensated by an insurance policy complying with the terms of the act. Colo. Rev. Stat. Ann., § 10-4-701 et seq.

Plaintiff made demand for payment on the insurance carrier for the Colorado automobile. That company paid the property damage on the vehicle owned by plaintiff's stepson, but refused to pay any damages for personal injuries to the plaintiff because of the Colorado Auto Accident Reparations Act. Plaintiff then brought this action against the insurance carrier on his own automobile under the uninsured motorist coverage of the policy. The District Court found as a matter of law that the Colorado automobile was an "uninsured" motor vehicle, and a jury verdict for the plaintiff was thereafter returned.

The first issue is whether or not the Colorado automobile was an "uninsured motor vehicle" under the

terms of the Nebraska statutes and the terms of the plaintiff's insurance policy. It is conceded that the insurance coverage on the Colorado automobile not only complied with all the provisions of the Colorado Auto Accident Reparations Act, but afforded the coverage and limits for personal injury specified by section 60-509, R. R. S. 1943. Had the accident occurred in the State of Nebraska the Colorado car would clearly have been an insured rather than an uninsured motor vehicle. It was not the Colorado automobile insurance policy which restricted or limited the legal liability of the Colorado driver or her insurance carrier. Instead, it was the law of Colorado which had that effect.

The trial court found that the Colorado policy did not afford the minimum dollar coverage specified by the Financial Responsibility Act of the State of Nebraska, and that it was therefore not applicable to the particular accident. The Colorado policy applied to and covered the particular accident involved here. The insurer was obligated to pay on behalf of the Colorado driver all sums which the driver became legally obligated to pay as damages because of bodily injury arising out of this accident. The Colorado policy covered the Colorado vehicle at the time of the accident, and its coverage and limits complied with Nebraska law. A vehicle which has liability insurance coverage effective and applicable to it at the time of an accident in limits not less than the amounts required by section 60-509, R. R. S. 1943, is not an uninsured motor vehicle within the meaning of section 60-509.01, R. R. S. 1943. See Emery v. State Farm Mut. Auto. Ins. Co., 195 Neb. 619, 239 N. W. 2d 798. The Colorado automobile was not an uninsured motor vehicle.

The thrust of plaintiff's argument is that he should be entitled to recover from the Colorado driver as though the tort liability law of Nebraska applied to the accident in Colorado, and that if he cannot do so,

then he should be allowed to recover under the uninsured motorist coverage of his own policy. This court has consistently held that in an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will be applied, and that law governs not only the amount of recovery but also the right to recover. See, Lorenzen v. Continental Baking Co., 180 Neb. 23, 141 N. W. 2d 163; Peterson v. Dean, 186 Neb. 716, 186 N. W. 2d 107.

Under virtually any rationale of the current principles of conflict of laws which apply to actions for personal injuries the same result still follows. Restatement, Conflict of Laws 2d, section 146, page 430, states in part: "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship * * *." Comment d under that section makes it clear that in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection.

Even if the Colorado car were held to be an uninsured motor vehicle, the plaintiff could only recover under his own uninsured motorist coverage any sums which the operator of the Colorado automobile would be legally responsible to pay to the plaintiff as damages, and that issue is determined under Colorado law. Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorist to the insured for the personal injuries sustained. The claimant must establish the liability of the uninsured motorist to him before he can recover. See, 12 Couch on Insurance, § 45:649, p. 584; Noland v. Farmers Ins. Exchange (Mo. App.), 413 S. W. 2d

530; Bachman v. American Mut. Ins. Co. of Boston, 338 F. Supp. 1372 (Kan., 1972). Whether the Colorado driver is regarded as an insured motorist or an uninsured motorist, there is simply no dispute that she is not legally liable to the plaintiff for his bodily injuries suffered in this accident.

In view of the determinations made we do not find it necessary to reach additional issues as to the uninsured motorist coverage here which have been argued in the briefs. Those issues would be cumulative at this point. The defendant's motion for summary judgment should have been granted. The judgment of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

GIL GRADY, APPELLEE, V. DONALD E. DENBECK, APPELLANT.

251 N. W. 2d 864

Filed March 16, 1977. No. 40811.

Contracts: Usury. Contracts which are valid where made do not offend the public policy of a forum, although they provide for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such contract, if made in the law of the forum.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Forrest F. Peetz of Magnuson, Magnuson & Peetz, for appellant.

Edward E. Hannon of Cronin & Hannon, for appellee.

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

WHITE, C. J.

This is an action to recover the balance due on a promissory note. The note was executed at Guy-

mon, Oklahoma, on March 1, 1970, in the sum of $15,000, and made payable to Ray W. and Eunice M. Vining of Guymon, Oklahoma. The note was payable at the office of the City National Bank, Guymon, Oklahoma. The note was endorsed by the Vinings to Ronald D. and Susan A. Hutchinson, who in turn endorsed the note to the plaintiff. The note was payable in three installments of $5,000. The defendant paid the plaintiff $5,000 on the note on March 6, 1971. No further payment on the note was received by the plaintiff.

Trial was held on March 8, 1976. The jury returned a verdict in favor of the plaintiff and against the defendant in the amount of $10,000, the unpaid balance of the note. The plaintiff then filed a motion for determination of interest and assessment of costs. The plaintiff's motion was sustained by the court over the defendant's objections. The court determined that the principal and interest computed as of March 1, 1976, was $18,037.71, plus interest at 10 percent per annum from March 1, 1976. The defendant's motions for a new trial were overruled, and he now appeals. We affirm the judgment of the District Court.

On appeal, the defendant first argues, citing provisions of the Nebraska statutes which provide that any rate of interest not exceeding 9 percent per year shall be valid in this state (see former sections 45-101 and 45-105, R. R. S. 1943 [Reissue 1974]), that any rate of interest exceeding 9 percent per annum, even though lawful in the state where the loan was executed is invalid and is not enforceable in this state. Such rate of interest, he contends, would be usurious and violate the settled public policy of this state, and enforcement of such a rate of interest would work an injury to a citizen of this state.

The note in question here provided for interest at a rate of 8 percent until paid, and further provided that in default of payment of interest, interest was to

become as principal annually and draw 10 percent per annum interest.

The defendant's contention is disposed of by our decision in Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240 (1954). In that opinion we held: "* * * in the absence of any statute requiring the application of a contrary rule: 'Usury laws are not so distinctive a part of the public policy of the forum that the courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, though valid according to its proper law.' 11 Am. Jur., Conflict of Laws, § 156, p. 458. As stated in § 158, p. 464: 'Contracts which are valid where made do not offend the public policy of a forum, although they provide for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such contract, if made in the law of the forum.' See, also, 66 C. J., Usury, § 33, p. 158; and International Harvester Co. v. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L.R.A.N.S. 774, a case frequently cited. * * *

"This court has in effect recognized the foregoing rules as applied to the general usury laws, and has enforced bona fide contracts which were valid under the laws of the state where made and to be performed. Coad v. Home Cattle Co., 32 Neb. 761, 49 N. W. 757, 29 Am. S. R. 465; Hewit v. Bank of Indian Territory, 64 Neb. 463, 90 N. W. 250, * * *."

Additionally, section 45-158, R. R. S. 1943, provides, with an exception which is not relevant to this appeal, that loans made outside this state, if legally made in any state under and in accordance with a regulatory small loan law similar in principle to the Nebraska statutes, are valid and enforceable in this state.

The note in question was executed in Oklahoma. The defendant does not argue that the interest provisions of the note are invalid or usurious under the

laws of the state. The plaintiff pleaded the Constitution and the laws of the State of Oklahoma as to the interest provisions, and under these provisions the note involved herein is neither usurious nor invalid. See 15 Okla. Stat. Ann., Ch., 6, §§ 263 to 266 (1966). That being the case, as shown above, the interest provisions of the note are valid and enforceable in this state.

The defendant next argues that even if we find the Oklahoma interest rate is applicable to this note, it should only be applied to actual principal, and the provision in the note which states that in default of payment of interest, interest shall become as principal and draw 10 percent interest per annum should not be enforced. Again we must look to the law of Oklahoma where the note was executed. The defendant does not argue that this provision is invalid under the law of Oklahoma, nor do we find it to be so. See, e.g., Covington v. Fisher, 22 Okla. 207, 97 P. 615 (1908). There is no merit to this contention.

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

AFFIRMED.

NEBCO, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. GERALD SPEEDLIN, CITY TREASURER OF THE CITY OF LINCOLN, NEBRASKA, ET AL, APPELLEES AND CROSS-APPELLANTS.

251 N. W. 2d 710

Filed March 16, 1977. No. 40827.

1. **Special Assessments: Municipal Corporations.** A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction.
2. _____: _____. Where it is alleged and proved that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and subject to collateral attack.
3. _____: _____. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment.

4. **Special Assessments: Trial.** A property owner who attacks a special assessment as void has the burden of establishing its invalidity.
5. **Special Assessments: Municipal Corporations: Evidence: Sewers and Sewer Districts.** The mere fact that property is served by a private sewer adequate to present immediate needs of the property does not conclusively establish that there is no benefit from construction of a public sewer adjacent to the property.
6. _____: _____: _____: _____. In calculating the amount of special benefit to property arising from construction of a public sewer, connection costs need not be subtracted.
7. _____: _____: _____: _____. Future use of property is an element which may be considered in determining the amount of special benefit.
8. **Special Assessments: Municipal Corporations: Sewers and Sewer Districts.** Nebraska statutes governing the levying of a special assessment in sewer districts contemplate the levying of an assessment to the extent of the benefit and there need not always be an immediate and proportionate increase in the market value of the property by reason of the improvement.

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

James W. Hewitt, for appellant.

Charles D. Humble and William F. Austin, for appellees.

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

CLINTON, J.

This is an action brought by the plaintiff, Nebco, Inc., property owner, to have special assessments against its property, which was included in sewer district 918 of the City of Lincoln, declared null and void, and to enjoin the collection of the assessments on the grounds that they were arbitrarily made, constructively fraudulent, and illegal. In general, the basis of the claim is that the property assessed was already adequately served by existing private and public sewer facilities, hence it was not and could not be benefited by the improvement. Relief was

denied by the trial court as to three of the lots involved and was granted as to a fourth lot. The plaintiff perfected its appeal to this court, while the City of Lincoln and the defendant officials have cross-appealed as to the relief granted. We affirm the portion of the trial court's judgment denying relief and sustain the cross-appeal of the defendants.

Since this action is a collateral attack upon the assessments, the issues which the owner may present are limited. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Wead v. City of Omaha, 124 Neb. 474, 247 N. W. 24; Wiborg v. City of Norfolk, 176 Neb. 825, 127 N. W. 2d 499; Midwest Development Corp. v. City of Norfolk, 192 Neb. 475, 222 N. W. 2d 566. We have held that where it is alleged and proved that the physical facts are such that the property was not and could not be specially benefited, the levy may be held to be arbitrary, constructively fraudulent, and therefore void, and subject to collateral attack. Wiborg v. City of Norfolk, *supra*; Midwest Development Corp. v. City of Norfolk, *supra*. All defects, irregularities, and inequalities in the making of an assessment, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings. Wead v. City of Omaha, *supra*; Midwest Development Corp. v. City of Norfolk, *supra*. Mere excessiveness of a special assessment may not be corrected in a collateral attack upon the assessment. Loup River P. P. Dist. v. Platte County, 141 Neb. 29, 2 N. W. 2d 609. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Bitter v. City of Lincoln, 165 Neb. 201, 85 N. W. 2d 302; Midwest Development Corp. v. City of Norfolk, *supra*. Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the

theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general. Midwest Development Corp. v. City of Norfolk, *supra.*

Since this a proceeding in equity we examine the record de novo.

The plaintiff, Nebco, Inc., is the owner of certain irregular lots within the city of Lincoln covering a roughly triangular area of approximately 75 acres, bordered on the south (the hypotenuse side of the triangle) by Cornhusker Highway and on the north side by Fletcher Avenue. On these lots the plaintiff, or its related corporations, carry on various activities in the concrete industry. Plaintiff leases portions of one lot to a third party. Lots 71, 76, 79, and 97 are located generally in the southern portion of the 75-acre tract and abut Cornhusker Highway on the north. Lot 56, also owned by the plaintiff, lies generally in the northern portion of the tract and abuts Fletcher Avenue; no part of this lot adjoins Cornhusker Highway.

By ordinance in July of 1972, the City of Lincoln created sewer district 918. Pursuant to ordinance the city constructed a sewer which runs from east to west along the south side of Cornhusker Highway opposite Lots 71, 79, and 76; thence northwesterly on an acquired easement across Lots 76 and 97 to property adjacent to the west side (the base of the triangle) of the plaintiff's property; thence northerly to Fletcher Avenue where it joins an existing sewer line constructed in about 1962. The district 918 sewer line includes several manholes located on the north side of Cornhusker Highway abutting the plaintiff's lots and connected to the main by lines which pass under the highway. In March 1975, the cost of constructing the sewer in district 918 was assessed in part against parts of Lots 71, 79, 76, and 97. It is these assessments which the plaintiff seeks to have declared void.

No portions of Lots 71, 79, 76, or 97 have previously been assessed in any sewer district. In 1962 Lot 56, upon which a large part of the plaintiff's extensive improvements and facilities are located, was assessed for benefits arising by reason of construction of the Fletcher Avenue sewer. After that sewer was constructed the plaintiff connected its facilities on Lot 56 to it. Thereafter over a period of time plaintiff extended its own sewer lines on Lot 56 and installed a lift station on Lot 56 so that the sewer served Lots 79 and 76 through the connection in Fletcher Avenue.

Facilities on Lot 76 served by the plaintiff's extension from its Lot 56 sewer are a rebar fabricating plant, a block plant, and an office building. A portion of Lot 76, lying adjacent to and on each side of the sewer where it crosses that lot in a northwesterly direction, is unimproved property.

On Lot 79 an office building is similarly served. The assessment against this lot is the one which the trial court found void.

Lot 71 has no sewer connection of any kind. Plaintiff uses a portion of this lot for open air storage of its products. The balance of Lot 71 is occupied by a tenant which operates an asphalt plant thereon. Only machinery and materials are located on the portion of Lot 71 occupied by the asphalt plant and it has no improvements of any kind. Portable toilets are the only sanitary facilities on this lot. The lease on the property is apparently from month to month.

Lot 97 has located on it an office building which is served by a septic system. Most of this lot has no improvements on it. Plaintiff's property is zoned for heavy industrial use.

Plaintiff's position is (1) plaintiff receives no present benefits from the construction of the sewer in district 918 because (a) it has its own sewer system; (b) the cost of connection to the district 918 sewer exceeds the cost of any possible benefit; and (c) the

district 918 sewer affords no added capacity because it flows into the Fletcher Avenue sewer to which plaintiff is already connected. (2) Plaintiff will receive no benefits in the immediate future because the use of the property is fixed; plaintiff has no plans for expansion; and it would be impractical to develop the property because there is insufficient storage space for the material used in manufacturing to do so. Plaintiff introduced evidence tending to support the above conclusions. The plaintiff's witnesses acknowledged, however, that if its facilities on Lots 76 and 79 were not already served through the connections on Lot 56 with the Fletcher Avenue sewer, their opinions would be different. It is uncontroverted that undeveloped portions of Lots 76 and 97 referred to as the slough area could not be feasibly served through further extensions of the private sewer. Neither does it seem to be contested that Lot 71, which is approximately 20 acres in area, can best be served by a connection with district 918. It also seems uncontroverted that the block plant and offices on Lot 76 and the office on Lot 79 could be served by gravity flow connections to the manholes of district 918. One of the plaintiff's witnesses acknowledges that his opinion that the property is not benefited by the construction of the district 918 sewer is based solely upon the fact that the existing facilities are adequately served by the plaintiff's private sewer and its connection with the Fletcher Avenue line, and that if additional buildings should be placed on the south portion of the plaintiff's property it would be more feasible to tie in to the district 918 sewer. Plaintiff also introduced evidence that the market value of the property was not increased by reason of the sewer construction. Other details of the plaintiff's evidence will be later discussed in connection with its particular contentions.

Evidence introduced by the city would support the conclusion that all of Lot 71, Lot 79, most of Lot 76,

and all of Lot 97 can be served by gravity flow to the manholes of district 918. The record establishes that the special assessments were made in accordance with the standard engineering formula used throughout Lincoln to assess such benefits in sewer districts.

It is clear from our above summary of the evidence that the physical facts are not such that the property was not and could not have been benefited in any amount or could not have been benefited to any extent approaching the assessment. Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753. The burden of proof was on the plaintiff and it cannot be said that the finding of fact by the court upholding the assessments is contrary to the physical facts.

The plaintiff's position, however, is more sophisticated than that. It contends that as a matter of law property already served by the existing improvement is not benefited by an additional improvement of the same kind. It cites such cases as Independent School Dist. No. 709 v. City of Duluth, 287 Minn. 200, 177 N. W. 2d 812. That case is clearly distinguishable from the one at hand. In that case a 32-acre tract had been assessed for sewer improvements in 1914. In 1966 another sewer was constructed and assessment was made against the property. The tract was undeveloped both in 1914 and in 1966. The court in that case canceled the 1966 assessment as to approximately one-half of the property because the evidence showed that that portion could not be benefited by the new sewer and could be adequately served by the old sewer. The court said: "The evidence presented at the trial clearly indicated that a portion of the property — 18.2 acres — could be served and benefited by the new sewer line, but that 14.6 acres received no benefit and could be served by the old Duluth Heights Outfall Trunk Sewer constructed in 1914." The court in that case held

simply that the evidence supported the fact finding of the trial court. The evidence in the case before us shows that the property here assessed (none of which has previously been assessed for any sewer improvement) can be benefited by the district 918 sewer. The fact that part of Lots 76 and 79 are served by the private sewer extension from the Fletcher Avenue public sewer is not conclusive of the absence of a benefit or that the benefit does not approach the assessment. The factual situation before us is similar to that involved in Midwest Development Corp. v. City of Norfolk, *supra*, where we held that the fact property not previously assessed in any water district could be served by a private waterline through property previously assessed in another district did not bar assessment in the new district where the evidence showed benefit to the property.

Plaintiff introduced evidence to show that if it were to connect the rebar plant, the block plant, and the two office buildings (all located on Lots 76 and 79) to the new sewer it would cost $45,879.68. If the rebar plant were not connected it would cost only $32,281.48 because a lift station would be eliminated. If only the two office buildings were served the cost would be $15,190.56. The record does not establish that the plaintiff is required by law to make such reconnections. We were confronted with somewhat similar conditions in Midwest Development Corp. v. City of Norfolk, *supra*. We there said: "If, as the plaintiff argues, the cost of connection must be offset against the assessment, then, in many cases, there could be no assessment for special improvements at all. Such is not the law. The statute above clearly contemplates that the property owner shall pay the special assessment as well as the connection cost."

With reference to plaintiff's contention that the district 918 sewer does not give increased sewer ca-

pacity to the property because it ultimately runs into the Fletcher Avenue sewer, we comment as follows. No authority is cited which supports the proposition that this fact makes the assessment illegal. There is no evidence whatever to show that the capacity of the district 918 sewer is insufficient to completely and adequately serve the property assessed. If there were evidence that the sewer was inadequate to serve the property that would obviously either affect the amount of benefit and the assessment, or perhaps make the assessment void if there were a gross inadequacy. The fact that no added capacity results is immaterial.

The plaintiff also contends that the improvements will not benefit the property in the immediate future and for that reason an assessment cannot be sustained. It cites, among other cases, Munsell v. City of Hebron, 117 Neb. 251, 220 N. W. 289; and Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209. In the first-cited case this court said: " 'The vital principle underlying special assessments is that the value of the property taxed has been increased in a sum at least equal to the assessment levied. To levy a tax [special assessment] without a corresponding increase in value is to take private property for public use,' " citing Schneider v. Plum, 86 Neb. 129, 124 N. W. 1132. That case involved an appeal from the assessment and not a collateral attack. The improvement in that case was paving adjacent to two mostly undeveloped tracts. The court found that the assessment exceeded the benefits and reduced the assessment to $1,000 per tract. The principle cited is dictum so far as the facts in the Munsell case are concerned. In Schneider v. Plum, *supra,* from which the quoted principle is taken, the evidence was that the assessment proceedings by the city were void because the proceedings themselves indicate that the village had not made the assessment based upon benefit, but had levied the cost

of the improvement irrespective of benefit. In the case before us the proceedings by which the levy of the assessment was made are not attacked. A presumption exists that the levy was properly determined and there is no evidence otherwise. See Chicago & N. W. Ry. Co. v. City of Albion, 109 Neb. 739, 192 N. W. 233, where the import of the holding in Schneider v. Plum, *supra*, is discussed.

Sump v. Omaha Public Power Dist., *supra,* cited by the plaintiff, involved the question of determining the market value of property in eminent domain proceedings and held that in determining such value, consideration of future uses must be limited to reasonable uses in the immediate future. Plaintiff argues, apparently, that there can be no valid special assessment unless it be shown there is an immediate increase in market value by reason of the improvement and points out that an officer of the plaintiff testified that the value of the land was the same both before and after the construction of the sewer. His testimony was wholly by way of conclusion and the trial court, the finder of fact, did not necessarily have to accept said testimony, nor was it sufficient to require a finding that the assessment was void. It is clear that the opinion of the witness was founded upon the present use of the property and the absence of any plans to expand. It is not only present, but also future, use of the property which may be considered in determining whether the property has been specially benefited. In Qvale v. City of Willmar, 223 Minn. 51, 25 N. W. 2d 699, similar arguments were made. The plaintiff there owned several lots on which were located his home and extensively landscaped grounds. Lots on the south side of the property were assessed in a water district which served the plaintiff's residence from a water main in the street abutting the property on the south. Later another water main was constructed in the street which abutted the lots on the north side of

the plaintiff's property and these lots were then assessed. The court said: "In other words, his present use of the property, he claims, is such that no benefits accrue to him by reason of the improvement. His lots on Benson avenue are separate, individual parcels of land. If in other ownership, it could not be successfully claimed that these lots were not benefited by the extension of the water main in front of the lots. Appellant's witnesses Kvam and Anderson based their opinion that appellant and his property were not benefited on the present use of the lots. If the lots were used for other purposes, they admitted that there would be a benefit from the laying of the water main." The court then held that the assessment was not void just because the present use was not enhanced by the improvement. See, also, Village of Edina v. Joseph, 264 Minn. 84, 119 N. W. 2d 809; Brenton v. City of Des Moines, 219 Iowa 267, 257 N. W. 794.

The governing statutes with reference to special assessments for improvements provide that the city council shall "assess the cost [of the improvements] against the property in such districts, to the extent of the special benefits." § 15-717, R. R. S. 1943. The following section 15-718, R. R. S. 1943, provides in part: "Such taxes shall be levied upon the real estate within the sewerage district . . . to the extent of benefits to such property by reason of such improvements." It seems clear that Nebraska statutes contemplate levying the assessments to the extent of the benefits to the property and that there need not always be an immediate and proportionate increase in market value by reason of the improvement. See Foren v. City of Royal Oak, 342 Mich. 451, 70 N. W. 2d 692. It is evident that the benefit from some types of improvements accrue almost wholly to the property benefited. In other cases benefit results partly to the property and partly to the general public. The underlying principle is that

the assessment should not exceed the benefit. Neville v. City of Omaha, 119 Neb. 550, 230 N. W. 108. See, also, Goodell v. City of Clinton (Iowa), 193 N. W. 2d 91.

In this case because the attack is collateral, the trial court was, and this court is, limited to the question of whether no special benefits resulted, or no benefits approaching the amount of the assessment resulted. We conclude that the trial court was correct in denying the requested relief as to Lots 71, 76, and 97. The court made no specific finding as to why it concluded that Lot 79 was not benefited. We cannot discern from the record that the situation of Lot 79, insofar as benefits from the sewer in district 918 is concerned, is materially different from that of the other properties involved. This lot has not been previously assessed. It is dependent upon the existence of the private sewer from the Fletcher Avenue connection. If ownership of the lot or some portion thereof were severed, having an independent sewer connection would be an obvious advantage. We conclude that the plaintiff has not sustained its burden of proof as to Lot 79 and reverse the portion of the trial court's judgment pertaining thereto.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. ONE 1968 VOLKSWAGEN, APPELLANT.

251 N. W. 2d 666

Filed March 16, 1977. No. 40857.

Motor Vehicles: Searches and Seizures: Controlled Substances: Statutes: Constitutional Law. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law.

Appeal from the District Court of Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Healey, Healey, Brown & Wieland, for appellant.

Ronald D. Lahners, Robert R. Gibson, and Stephen K. Yungblut, for appellee.

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

MCCOWN, J.

This is a proceeding for forfeiture of a 1968 Volkswagen allegedly used for the unlawful transportation of controlled substances. The District Court entered judgment for condemnation and this appeal followed.

The vehicle involved in this condemnation proceeding was owned by James W. Benson, the defendant in State v. Benson, *ante* p. 14, 659 N. W. 2d 251. The facts with respect to the unlawful transportation of controlled substances are set out in that case. Constitutional issues of unlawful detention and search and seizure have been disposed of in State v. Benson, *supra,* and apply equally here.

The defendant's counsel raises two additional issues in this appeal. He challenges the validity of the condemnation action as a taking of property without just compensation and without due process of law, and contends that the vehicle was not accurately or correctly described in the complaint and order.

The action here was taken under the provisions of section 28-4,135, R. R. S. 1943, which provides in part: "(4) When any * * * vehicle * * * is seized * * * the person seizing the same shall within five days thereafter cause to be filed in the district court of the county in which seizure was made a complaint for condemnation of the vehicle seized. * * * The complaint shall describe the conveyance, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and shall conclude with a prayer of due process to enforce the forfeiture."

The basis for the forfeiture here was the use of the vehicle for the unlawful transportation of controlled substances. The United States Supreme Court, in passing on a very similar statute, has rejected constitutional challenges like those made here and upheld the validity of such a forfeiture statute. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U. S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), the court said: "Forfeiture of conveyances that have been used — and may be used again — in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." That case is controlling here. The seizure and forfeiture of vehicles used for the unlawful transportation of controlled substances, carried out under the provisions of section 28-4,135(4), R. R. S. 1943, does not constitute an unconstitutional taking of property without just compensation or without due process of law.

Defendant's counsel also contends that provisions for forfeiture must be strictly construed and that the decree of forfeiture does not accurately and correctly describe the vehicle to be forfeited. The complaint described the vehicle as a 1968 Volkswagen seized by the Nebraska State Patrol near Lincoln on October 16, 1974, and in the custody of the state patrol. The order to the sheriff to seize the vehicle and hold it pending further order of the court described the vehicle as bearing California license YKD 476. The demurrer and answer of James W. Benson refers to the vehicle as bearing California license number YKD 470. The State's reply also describes the vehicle as bearing license YKD 470. The order for condemnation simply referred to the 1968 Volkswagen vehicle "involved here," and the order was approved as to form by counsel.

The statute requires that the complaint describe

the conveyance and state the name of the owner, if known. The only discrepancy in any description involved one order which listed the last digit of the California license as a 6 rather than an 0. That might well have been a typographical error. It would have been preferable to have a more detailed description, including body type and color, plus serial or motor numbers, if available. However, we cannot say that the statute requires a more specific description of the vehicle to be forfeited when there is no actual confusion, the vehicle is in custody, and the owner appears and participates in the hearing. Under the circumstances here the description of the vehicle was sufficient to constitute compliance with the requirements of section 28-4,135(4), R. R. S. 1943.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD W. THOMPSON, APPELLANT.

251 N. W. 2d 387

Filed March 16, 1977. No. 40865.

1. **Criminal Law: Trial: Confessions: Evidence.** The evidentiary use of incriminating statements made by a defendant to the police while in police custody is permissible when the statements are the product of a rational intellect and a free will, and when the statements are given voluntarily, knowingly, and intelligently, after the required Miranda warnings have been given.
2. **Criminal Law: Confessions: Evidence.** The determination of whether a statement was voluntarily made turns on the consideration of the totality of the circumstances present in each case.
3. _____: _____: _____. A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.
4. _____: _____: _____. The form of a statement, as oral or written, is immaterial in the determination of its admissibility as an admission. Both oral and written statements of a defendant are admissible if voluntary.
5. **Criminal Law: Evidence: Rape: Sexual Assault.** It is not essential that the prosecutrix be corroborated by other witnesses as

to the particular acts which constitute the offense; it is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue.

6. **Criminal Law: Witnesses: Evidence: Rape: Sexual Assault.** Admissions of a defendant may be sufficient corroboration of the testimony of the prosecutrix in a rape or sexual assault case.
7. **Criminal Law: Trial: Evidence.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
8. **Trial: Judgments: Evidence: Verdicts.** In a jury-waived action the judgment of the District Court on the facts has the same force as a jury verdict, and will not be set aside on appeal if there is sufficient competent evidence to support it; and the verdict of a jury must be sustained if there is evidence, taking the view most favorable to the State, to support it.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Johnston, Grossman, Johnston & Barber, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BRODKEY, J.

The defendant and appellant herein, Richard W. Thompson, was charged with first degree sexual assault under section 28-408.03, R. R. S. 1943, in an information filed in the District Court for Lancaster County on February 11, 1976. The defendant waived a jury trial; and after trial to the court, commencing April 21, 1976, was found guilty as charged. The defendant was sentenced to a prison term of not less than 18 months nor more than 3 years. The defendant has now appealed from his conviction, contending that admissions made by him to the police were improperly admitted into evidence, and that there was insufficient corroboration of the prosecutrix'

testimony with regard to the element of force. We affirm.

On January 5, 1976, at approximately 4 p.m., the defendant went to an apartment complex in Lincoln, Nebraska, to visit a girl, Jeannie, who lived in an apartment next door to the prosecutrix. The prosecutrix heard the defendant knocking, came to her door, and advised the defendant that Jeannie was not at home. She and the defendant then began to converse, and she invited him into her apartment to wait for Jeannie to return.

The defendant remained in prosecutrix' apartment until approximately 6 p.m. During this time the two parties engaged in kissing, and possibly petting, and eventually the defendant propositioned her to have sexual intercourse with him. She rejected the defendant's proposal, but the defendant continued to try to persuade her. The defendant then left the apartment, telling prosecutrix that he was going to have dinner, and that he might return later. He urged prosecutrix to reconsider her refusal while he was gone. The defendant went to several bars after he left prosecutrix' apartment, and returned at approximately 1:30 a.m. on January 6, 1976. Prosecutrix who had retired, awoke and permitted the defendant to enter the apartment.

The prosecutrix and the defendant gave conflicting versions of what occurred next. Prosecutrix stated that the defendant again tried to persuade her to engage in sexual intercourse, and began to make passes at her, but that she refused his advances. She testified that the defendant then took a knife from his pocket, and asked whether the knife would "make any difference." The defendant then held the knife to prosecutrix' neck, removed her undergarments, and forced her to submit to intercourse. She stated that the defendant penetrated her, and that he subsequently ejaculated on the bedsheet. Afterwards, the defendant threatened to kill her if

she called the police, and forced her to sign a note stating that her actions had been voluntary. The defendant also forced her to swear on the Bible that she would not call the police, and then left.

The defendant testified that prosecutrix first brushed off his passes, but that she eventually accepted them. He stated that she had voluntarily engaged in intercourse, but that she requested him to stop shortly after he penetrated her. The defendant did so, and ejaculated on the sheet. The defendant admitted having a knife when he was in the apartment, but stated that he did not threaten her with the knife until she threatened to call the police, after intercourse had occurred. According to the defendant, he took the knife from his pocket, laid it on a table, and told prosecutrix: "You know I could kill you with this knife but I don't want to and I am not going to. But you have me really scared, because you can hurt my family and me and my parole could be violated by you making these statements that aren't true." The defendant stated that she then wrote a note to the effect that her actions had been voluntary, but that he did not accept the note because he wanted a promise that she would not call the police. The defendant testified that prosecutrix did so promise, but that he did not force her to swear on the Bible that she would not report the incident.

Prosecutrix did promptly report to the police that she had been raped by the defendant. Police officers went to the defendant's home at 8 a.m. on January 6, 1976, and took him to the police station for questioning. The defendant initially denied that he had returned to prosecutrix' apartment in the early morning hours of January 6, 1976, but ultimately gave the following written statement which was read, corrected, and initialed by Thompson; and which was admitted into evidence at the trial: "I returned to the apartment about 1:30 in the morn-

ing and I knocked on the door and she asked who was there and I told her that it was Rick. She opened the door and I asked her if I could come in and she opened the door and allowed me to come into her apartment. After entering her apartment we sat down on the bed and talked and I made two or three passes which she brushed off and we continued to talk and I made more passes which she accepted. I became very sexually aroused and from the way that she was acting I felt that she was too. At this time, I attempted to have intercourse with her. The sexual play was proceeding in a fashion that led me to believe that we were going to have intercourse. Things proceeded on until just before the consummation of this act. When (sic) she said that she didn't want to do anything. By this time, I was sexually aroused to the highest point before intercourse. Through her actions I felt that she was playing with me so I asked her if a knife made *nay* (sic) difference in submission. (R.T.) She said yes it did. I then began to have intercourse with her. I was barely inside of her when she said no don't I don't want to do any of this. At that time I extracted myself from her and climaxed on the bed. She then said that she was going to call the police and say that I raped her. I became very uptight and very scared and I asked her not to call the police, said that I didn't rape her that she knew that I didn't but yet she persisted in saying that she was going to call the police. At this time I told her that her calling the police would hurt my family, my wife and two children, and I told her 'I could kill you (R.T.) with this knife, but I don't want to and I'm not going to, just *pelase* (sic) promise (R.T.) me that you won't call the police please.' The knife was bought (sic) out just before the act of intercourse and put back in my pocket soon after that. The knife was a bluff because I was so sexually aroused and I thought she was playing back. During the conversa-

tion of not calling the police the knife was put away and there was no threat. After talking with her for 15 minutes ~~and~~ to half an hour (R.T.) I asked her again please not to call the police because she would be causing me (R.T.) alot (sic) of trouble for nothing because of the way that things happened it couldn't be rape. At this time, she promiesd (sic) that she wouldn't call the police and I left."

The defendant also advised the police where they could find the knife which he held on the night of the incidents involved in this case. The knife was recovered and admitted into evidence at defendant's trial. There was also evidence that there was semen stains on the bedsheet found in the prosecutrix' apartment immediately after she called the police. Finally, police officers testified at trial in regard to certain oral statements made to them by the defendant after his arrest. Other facts relevant to the defendant's assignments of error will be discussed below.

The defendant contends on appeal that the District Court erred in (1) finding that written and oral admissions made by the defendant to the police were voluntarily, intelligently, and understandingly given; (2) determining that the oral admissions of the defendant were properly admissible when his admissions had finally been reduced to a written statement; (3) finding that the testimony of the prosecutrix was sufficiently corroborated in regard to the element of force necessary to sustain a conviction; and (4) failing to dismiss the case after both the conclusion of the State's evidence and all the evidence. We will discuss these contentions in the order they are presented.

The evidentiary use of incriminating statements made by a defendant to the police while in police custody is permissible when the statements are the product of a rational intellect and a free will, and when the statements are given voluntarily, know-

ingly, and intelligently, after the required Miranda warnings have been given. State v. McDonald, 195 Neb. 625, 240 N. W. 2d 8 (1976); Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The determination of whether a statement was voluntarily made turns on the consideration of the totality of the circumstances present in each case. State v. McDonald, *supra;* Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

The defendant in this case concedes that he was fully advised of his rights, which he understood, before making any statements to the police. He initially denied sexual involvement with the prosecutrix, stating that he did not return to her apartment on January 6, 1976. He later changed this statement, stating that prosecutrix had voluntarily had intercourse with him. Finally, he stated that he had threatened her with a knife in order to get her to comply with his demands. All the above statements were oral, and were testified to by the officers who questioned the defendant. The defendant then made the written statement which was quoted earlier in this opinion.

The defendant challenges the admissibility of his admissions on the ground that they were the product of inducements made by the police. At the suppression hearing, the defendant testified that police officers made two promises to him in order to obtain his statement: (1) That if he made a statement he would be charged only with simple assault; and (2) that if he made a statement he would be promptly arraigned and allowed to go home, but that if he refused, he would be thrown in jail. Police officers testified that no such promises were made. They stated that they had told the defendant of the minimum and maximum charges that could be filed in the case; but that the prosecutor would be the official who would determine what charges to file.

They also responded to the defendant's questions of what would happen if no statement was made, but did not promise him that he would be released if he did make a statement. They did advise him that he would remain in jail until the prosecutor determined what charges should be filed, and until he was arraigned. The interrogating officer also advised the defendant that his parole officer would have to be contacted before he could be released.

The trial court found that the defendant had freely and voluntarily waived his rights and given the statements, and in so finding considered all relevant circumstances, including the fact that the defendant had had previous experience with police questioning. "A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous." State v. McDonald, *supra*. We agree with the trial court that the statements of the defendant were freely, voluntarily, and intelligently given, and that finding was clearly not erroneous. The defendant was fully advised of his rights, understood them, and had prior experience with police questioning. The trial court weighed the credibility of the witnesses at the suppression hearing and found that the statements were not the product of inducement or promises. There is no merit to this assignment of error.

The defendant next contends that his oral admissions were inadmissible, even if made voluntarily, arguing that where, subsequent to the making of multiple inconsistent admissions, a party makes a definite selection among them, it is only that selection which should be admissible. Under this theory the defendant contends that only his written admission was admissible.

None of defendant's authorities support this proposition. The form of a statement, as oral or written, is without effect in the determination of its admissibility as an admission. 29 Am. Jur. 2d, Evidence, §

602, p. 657. This court has previously held that where the evidence tends to prove that a defendant has orally admitted his guilt, it is not error for the trial court to admit a written confession of substantially the same tenor which was voluntarily made and signed by the defendant subsequent to such oral admission. King v. State, 108 Neb. 428, 187 N. W. 934 (1922). Both oral and written statements of a defendant are admissible if voluntary. United States v. Cohen, 448 F. 2d 654 (8th Cir., 1971). The oral statements by the defendant in this case were made prior to the time he gave his written statement, and were distinct and separate from the written statement. Both the oral and written statements were competent evidence, and it was not error to admit the oral statements into evidence.

The defendant's next contention is that the testimony of the prosecutrix was not sufficiently corroborated as to the element of force required to prove the charge in the information. Section 28-408.03, R. R. S. 1943, provides that: "A person shall be guilty of sexual assault in the first degree when such person subjects another person to sexual penetration, and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception * * *." There is no merit to this contention.

It is true that the testimony of the prosecutrix alone and uncorroborated by any other evidence is not sufficient to sustain a conviction for rape. State v. Fisher, 190 Neb. 742, 212 N. W. 2d 568 (1973). "In this state, however, it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to the principal fact in issue." State v. Ferguson, 188 Neb. 330, 196 N. W. 2d 374 (1972). Cf., Pew v. State, 164 Neb. 735, 83 N. W. 2d 377 (1957); and Comment, Nebraska's Corroboration Rule, 54

Neb. L. Rev. 93, 105 (1975). There was clearly sufficient corroboration of the prosecutrix' testimony in this case. First, the defendant's oral and written statements to the police not only corroborate the prosecutrix' testimony, but essentially provide an identical version as to what happened. This court has previously held that admissions of a defendant are sufficient corroboration of a prosecutrix' testimony. Miller v. State, 169 Neb. 737, 100 N. W. 2d 876 (1960). Secondly, the prosecutrix immediately reported the incident to the police, a fact which is relevant to the issue of corroboration. State v. Ferguson, *supra*. Thirdly, semen stains were found on the bedsheet in the prosecutrix' apartment, a fact which supports the prosecutrix' version of what occurred. Finally, the defendant admitted that he was in possession of a knife on the night of the incidents involved in this case. These facts more than meet the requirement that the prosecutrix' testimony be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. State v. Garza, 187 Neb. 407, 191 N. W. 2d 454 (1971); State v. Ferguson, *supra*.

Finally, the defendant contends that the trial court erred in failing to dismiss the case against the defendant at the close of the State's evidence, and at the close of all the evidence. In support of this contention the defendant argues that the trial court erred in resolving the issue of the credibility of the witnesses in favor of the prosecutrix. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Miller, 194 Neb. 215, 231 N. W. 2d 140 (1975). In a criminal action, this court will not interfere with a verdict of guilty based on conflicting evidence unless, as a

matter of law, evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt. State v. Corfield, 189 Neb. 163, 201 N. W. 2d 818 (1972). In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. Burhoop v. Pegram, 194 Neb. 606, 234 N. W. 2d 828 (1975); Siefford v. Housing Authority, 192 Neb. 643, 223 N. W. 2d 816 (1974). The verdict of a jury must be sustained if there is evidence, taking the view most favorable to the State, to support it. State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589 (1975); State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650 (1976). The evidence in this case clearly supports the verdict of the trial court, and there was no error in failing to dismiss the case against the defendant at the conclusion of the evidence.

The defendant's assignments of error are without merit, and the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARRETT E. WOUNDED HEAD, APPELLANT.

251 N. W. 2d 668

Filed March 16, 1977. No. 40880.

1. **Criminal Law: Sentences: Probation and Parole.** This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion.
2. **Criminal Law: Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

T. Clement Gaughan and Paul M. Conley, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

MCCOWN, J.

The defendant pleaded nolo contendere to a charge of assault with intent to inflict great bodily injury and was sentenced to 2 to 5 years imprisonment. The sole issue on appeal is whether the defendant's sentence was excessive.

Defendant was originally charged with one count of robbery and two counts of assault with intent to inflict great bodily injury, all arising out of an incident in the early morning hours of November 30, 1974. Sometime after 1 a.m., the defendant and three other men crashed a party at a house in Lincoln, Nebraska, but left in a short while. The four men returned about 3:30 a.m., and viciously assaulted two men in the house at that time. After the assault, they robbed the victims and removed cash, jewelry, and various items of property from the house, and damaged the house and contents extensively. Both victims required medical treatment at the hospital.

The defendant was actively involved in the incident although not quite so extensively as two of the others. The defendant pleaded nolo contendere to one count of assault with intent to inflict great bodily injury under a plea bargain which involved the dismissal of the robbery count and the other count of assault. The District Court accepted the plea and committed the defendant to the Division of Corrections for study and evaluation before sentencing.

The evaluation report by the diagnostic center team recommended imprisonment. The report noted that the 24-year-old defendant had a history of assaultive behavior when intoxicated and a failure to benefit from prior probationary and rehabilitative

programs. The report also noted that if sentenced to the Nebraska Penal and Correctional Complex the defendant would have the opportunity to receive assistance through the chemical dependency program and vocational skill training program.

The defendant offered testimony from a social worker at the sentencing hearing who expressed the opinion that it would be more appropriate to place the defendant in a community setting rather than to incarcerate him. The court considered all the alternatives and sentenced the defendant to 2 to 5 years imprisonment with credit for the 124 days he had already spent in custody.

The penalty for assault with intent to inflict great bodily injury is 1 to 20 years. In State v. Swails, 195 Neb. 406, 238 N. W. 2d 246, we affirmed a denial of probation and a prison sentence of 1 to 2 years on a charge of assault with intent to inflict great bodily injury. We referred to the fact that probation in that case might have been appropriate except for the seriousness of the offense and the violence with which it was committed. In the case now before us the violence was just as vicious, charges on two other counts were dismissed, and the defendant's prior record here was incomparably worse than Swails'. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. See State v. Swails, *supra*. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Coleman, 196 Neb. 721, 246 N. W. 2d 61. Those rules are clearly applicable here. The District Court did not abuse its discretion and the sentence is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ERNEST H. ADDISON AND MICHAEL T. LEVY, MEMBERS OF THE NEBRASKA STATE BAR ASSOCIATION, RESPONDENTS.

251 N. W. 2d 717

Filed March 23, 1977. No. 40444.

Attorneys at Law: Disciplinary Proceedings: Canons. Where the conduct of attorneys violates provisions of the Nebraska Code of Professional Responsibility and their oaths as attorneys at law, but does not involve moral turpitude or characterize them as unsuitable to practice law, a judgment of reprimand and censure is appropriate.

Original action. On motions of respondents for judgment on findings and recommendation of referee. Judgment of reprimand and censure.

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

David S. Lathrop of Lathrop & Albracht, and Paul E. Galter of Galter & Geier, for respondents.

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

PER CURIAM.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on relation of the Nebraska State Bar Association against Ernest H. Addison and Michael T. Levy, who are lawyers duly admitted and licensed to practice their profession in this state.

A formal charge against respondents, Addison and Levy, was filed in this court on November 3, 1975, alleging their violation of Rules DR 1-102(A)(1), (4), (5), and (6), DR 5-103(A), DR 9-102(A), and DR 9-102(B)(3) of the Code of Professional Responsibility of the Nebraska State Bar Association; and also violations of their oaths as attorneys at law, as set out in section 7-104, R. R. S. 1943.

The referee appointed herein held a hearing on the

matter and has filed his report with findings of fact and conclusions of law; and has recommended that the court reprimand each respondent for the conduct which was the subject of the formal charge. Relator has not filed exceptions to that report. Rule 9(1) of Article III of the Revised Rules of the Supreme Court of Nebraska (1974), provides: "Within ten days after the filing of such report, any party thereto may file written exceptions to such report. If no exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require." More than 10 days having elapsed since the filing of the referee's report on December 21, 1976, each respondent filed a motion that an appropriate order and judgment should be entered by this court in conformance with the findings and recommendations of the said referee.

It appears from the record that the charges in question arose out of proceedings for dissolution of marriage between the petitioner, Danny L. Benak, and Susan K. Benak, the respondent, which action was filed on October 22, 1973, in Douglas County. Danny was represented by Attorney Levy, and Susan was represented by Attorney Addison. The decree entered by the court in that case provided, among other things, that the residence of the parties should be sold, and the net proceeds thereof delivered to Michael T. Levy and Ernest H. Addison as trustees. The trustees were directed to apply the net proceeds of the sale to satisfy, insofar as possible, the personal debts of the parties; and in the event the parties were unable to agree upon the disbursements of funds by said trustees, then the trustees were authorized to disburse the funds in their sole discretion as to those creditors who were to receive payment, and the amounts of said payments. In the event any funds remained from the sale of the residence after payment of the personal debts of the

parties, the parties were to be awarded the balance of said funds. The decree also provided that the petitioner (Danny) should assume and pay all joint debts of the parties existing as of October 22, 1973, and should hold respondent (Susan) harmless from any liability thereon. It was further provided that Danny should, within 30 days from the entry of the decree, pay to Susan, as alimony, the sum of $800; that Danny should pay to Ernest H. Addison, for his services rendered the respondent, the sum of $400; and also Danny should pay all taxable court costs.

The home was thereafter sold; and the net payout equity, in the amount of $4,169.29, was deposited in a bank account entitled "Michael T. Levy and Ernest H. Addison, Trustees." Sometime thereafter, the attorneys concluded that they, too, were creditors and were entitled to have attorneys' fees paid out of the trust funds. They set the respective amounts of such attorneys' fees in the sums of $1,500 for Addison and $1,000 for Levy, which sums were apparently in addition to expenses and fees previously paid to the respective attorneys. The parties to the action were apparently agreeable to the payment of the fees to the attorneys; and on March 27, 1974, they entered a joint stipulation for distribution of the trust proceeds in the amount of $4,169.29 for the payment of the attorneys' fees and expenses in question, and also the $800 alimony to Susan with the remainder, in the sum of $594.04, payable to Danny. The stipulation also provided that Susan should hold Danny harmless from any liability or contempt citation for failure to pay a creditor, Dial Finance Company, which held a security interest in household goods, furnishings, and fixtures. Susan and Danny signed the stipulation willingly and with knowledge of its provisions; and, in fact, appeared to be pleased with the distribution of funds.

The stipulation constituted a material change in the provisions of the decree in the dissolution action

of January 22, 1974. However, the stipulation itself was never filed in the court action, nor was it called to the attention of the trial judge for his approval. The record shows that Levy assumed that Addison would file the stipulation in the proceedings, and Addison concedes that Levy had the right to assume that he would do so, as he (Addison) had prepared and had possession of the stipulation. Addison's explanation for his failure to do so was that his secretary generally took care of all his filings of court papers. The secretary testified she didn't understand how she had failed to file the stipulation. Subsequently, in a "show cause" hearing before a different District Judge, both attorneys offered to, and in fact did, pay a portion of the amounts they had received into court. Those funds, consisting of $1,500 repaid from Addison and $1,000 repaid from Levy, apparently became assets in subsequent bankruptcy proceedings filed by the wife, Susan.

In his report the referee found that the decree of dissolution was materially altered by the stipulation in question, and that the stipulation, and the payment of funds pursuant thereto, was in violation of the decree; and the attorneys knew or should have known that the decree of dissolution could be modified in such a material or significant manner only by application to, and order by, the District Court. The referee further found that the attorneys had violated DR 1-102(A)(5), providing that a lawyer shall not engage in conduct that is prejudicial to the administration of justice; and also DR 1-102(A)(6), providing that a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law; and finally that they had violated DR 1-102(A)(1), providing that a lawyer shall not violate a disciplinary rule.

The referee found that the attorneys did not violate DR 1-102(A)(4), providing that an attorney shall not engage in conduct involving dishonesty, fraud,

deceit, or misrepresentation; nor DR 5-103, forbidding the purchase of a proprietary interest in the cause of action; and also found that there was no violation of DR 9-102(A) or of DR 9-102(B)(3), requiring the maintenance of separate bank accounts and records. The court found a technical violation of DR 1-102(A)(6), but also found that the same acts constituted a violation of DR 1-102(A)(5). Finally, the referee found that the attorneys had violated their oaths as attorneys at law, as set out in section 7-104, R. R. S. 1943.

In his recommendations, the referee found that the evidence indicated the lawyers had been in good standing and free from ethical complaints, save for the case at bar, and that they had exhibited an attitude of regret and remorse. The referee concluded that for an isolated, single offense, of a nature not demonstrating qualities of moral turpitude, censure or reprimand by the court would be appropriate. He recommended that the court reprimand each respondent for the conduct which was the subject of the formal charge. In the case In re Fahey, 8 Cal. 3d 842, 106 Cal. Rptr. 313 (1973), the Supreme Court of California stated: "Our standard of moral turpitude depends not on popular impressions but on the violator's own motivation as it relates to his moral fitness to practice law." Clearly we do not condone the conduct of the respondents in this case, even though done under a misconception of rights. Their conduct has demeaned not only themselves but also the high profession which they serve. We feel, however, that under the circumstances of this case such conduct does not constitute moral turpitude, does not characterize the respondents as unsuitable to practice law, and does not require the disbarment or suspension of either attorney.

We believe that the referee was correct in his findings of fact and conclusions of law, and also in his recommendation. We, therefore, enter a judgment

of reprimand and censure as to each of the respondent attorneys.

JUDGMENT OF REPRIMAND AND CENSURE.

CLINTON, J., dissenting.

I do not believe a reprimand is sufficient discipline in the light of the seriousness of the offense. For the violation of trust of which respondents are guilty, I would impose a suspension from the practice of law for a period of 6 months.

SPENCER, J., dissenting.

I believe censure and reprimand herein is too lenient a penalty for the gravity of the offense. I would at the very least impose a temporary suspension.

The conduct of counsel was a knowing violation of their fiduciary duty. They knew that as trustees they were directed to apply the net proceeds in a specific manner. The referee finds that no fraud was involved. In my judgment, the action of the attorneys was a fraud on the creditors who were to receive payment. There is no way that I could condone their actions.

The trial court appointed them trustees for a specific purpose. They then jointly agreed to convert a portion of the fund to their own use. As lawyers, they were bound to know they could not change the terms of their trust without the consent of the court. If they did not know that an agreement with their clients could not change the terms of their trust in this instance, they have no right to be in the practice of law.

The penalty imposed is merely a slap on the wrist. It is not fair to those we have punished in the past for no more serious violations.

I respectfully dissent from the majority opinion.

LANA KOEPF, ADMINISTRATRIX OF THE ESTATE OF SCOTT EDWARD KOEPF, DECEASED, APPELLANT, V. COUNTY OF YORK, STATE OF NEBRASKA, APPELLEE.

251 N. W. 2d 866

Filed March, 23, 1977. No. 40576.

1. **Political Subdivisions: Torts: Immunity.** The liability of a political subdivision under the Political Subdivisions Tort Claims Act consists of such liability as would exist in a private person or corporation without that immunity.
2. **Public Officers and Employees: Prosecuting Attorneys: Immunity: Infants.** A public prosecutor when acting in the general scope of his official authority in making a determination whether to file a juvenile court petition is exercising a quasi-judicial function and is immune from suit for an erroneous or negligent determination when he acts in good faith.
3. **Public Officers and Employees: Immunity.** A ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it.
4. **Political Subdivisions: Torts: Public Officers and Employees: Infants.** The decisions of a county welfare department for the maintenance, care, or supervision of a dependent child, or in connection with the child's placement in a particular home, may entail the exercise of discretion in a literal sense, but such decisions do not achieve the level of basic policy decisions and do not fall within the discretionary-function exception as stated in section 23-2409, R. R. S. 1943, of the Political Subdivisions Tort Claims Act.
5. **Political Subdivisions: Torts: Trial.** Under the Political Subdivisions Tort Claims Act, the findings of the District Court will not be disturbed on appeal unless they are clearly wrong.
6. **Trial: Evidence: Judgments.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can be reasonably deduced from it.

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

Vestecka & Gorham and Dennis C. Tegtmeier, for appellant.

James M. Bausch of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

WHITE, C. THOMAS, J.

Lana Koepf, administratrix of the estate of Scott Edward Koepf, deceased, brought this action in the District Court for the wrongful death of a minor child, Scott Edward Koepf, against the defendant County of York under the provisions of the Political Subdivisions Tort Claims Act. §§ 23-2401 to 23-2420, R. R. S. 1943. Actions under the Political Subdivisions Tort Claims Act are triable to the court without a jury. At the conclusion of all the evidence in the case, the trial court entered judgment for the defendant. Plaintiff appeals.

On December 7, 1971, the county attorney of York County, Nebraska, filed a petition in the juvenile department in the county court of York County alleging that Scott was a neglected child within the meaning of the juvenile laws of the State of Nebraska. The petition alleges that Scott was born on November 28, 1970, the illegitimate son of the administratrix. The petition prayed that the county court inquire into the alleged neglect of Scott and make such order as might be required. On the filing of the petition, the county judge, Judge Hermann Glock, entered an order directing that the child be taken from the custody of the administratrix by the sheriff and placed in the custody of the York County welfare department, "until such time as the matter is heard." A summons was issued at the same time setting the matter for hearing on the 23rd day of December 1971, at 2 p.m. Pursuant to the order, the sheriff went to the York apartment of Lana Koepf and there took custody of Scott and delivered him to the welfare department of York County. On December 23, 1971, Lana appeared but the matter was continued by Judge Glock until January 4, 1972. On January 4 the hearing was held. The court ordered that the matter be continued until February 8 at 2 p.m. for final determination and further ordered that

the care and custody of Scott be continued in the York County welfare department.

At the time of the placement of Scott with the welfare department, Mrs. Cecelia Grosse, a caseworker, was in charge of the office. The director of welfare was ill at the time. Scott was placed by the welfare department in the home of a Mrs. Thelma Sitzman of York, Nebraska, and remained in her custody until January 21, 1972, when Scott was brought to the York County Hospital. Shortly after his arrival at the hospital he was pronounced dead. The autopsy report found that "death is attributed to subdural and subarchnold hemorrhage with associated cerebral edema. Multiple zones of ecchymosis are noted in the skin of the body, particularly on the face. Thirty-six areas of ecchymosis were noted in the skin of the face alone. There was severe laceration of the mucous membrane of the mouth involving the upper lip and maxillary mucosa in the region of the right central incisor tooth. The pulmonary edema and congestion is considerable (sic) terminal." The evidence establishes that Scott died of the results of severe physical injuries.

The plaintiff alleges that the judge, county attorney, and the sheriff were negligent in removing Scott from Lana's custody on December 7, 1971. It is further alleged that the welfare department was negligent in the selection of Mrs. Thelma Sitzman as a foster parent in (1) not requiring that Mrs. Sitzman be examined by a physician prior to placing Scott in the Sitzman home, (2) not inquiring as to Mrs. Sitzman's attitude toward corporal punishment prior to placing Scott in the Sitzman home, and (3) leaving Scott in the Sitzmans' home after having received complaints about Mrs. Sitzman.

The Political Subdivisions Tort Claims Act, section 23-2401, R. R. S. 1943, removes, to at least a partial extent, the traditional immunity of subdivisions for the negligent acts of their employees and officers.

The question regarding judge's liability has been long settled and clearly established. As a general rule, judges are immune from civil actions for damages for acts performed in the course of their official functions and judicial capacity. Rhodes v. Houston, 202 F. Supp. 624 (D.C. Neb., 1962); Santa Clara v. County of Santa Clara, 1 Cal. App. 3d 493, 81 Cal. Rptr. 643. An exception to the rule of judicial immunity exists. It is founded upon proof that a judge acted in the clear absence of all jurisdiction and where such jurisdictional deficiency was known by the judge when he acted.

The plaintiff does not challenge the good faith of the judge, nor does she offer any evidence in support of such a claim. Rather, she acknowledges jurisdiction by her pleadings. The judge's immunity is patent.

A county attorney "having knowledge of a child in his county who appears to be a child as described in subdivision (1), (2), (3), or (4) of section 43-202 may file with the clerk of the court having jurisdiction in the matter, a petition in writing, setting forth the facts verified by affidavit." § 43-205, R. S. Supp., 1976.

Section 43-202(2), R. S. Supp., 1976, grants exclusive original jurisdiction to county courts or separate juvenile courts of any child under the age of 18 years "whose parent * * * neglects * * * to provide proper or necessary * * * care necessary for the health, morals, or well-being of such child" or "who is in a situation * * * dangerous to life or limb or injurious to the health or morals of such child."

Section 43-206(5), R. S. Supp., 1976, states: "If it appears that the child is in such condition or surroundings * * * the judge may * * * order the officer serving it (summons) to take the child into custody at once."

The information that led to the filing of the petition in the juvenile department in the county court of York County was provided to the county attorney by the

grandmother and aunt of Scott, the plaintiff's mother and sister.

The liability of a political subdivision under the Political Subdivisions Tort Claims Act is not an absolute liability, but consists of such liability as would exist in a private person or corporation without that immunity. § 23-2402, R. R. S. 1943.

Quite apart from the record which fails to disclose any failure by the county attorney to comply with the provisions of sections 43-201 et seq., R. S. Supp., 1976, we are here faced with an assertion of liability of a county where the officer himself is immune.

In Koch v. Grimminger, 192 Neb. 706, 223 N. W. 2d 833, we stated: "* * * that a public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial * * * function and that where he acts in good faith he is immune from suit for an erroneous or negligent determination."

The plaintiff does not allege that the prosecutor did not act in good faith nor does plaintiff attempt to so prove. The county attorney is personally immune. Strong reasons of policy exist to cloak a prosecutor with such immunity.

"A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant will often transform his resentment at being prosecuted into the ascription of improper and malicious actions of the State's advocate. * * * Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." Imbler v. Pachtman,

424 U. S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

The policy which necessitates the immunity from suit for a prosecutor necessarily requires a similar and possibly extended immunity for the political subdivision of whom the prosecutor may be an employee or officer. If it can be said that the public interest requires a prosecutor not to be constrained in the conduct of the affairs of his office, by threat of suit, then neither should that constraint be placed on the subdivision which hires him or of which he is an officer.

We hold that the Political Subdivisions Tort Claims Act does not extend liability to a subdivision of this state for alleged negligent action of the county attorney in the filing of juvenile petitions.

Similar and equally convincing arguments exist that the sheriff is also immune. A ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it. See Atwood v. Atwater, 43 Neb. 147, 61 N. W. 574 (1895). The sheriff's act was ministerial in character. He is immune from liability for carrying out those acts. The county of York, of which the sheriff is an officer, is likewise immune for the same reasons set forth above.

Defendant York County asserts that it is immune from suit for alleged negligent acts of the welfare department on two grounds both founded on section 23-2409, R. R. S. 1943: (1) That the claim of the plaintiff arises out of assault and battery; and (2) that the acts of the welfare department are claims based on the exercise or nonexercise of a discretionary function.

The first assertion is demonstrably erroneous. Plaintiff's allegation is not based upon the alleged assault by the foster mother. Instead, it is based upon the alleged negligence of the welfare department in the selection and supervision of the foster home.

The second assertion is also without merit. The "discretionary function" provision has been the sub-

ject of considerable litigation as to which acts of government are discretionary and which are not.

It seems to us that the better rule and one that should be adopted in this state is one that suggests that the discretionary-function exemption extends only to the basic policy decisions and not to ministerial acts arising therefrom. See Indian Towing Co. v. United States, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

In Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27, a minor plaintiff, through her guardian ad litem, brought suit for personal injuries from battering by the operators of a boarding home for neglected and dependent children. The home had been investigated and approved by the defendant State Department of Social Welfare. Defendant demurred on the grounds that the acts of investigation, placement, and supervision were "discretionary acts" and therefore exempt. The provisions of California Government Code section 820.2 provide "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him," regardless of whether the discretion was abused. Section 815.2, Cal. Gov. Code, provides that where the public employee is immune, the public entity is also immune. The trial court sustained the demurrer and the Court of Appeals reversed. The fifth headnote in the case reads: "Decisions for the maintenance, care or supervision of a dependent child, or in connection with the child's placement in a particular home, may entail the exercise of discretion in a literal sense, but such determinations do not achieve the level of basic policy decision and thus do not, under Gov. Code, § 820.2, preclude judicial inquiry into whether negligence of public employees was involved and whether such negligence caused or contributed to injuries received by the child in a boarding home."

The placement in foster homes of defenseless chil-

dren, and the supervision of their health and care, once committed to the custody of the welfare department must be accomplished with the reasonable care commensurate with the circumstances. We hold that a political subdivision of this state can be held liable for a breach of that duty.

In reviewing the decision of the trial court, the following rules are applicable. Under the Political Subdivisions Tort Claims Act, the findings of a District Court under the act will not be disturbed on appeal unless they are clearly wrong. See, Daniels v. Andersen, 195 Neb. 95, 237 N. W. 2d 397 (1975); Buttner v. Omaha P. P. Dist., 193 Neb. 515, 227 N. W. 2d 862 (1975). In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from it. See, Daniels v. Andersen, *supra;* Palmer v. Dorn, 196 Neb. 360, 243 N. W. 2d 57 (1976).

In December 1967 the York County department of welfare prepared a foster-home study of the home of Everette and Thelma Sitzman. The study disclosed that Everette Sitzman was partially disabled and a high school graduate. Thelma Sitzman had completed the ninth grade. The Sitzmans had three children who were average students. Due to medical problems and Everette Sitzman's disability, the Sitzmans were ADC recipients. The home was well kept and neat.

There are no published standards used by the welfare department to determine fitness of foster homes other than those of the State Department of Public Welfare. These standards are used by the department to license state foster homes where the children of more than one set of parents reside. The outline was used in the preparation of the Sitzman home study. The Sitzman study, although not extensive, did not in-

dicate any negative attitudes toward children. It did not disclose the Sitzmans' attitude toward corporal punishment.

The Sitzman home was approved for foster-home care and thereafter two children were placed in the home. An 18-month-old boy was in the home from January 11, 1968, to February 26, 1968, and a 6-month-old boy from August 24, 1971, to September 23, 1971. In each case the child did well, improving markedly in health and alertness during the foster-home care. No further foster-home study was made on the Sitzman home.

The director of the welfare department testified that the Sitzmans were, in her opinion, on December 7, 1971, proper foster parents. This opinion was based on the knowledge of the welfare department on home visits from 1966, the foster-home study, and the favorable experience of the two children placed in the home. The welfare director testified that it was not unusual to have unfavorable comments made by members of the public as to selected foster parents and that in nearly all cases of placement, one or more telephone calls would be received concerning the fitness of foster parents by the department.

The first information unfavorable to Mrs. Sitzman came from her sister in February 1968. The sister, Mrs. Joan Sanders, and her daughter, Jennie Emken, told the welfare director that they did not agree with the way in which the foster child then in the home was being cared for. Mrs. Speece, the welfare director, did not rely on that statement as the experience of the department was to the contrary. Mrs. Emken at this same time was interested in foster-home care. After the foster child was returned to his parents, the parents called Mrs. Sitzman as a babysitter.

The next occasion was in August 1971. Again the informant was Jennie Emken. At this visit Mrs. Speece was told that the foster child then in the Sitzman home was not receiving good care and that, in

Mrs. Emken's opinion, Mrs. Sitzman was not emotionally stable. Mrs. Emken again requested consideration for foster-home care. This statement was not credited by Mrs. Grosse, the caseworker. The observation of the child indicated he was receiving adequate care. Mrs. Emken's remarks were attributed to jealousy.

In December 1971 or early January 1972, the caseworker Cecelia Grosse received a call from Mrs. Sanders to tell Mrs. Grosse that Mrs. Sitzman's nerves were bad and that "she does not take proper care of Scottie." Later that same date, the child's grandmother called and informed Mrs. Grosse that in checking around she felt that Mrs. Sitzman was a good person to have Scott. Later on the same day Mrs. Sitzman called the worker to report calls and complaints from the mother and grandmother. Mrs. Sitzman was crying at the time. During the period of time Scott was in the Sitzman home, the caseworker saw him seven times, five times in the home and twice outside the home. She discovered nothing unusual about Scott nor did she notice any bruises or marks.

During the time she had Scott in her home, Mrs. Sitzman was taking seven prescriptive drugs from three separate physicians. The expert testimony suggests the results could have been psychological depression and mental confusion.

The plaintiff testified that at the January 4, 1972, hearing Scott showed bruise marks on his body. This testimony was not verified nor were the bruises noticed by any others at the hearing.

The plaintiff here suggests that the trial court's finding is clearly wrong; that the selection of the foster parents and their supervision was performed negligently; and that the negligence of the welfare department was the proximate cause of Scott's injuries and death.

The most that can be said is that a factual question

was presented. Under our standard of review, the judgment must be affirmed since the trial court's determination was not clearly wrong.

AFFIRMED.

ROSE E. ARKFELD ET AL., APPELLEES, V. JOHN VOLK, APPELLANT, IMPLEADED WITH COUNTY OF MADISON, APPELLEE.

251 N. W. 2d 720

Filed March 23, 1977. No. 40603.

1. **Property: Waters: Damages: Statutes.** Even though a landowner does not come under the protection of section 31-201, R. R. S. 1943, he may drain off his impounded waters so long as he does not damage or threaten others.
2. **Injunction: Damages: Proof.** In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief.

Appeal from the District Court for Madison County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Mueting, DeLay & Spittler, for appellant.

Kirby, Duggan & McConnell, for appellees Arkfeld.

Daniel B. Flood, for appellee County of Madison.

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

COADY, District Judge.

This is an action for an injunction involving the course of drainage of impounded surface waters. The trial court enjoined John Volk and the County of Madison from allowing such water to drain through a county road ditch and required defendants to restore an excavation. Defendant Volk appeals.

John Volk is a defendant and owner of a leasehold estate in the north one-half of the northwest quarter of Section 3, Township 23 North, Range 3 West of the

6th P.M., Madison County, Nebraska. At the east end of that property there is a natural depression so that after a heavy rain 8 to 10 acres will retain a foot of standing water. There is no natural drain except for seepage and evaporation. The standing water seeps into and runs through a tile drain to a point in a ditch under a bridge ½ mile away. The bridge is located on the county road which separates Sections 2 and 3 and is due east of the southeast corner of defendant Volk's property. The tile system will drain the depression in a week. The plaintiffs do not complain about water drained through the tile or received in a diffused state.

The bill of exceptions indicates that plaintiffs own most of Section 2 except the south one-half of the southeast quarter. The pleadings indicate plaintiffs claim that their property in the south one-half and the east one-half of the northeast quarter are subject to damage. The north one-half and the south one-half of this section are separated by a manmade ditch which is 14 feet deep and 20 feet wide. This ditch was constructed prior to 1916 and runs from the west line of Section 2 straight east into Section 1 and Battle Creek. Nearly all the fields in this section are drained through tile systems into this large ditch. Prior to the construction of this ditch, the section was described as an impassable swamp.

Section 2 has a second manmade ditch beginning at the aforementioned county road bridge. This ditch runs easterly ¼ mile and then ¼ mile south to the half-mile line ditch. This east-south ditch was described as being 6 to 8 feet deep and 16 feet wide. The evidence indicates that these two ditches drain at least four sections, and maybe six, including all of Section 2. It is clear that these ditches do not drain Volk's impounded water except for those waters which are delivered by his tile system at the bridge site.

In 1973, Volk deepened a county road ditch for a

distance of 500 to 800 feet beginning at the northeast corner of his property in an easterly direction through a small or slight ridge. He increased the ditch' depth by 2 feet so that it is now a 4 or 5 foot cut. The evidence does show that Volk's water will travel or drain through the road ditch ½ mile to the northeast corner of Section 3, then turn right and run ¼ mile south through the road ditch to the bridge, where the water will join that deposited in plaintiffs' ditch by Volk's tile system.

Volk does not come under the protection of section 31-201, R. R. S. 1943, but any landowner may drain off his impounded waters so long as he does not damage or threaten others. Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73; Nickerson Township v. Adams, 185 Neb. 31, 173 N. W. 2d 387. In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief. A court of equity will not grant injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief. Muff v. Mahloch Farms Co., Inc., *supra*.

All the plaintiffs admit that no damages have been sustained as of the time of trial. In 1972, Volk had pumped his standing water over the ridge and into the road ditch without damage. Volk testified that there had been a 4½ inch rain on July 20, 1975, and that his water did not go as far as the northeast corner of Section 3. The witnesses testified, and a geological survey map substantiates, that Sections 2 and 3 are very flat. High water in Section 2 usually lasts 2 days. Volk's water will travel some distance and turn at right angles. There is no evidence that the trial judge made any personal inspection of the premises.

Plaintiffs' complaints concern a known volume of water, 10 acres times 1 foot, which is not substantial when compared to the waters their properties al-

ready suffer. There is wisdom in the national slogan, "Every litter bit hurts," but we would hardly advise substituting injunctions for other remedies against threatened violations of small scale. The likelihood of substantial damage added by reason of Volk's water traveling through the road ditch is insignificant.

The trial judge enjoined the defendants from diverting surface water onto plaintiffs' land by means of the roadside ditch and ordered defendants to restore the ditch elevation to the height of the ridge so that none of the subject water might escape. After closely reviewing the testimony of plaintiffs, we believe that they, and the trial judge, have concluded or anticipated that the County of Madison and John Volk, as well as Volk's immediate eastern neighbor whose land is bounded by the road ditch, will allow such ditch to deepen, alter its course, or become a roaring torrent. Believing that such conclusion or anticipation is unjustified, we reverse.

We acknowledge that the County of Madison did not appeal the decision of the trial court and ordinarily would be required to fill the ditch. Because such compliance would defeat defendant John Volk's appeal and our findings herein, we find that plaintiffs should be enjoined from filing any action or making any claim against Madison County which is grounded upon the failure of said county to comply with the aforementioned order and judgment of the District Court.

The judgment is reversed and the cause is remanded to the District Court for entry of a decree modified in accordance with this opinion. Costs are taxed to the appellees Rose E. Arkfeld, E. F. Bierman, and Robert F. Tiedgen and Mary J. Tiedgen, husband and wife.

REVERSED AND REMANDED WITH DIRECTIONS.

STEEL CONTAINERS, INC., A CORPORATION, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE.

251 N. W. 2d 669

Filed March 23, 1977. No. 40657.

1. **Political Subdivisions: Torts: Judgments: Trial.** On an appeal of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong.
2. **Public Utilities: Electricity: Negligence: Evidence: Trial.** Evidence of custom and usage in the electrical power industry is pertinent on the question of negligence and it, together with all other facts and circumstances of the case, presents a question for the determination of the trier of facts as to whether or not due care was used.

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

John R. Barton of Crossman, Barton & Norris, for appellant.

Stephen G. Olson of Fraser, Stryker, Veach, Vaughn & Meusey, for appellee.

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

HASTINGS, District Judge.

This is an action for damages brought against the defendant, Omaha Public Power District, a public corporation, for its alleged negligence in requiring electrical service to plaintiff's business of greater capacity than was later determined to be necessary. The case was tried to the court without a jury as is mandated by the Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943, and was dismissed for the reason "that the plaintiff has failed to produce any evidence of negligence on the part of the Omaha Public Power District which was the proximate cause of any of the plaintiff's damage."

In December of 1971, plaintiff corporation leased the Jadatom Building in the City of Omaha to install a pail factory. Part of the equipment moved into the building was a 250 KVA welding machine. This particular welder previously had been operated in Portland, Oregon, on one leg of a three phase electrical service of unknown capacity. A question arose in the mind of plaintiff's president as to the electrical service capacity at the Jadatom Building which was served by three 50 KVA transformers providing 480 volt three phase service, and defendant was called for advice. The only information considered by defendant's employees was the name plate rating on the welder itself and, from that information, it was determined that it would be necessary to isolate the welder onto a single phase line with additional transformer capacity. Because the cost of rewiring and the minimum monthly energy charge required by the defendant would make the contemplated operation economically unfeasible, the plaintiff rescinded the lease, made a settlement with the landlord, and moved the production equipment into its own building on North 11th Street. The same service requirements and minimum monthly energy charge were made by the defendant at that location to which plaintiff acceded.

Defendant steadfastly refused to consider the proposed use to be made of the welding machine by the plaintiff, which was claimed to be well below its name plate capacity, and refused or at least neglected to run any capacity tests with the welder hooked up to anything but the required single phase service. Its position was that it had not only an obligation to plaintiff, but to others of its customers who might be adversely affected by plaintiff's use of insufficient power capability as well as to itself in the safeguarding of its own equipment. This obligation, it insisted, was to provide facilities which would handle the maximum rated capacity of the welder

because there was no way that it could be guaranteed that the machine would not be used in that manner.

After several months of operation, plaintiff again complained about the high cost of its monthly minimum energy charge and requested the defendant to make a test of its power requirements as the plant was then being operated. Such a test was run and it was determined that the original three phase service in either the Jadatom Building or the North 11th Street Building would have handled the welder in the manner that it was then being utilized. Accordingly, the single phase service was removed and the monthly minimum energy charge discontinued. Plaintiff in this action seeks to recover its expenses in moving from the Jadatom Building, the cost of installing and removing the one phase service, and the difference between the minimum monthly charges paid and the charges for the actual energy used.

Plaintiff's witnesses would tend to prove that by assuming the gauge of metal to be welded and the speed at which it was to be welded, the kilowatt utilization or power requirements of the welder could be determined by employing various charts and engineering formulas without the necessity of actually hooking up the machine.

From the evidence adduced by defendant, the court could find that it was the plaintiff which had called in defendant to assure plaintiff that the power capacity was adequate; that if plaintiff had taken it on itself to assume the risk of hooking up and operating the welder on one leg of the existing three phase service and then had run its own test which showed it operated within the existing service capabilities, plaintiff would have been permitted to utilize the existing service. An electrical engineer for the contractor who originally wired the Jadatom Building and who was doing the wiring work for plaintiff in that building, testified that he would not recommend

connecting a 250 KVA welder to the existing service, and agreed with the single phase requirement. He also gave as his opinion that in dealing with electrical equipment and capacity requirements it is normal practice to abide by the name plate rating.

Personnel of the defendant company as well as the distribution engineer for the Board of Public Utilities of Kansas City, Kansas, testified that it is normal industry practice to provide service for the maximum name plate capacity of the equipment being used.

Defendant contends that it followed industry standards, and therefore was not negligent, suggesting that if it had provided facilities of insufficient power capacity and damage had occurred, it would have been liable.

Plaintiff insists that custom or standards of an industry cannot excuse the failure to use ordinary care under the particular circumstances. The problem with this position is that plaintiff suggests no definitive alternative standards. It cites Hiers v. South Carolina Power Co., 198 So. C. 280, 17 S. E. 2d 698, as supporting the proposition that a power company which failed to furnish adequate power for a customer's electric motor violated an implied duty "to furnish sufficient voltage" to reasonably take care of the use to which it knew the customer was going to make of the electric service. From that point it argues that a power company can be held liable for furnishing more than adequate power. But what is the standard? Plaintiff also cites Virginia Electric & Power Co. v. Carolina Peanut Co., 186 F. 2d 816, as follows: "While evidence of custom is pertinent on the question of negligence as tending to establish whether due care has been used under the circumstances of the case, it is not conclusive of the question, *which is one for the determination of the jury* where there is other evidence from which the jury could properly conclude that ordinary care

was not used. Custom cannot excuse the failure to use ordinary care." (Emphasis supplied.)

In Buttner v. Omaha P. P. Dist., 193 Neb. 515, 227 N. W. 2d 862 (1975), this court stated as follows: "The failure of plaintiffs to establish by a preponderance of the evidence the amount of current flowing from the downed conductor was fatal to their contentions. They failed to prove to the satisfaction of the trial court that a proximate cause of the fire was the absence of the fuse or the setting of the relays as the court may well have found from the evidence that the fire would have resulted even had the precautions plaintiffs advocated been taken. *Furthermore, the court could reasonably have found that the setting of the relays and the failure to fuse the tap were not in violation of industry standards and did not constitute negligence.*" (Emphasis supplied.)

Section 23-2406, R. R. S. 1943, provides that actions of this kind "shall be heard and determined by the appropriate court without a jury." Interpreting this section, this court in Buttner v. Omaha P. P. Dist., *supra,* stated: "As we have heretofore held: 'On an appeal to this court of an action under the State Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong.' (Citations omitted)."

Evidence of custom and usage in the electrical power industry is pertinent on the question of negligence and it, together with all other facts and circumstances of the case, presents a question for the determination of the trier of facts as to whether or not due care was used. That question having been determined by the trial court contrary to plaintiff's contention, and no error being apparent from an examination of the record, the judgment is affirmed.

AFFIRMED.

DELORES E. HRABIK, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF MICHAELA ANN SHEA, DECEASED, APPELLANT, V. JAMES E. GOTTSCH ET AL., APPELLEES.

251 N. W. 2d 672

Filed March 23, 1977. No. 40813.

1. **Trial: Evidence.** Where the evidence is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than submit it to the jury.
2. **Pedestrians: Highways: Negligence.** One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar recovery as a matter of law.
3. _____: _____: _____. A pedestrian who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger.
4. **Pedestrians: Motor Vehicles: Negligence.** One who sees or could have seen the approach of a moving vehicle in close proximity to him, who suddenly moves from a place of safety into the path of such vehicle and is struck, is guilty of contributory negligence more than slight as a matter of law.

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

Frank Matthews of Matthews, Kelley, Cannon & Carpenter, for appellant.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, for appellees.

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

MCCOWN, J.

This is an action for wrongful death resulting from a car-pedestrian accident. The District Court sustained a motion to dismiss at the conclusion of plaintiff's evidence and plaintiff has appealed.

At about 12:45 a.m., January 20, 1973, the 14-year-old daughter of the plaintiff and two companions were crossing Military Avenue on foot at a point near Fort Street in the outskirts of Omaha, Nebraska, when they were struck by a car driven by de-

fendant. Plaintiff's daughter and one of her companions were killed.

Military Avenue is a controlled access four-lane highway running northwest to southeast. The two westbound traffic lanes, each 13 feet wide, are divided from the eastbound traffic lanes by a 14-foot concrete median. The median narrows a short distance east of the place of the accident to form a 10-foot left-turn lane for westbound traffic turning southwest to Fort Street. Fort Street intersects Military Avenue at an angle from the southwest and terminates. The weather on the night of the accident was clear. The pavement was dry, straight, and level, and the temperature was 33 degrees. The area was dark. The posted speed limit was 50 miles per hour. The pedestrians were wearing dark clothing except that plaintiff's decedent was wearing a yellow top.

Plaintiff's decedent and a girl friend were helping a boy to cross Military Avenue from south to north at a point some distance east of Fort Street and between intersections. They were supporting him between them and he was dragging his feet. They proceeded slowly across the eastbound lanes. The driver of an eastbound car did not see them until they were in the middle of her lane and she was forced to stop suddenly to avoid hitting them. The pedestrians proceeded in front of the car and onto the median without looking at the car. When the three pedestrians crossed the median there were two cars approaching in the westbound lanes somewhat less than a block away. One of the cars was in the inside lane preparing to turn into the left-turn lane. The defendant's car was in the outside lane. A passenger in the car in the inside lane testified that when the car was about 250 or 300 feet away, he looked up and saw the pedestrians on the median. He did not recall whether the pedestrians looked for oncoming traffic or not. The pedestrians proceeded

across the left-turn lane and into the inside westbound lane. The car in which the passenger was riding proceeded into the left-turn lane and passed behind the pedestrians. The pedestrians crossed the inside lane and continued into the outside lane and were struck by the defendant's automobile a few feet from the north edge of the pavement. The defendant said that he did not see the pedestrians until they were right in front of him, and that he was traveling 40 miles per hour. He put on his brakes just before the impact and left 123 feet of skidmarks. Plaintiff's decedent was dead on arrival at the hospital.

The defendant denied any negligence on his part and alleged that the plaintiff's decedent was guilty of contributory negligence more than slight. At trial plaintiff attempted to introduce evidence by an accident reconstruction expert that the defendant was exceeding the posted speed limit and was going at least 52.4 miles per hour at the time of the accident. The reconstruction was done 3 years after the accident on the basis of police photographs taken on the night of the accident. That evidence was objected to and the objection was sustained.

The evidence was that the defendant had had two beers at about 8 p.m. A breathalyzer test approximately 2 hours after the accident showed a blood alcohol level of .0125. The plaintiff attempted to introduce evidence from a toxicologist that an average male weighing 150 pounds would have had a probable blood alcohol level of .05 at the time of the accident to have had a .0125 blood alcohol level 2 hours later, and that it would have taken five beers at 8 p.m., to have produced the .05 level. The evidence of the toxicologist was objected to and that objection was also sustained.

At the conclusion of plaintiff's evidence, the defendant moved for dismissal and the court sustained that motion.

The critical issue on appeal is whether or not the conduct of plaintiff's decedent constituted contributory negligence more than slight and bars recovery as a matter of law. Where the evidence is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than submit it to the jury. Hoefer v. Marinan, 195 Neb. 477, 238 N. W. 2d 900. Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, and where there is a conflict in the evidence, such issues must be submitted to the jury. Hansen v. Hasenkamp, 192 Neb. 530, 223 N. W. 2d 44.

Certain principles are particularly applicable in the case of pedestrian accidents. One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar recovery as a matter of law. A pedestrian who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. Merritt v. Reed, 186 Neb. 561, 185 N. W. 2d 261. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery. Lileikis v. Kudirka, 180 Neb. 742, 145 N. W. 2d 441; Blum v. Brichacek, 191 Neb. 457, 215 N. W. 2d 888. In the case now before us, the night was clear, the area was dark, and the highway was straight and level. The evidence is undisputable that if plaintiff's decedent had looked prior to leaving the place of safety in the median or anytime thereafter, she could and should have seen the headlights of defendant's approaching vehicle.

We have consistently held that when a pedestrian crosses a street between intersections without look-

ing at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, and proceeds regardless of that fact, the situation ordinarily presents a question for the court. Where the pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented. Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64.

Where a motion to dismiss has been sustained, the facts must be viewed in the light most favorable to the plaintiff. See Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56. In the case before us there is no testimony that plaintiff's decedent looked at any time, but there is testimony that at some times during the crossing she was not looking. In any event, the evidence is uncontradicted that she was not keeping a constant lookout for her safety during the crossing. Even if it might be said that plaintiff's decedent may have looked, the evidence is then clear that she moved from a place of safety into the path of an approaching vehicle. In either event, she was guilty of contributory negligence more than slight as a matter of law.

In view of the disposition made it is unnecessary to consider the assignments of error directed to the expert testimony. Even if admitted and considered in the light most favorable to the plaintiff, that evidence would not change the result here.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY KOHOUT, APPELLANT.

251 N. W. 2d 723

Filed March 23, 1977. No. 40819.

1. **Criminal Law: Wiretaps: Searches and Seizures.** Any aggrieved

person may move to suppress the contents of any intercepted wire or oral communication, or the evidence derived therefrom, on the grounds the communication was unlawfully intercepted, the order of authorization was insufficient on its face, or the interception was not made in conformity with the order.

2. **Criminal Law: Searches and Seizures: Evidence: Burden of Proof.** A movant who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of proof to show that the warrant was invalid.
3. **Criminal Law: Statutes: Courts: Wiretaps: Reports.** The statutory provision concerning progress reports is permissive and whether such reports shall be required is within the discretion of the judge authorizing the wiretap.
4. **Criminal Law: Evidence: Trial.** No evidence shall be suppressed because of technical irregularities not affecting the substantial rights of the accused.

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

Kirk E. Naylor, Jr., of Naylor & Keefe, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

BOSLAUGH, J.

The defendant, Jeffrey Kohout, was convicted of unlawful possession of amphetamines and sentenced to 1 year probation which included 30 days imprisonment in the county jail. He has appealed and contends the trial court erred in overruling his motion to suppress evidence which was seized during a search of the residence where he lived.

The search was made pursuant to a warrant. The affidavit upon which the warrant was issued was based upon information obtained through wiretaps upon one or two telephones. The record does not identify which telephones were involved in the conversations.

An order authorizing a wiretap on telephone num-

ber 483-1844 located at 7000 Shamrock Road in Lincoln, Nebraska, was obtained on October 25, 1974. An extension of this order was obtained on November 27, 1974. The record contains an application for a wiretap on a second telephone at the same address, number 483-1700, dated November 19, 1974.

The affidavit for the search warrant was based upon information obtained from conversations intercepted within 2 days of December 4, 1974. The affidavit was filed on December 4, 1974, and the warrant was issued on that date. A search of the premises on the same day resulted in the seizure of a bag containing a quantity of amphetamine tablets and a business card of the defendant which were found in a room occupied by the defendant. There is no contention that the evidence was insufficient to support the finding of guilty.

The defendant's theory of the case is that the search was illegal because the information which was used to obtain the warrant was obtained through illegal wiretaps. Section 86-705(9), R. R. S. 1943, provides that any aggrieved person may move to suppress the contents of any intercepted wire or oral communication, "or evidence derived therefrom," on the grounds the communication was unlawfully intercepted, the order of authorization was insufficient on its face, or the interception was not made in conformity with the order.

The motion to suppress was submitted upon a stipulation made in open court. The stipulation provided that all the applications, affidavits, and court orders for the wiretaps were contained in two large envelopes marked exhibit 3 and exhibit 4, and that the conversations were intercepted "pursuant to the wiretap authorizations" contained in the exhibits.

The envelopes contained the application dated November 27, 1974, for an extension of authority to intercept wire and oral communications on telephone number 483-1844, and the order authorizing the ex-

tension for a period of not to exceed 30 days from November 24, 1974; and an application and affidavit dated November 19, 1974, for authority to intercept wire and oral communications on telephone number 483-1700. By a stipulation filed in this court, pursuant to Rule 7e, Revised Rules of the Supreme Court, 1974, the parties have supplied copies of the application, affidavit, and order dated October 25, 1974, authorizing the wiretap on telephone number 483-1844. The following writing appears on the outside of the envelope which is exhibit 3: "11-19-74-Order re Wire Communications William D. Blue, District Judge." However, no order authorizing a wiretap on telephone number 483-1700 appears in the record.

In the absence of an order authorizing a wiretap on telephone number 483-1700, any interception of messages over that line would be illegal. The problem in this case is that the record does not show any of the conversations referred to in the affidavit for the search warrant were intercepted through a wiretap on telephone number 483-1700, and the stipulation provided all conversations were intercepted pursuant to the authorizations contained in exhibits 3 and 4. The burden of proof on a motion to suppress is generally on the movant if he claims a warrant regular on its face was invalid. See LeDent v. Wolff, 460 F. 2d 1001. The absence of an order authorizing a wiretap on telephone number 483-1700 does not establish that the conversations referred to in the affidavit for a search warrant were intercepted illegally.

The order of November 27, 1974, contained a provision for written reports to be made to the court at 5-day intervals showing that progress had been made toward the achievement of the authorized objective and the need for continued interception. A similar provision was included in the order of October 25,

1974. No such reports were ever submitted to Judge Blue who entered the orders.

The language of the statute concerning such reports is permissive. Section 86-705(6), R. R. S. 1943, provides the order may require such reports be made to the judge who issued the order at such intervals as the judge may require. Since this is a requirement that the judge may impose at his discretion, it is also within his discretion to waive the requirement or to determine what effect a failure to comply with the requirement should have. See United States v. Iannelli, 477 F. 2d 999, affirmed 420 U. S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616.

The application for an extension of the wiretap on telephone number 483-1844, made on November 27, 1974, was in part a report showing the progress that had been made toward the achievement of the authorized objective and a showing of the need for a continued interception. The order of November 27, 1974, extending the authorization for the wiretap on telephone number 483-1844 was not illegal because the State had not filed the 5-day reports required by the order of October 25, 1974.

The search warrant was issued on December 4, 1974, 7 days after the order of November 27, 1974, extended the authorization for the wiretap on telephone number 483-1844. According to the affidavit for the search warrant, the conversations referred to in the affidavit were intercepted within 2 days of December 4, 1974. It seems obvious that a report filed at or about that time would have reported substantial progress toward the achievement of the authorized objective and the need for continued interception. There is little or no likelihood that the authorization for the wiretap would have been terminated just before the raid took place. The fact that the State failed to file a report pursuant to the order of November 27, 1974, did not require the motion to suppress be sustained.

The defendant further contends the communications were unlawfully intercepted because the applications made on November 19, 1974, and on November 27, 1974, did not comply with the requirement of the statute that each application shall include: "A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; * * *".. § 86-705(1)(e), R. R. S. 1943.

The application of November 19, 1974, which sought authorization for a wiretap on telephone number 483-1700, made no reference to the application of October 25, 1974, and alleged affirmatively that the applicant knew of no previous applications. The application of November 27, 1974, for authority for an extension of the wiretap on telephone number 483-1844, stated that the original application was the only application known to the applicant which had been made to any judge for authorization to intercept communications to or from Jeffrey Kohout, Rick Taylor, Michael Hayes, and Jay Loisel. All applications were made by the same applicant. The orders of October 25, 1974, and November 27, 1974, were signed by Judge Blue.

The statement in the application of November 19, 1974, was obviously untrue. However, its effect upon an order authorizing a wiretap on telephone number 483-1700 need not be decided in the absence of evidence that any of the conversations in question were intercepted through a wiretap on that telephone.

The statement in the application of November 27, 1974, could be true only if the application of November 19, 1974, was never submitted. The State

relies on section 29-823, R. R. S. 1943, which provides in part: "No evidence shall be suppressed because of technical irregularities not affecting the substantial rights of the accused."

The failure to refer to the application of November 19, 1974, in the application of November 27, 1974, under the particular facts and circumstances of this case appears to be a technical irregularity not affecting any substantial right of the accused. We think it was within the discretion of the trial court to find that the motion to suppress should be overruled. See United States v. Civella, 533 F. 2d 1395.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, C. THOMAS, J., concurring.

I concur. While agreeing with the majority opinion, I find it necessary to distinguish United States v. Bellosi, 501 F. 2d 833 (D.C. Cir., 1974), from the current case. Federal statutes controlling judicial authorizations of wire interceptions are similar to Nebraska's in that both require disclosure of all previous applications for judicial authorization of interceptions involving the same person. The Bellosi case involved three successive wiretaps on the same person. The applications for the second and third interceptions did not disclose the first interception. The first and third interceptions were authorized by Judge Hart. The first was authorized on July 29, 1971, the third in January 1973. The second interception was authorized by Judge Greene. The Bellosi opinion ruled that the latter two interceptions were unlawful due to the failure of the applicant to disclose the first wiretap. The case at hand can be distinguished from the Bellosi case which was based upon the reasoning that a judge, in authorizing an interception, would need to know of any prior authorizations in order to properly decide if a new interception should be authorized. The second wiretap in Bellosi was authorized by a different judge than who

authorized the first interception. The first and third interceptions were authorized by the same judge 1½ years apart. In the current case, the interceptions were authorized by the same judge only 34 days apart. While there has been a technical violation of section 86-705, R. R. S. 1943, it is obvious that compliance with that section would not have provided the judge with any additional information not already known by him.

CLINTON, J., joins in this concurrence.

AMERICAN MOTORS SALES CORPORATION, A DELEWARE CORPORATION, APPELLANT, V. B. O. PERKINS, DOING BUSINESS AS PERKINS NEW & USED CARS, ET AL., APPELLEES.

251 N. W. 2d 727

Filed March 23, 1977. No. 40822.

1. **Pleadings: Statutes: Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it, and at the same time and in the same action question its constitutionality.
2. **Administrative Law: Motor Vehicles: Contracts: Pleadings: Evidence.** The decision of the Nebraska Motor Vehicle Industry Licensing Board was not supported by competent evidence. The record supports a determination that plaintiff proved that defendant failed to discharge his obligations under the franchise agreements in the particulars alleged by it.

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

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

Wagner & Johnson, Ginsburg, Rosenberg, Ginsburg & Krivosha, and Ronald Rosenberg, for appellee Perkins.

John R. Doyle, for appellee Nebraska Motor Vehicle Industry Licensing Board.

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

SPENCER, J.

This is an appeal from a determination that American Motors Sales Corporation, hereinafter referred to as AMSC, is required to continue the franchise of B. O. Perkins, doing business as Perkins New & Used Cars, of Columbus, Nebraska, beyond the termination date set out in the franchise agreement between the parties. We reverse.

AMSC alleges four assignments of error. (1) The Nebraska Motor Vehicle Industry Licensing Act, sections 60-1401.01 to 60-1435, R. R. S. 1943, as amended, is unconstitutional in that it unduly restricts the right of freedom to contract. (2) The membership composition of the Nebraska Motor Vehicle Industry Licensing Board constitutes a denial of due process. (3) The act is in direct conflict with the Federal Automobile Dealers Franchise Act, Title 15 U. S. C., sections 1221 to 1225. (4) The decision of the licensing board was not supported by competent evidence.

Perkins became a franchise dealer of American Motors automobiles in 1969, for a 6-month probationary period. In November of 1969, he was given another probationary period until May of 1970. In May of 1970, he was put on a standard 2-year franchise. This was renewed for an additional 2-year period with the franchise to terminate automatically on May 19, 1974. AMSC decided not to renew the franchise but to terminate it. In 1972, however, the Nebraska Motor Vehicle Industry Licensing Act, sections 60-1401.01 to 60-1435, R. R. S. 1943, required the approval of the Nebraska Motor Vehicle Industry Licensing Board before the termination or discontinuance of a franchise.

On July 24, 1974, AMSC filed its application with the licensing board pursuant to section 60-1424, R. R.

S. 1943, to terminate the franchise. It continued the franchise in effect pending the decision of the board.

In its application, AMSC alleged that Perkins failed to discharge his obligations under the franchise agreement in the following respects: (1) He failed to develop sales potential; (2) he failed to maintain a showroom for new vehicles; (3) he failed to provide an additional service stall; (4) he failed to employ even one salesman; (5) he failed to submit monthly financial statements; (6) he failed to stock sufficient new cars; (7) he failed to advertise and promote American Motors products; and (8) he failed to upgrade service equipment and the service department.

A hearing was held before the board on October 18, 1974. On March 27, 1975, the board entered an order finding it had jurisdiction and denied the application for failure of AMSC to establish good cause for termination, as required by section 60-1420, R. R. S. 1943.

Pursuant to section 84-917, R. R. S. 1943, AMSC petitioned the District Court for Lancaster County for judicial review. The Attorney General of the State of Nebraska and the Nebraska Motor Vehicle Industry Licensing Board were also made parties in the District Court. On March 31, 1976, the District Court entered an order affirming the decision of the licensing board. AMSC prosecutes this appeal from that order.

The act under consideration provides that before a manufacturer may discontinue or terminate a franchise or establish an additional franchise in the same community, the manufacturer must file an application with the Nebraska Motor Vehicle Industry Licensing Board. § 60-1424, R. R. S. 1943. The board is composed of the Director of Motor Vehicles, who is the chairman, and nine members. The nine members include three new motor vehicle dealers, two used motor vehicle dealers, one motorcycle

dealer, one trailer dealer or a combination motor vehicle and trailer dealer, one factory representative, and one member of the general public. § 60-1402, R. R. S. 1943. Of the nine members, seven are franchise holders.

A franchise may be terminated or discontinued only when the manufacturer proves good cause exists and shows that another franchise will become effective in the community unless the community will not support a franchise. § 60-1420, R. R. S. 1943. The manufacturer has the burden of proof on these issues. § 60-1427, R. R. S. 1943.

If the manufacturer is permitted to terminate or discontinue a franchise and is further permitted to withdraw from that community, it cannot later enter into a franchise in the community except upon a showing of a change in circumstances. § 60-1421, R. R. S. 1943.

To establish an additional dealership in a community, the manufacturer is required to demonstrate that there is good cause for the additional dealership, and further that it is in the public interest. § 60-1422, R. R. S. 1943.

Section 60-1429, R. R. S. 1943, provides that the following are not good cause for the termination or discontinuance of a franchise or the establishment of an additional franchise: (1) The manufacturer's desire for further sales penetration of the market; (2) change of ownership or executive management of a dealership unless the manufacturer proves substantial detriment to the distribution of its products in the community; and (3) the refusal to purchase or accept delivery of products or services not ordered by the franchisee.

In determining whether good cause has been shown for the termination or discontinuance of a franchise the board is to consider the amount of business transacted by the franchisee; the investment made by the franchisee and the permanency of

the investment; whether disruption of the business of the franchisee would be injurious to the public welfare; whether the franchisee has adequate service facilities, equipment, parts, and qualified service personnel; whether the franchisee refuses to honor the manufacturer's warranties; and the failure of the franchisee to substantially comply with the requirements of the manufacturer which the board finds reasonable and material or bad faith of the franchisee in complying with such requirements. § 60-1433, R.R.S. 1943.

AMSC in its first two assignments attacks the validity of the act. This action was initiated by AMSC. True, the law requires a manufacturer desiring to terminate a franchise to file an application with the board for that purpose. Two courses of procedure were open to AMSC. It could have directly contested the constitutionality of the act in the courts, or it could have invoked the jurisdiction of the board under the act. It adopted the latter procedure.

While there may be serious questions about the franchise termination portions of the act, under our law it is not before us. AMSC, having invoked the jurisdiction of the board, could not reserve the constitutional issue and proceed with the action. We have repeatedly held that a litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it, and at the same time and in the same action question its constitutionality. State v. Wells, 197 Neb. 584, 249 N. W. 2d 904 (1977).

We next consider appellant's fourth assignment, which we believe is determinative of the question herein. The decision of the licensing board was not supported by competent evidence. The record is conclusive. Perkins has never met the terms of the franchise agreement. The record supports a determination that AMSC proved Perkins failed to dis-

charge his obligations under the franchise agreements in the particulars alleged by it.

It is undisputed that Perkins was and is a very successful used car dealer. He has failed, however, to develop his sales potential as a new car dealer. Considering the criteria set out in section 60-1433, R. R. S. 1943, the board should have sustained the application of AMSC.

The record does not indicate that Perkins changed his facilities in any way to conduct a new car operation, or materially increased his investment to do so. This seems to have been one of the major points of contention between the parties. Perkins has never maintained a showroom for new vehicles. He has failed to provide an additional service stall. He has never employed a new car salesman. He has failed to submit monthly financial statements. He does not stock sufficient new cars to promote the operation of the franchise. He has failed to advertise the American Motors products. He has taken no steps to upgrade his service equipment or his service department. He has failed or refused to stock necessary tools for the newest AMSC cars.

It is very evident that the decision of the Nebraska Motor Vehicle Industry Licensing Act as applied by the board freezes AMSC into a wholly unsatisfactory situation. A successful used car dealer uses the franchise to supplement his operation rather than to develop the franchise potential for the benefit of both the parties to the franchise agreement. We find the decision of the board was arbitrary and capricious and unsupported by competent and sufficient evidence.

The signing of a franchise agreement by the dealer is certainly a promise to the manufacturer that he will use his best endeavors to promote the manufacturer's products. This necessarily implies adequate facilities and at least one salesman devoting his time and attention to the promotion of the

manufacturer's product. We feel the record demonstrates that AMSC gave Perkins every opportunity to upgrade his operation to realize the sales potential for the manufacturer's cars in the area he served. The automobile industry is a highly competitive field and an automobile manufacturer should have the right to bargain for and insist upon proper representation from its authorized dealers.

The testimony of the dealer on cross-examination was that he is not going to expand his facilities. He has informed AMSC he is not going to take any more stock cars, but only place retail or sold orders. It seemed apparent from his testimony that he was only interested in junior line vehicles which appear to be in demand.

It is apparent to us that the licensing board in no way attempted to deal with the real question at issue herein: Whether Perkins had met the obligations of the franchise in the past, and what his intentions were for the future. The record demonstrates that he has not met the terms of the franchise in the past, and had no intention of meeting its terms in the immediate future.

For the foregoing reasons, we reverse the judgment of the District Court affirming the Nebraska Motor Vehicle Industry Licensing Board. We remand the cause with directions to grant the application of AMSC and terminate the B. O. Perkins franchise upon the establishment of another franchise in the Columbus, Nebraska, area.

REVERSED AND REMANDED WITH DIRECTIONS.

EQUAL OPPORTUNITY COMMISSION OF THE STATE OF NEBRASKA, APPELLANT, V. WEYERHAEUSER COMPANY, A CORPORATION, APPELLEE.

251 N. W. 2d 730

Filed March 23, 1977. No. 40856.

1. **Administrative Law: Statutes: Time: Employer and Employee.** The 30-day period specified in section 48-1008, R. R. S. 1943, of the Act Prohibiting Unjust Discrimination in Employment Because of Age, is not a period limiting the right of action of the Equal Opportunity Commission, but the elapse of the 30-day period is a condition precedent to the ripening of the individual cause of action of the aggrieved employee.
2. **Statutes: Legislature.** Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention.
3. _____: _____. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately.
4. _____: _____. The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law, and the rules or canons of construction are merely aids for ascertaining legislative intent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent.
5. _____: _____. All the rules of construction should be considered when it is necessary to construe a statute, and no particular rule should be followed to the exclusion of all others.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Roger J. Miller, for appellee.

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

CLINTON, J.

The question in this case is whether section 48-1008, R. R. S. 1943, a part of the Act Prohibiting Unjust Discrimination in Employment Because of Age, limits the right of the Equal Opportunity Commission to bring suit on behalf of the aggrieved employee to a 30-day period following filing of the complaint by the employee, or whether the elapse of the 30-day period is simply a condition precedent to the right of the aggrieved employee to bring an action on his own behalf. The District Court for Douglas County held that the commission's action in this case was barred by a 30-day statute of limitation, sustained the defendant employer's demurrer to the petition of the commission, and dismissed the action. The commission appeals to this court. We reverse and remand because we are convinced that the controverted provision of section 48-1008, R. R. S. 1943, is not a statute of limitation.

Stella A. Hasiak, on January 8, 1975, filed a complaint against her employer, the Weyerhaeuser Company, charging that she had been discharged from her employment because of her age. This action on her behalf by the commission was not filed until February 13, 1976.

The act prohibits employment discrimination on account of age and applies only to employees "at least forty years of age but less than sixty-five." § 48-1003, R. R. S. 1943. Section 48-1008, R. R. S. 1943, is as follows: "Any person aggrieved by a suspected violation of the provisions of sections 48-1001 to 48-1009 shall file with the Equal Opportunity Commission a formal complaint in such manner and form prescribed by the commission. The commission shall have a period of thirty days to make an investigation and initiate an action to enforce the rights of such employee under the provisions of sections 48-1001 to 48-1009. If the commission does not initiate such action within the thirty-day period, the person

aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of sections 48-1001 to 48-1009." Section 48-1007, R. R. S. 1943, defines in four categories the powers of the commission and these include: "(3) to make investigations . . . and (4) to bring civil action in its name in any court of competent jurisdiction against any person deemed to be violating . . . to compel compliance with the provisions of . . . [the act] or to enjoin any such person from continuing any practice that is deemed to be in violation of . . . ." Section 48-1009, R. R. S. 1943, defines the type of relief to be granted in an action to enforce the provisions of the act, which we will say more about later.

The employer takes the position, adopted by the District Court, that the sentence which gave rise to the dispute, to wit, "The commission shall have a period of thirty days to make an investigation and initiate an action to enforce the rights of such employee . . .," is perfectly clear, requires no interpretation, and is patently a 30-day statute of limitation. On the other hand, the commission argues essentially that the section, which includes the quoted sentence, speaks of the right of the employee, and the sentence in question must be read in the context of the whole act and its purposes, and especially in the light of the sentence which follows, to wit, "If the commission does not initiate such action within the thirty-day period, the person aggrieved may bring civil action . . . ," and that when so read the statute simply means the commission has 30 days to act before the individual cause of action accrues. It does not necessarily follow, says the commission, that its right of action is thereafter barred. To this the employer responds that the legislative purpose was to prevent duplicative litigation by eliminating the cause of action common to the commission and the individual by allowing the individual cause to ripen af-

ter the passage of the 30 days. Each party points to legislative history which each claims supports its interpretation.

We find that the section in question is ambiguous and conclude that the Legislature did not intend by the 30-day provision to place a limitation on the commission's cause of action, but that the provision is as the commission contends, a condition precedent to the ripening of the individual cause of action.

The reasons for our conclusion are these. First: Such an interpretation is the more reasonable in the light of the purpose of the entire act. Its provisions make clear that the causes of actions which the act creates are designed to do more than provide a remedy for specific individual cases of discrimination. It is also designed to prevent discriminatory practices and to remedy discriminatory practices in which the individual employee may not have a direct interest. This is evidenced both by what the act makes illegal and by the varying legal remedies which it contemplates. Section 48-1004, R. R. S. 1943, makes unlawful several practices: For an employer (a) to refuse to hire, to discharge, or otherwise discriminate because of age; (b) to utilize an employment agency, placement service, labor organization, or school, etc., which discriminates because of age; (c) for a labor organization to use discriminatory classifications; and (d) for the employer or labor organization to discharge or discriminate because a person asserts his rights, or assists in the assertion of rights under the act.

The act contemplates varying kinds of relief. Section 48-1007, R. R. S. 1943, which defines the general powers of the commission, grants it authority "to bring civil action in its name . . . to compel compliance with the provisions of . . . [the act] or to enjoin any such person from continuing any practice . . . ." Section 48-1008, R. R. S. 1943, authorizes the aggrieved person, after the 30-day period, to "bring a

civil action . . . for such legal or equitable relief as will effectuate the purposes . . . ." Section 48-1009, R. R. S. 1943, defines the type of relief which the court may grant in any case, to wit, "such legal or equitable relief as the court may deem appropriate . . . including judgments compelling employment, reinstatement, or promotion, or enforcing liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation."

It is surely clear that a discharged employee will be primarily interested in the restoration of his employment and the recovery of lost wages. On the other hand, the commission, in order to carry out its mandate, will be more interested in other types of relief such as eliminating patterns of discrimination and future discrimination. A discharged employee would scarcely be primarily interested in enjoining the use of an employment agency or placement service which discriminates.

If the sentence of the statute which gives rise to the issue here is construed as a statute of limitation then the general purposes of the act are largely emasculated. Even the power of the commission to investigate a particular complaint would terminate after 30 days for there is no way the "limitation" can be construed to apply merely to "initiate an action" and not apply to "make an investigation."

It would be possible, of course, to construe the sentence, "The commission shall have a period of thirty days to make an investigation and initiate an action to enforce the rights of such employee . . . ," to be a statute of limitation applicable only to the commission's cause of action for those things personal to the aggrieved employee. But in the light of the whole act this does not appear to be what the Legislature intended. This would in fact lead to the duplicative actions which the employer says the statute is designed to avoid. The present cause is illustrative in that the commission prays for certain relief appli-

cable only to Stella A. Hasiak, as well as for other relief enabling it to perform its statutory function.

We willingly acknowledge that the construction of the statute which we adopt makes the sentence merely a prefatory statement to the section which follows. We recognize that the statute under consideration would mean the same even without the sentence which has given rise to the problem. However, we are convinced that what it is is simply a prefatory remark.

These are the principles of construction which we have applied. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. Matzke v. City of Seward, 193 Neb. 211, 226 N. W. 2d 340. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. Matzke v. City of Seward, *supra.*

"The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law, and the rules or canons of construction are merely aids for ascertaining legislative intent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent." 82 C. J. S., Statutes, § 311, p. 526. "All the rules should be considered when it is necessary to construe a statute, and no particular rule should be followed to the exclusion of all others . . . ." 82 C. J. S., Statutes, § 311, p. 528.

We hold that the provision in section 48-1008, R. R. S. 1943, stating that the commission shall have 30 days to make an investigation and initiate an action is not a statute of limitation, but that the 30-day period after the filing of a complaint is merely a

condition precedent to the ripening of the aggrieved employee's cause of action.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GERALD DENT AND BRADLEY K. BODEMAN, APPELLANTS.

251 N. W. 2d 734

Filed March 23, 1977. No. 40928.

1. **Criminal Law: Trial: Evidence.** A conviction may rest upon circumstantial evidence if it is substantial.
2. **Criminal Law: Conspiracy: Controlled Substances: Evidence.** A charge of conspiracy to unlawfully distribute a controlled substance to third parties may be sustained by proof of an agreement by two or more parties to participate in the chain of distribution and proof of an overt act in furtherance of the agreement.

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

Kirk E. Naylor, Jr., of Naylor & Keefe, and James D. Livingston, Jr., of Cunningham, Blackburn, Von Seggern & Livingston, for appellants.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

PER CURIAM.

The defendants were convicted of conspiracy to distribute cocaine and sentenced to 90 days imprisonment to be followed by 18 months probation. They have appealed and contend the evidence was not sufficient to support their conviction.

A jury was waived and the case tried to the court. There was evidence from which the trial court could have found that the defendant Bradley K. Bodeman was a resident of Grand Island, Nebraska. On October 4, 1975, William E. Burke went to the Bodeman residence at about 7 p.m. to purchase cocaine.

There were two other persons at the residence in addition to Bodeman and his wife while Burke was there. While Burke was at the residence Bodeman received a telephone call from the defendant Gary Dent who was in Lincoln, Nebraska. The conversation was intercepted and recorded because there was a wiretap on the telephone at that time.

The substance of the conversation was that Bodeman said he had a bunch of "LB's" coming in the next day and "we're going to be making a bunch of money." Bodeman wanted "some more of them" as soon as possible; 6 or 7 of the 10 Dent had left. Bodeman and Dent then agreed to meet that night in front of the Ramada Inn near York, Nebraska, so that Dent could deliver "seven" to Bodeman. The items which were the subject of the conversation were not identified. Burke overheard Bodeman's part of the conversation and then left. Although Burke went to the Bodeman residence for the purpose of buying cocaine, he couldn't say whether Bodeman had any cocaine available because they "didn't talk about it," while he was at the residence.

A highway patrolman observed Dent and Bodeman in the parking lot in front of the Ramada Inn near York, Nebraska, at about 9 p.m. Dent was positively identified because he was stopped by the patrolman and given a warning ticket for defective lights after he had started back toward Lincoln. Bodeman was identified by the vehicle which he was driving.

Burke called the Bodeman residence at about 10:30 p.m., and talked to Bodeman's wife. Burke then went to the residence at about midnight and purchased 4 1-gram packets of a white powder from Bodeman which Burke understood and assumed was cocaine from previous conversations. He used it and said that it produced a numbing sensation when he touched it to his tongue and it gave him a "runny nose." In answer to direct questions Burke stated

he did not believe he received cocaine from Bodeman or that "it was very poor." There is no other evidence to identify the white powder sold to Burke by Bodeman as cocaine.

The State's theory of the case is that Dent and Bodeman were engaged in the distribution of cocaine, Dent as a wholesaler and Bodeman as a retailer. They agreed to meet near York, Nebraska, on October 4, 1974, so that Dent could deliver cocaine to Bodeman who in turn would sell it to third persons.

The conspiracy was an agreement to distribute and sell cocaine to third persons. The meeting near York, Nebraska, was an overt act in furtherance of the conspiracy. The sale to Burke at about midnight was a part of the final distribution which both defendants intended would take place.

Although the evidence is in part circumstantial, a conviction may rest upon circumstantial evidence if it is substantial. State v. Von Suggs, 196 Neb. 757, 246 N. W. 2d 206. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. As we view the record the evidence of the State was substantial and was sufficient to support the conviction.

The defendants contend the evidence will not support a conviction for conspiracy because the transaction between Dent and Bodeman was a sale in which Dent was the seller and Bodeman the buyer, and Dent did not participate in any way in the sale from Bodeman to Burke that took place later. The defendant argues that a conspiracy must be a joint agreement by the conspirators to perform the same act.

The conspiracy charged in this case was the distribution of cocaine. Both defendants agreed to participate in the chain of distribution and the object of the conspiracy was to have the cocaine distributed to third persons through Bodeman. Both defendants

intended and expected that would take place. Both defendants participated in an overt act in furtherance of the conspiracy, and the purpose was accomplished when Bodeman delivered the cocaine to Burke. The defendant's contention is without merit. See, United States v. Carlson, 547 F. 2d 1346 (Dec. 28, 1976); United States v. Bommarito, 524 F. 2d 140.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The defendants, Gerald Dent of Lincoln, Nebraska, and Bradley K. Bodeman, of Grand Island, Nebraska, were charged with conspiracy to distribute cocaine. The only evidence of any conspiracy agreement was a telephone call made by Dent to Bodeman on the early evening of October 4, 1975. The main substance of the telephone conversation, which was taped, is set out in the majority opinion. In the entire conversation there was no mention of cocaine, nor of any controlled substance, nor were any terms used which would indicate they were talking about any particular or general kind of property, goods, or substance. A fair interpretation of the entire conversation would be that Bodeman and Dent agreed to meet in York, Nebraska, that evening so that Dent could deliver 6 or 7 of the unidentified items to Bodeman.

The meeting of the two in York was under surveillance by a highway patrolman. He observed the meeting from a distance of about 300 feet. The meeting lasted approximately 5 minutes. The officer observed nothing unusual or illegal. When the meeting was over the officer followed one car, stopped it, and identified Dent. No property or substance of any kind was found or seized from either of the defendants or from the vehicles, nor was any physical evidence introduced at the trial. It would be fair to say that the State's evidence established

simply an agreement to deliver 6 or 7 items of property in York, Nebraska, and a meeting in York thereafter. It might be inferred that the property was illicit or contraband and that the transaction was illegal or even criminal, but it is equally reasonable to infer that the property and the transaction were both legal and proper. At best, the evidence as to Dent failed to prove him guilty of anything, and clearly failed to prove him guilty of the specific crime he was charged with.

The majority opinion now holds in effect that evidence of an agreement between two persons to sell and deliver unidentified property which is possibly or even probably illicit or contraband, followed by some act, is sufficient to establish a conspiracy to distribute cocaine or any other controlled substance. The holding means also that the State may prove a conspiracy to commit a specific offense by proving an agreement to commit any act which is possibly or even probably unlawful or criminal.

The evidence in this case fails to connect the defendant Dent with any controlled substances. The inferences the State relies upon for connection rest upon evidence that Bodeman sold a substance to an individual named Burke in Grand Island several hours after Bodeman and Dent had met in York. The sale was made in Bodeman's residence. It had been prearranged by Bodeman several days before, and the nature of the substance sold was in dispute. Any connection between Dent and whatever the transaction was between Bodeman and Burke rests upon a web of inferences which the evidence does not support.

In State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187, we said: "Where circumstantial evidence is relied upon in a criminal prosecution, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.

Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused."

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.

Under present conditions in our society it is critically important that the controlled substances laws be vigorously and thoroughly enforced. Fundamental principles of justice, however, also require that the State prove a citizen guilty of the crime with which he is charged. To prove an individual guilty of a conspiracy to commit a specific criminal offense requires more than proving a "conspiracy" to engage in some unidentified conduct which is possibly or even probably illegal. The State must still prove that the defendants here were guilty of a conspiracy to commit a specific crime, and it must be proved beyond a reasonable doubt. The evidence failed to prove Dent guilty and Bodeman cannot be charged with conspiring with himself. The evidence does not support the conviction.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP R. KLUGE, APPELLANT.

251 N. W. 2d 737

Filed March 23, 1977. No. 40933.

1. **Criminal Law: New Trial: Guilty Plea: Waiver: Evidence.** A motion for new trial on the ground of newly discovered evidence is not appropriate where a defendant has entered a plea of guilty or nolo contendere, as such a plea waives all defenses to the crime charged, whether procedural, statutory, or constitutional.
2. **Criminal Law: Trial: Guilty Plea: Evidence.** A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest

injustice and the ground for withdrawal is established by clear and convincing evidence.

3. **Criminal Law: Trial: Guilty Plea.** When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

BRODKEY, J.

In an information filed in the District Court for Douglas County on May 15, 1975, under section 28-533, R. R. S. 1943, the defendant and appellant herein, Phillip R. Kluge, was charged with willfully and maliciously entering a dwelling house and attempting to kill, disfigure, or maim a young girl. The defendant originally pled not guilty, but was subsequently permitted to withdraw that plea. He then pled nolo contendere to the charge on July 14, 1975, was found guilty, and was sentenced to imprisonment for a term of 3 years. The defendant appealed to this court from that sentence on the ground that it was excessive. This court affirmed the sentence. State v. Kluge, 196 Neb. 41, 241 N. W. 2d 354 (1976). On May 17, 1976, the defendant filed a motion for new trial in the District Court on the ground of newly discovered evidence. On June 23, 1976, the defendant moved to vacate his sentence and to withdraw his plea on the same ground, and for other reasons not at issue on this appeal. Hearing was had in the District Court on both motions, which were overruled. The defendant now appeals to this court, contending that the District

Court erred in overruling his motions. We affirm.

The evidence presented in the hearing on the motions consisted of the testimony of the defendant and Joseph E. Sinnett. Sinnett stated that he was with the defendant on the day of the crime, and that he and the defendant were drinking at bars in Omaha. The defendant became drunk and out of control, and Sinnett offered him some amphetamine tablets to "sober him up." The defendant took a box of tablets, went to the restroom, and when he came back, four amphetamine tablets were missing from the box. Sinnett and the defendant remained at the bar for 2 hours after this incident occurred, and Sinnett then went home. The defendant stated that he could recall nothing about taking the tablets, and could remember nothing which occurred on the evening of the crime other than the fact that he was drunk and at a bar.

Sinnett stated that he had not come forward with his testimony at the time the defendant was arrested because he feared being prosecuted for possession of amphetamines. He was now willing to testify because the prosecutor had given him immunity. The defendant acknowledges that Sinnett's potential testimony was known to him at the time he entered his plea, but contends that the testimony was unavailable to him because Sinnett was unwilling to come forward at that time.

The defendant contends that the above evidence was sufficient to support his motion for a new trial under section 29-2101, R. R. S. 1943, which provides that a new trial, after a verdict of conviction, may be granted for the reason of "newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial." The defendant also contends that the evidence at the hearing was sufficient to support his motion to withdraw his plea of no contest and to vacate his conviction and sentence. The thrust of the defendant's argument is that, had Sinnett's testimony

been available earlier, he could have pled not guilty and might have successfully raised the defense that he was too intoxicated at the time of the crime to have formed the necessary criminal intent.

We first note that a motion for new trial on the ground of newly discovered evidence is not appropriate where a defendant has entered a plea of guilty or no contest. A guilty plea waives all defenses to the crime charged, whether procedural, statutory, or constitutional. State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776 (1975); State v. Griger, 190 Neb. 405, 208 N. W. 2d 672 (1973). A plea of no contest is equivalent to, and places a defendant in the same position as, a plea of guilty. State v. Abramson, 197 Neb. 135, 247 N. W. 2d 59 (1976); State v. Neuman, 175 Neb. 832, 125 N. W. 2d 5 (1963). By entering a plea of no contest, therefore, the defendant waived all defenses to the crime charged. As a consequence, the issue in this case is whether the District Court erred in overruling the defendant's motion to withdraw his plea and vacate his conviction and sentence.

This court approved and adopted the American Bar Association Standards Relating to Pleas of Guilty as minimum standards in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), and has adhered to those standards with reference to withdrawal of guilty pleas. State v. Evans, 194 Neb. 559, 234 N. W. 2d 199 (1975). Section 2.1 of those standards provides:

"(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. * * *

"(b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for

any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." Section 2.1 also provides that withdrawal of the plea is necessary to correct a manifest injustice whenever the defendant proves that he was denied the effective assistance of counsel, that the plea was not entered or ratified by the defendant, that the plea was involuntary or unknowing, or that the prosecution has failed to abide by a plea agreement.

This court has held on numerous occasions that a motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence. State v. Freeman, 193 Neb. 227, 226 N. W. 2d 351 (1975); State v. Daniels, 190 Neb. 602, 211 N. W. 2d 127 (1973); State v. Johnson, 187 Neb. 26, 187 N. W. 2d 99 (1971). When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Williams, 191 Neb. 57, 213 N. W. 2d 727 (1974); State v. Eutzy, 184 Neb. 755, 172 N. W. 2d 94 (1969).

The defendant in this case concedes that his plea was entered voluntarily, with understanding as to its effect, and with knowledge of the potential testimony of Sinnett. The defendant contends, however, that his plea was given "inadvisedly," and that State v. Journey, 186 Neb. 556, 184 N. W. 2d 616 (1971), mandates reversal in this case. In Journey, a defendant entered a plea without the assistance of an attorney. We held that the defendant should be allowed to withdraw his plea for this reason, stating that leave may be given to withdraw a plea where it was entered inadvisedly if any reasonable ground is offered for going to the jury.

The situation present in State v. Journey, *supra,* is obviously distinguishable from the one present in this case. Here defendant was represented by counsel; and his plea was not entered inadvisedly, but with full knowledge of all relevant factors. There was no evidence at the hearing below as to the measures the defendant took, before entering his plea, to secure the testimony of Sinnett. Furthermore, Sinnett's testimony was not required to present a defense, for the defendant could have elected to go to trial without such testimony and present his defense by his own, or any other, testimony that he was too intoxicated to form the requisite criminal intent. He chose to plead no contest. This is clearly not a case where granting leave to withdraw the plea is necessary to correct a manifest injustice, and the trial court's refusal to do so was not error. State v. Evans, *supra*; State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815 (1974). The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the portion of the opinion insofar as it pertains to the determination of the motion for a new trial under section 29-2101, R. R. S. 1943. I also concur in the result.

I believe it is unnecessary to discuss the matter of withdrawal of the plea of guilty. This was not a post conviction proceeding nor an application for a writ of error coram nobis. The defendant pled no facts which would have entitled him to relief under either of these two remedies. He does not even plead that his plea of nolo contendere was involuntarily entered.

The judgment of conviction having become final, the District Court had no power to entertain a motion to set aside the conviction apart from a proper exercise of one of the three above remedies. I write this concurrence solely because I fear that the extended discussion of withdrawal of the plea in the opinion may lead some to the conclusion that the trial

court may, apart from the above three remedies, permit withdrawal of a plea of nolo contendere or guilty after it has become final.

IN RE ESTATE OF FRIEDA BOCK, DECEASED. IDOLA BOCK OVERBECK, APPELLANT, V. ESTATE OF FRIEDA BOCK, DECEASED, ET AL., APPELLEES.

251 N. W. 2d 872

Filed March 30, 1977. No. 40694.

1. **Wills.** The cardinal rule in construing a will is to ascertain and effectuate the intention of the testatrix, if such intention is not contrary to law.
2. **Wills: Property.** An option to purchase property of an estate, whether it be at an appraised value, or at a price named or agreed upon, may be created by will.
3. **Wills: Property: Administrators and Executors.** Under a will providing that a son of the testatrix who, also, was designated as executor of her estate be granted an option to purchase certain real estate at its fair market value to be fixed by an appraiser named in the will, the fair market value fixed by the appraiser named in the will is controlling in the absence of bad faith or fraud.

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

Christensen Law Offices, for appellant.

F. W. Carstens, for appellees.

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

BURKE, District Judge.

Frieda Bock died testate on November 27, 1973. She appointed her sons, Ralph Bock and Oscar Bock, as executors of her estate.

The appellant, Idola Bock Overbeck, is a daughter of Frieda Bock and a devisee, legatee, and residuary distributee under the will. She appeals from an order of the trial judge approving and affirming the appraisal of Keith N. Krecklow fixing the fair mar-

ket value of certain real estate covered by the will.

Clauses 3A and B of the will read:

"3. I hereby devise and bequeath all the residue of my estate as follows:

"A. A ⅓ interest to my daughter, Idola Bock Overbeck; a ⅓ interest to my daughter, Elda Bock Blount; a 1/9 interest to my grandchild, Wesley Cole; a 1/9 interest to my grandchild Cynthia Cole, and a 1/9 interest to my grandchild, Vickie Cole, in the following described real estate: The East Half (E½) of the Northeast Quarter (NE¼) and the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼) in Section Ten (10), Township Four (4), Range Three (3), Jefferson County, Nebraska.

"B. I give to my son, Ralph Bock, the right and privilege to buy the Southeast Quarter (SE¼) of Section Three (3), Township Four (4), Range Three (3), Jefferson County, Nebraska, within six months after my death. If within six months after my death, he elects to purchase the above described real estate, the price which he shall pay therefor shall be determined and fixed by the individual or person who appraises real estate for the Federal Land Bank in Gage County, Nebraska. The executors shall obtain the services of said appraiser from the Federal Land Bank in Gage County, Nebraska, and request that he make an appraisal of said real estate to determine its fair and reasonable market value as of the date of my death. If the Federal Land Bank appraiser is unavailable or unable to make said appraisal, I then direct that the real estate firm of Eyth-Krecklow, Beatrice, Nebraska, shall make said appraisal. The price to be determined by either the Federal Land Bank appraiser or Eyth-Krecklow shall be the purchase price which Ralph shall be required to pay for said real estate if he desires to purchase.

"If Ralph elects to buy said real estate the purchase price which he pays therefor shall be dis-

tributed in the same manner and in the same proportions as provided for in the distribution of the real estate in Paragraph 3A above. If Ralph elects not to purchase said real estate, then I give said real estate in absolute title to the same persons in the same proportions as set out in Paragraph 3A above, it being my intention that either the purchase price derived from the sale of said real estate to Ralph, or the real estate itself, if Ralph elects not to buy, shall be given to and be received by my daughters, Idola Bock Overbeck, and Elda Bock Blount, and the children of my deceased daughter who are Wesley Cole, Cynthia Cole and Vickie Cole."

Pursuant to the directions of the testatrix the lawyer for the executors first contacted Willis J. Berry, manager of the Federal Land Bank Association in Gage County, and requested that he appraise the real estate in Jefferson County. Mr. Berry declined the request stating that company policy prohibited such activity.

Next, the attorney, pursuant to the directions of the testatrix, contacted and retained Mr. Krecklow of the real estate firm of Eyth-Krecklow to appraise the real estate in Jefferson County.

On April 2, 1974, Mr. Krecklow submitted a written appraisal report fixing the fair market value of the real estate described in Clause 3B of the will at $36,800.

On April 29, 1974, and within the 6-month period provided by the will, Ralph Bock exercised his option to purchase the real estate at the appraised value and filed his notice of election to purchase with the county court.

An option to purchase property of an estate, whether it be at an appraised value, or at a price named or agreed upon, may be created by will. Watson v. Riley, 101 Neb. 511, 164 N. W. 81.

The appellant in her appeal to the District Court from an order of the county court overruling her ob-

jection to the valuation placed on the real estate by Mr. Krecklow charged that the executors and their attorney breached their fiduciary duties, acted in bad faith in obtaining the appraisal, and were guilty of constructive fraud.

A close, careful examination of the record reveals that her charges are without foundation in fact, and border on being reckless and irresponsible.

In an effort to support her charges she produced an expert witness at the trial who testified that in his opinion the fair market value of the real estate was $50,400.

The appraisal of real estate is not an exact science. Had the testatrix intended to have the fair market value of the real estate fixed by the composite judgment of a panel of real estate appraisers, she could have selected the panel or directed the county judge to select the panel. She did neither. She personally selected a single appraiser and directed that the price determined by the appraiser would be the purchase price.

The cardinal rule in construing a will is to ascertain and effectuate the intention of the testatrix if such intention is not contrary to law. Wondra v. Platte Valley State Bank & Trust Co., 194 Neb. 41, 230 N. W. 2d 182.

The appraiser selected by the testatrix was a professional farm manager, real estate broker, and appraiser. He was not acquainted with Ralph Bock and at the time he made his appraisal he was not aware that under the terms of the will Ralph Bock was given an option to purchase the property which was the subject of his appraisal.

In making his determination of fair market value, Mr. Krecklow visited the site alone on three occasions, walked over it, examined the soil, and studied the soil map prepared by the Soil Conservation Service in Jefferson County. In addition, he analyzed comparable sales in the area.

Under a will providing that a son of the testatrix who, also, was designated as executor of her estate be granted an option to purchase certain real estate at its fair market value to be fixed by an appraiser named in the will, the value fixed by the appraiser named in the will is controlling in the absence of bad faith or fraud. In re Estate of Eckey, 192 Iowa 572, 185 N. W. 118 (1921); In re Estate of Giffin, 166 N. W. 2d 800 (Iowa, 1969); In re Estate of Lorimor, 216 N. W. 2d 349 (Iowa, 1974).

The intention of the testatrix is the polestar by which the judge must be guided. Her intention was clear and her directions were carried out to the letter by the attorney for the executors. The appellant's bare allegations of bad faith or fraud remain precisely that — bare allegations.

If a judge, aided by hindsight and the ingenuity of counsel, assumes the role of a rewrite man in construing a will to attain what he believes to be wise or beneficial, results, full of mischief, will follow.

For the reasons stated, the judgment of the trial court is affirmed.

AFFIRMED.

LEONA F. BUCK, APPELLEE, V. IOWA BEEF PROCESSORS, INC., APPELLANT.

251 N. W. 2d 875

Filed March 30, 1977. No. 40799.

1. **Workmen's Compensation: Evidence.** Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
2. **Workmen's Compensation: Evidence: 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 favorable to the successful party.
3. **Workmen's Compensation: Employer and Employee.** As to employees having fixed hours and place of work, injuries occurring on

the premises of the employer while the employee is going to and coming from work before or after working hours or at lunchtime are compensable.

4. _____: _____. An accidental injury sustained by an employee on the premises where she is employed during her lunch period while going to or coming from work is an injury arising out of and in the course of her employment.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Smith, Smith & Boyd, for appellant.

Mohummed Sadden and Joe Cosgrove, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case. A single judge and later a three judge Workmen's Compensation Court entered an award for plaintiff for temporary total disability and a permanent partial disability to plaintiff's right foot, together with medical expenses. The defendant employer has appealed.

Plaintiff was employed by the defendant as a meat checker on the production line of the defendant's meat processing plant at Dakota City, Nebraska. On December 23, 1974, she was to work the 3 to 11:30 p.m., shift. When she arrived at defendant's plant at about 2:15 p.m., the employees' parking lot was full and plaintiff parked on the county road right-of-way across from one of the plant entrances. At that entrance to defendant's plant there is a metal chain link fence which has a small gate in it about 3 feet wide for pedestrians. Plaintiff entered and went to work. After approximately 4 hours she left her work to take her lunch break. Employees are entitled to a 30-minute lunch break. They may leave the premises on their lunch time or eat in the cafeteria provided for them in the plant. The plaintiff left the plant to move her car into the employees' parking lot. Her boots were greasy from her work

and the pavement in the parking lot was icy. The plaintiff walked across the parking lot and as she started through the pedestrian gate, she slipped and fell, and landed just outside the gate. Plaintiff's ankle was broken and she was not able to return to work until June 1, 1975.

The single judge Workmen's Compensation Court and the three judge Workmen's Compensation Court awarded the plaintiff compensation for temporary total disability for a period of 22 6/7 weeks and for an 11 percent permanent partial disability to the right foot, together with medical and hospital expenses. Both courts specifically found that plaintiff fell on the premises of the defendant. The defendant employer has appealed to this court from the award of the three judge Workmen's Compensation Court on rehearing.

The defendant contends that the plaintiff was engaged in a personal errand during her lunch period; that the errand was not incidental to her employment; and that the injury therefore did not arise out of or in the course of her employment. There is also an inference in defendant's argument that the evidence showed that plaintiff fell outside the pedestrian gate and off the premises of the defendant.

There is no evidence that the chain link fence was the outside boundary of defendant's premises and, even if it were, both Workmen's Compensation Courts specifically found that plaintiff fell on the defendant's premises, and there was sufficient competent evidence in the record to support that determination. The findings of fact of the Workmen's Compensation Court on rehearing in this case were made on April 13, 1976. Under section 48-185, R. S. Supp., 1976, those findings of fact have the same force and effect as a jury verdict in a civil case. 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. Salinas v. Cyprus Industrial Minerals Co., 197 Neb. 198, 247 N. W. 2d 451.

Defendant contends that the injury received by plaintiff was sustained during her lunch hour and while she was leaving the employer's premises on a personal errand and was therefore not incidental to her employment. As early as McDonald v. Richardson County, 135 Neb. 150, 280 N. W. 456, this court said: "An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law. Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable." Walking to or from work at the beginning or end of a lunch hour is just as much an incident of employment as it is at the beginning or end of a day.

In 1 Larson, Workmen's Compensation Law, section 15.00 at page 4-2, it is stated: "As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work before or after working hours or at lunchtime are compensable * * *."

In Thomsen v. Sears Roebuck & Co., 192 Neb. 236, 219 N. W. 2d 746, this court held that an accidental injury sustained by an employee on the premises where she was employed, during her lunch hour, while she was in an employees' lunchroom, was an injury arising out of and in the course of her employment, and that her intention to undertake a personal errand at the time was wholly immaterial.

An accidental injury sustained by an employee on the premises where she is employed, during her

lunch period, while going to or coming from work, is an injury arising out of and in the course of her employment. The fact that plaintiff intended to perform a personal errand after leaving the employer's premises is immaterial. In this case the employees were permitted to leave the premises for lunch or for other purposes during the lunch hour. Courts have been liberal in protecting workers during unpaid lunch periods if the injury occurs on the premises of the employer while the employee is doing what an individual might reasonably do within a time during which he is employed and at a place on the premises where he may reasonably be at that time.

Under the facts here the plaintiff's injury arose out of and in the course of her employment. The judgment of the Workmen's Compensation Court is affirmed. The plaintiff is allowed the sum of $750 for the services of her attorney in this court.

AFFIRMED.

TIMMERMAN BROS., INC., A NEBRASKA CORPORATION, APPELLANT, V. STANLEY QUIGLEY ET AL., APPELLEES.

251 N. W. 2d 877

Filed March 30, 1977. No. 40832.

1. **Contracts: Intent.** An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents.
2. _____: _____. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning.

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

Ronald D. Mousel, for appellant.

Sarah Jane Cunningham, for appellees.

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

McCOWN, J.

The plaintiff, Timmerman Bros., Inc., brought this proceeding against the defendants to obtain an equitable owner's share of the proceeds of a wheat crop harvested by defendants from land sold to the plaintiff by defendants. The District Court entered judgment for the defendants and plaintiff has appealed.

In the spring of 1973, the plaintiff, Timmerman Bros., Inc., decided to purchase certain lands located near McCook, Nebraska, for the operation of a commercial feedlot. The land consisted of several tracts owned by several different owners. Plaintiff prepared a form of real estate purchase agreement and began to negotiate and submit purchase and sale agreements to the various owners. Plaintiff hoped to close the various purchases and begin construction in late summer of 1973. By June 27, 1973, all the landowners had signed real estate purchase agreements with plaintiff. The defendants signed a purchase agreement form June 8, 1973. The agreement was executed by the plaintiff on June 20, 1973, and mailed to the defendants' attorney on July 5, 1973.

The agreement provided that defendants would furnish an abstract showing good and marketable title within 15 days, and that closing was to be 15 days after the sellers had furnished an acceptable abstract. The agreement recited that other parcels of land were being purchased also and gave the plaintiff the right to declare the agreement null and void in the event it was unable to close the purchases on all the parcels of land. The agreement also provided that plaintiff was to have possession of the land at the closing, subject to specific provisions for growing crops. Title difficulties arose in connection with some of the tracts of land other than the defendants' and closing was deferred. Plaintiff obtained permission for an early entry to commence con-

struction. Construction began July 15, 1973, but none of the construction was on the particular part of the land involved here.

On August 20, 1973, defendant, Anna Quigley, received an advance payment of $10,000 on the purchase price to permit her to make a payment on a new home. As security for the advance, the defendants signed a deed to the property and deposited it with their attorney to be held until the actual closing.

In August 1973, the defendant, Stanley Quigley, and his son prepared the 79.2 acres of wheat ground for planting by disking and fertilizing it. In late August 1973, Stanley talked to one of the officers of the plaintiff and told him that if the contract was not closed by September 1, 1973, he was going to plant the wheat and have possession of the wheat ground. On September 2 or 3, 1973, the defendant, Stanley Quigley, planted the wheat.

The closing on the contract finally took place October 22, 1973. Approximately 90 days thereafter Anna Quigley moved from the residence. On June 21 and 22, 1974, the defendant, Stanley Quigley, returned and harvested the 79.2 acres of wheat he had planted in September of 1973. The plaintiff sought to recover one-third of the proceeds as the owner's share. The District Court entered judgment in favor of the defendants, and this appeal followed.

The basic issue on this appeal is whether the provisions of the purchase and sale contract as to growing crops are clear and unambiguous or whether those provisions are ambiguous and therefore subject to interpretation.

Paragraph 8 of the contract deals specifically with the issue. It provides: "Seller agrees to give possession of the Land to Buyer at the Closing; provided, that Seller shall retain the right to use any portion of the Land on which growing crops are located at the time of the Closing until such crops have

been harvested by Seller, and such growing crops shall belong to Seller." The remaining language of paragraph 8 also provides that if the buyer requires possession of any portion of the land on which growing crops are located prior to the harvesting of such growing crops, the buyer shall have the right to take possession of the land upon payment to the seller of the then estimated market value of the growing crops upon harvest.

The provisions of the contract with respect to growing crops are neither vague nor uncertain. Neither the language nor the meaning is ambiguous. An unambiguous contract is not subject to interpretation or construction, and the intent of the parties must be determined from its contents. Inland Drilling Co. v. Davis Oil Co., 183 Neb. 116, 158 N. W. 2d 536.

Even if there were some uncertainty as to its meaning, the contract would have to be construed against the plaintiff since the plaintiff prepared it. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning. Omaha P. P. Dist. v. Natkin & Co., 193 Neb. 518, 227 N. W. 2d 864. There is no evidence that defendants had any reason to suppose that the plaintiff interpreted the provisions of paragraph 8 in any sense different than its language indicated.

Plaintiff's remaining assignments of error are without merit and do not require discussion. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

NEBRASKA STATE BANK, A CORPORATION, APPELLANT, V. CHARLES R. DUDLEY ET AL., APPELLEES.

252 N. W. 2d 277

Filed March 30, 1977. No. 40866.

1. **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.

2. **Security Agreements.** A clause in a security instrument providing that the creditor may at any time he feels insecure, treat the debt as due and take and sell the property, will not authorize the seizure and sale of the property unless the debtor is about to do, or has done, some act which tends to impair the security.

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

Norris G. Leamer, for appellant.

O'Brien, Galvin & O'Brien, Donald E. O'Brien, and James R. Peterson, for appellees.

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

SPENCER, J.

This is the second appearance of this replevin action before this court. The first case was reversed and remanded for a new trial because of erroneous jury instructions. Nebraska State Bank v. Dudley, 194 Neb. 1, 229 N. W. 2d 559 (1975). The issue submitted to the jury on plaintiff's right of possession was whether the note was in default and, if not, whether bank properly deemed itself insecure because of acts of the defendants which would impair the security. The jury found right of possession to be in the defendants. Bank appeals. We affirm.

Defendants were owners of a drugstore in South Sioux City, Nebraska. On November 15, 1966, bank loaned defendants $16,583.89, evidenced by a note, and secured by a security interest in the inventory and equipment in defendants' store. On November 6, 1967, defendants borrowed an additional $5,000. A renewal note in the principal amount of $19,830.02 was executed. This note is in the following form:

Nebraska State Bank v. Dudley

COLL. 54
OFF. 52 NEW 5000 RENEWAL 830 OLD No. 665722

NOTE Charles R. Dudley
(NAME)

$ 19830 South Sioux City, Nebr., Dec. 6 1967

Jan. 20 1969 after date, for value received, I, we or either of us, jointly and severally, promise to pay to the order of the NEBRASKA STATE BANK, at the NEBRASKA STATE BANK, South Sioux City, Nebraska.

Nineteen Thousand Eight Hundred Thirty and Tax cents Dollars

with 7½ per cent interest per annum from date payable annually.

Principal and interest to bear interest at the rate of nine per cent per annum from the time it becomes due.

The makers and endorsers of this note hereby severally waive protest, demand, notice of non-payment and benefit of all the exemption laws of the State of Nebraska, and each of us hereby personally charge our own separate estate with the payment of this note, including that now owned, and that hereafter acquired.

No. 012-522

Due Payments of 250.00 are entered

Payable Beginning Nov 20, 1967

P.O. 2515 Dakota Ave SSC

Security Equipment 11-15-66

Charles R. Dudley

Delores S. Dudley

[redacted]

4

United States Check Book Co. Omaha

EX. NO. 4
CLERK 2-2-76
CASE NO. 8568

Except for the amount and date, this note differed from the original in four particulars. The original note, instead of "Jan 20, 1969" read "Installments." The rate of interest was 6½ instead of 7½. The original note read "Payments of $250.00 which Includes Interest Beginning Dec 20, 1966." The other difference was the original note was signed only by Chas. R. Dudley.

Defendants made monthly payments on the note until May 22, 1972. At that time there was a balance owing of $11,161.86. The replevin action was filed June 7, 1972, or 13 days before the next payment would be due if the note was to to paid out in installments. On that date, the sheriff took possession of the property under an order of replevin. Plaintiff also exercised its right of set-off against defendants' business checking account, which contained $1,054.82. The property replevined was appraised at $10,230. A sale of it by the bank netted approximately $3,500.

By agreement of the parties, the only issue tried was who had the right of possession at the time of the commencement of the action. The security agreement provided: "* * * upon default Secured Party shall have the immediate right to the possession of the Collateral." It also defines "default" and further provided: "UPON SUCH DEFAULT and at any time thereafter, or if it deems itself insecure, Secured Party may declare all Obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Nebraska Uniform Commercial Code."

Defendants' landlord was a director of the bank. Defendants had been given notice to vacate because the landlord had sold or was in the process of selling the building. The bank's evidence indicates the defendants were $465 in arrears on rent for the drugstore at the time of the replevin, but defendants had a dispute with the landlord.

Defendants had requested another loan to facilitate

their move to a different location. Two or three meetings took place between bank officers and Mrs. Dudley, but no new loan was made. The bank requested additional security but no decision had been made. Plaintiff made no demand for payment of the note or for possession of the security before filing the replevin action.

Defendants had made the required $250 monthly payments through May 22, 1972. Although the note was ostensibly due January 20, 1969, the bank had continued to accept the installment payments. One of the bank's witnesses testified that an executive vice president who had authority to do so had told him he was of the opinion the note would be continued so long as the $250 payments were made. The note was not presented for payment on January 20, 1969, or at any time thereafter.

It is bank's position the note by its terms was due January 20, 1969. It contends that at any time thereafter, regardless of payments, it had the right to commence an action to replevin its security. It was not necessary to first make demand on the defendants for payment or possession. The difficulty with bank's position is that its own evidence raised an issue as to whether or not the note had been extended. Donald Kuhl, a former vice president of the bank, testified the officer who made the loan had said the note could be continued so long as the $250 payments were made.

The note, which the present one renewed, did not list a due date, but provided solely for installment payments. The defendants' evidence raised a jury issue as to whether or not the bank agreed to continue the note in effect so long as the installment payments were made. Because of this arrangement, the jury could find the defendants were not in default on the obligation at the time the replevin action was filed without notice.

The note would appear to be somewhat ambiguous.

"Jan 20, 1969" was inserted in the blank intended for the period of time after which the note would be due. The blank indicating the due date was not filled in. The terms of the payment are also ambiguous. The note does not specifically mention monthly payments. For "Payable" it states "Payments of 250.00 inc interest beginning Nov 20, 1967." Further, the note states that interest is payable annually, and yet the payments of $250 include interest.

In Richards v. Bycroft, 197 Neb. 478, 249 N. W. 2d 743 (1977), we stated: "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."

Here, the bank accepted monthly payments on the obligation without question until the replevin action. On August 3, 1971, it filed a statement with the county clerk that the original financing statement between it and Charles R. Dudley was still effective. It seems unusual that bank would permit regular monthly payments on a note for more than 3 years after its due date without making a demand for payment unless some agreement for that arrangement existed. If the bank did not intend to continue the arrangements which had continued for more than 3 years, at the very least it should have made a demand for payment of the amount due on the note or for the surrender of the collateral.

Bank argues in a circle by insisting that no demand is necessary if a note is unpaid after its due date. The due date was one of the issues to be decided to determine whether or not the Dudleys were in default. This issue was decided adversely to the bank.

Bank argues: "Even if the note is not in default, the Security Agreement clearly provides 'if it deems itself insecure, secured party may declare all obli-

gations secured hereby immediately due and payable and shall have the remedies of a secured party under the Nebraska Uniform Commercial Code.' Section 9-501 U.C.C. provides a secured party has those rights 'provided in the security agreement' in addition to those rights provided by the U.C.C. This 'insecure clause' is a right provided by the agreement and is long recognized in Nebraska. J. I. Case Plow Works v. Marr, 33 Neb. 215, 49 N. W. 1119; * * *."

Section 9-501, U.C.C., provides remedies when a debtor is in default under a security agreement. Bank's difficulty is the question as to whether or not the Dudleys were in default was the issue in the case.

The first opinion herein, Nebraska State Bank v. Dudley, 194 Neb. 1, 229 N. W. 2d 559 (1975), cited J. I. Case Plow Works v. Marr, 33 Neb. 215, 49 N. W. 1119, and stated: "A clause in a chattel mortgage providing that the mortgagee may, at any time he feels insecure, treat the debt as due and take and sell the property, will not authorize the seizure and sale of the property unless the mortgagor is about to do, or has done, some act which tends to impair the security." This same rule applies to the security interest herein.

There is no merit to bank's contention the court should have directed a verdict for it at the close of the evidence. The evidence was sufficient to raise a question as to whether or not the defendants were in default on the obligation covered by the security. This issue was properly submitted to the jury. The further question as to whether or not, if the defendants were not in default, the plaintiff had the right to deem itself insecure also was a jury question. The jury resolved both these issues against the plaintiff and determined the right of possession was in the defendants.

The final question raised by the bank is that the court erred in failing to instruct the jury that no de-

mand for payment was necessary before filing the replevin action. The court properly instructed the jury that in the event of a default, no demand for payment is necessary. If we understand the bank's contention, it is that regardless of default no demand for payment was necessary. Bank has failed to produce any authority for its contention, and we can find none.

There is no merit to any of the bank's assignments. The issues were properly submitted to the jury. The judgment herein should be and hereby is affirmed.

AFFIRMED.

BEVERLY JENSEN, APPELLANT, V. MARY E. SHADEGG, APPELLEE.

251 N. W. 2d 880

Filed March 30, 1977. No. 40868.

1. **Trial: Verdicts: Evidence.** A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Trial: Negligence.** In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
3. **Trial: Evidence.** In every case, before an issue may be submitted to a jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is sufficient evidence upon which a jury can properly proceed to find a verdict for the party upon whom the burden is imposed.

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

Holtorf, Hansen, Kovarik & Nuttleman, for appellant.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

SPENCER, J.

This is an action to recover damages sustained as the result of an automobile collision. Defendant, Mary E. Shadegg, filed a cross-petition. The jury returned a verdict in favor of defendant on plaintiff's petition, and in favor of plaintiff, Beverly Jensen, on defendant's cross-petition. Plaintiff perfected the appeal herein. No cross-appeal has been filed.

The only issue plaintiff raises on appeal is whether the trial court committed prejudicial error by preventing her from showing bias and prejudice on the part of the insurance adjuster for defendant's liability carrier, who appeared as a witness for the defendant. Defendant argues the error, if any, was without prejudice because a verdict should have been directed on her motion. We find the court was in error in restricting the cross-examination of defendant's witness as to his bias and prejudice. We do not discuss it further, however, because we find the case should not have been submitted to the jury in the first instance.

The accident occurred at approximately 6 p.m. on July 26, 1971, at a "T" intersection of two graveled roads in rural Scotts Bluff County, Nebraska. Neither road had a stop sign at the intersection. The roads are fairly level, but several trees at the southeast corner of the intersection obstructed the views of both parties herein. Plaintiff, who was alone, was traveling north on the road which would form the top of the "T" intersection. The defendant, who was accompanied by three passengers, was traveling west on the stem of the "T" intersection, making a left turn to travel south.

Plaintiff testified that as she approached the accident scene, she was traveling about 45 to 50 miles per hour. She saw the defendant pull out from be-

hind the trees and stop. At that time she touched her brakes. Defendant came to a stop so plaintiff accelerated her car and proceeded toward the intersection. Plaintiff's testimony is as follows: "I braked once when I first saw her just as a reaction and honked and then realized that she was going to stop and not proceed so I went on and realized that she was, in fact, going on and then began the frantic attempt to stop."

The undisputed testimony is that the driveway of the nearest farm dwelling is 100 yards from the intersection. Plaintiff did not recall the driveway at the time, but was sure that she had passed it when the defendant began to pull forward into the intersection. Plaintiff at no time fixed her position when defendant moved into the intersection.

Plaintiff's further testimony as to her actions at the time she first saw the defendant at the intersection was as follows: "Well, I stopped, you know, put my brakes on once when I first saw her pull out and stop because I didn't know if she was going to proceed but she stopped and so then I went on and then she proceeded and then stopped in the middle of the road. Q. Okay. Do you know whether or not after you touched the brakes the first time whether you put your foot back on the accelerator or coasted? A. I would have probably put my foot back on the accelerator slightly. Q. Can you estimate the length of time that Mrs. Shadegg remained stationary before she pulled out the last time? A. No, other than it was a period indicating a complete stop. It wasn't a hesitation pull forward but a complete stop. Q. Do you know how far you had traveled between the time Mrs. Shadegg had stopped and the time she started to go again? A. I really have no idea. Like I say, it all happened so fast it is really hard to judge. I would rather say nothing than give an incorrect answer."

Plaintiff also testified on direct as follows: "Q.

Okay. Had she come to a complete stop in the middle of the road at the time of the impact? A. Yes, sir. Because I just kept thinking she would be moving on and I had hit my horn and I assumed by that time she had seen me. I was assuming that she would move on. That is why I did not attempt to go to the left but tried to go to the right."

There is no testimony in the record where plaintiff's car was when defendant came to this stop in the intersection. Plaintiff, from the above testimony, must have been far enough away to have permitted defendant to have completed her turn if she had not stopped. This is the only conclusion we can draw from the plaintiff's testimony.

A Nebraska State Patrol trooper called by the plaintiff described the intersection as follows: "It is a T-intersection. From the intersection you can go south, north or east but there is no west. There is a heavy growth of Chinese Elm type trees on the southeast corner of the intersection running both south and east." The trooper testified that from his investigation it was obvious that the plaintiff was traveling at a speed so that she could not get stopped. He further testified that there was sufficient room for the plaintiff to have passed to the right or east of the defendant's vehicle had she had her car under control.

Defendant moved for a directed verdict at the close of plaintiff's evidence, and renewed that motion at the close of all the evidence. We conclude that the motion for directed verdict should have been sustained on both occasions. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Wees v. Creighton

Memorial St. Joseph's Hospital, 194 Neb. 295, 231 N. W. 2d 570 (1975).

For the purpose of this motion, the court should have assumed that defendant was negligent in coming to a stop before completing her turn in the intersection. However, it is apparent to us, giving plaintiff the benefit of every possible inference that can be drawn from her testimony, that she was contributorily negligent to the point that a verdict should have been directed against her.

The defendant had both the directional right-of-way and the right-of-way by being in the intersection first. Assuming, however, that plaintiff may have believed that the defendant was yielding the right-of-way to her, she still had the obligation to prove her position at that time and at the time the defendant's car actually moved to the center of the intersection. This proof is lacking. Further, it is evident from plaintiff's testimony she had not reached the intersection when, as she testified, defendant stopped in the middle of it.

While the plaintiff thought she was traveling at a speed of 45 to 50 miles an hour, the undisputed testimony of her own witness is that there was sufficient room for her to have passed to the right or east of the defendant's vehicle if she had had her car under control. Plaintiff was familiar with the intersection. She traveled it almost daily. If she had had her car under reasonable control, considering the obstruction and the nature of the road, the accident could have been avoided.

In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Wees v. Creighton Memorial St. Joseph's Hospital, 194 Neb. 295, 231 N. W. 2d 570 (1975).

While it is not material on the resolution of the

question herein, the testimony of the other witnesses to the accident put plaintiff's speed at 70 miles per hour. However, the photos in evidence indicate that plaintiff was traveling at a sufficient rate of speed at the time of impact to do considerable damage to her vehicle. The undisputed testimony of a witness for plaintiff is that the defendant's vehicle was moved sideways 6½ feet by the force of the impact.

The case of Hodgson v. Gladem, 187 Neb. 736, 193 N. W. 2d 779 (1972), is similar to the instant case except that in the instant case the defendant had the directional right-of-way, which was not the situation in Hodgson. In Hodgson, where we affirmed a judgment of dismissal for the defendant, we said: "A driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, * * *."

In Hodgson, *supra,* it was evident that both drivers approached the intersection at about the same time. That is not the situation here. Plaintiff's evidence placed the defendant's vehicle at the intersection while plaintiff was some distance away from it. She honked her horn and accelerated her vehicle as the defendant's vehicle proceeded into the intersection and stopped. According to her version of it, plaintiff was still approaching the intersection.

In every case, before an issue may be submitted to a jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is sufficient evidence upon which a jury can properly proceed to find a verdict for the party upon whom the burden is imposed. Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551 (1941).

On the facts as we interpret them, if the plaintiff had had her vehicle under reasonable control, the collision could have been avoided. The proximate cause of plaintiff's injury was her failure to yield the right-of-way to the defendant. Assuming negligence on the part of the defendant, plaintiff, on the facts herein, must be held contributorily negligent as a matter of law. It is evident plaintiff was traveling at a rate of speed which prevented her from taking effective action to avoid the accident when it should have been apparent to her it was going to occur.

Plaintiff twice honked her horn previous to the accident. The first time, when the defendant was at the intersection and obviously had the directional right-of-way. The second time, when the defendant was in the intersection and the plaintiff was approaching it. This demonstrates plaintiff's intention to take the right-of-way. It also suggests if she had had her car under reasonable control, the collision could have been avoided.

If the action should have been submitted to the jury, the action of the trial judge in restricting the plaintiff's cross-examination would have been prejudicial error. However, the error herein was in not sustaining the defendant's motion for a directed verdict. The jury found for the defendant on the plaintiff's petition. We affirm the judgment entered on the verdict.

AFFIRMED.

O'NEILL PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. PUTNAM RANCHES, INC., ET AL., APPELLANTS.

251 N. W. 2d 884

Filed March 30, 1977. No. 40873.

Courts: Receivers: Foreclosure. The request for the appointment of a receiver is addressed to the sound, equitable discretion of the court, and its ruling thereon will not be reversed on appeal unless an abuse of discretion is shown.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

M. J. Bruckner of Marti, Dalton, Bruckner, O'Gara & Keating, for appellants.

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

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

WHITE, C. J.

This is an appeal from the appointment of a receiver. The plaintiff, O'Neill Production Credit Association, initiated a mortgage foreclosure action against the defendant, Putnam Ranches, Inc. Pending a final determination of the foreclosure action, the plaintiff made application to the District Court for a receiver. On April 28, 1976, the District Court found that the statutory grounds for the appointment of a receiver existed, and appointed a receiver. The defendant filed a motion for a new trial, which was overruled, and now appeals. We affirm the judgment of the District Court.

On appeal, the defendant contends that the District Court erred in appointing a receiver. Section 25-1081, R. R. S. 1943, provides as follows: "A receiver may be appointed by the Supreme Court or the district court or by the judge of either * * * (2) in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt; * * * (5) in all other cases where receivers have heretofore been appointed by the usages of courts of equity."

The evidence before the District Court was as follows: The defendant is indebted to the plaintiff, due to various mortgages and security agreements, in the approximate amount of $2,500,000. Interest due the plaintiff as of April 1, 1976, was $125,980.38, and

is accruing thereafter at a rate of $617 per day. The defendant corporation's real property and personal property taxes are in arrears with a resulting tax lien on the defendant's property in the amount of $54,001.83, plus interest and other expenses. Additionally, there exists an unsatisfied judgment against the defendant in the amount of $83,899.14, plus interest.

While the defendant's real estate and personal property was valued in excess of the combined liabilities of the defendant corporation, the corporation lacked sufficient operating capital and was unable to meet its obligations in the ordinary course of business. William Putnam, president of the defendant corporation, testified that the defendant corporation was without any capital to repair its fences, operate its farms and ranches, care for its cattle, and feed its livestock. He testified that he personally was supplying funds to the corporation to enable it to carry on its necessary operations.

"It is fundamental that the power of appointment and removal of judicial receivers ordinarily rests in the sound discretion of the district court." State ex rel. Sorensen v. Hoskins State Bank, 132 Neb. 878, 273 N. W. 834 (1937). "The request for the appointment of a receiver is addressed to the sound, equitable discretion of the court, and its ruling thereon will not be reversed on appeal unless an abuse of discretion is shown." Cressman v. Bonham, 129 Neb. 201, 260 N. W. 818 (1935). See, also, Howell v. Poff, 122 Neb. 793, 291 N. W. 548 (1932); Duffy v. Omaha Merchants Express & Transfer Co., 127 Neb. 273, 255 N. W. 1 (1934); State ex rel. Sorensen v. State Bank of Minatare, 123 Neb. 109, 242 N. W. 278 (1932).

It is apparent from the foregoing review of the evidence before the District Court that, under the circumstances, there was no abuse of discretion in the appointment of a receiver by the District Court.

We have examined the other contentions raised by

the defendant and find them to be without merit.

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

AFFIRMED.

IN RE ESTATE OF LESLIE C. LANDMESSER, JR., DECEASED. KAREN BOOSALIS, APPELLANT, V. HORACE MANN INSURANCE COMPANY, APPELLEE.

251 N. W. 2d 885

Filed March 30, 1977. No. 40882.

1. **Courts: Appeal and Error: Statutes.** Appeals from the county court to the District Court in probate matters are tried in the District Court de novo and not de novo on the record. §§ 24-541, 30-1601, R. R. S. 1943.
2. **Evidence: Appeal and Error: Pleadings: Judgments.** In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court.
3. **Appeal and Error: Records: Rules of Supreme Court.** The rules for preparation, settlement, allowance, certification, filing, and amendment of the bills of exceptions on appeal to the Supreme Court from the District Court are governed by Rule 7, Revised Rules of the Supreme Court, 1974, enacted pursuant to the authority of section 25-1140, R. R. S. 1943.
4. **Courts: Judgments: Appeal and Error.** Where a default judgment has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere.

Appeal from the District Court for Harlan County: FREDRIC R. IRONS, Judge. Affirmed.

John C. Mitchell and Larry R. Demerath, for appellant.

Patrick L. Cooney for McCormack, Cooney & Mooney, for appellee.

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

CLINTON, J.

This is an appeal from an order of the District Court for Harlan County, Nebraska, affirming an order of the county court of Harlan County, vacating a default judgment rendered on a claim by Karen Boosalis for personal injuries suffered in an automobile collision in which the decedent Landmesser, the driver of the automobile in which Boosalis was a passenger, was killed. The District Court on the appeal also affirmed an order of the county court setting aside the appointment of Platte Valley State Bank & Trust Company as administrator of the Landmesser estate. The named administrator acquiesced in its removal by an instrument in writing filed in the county court. We affirm.

The errors assigned on this appeal would require an examination of the evidence presented to the District Court. There is before us a purported bill of exceptions. It is, however, for reasons we will later set forth, patently incomplete and clearly insufficient for us to make any determination that the District Court abused its discretion in setting aside the default judgment.

The following principles are applicable. Appeals from the county court to the District Court in probate matters are tried in the District Court de novo and not de novo on the record. §§ 24-541, 30-1601, R. R. S. 1943.

In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court. State v. Jacobsen, 194 Neb. 105, 230 N. W. 2d 219; Jung v. Cole, 184 Neb. 153, 165 N. W. 2d 717.

The rules for preparation, settlement, allowance, certification, filing, and amendment of the bills of exceptions on appeal to the Supreme Court from the

District Court are governed by Rule 7, Revised Rules of the Supreme Court, 1974, enacted pursuant to the authority of section 25-1140, R. R. S. 1943. State v. Jacobsen, *supra.*

Where a default judgment has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere. Urwin v. Dickerson, 185 Neb. 86, 173 N. W. 2d 874; Dennis v. Dennis, 179 Neb. 200, 137 N. W. 2d 694.

The certificate on the bill of exceptions recites: ". . . that this Bill of Exceptions is in one volume and contains all of the proceedings held, together with proper certificates therefor . . . ." The contents of the bill of exceptions consists only of machine copies of 14 documentary exhibits, including copies of correspondence, some signed and some unsigned; affidavits, some executed and some unexecuted; copies of newspaper clippings of notice of probate proceedings; unexecuted requests for admissions; unexecuted answers to requests for admissions; as well as copies of a claim of Karen Boosalis against the estate of Landmesser. It does not show that the exhibits were ever offered or received in evidence, it contains no stipulation that the exhibits are what they purport to be, or that the letters were sent and received, or that the originals of other unexecuted instruments were executed and served, or any other matters which lend substance to the papers. Neither does the bill contain a case stated.

On the other hand the order of the District Court makes certain findings purportedly based on the record that certain things were not done. Such a finding was obviously made on the basis of some additional evidence or stipulation of fact not contained in the bill. We conclude that the bill of exceptions is so patently incomplete as to be no bill of exceptions at

all. Consequently, as previously indicated, we conclude that the question is whether the pleadings support the judgment. We have examined the pleadings and conclude that they do support the orders setting aside the judgment on the claim and the order appointing the administrator.

AFFIRMED.

MARGARET BARNES, APPELLANT, V. FRED HAMPTON ET AL., APPELLEES, REVIVED IN THE NAME OF WINIFRED JEANNE HAMPTON, EXECUTRIX OF THE ESTATE OF FRED HAMPTON, DECEASED.

252 N. W. 2d 138

Filed March 30, 1977. No. 40925.

1. **Subrogation: Principal and Surety.** Upon payment of the obligation of the principal, a surety is subrogated to the rights of the creditor against the principal.
2. **Contracts.** Unless otherwise agreed, there is no privity of contract between an owner and a subcontractor.
3. **Contracts: Subrogation: Principal and Surety.** A surety, which is subrogated to the rights of the principal against a third person, takes the rights subject to all defenses which the third person had as against the principal.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed.

Michael O. Johanns of Peterson, Bowman, Coffman & Larsen, for appellant.

Stewart & Stewart, for appellee Hampton.

Vance Leininger, for appellee McMeekin.

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

BOSLAUGH, J.

In 1968 the Nebraska Construction Company of Elwood, Nebraska, entered into a contract to construct certain improvements for Sanitary and Improvement District No. 1 of Stanton County, Nebras-

ka. General Insurance Company of Nebraska was the surety on the performance bond furnished by the construction company.

The construction company subcontracted a part of the work, water mains and services, to the defendant, Fred Hampton. After the work was completed the improvement district sued the construction company and its surety for defective work performed by Hampton. That action was settled by payment of $12,750 to the improvement district.

This action was commenced on March 25, 1974, by the construction company and its surety to recover the amount paid to the improvement district and the cost of defending the action brought by the improvement district. The plaintiff, Margaret Barnes, is the assignee of the construction company and its surety and was substituted as plaintiff.

The defendant Hampton moved to dismiss on the ground the construction company had been dissolved on August 3, 1971, and the action was not brought within the 2-year limitation period provided in section 21-20,104, R. R. S. 1943. The plaintiff then moved to strike the motion to dismiss on the ground the issue could not be raised by motion but had to be raised by answer. The trial court sustained the motion to dismiss, overruled the motion to strike, and dismissed the action. The plaintiff has appealed. There is no issue concerning the dismissal of the action as to James A. McMeekin, a second defendant.

The plaintiff contends section 21-20,104, R. R. S. 1943, was not applicable to the surety because the surety was subrogated to the claim of the improvement district and was an entity separate from the construction company which was dissolved.

Upon payment of the obligation of the principal, a surety is subrogated to the rights of the creditor against the principal. Sheridan v. Dudden Implement, Inc., 174 Neb. 578, 119 N. W. 2d 64. If the

surety participated in the settlement of the action against the construction company, the surety was subrogated to the rights of the improvement district against the construction company. The improvement district had no right of action against Hampton because Hampton was a subcontractor and there was no privity of contract between the improvement district and Hampton. See Boyd v. Benkelman Public Housing Authority, 188 Neb. 69, 195 N. W. 2d 230. The surety obtained no rights against Hampton by subrogation from the improvement district.

Any right that the surety might assert against Hampton would be derived from the construction company and would be subject to any defense, including section 21-20,104, R. R. S. 1943, that Hampton would have against the construction company. See, 73 Am. Jur. 2d, Subrogation, § 106, p. 665; American Surety Co. v. School District, 117 Neb. 6, 219 N. W. 583. Since the plaintiff was the assignee of the construction company and the surety, all her rights were subject to the defenses Hampton had against the construction company and the surety.

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

AFFIRMED.

HUGH BURGESS ET AL., APPELLANTS, V. CURLY OLNEY'S, INC., APPELLEE.

251 N. W. 2d 888

Filed March 30, 1977. No. 40936.

1. **Trial: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong.
2. **Trial: Judgments: Evidence.** In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it.

3. **Trial: Judgments: Statutes.** It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R. R. S. 1943.
4. **Trial: Judgments: Statutes: Evidence.** Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
5. **Trial: Judgments.** A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.
6. _____: _____. The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically.
7. **Uniform Commercial Code: Damages.** Under the provisions of section 2-713, U. C. C., the measure of damages for nondelivery or repudiation by the seller is the difference between the market price and the contract price at the place of tender at the time the buyer learned of the breach.
8. _____: _____. Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. § 2-715(2), U. C. C.

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

Ross, Schroeder & Fritzler, for appellants.

Stevens & Freeman, for appellee.

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

CLINTON, J.

This is a law action seeking a money judgment for an alleged breach of a contract by which the defendant agreed to sell to the plaintiffs three used combines. A jury was waived and after trial the court rendered judgment against the defendant for $200 for return of a downpayment made by plaintiff purchasers and dismissed the plaintiffs' petition at their

cost. In its judgment and order of dismissal the court stated: "The Court finds from the evidence introduced at the time of trial that the down payment by plaintiffs to the defendant in the sum of $200.00 should be returned, and therefore judgment for the plaintiffs was rendered in the sum of $200.00. As to all other matters, the court finds for the defendant, and the costs are taxed to the plaintiffs."

The issues presented to the District Court as evidenced by the pleadings, the pretrial order defining issues, and the evidence were the following: (1) Was there a contract. (2) Was it breached by the defendant by selling the combines to a third party before the plaintiffs were required to take delivery. (3) Did the plaintiffs breach the contract by failing to take delivery within 2 or 3 weeks from the time the purchase order was signed and the downpayment made, and was performance by the defendant for that reason excused. (4) If the defendant breached the contract were the plaintiffs damaged, and if so, in what amount.

The plaintiffs have appealed and make four assignments of error. The first three may be consolidated into one, namely, that the judgment is not supported by the evidence. The final assignment, namely, that the court erred in admitting parol evidence to show the plaintiffs had agreed to take delivery within 2 or 3 weeks of the date the order was signed, has not been argued in the briefs and we will note it only in passing.

Plaintiffs' argument is wholly devoted to demonstrating that the evidence was sufficient to support a finding of damages caused to the plaintiffs by the defendant's alleged failure to perform. The plaintiffs mistake their posture before this court on appeal for two apparent reasons: (1) They assume because of remarks made by the trial judge immediately before he announced his decision that the judge based his judgment for the defendant upon the premise

that the evidence of damages was as a matter of law insufficient to support a finding of damage. They overlook the fact that the court's finding for the defendant as evidenced by the judgment is general. The court did not and it was not requested to make specific finding of fact and law as authorized by section 25-1127, R. R. S. 1943. (2) They also overlook the applicable standard and scope of review in this court in a law action where a jury is waived and the issues tried to the court.

The rules are these: "The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong.

"In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it.

"It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R. R. S. 1943.

"Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.

"A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.

"The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically."

Henkle & Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N. W. 2d 772.

There is no conflict in the evidence as to whether or not there was an agreement for the sale and purchase of the three combines. There is a direct and irreconcilable conflict as to whether the contract included an oral provision that delivery be taken within 2 or 3 weeks from the date the order was signed. Such an agreement, if made, did not in any way contradict or add to the contract as evidenced by the "Retail Order Form." The instrument simply did not deal with the time of delivery and the contract was not completely integrated in that respect. See Traudt v. Nebraska P. P. Dist., 197 Neb. 765, 251 N. W. 2d 148. The evidence would justify the District Court in finding that the taking of delivery by the plaintiffs and payment by them within 2 or 3 weeks from the signing of the order was a provision of the contract and was breached by the plaintiffs and that rescision by the defendant was proper.

With reference to the matter of damages, the plaintiffs rely upon the provisions of sections 2-713 and 2-715(2), U. C. C. For purposes of discussion here we will assume that the evidence of the plaintiffs was sufficient to have permitted a finding in their favor. The point, however, is that the evidence did not compel any such finding.

We will only briefly sketch the nature of the evidence. The purchase order was executed on November 30, 1973. The total sale price for the three combines was $2,200. Two hundred dollars was paid down and the balance payable was "Cash on Delivery." It is undisputed that the plaintiffs were to take delivery at the defendant's place of business in McCook, Nebraska. On February 20, 1974, the plaintiffs had not taken delivery. On that day the defendant notified the plaintiffs that the downpayment was being returned and then the same day sold the three combines, plus a hay baler, to a

third party for a total price of $3,400. The check for the $200 downpayment was transmitted to the plaintiffs, but not cashed by them at the time of trial and it was for this amount that the court rendered judgment against the defendant.

The plaintiffs' proof of damages takes two tacks. They claim the difference between the contract price and the market price under the provisions of section 2-713, U. C. C. As proof of market price they offered and there was received pertinent pages from "Official Guide Tractors and Farm Equipment," Spring 1974, which gave "average as is" and "average loan" values for combines of the kind and model in question. Such values for the combines totaled approximately $7,000. It was acknowledged, however, that actual market value depended upon the condition of the particular combines and their location within the rather extensive geographical areas covered by the guide. There was no competent opinion evidence offered to show what the particular condition of these combines in question was and what the market price would have been at McCook, Nebraska, when the buyers learned of the breach. The defendant's witness testified that the combines were in poor condition and that the sale of these three particular combines on February 20th, plus the hay baler, for a total amount of $3,400 was an arms-length transaction. Under the provisions of section 2-713, U. C. C., the measure of damages for nondelivery or repudiation by the seller is the difference between the market price and the contract price at the place of tender at the time the buyer learned of the breach. See, also, § 2-723, U. C. C. The evidence was such that the District Court could have found that the plaintiffs did not prove their damages in accordance with this standard.

Alternatively the plaintiffs claim consequential damages under section 2-715(2), U. C. C., for the difference between the contract price and the price at

which they could have resold the property in Minnesota (their home and place of business), during the contract period. The plaintiffs offered and there was received in evidence a sales agreement by which a third party had, in December 1973, agreed to purchase the three combines from the plaintiffs at a total price of $8,000.

Section 2-715(2) (a), U. C. C., provides as follows: "(2) Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; . . . ." We will assume for purposes of discussion, but without so deciding, that the above provision defines a proper measure of damages applicable to this case. We will further assume that there was some evidence that "loss . . . could not reasonably be prevented by cover or otherwise." See White & Summers, Uniform Commercial Code, § 10-4, p. 323. We will also assume that there was some evidence that the seller "had reason to know" at the time of contracting of the "general or particular requirements and needs" of the buyer in purchasing the property and from which the loss resulted. Without going into detail, suffice it to say that the evidence establishing the contract for resale of the combines was of such a nature that the court could have found that it was not a contract entered into in good faith, but was a sham and made only for the purpose of providing evidence of loss of profit which would have supposedly been made on resale. The evidence was also deficient in that there was no evidence to show what it would have cost plaintiffs to transport the combines to the place of resale in Minnesota. See § 2-723(2), U. C. C.

AFFIRMED.

JEROME J. MONTGOMERY, APPELLEE, V. QUANTUM LABS, INC., APPELLANT.

251 N. W. 2d 892

Filed March 30, 1977. No. 40949.

Trial: Pleadings: Instructions. It is error to instruct on a theory not raised by the pleadings, over the objection of the opponent, not having afforded the opponent the opportunity to plead to that theory or present evidence thereon.

Appeal from the District Court for Douglas County: PATRICK J. LYNCH, Judge. Reversed and remanded for a new trial.

James B. Thomas of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

Louis M. Leahy of Leahy, Washburn, Render & Cavanaugh, for appellee.

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

WHITE, C. THOMAS, J.

Plaintiff Jerome J. Montgomery brought suit in the District Court against the defendant Quantum Labs, Inc., for an alleged breach of a contract of employment. The plaintiff alleged in his petition that on or about September 1, 1972, the plaintiff and the defendant entered into a written agreement whereby plaintiff would be employed by defendant, to be compensated at the rate of 5 percent of the gross sales during the first year of the defendant's operation. The business was to commence on or about December 1, 1972, and the contract to continue until December 1, 1973. The plaintiff alleged that the contract was reduced to writing and signed by the parties, that the plaintiff did not receive a copy of the agreement, and that on or about April 1, 1973, plaintiff was discharged. The plaintiff sues for the 5 percent of the gross sales business of the defendant during the period from December 1, 1972, to Decem-

ber 1, 1973. The parties stipulated at trial that the gross business sales of Quantum was $91,716.48 for the period December 1, 1972, to December 1, 1973. In its answer Quantum admitted that Montgomery was an employee of Quantum from September 1972 to April 1973. The defendant denied that there was any written contract, but agreed the compensation was to be 5 percent of the gross sales business of the defendant during the time of employment. The defendant then denied the remaining allegations in the plaintiff's petition. Later defendant offered to confess judgment in the amount of $220.18, the amount of 5 percent of the gross sales of Quantum during the period December 1, 1972, to April 1, 1973, less amounts already paid to the plaintiff.

At the trial the plaintiff testified that a writing was presented to him by one of the defendant's officers. Whether the defendant, Quantum Labs, Inc., was actually formed at that time is not shown in the record. The plaintiff testified that he signed the original and the copy of the agreement, returned the documents to Quantum's officer, and entered into employment. Until December 1, 1972, plaintiff was engaged in locating a laboratory site for Quantum by cleaning and preparing the site for occupation. On December 1, 1972, plaintiff commenced soliciting business from physicians and businesses for Quantum. The case was tried to a jury which returned a verdict for the plaintiff in the amount of $4,195.34. Quantum appeals.

Quantum's principal assignment of error relates to the instructions of the trial court. It is Quantum's argument that there was not sufficient evidence to submit the case to a jury on the theory of a written contract since the plaintiff was unable to produce such a contract and the defendant denied the existence of any such contract. Section 27-1004, R. R. S. 1943, states, in part: "The original is not required, and other evidence of the contents of a writing, * * *

is admissible if: * * * (3) At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing * * *." In section 27-1008, R. R. S. 1943, it is provided: "* * * when an issue is raised (1) whether the asserted writing ever existed, or * * * (3) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact." The plaintiff testified as to the existence of a signed agreement, its return to Quantum, and his performance according to the terms of the agreement. We believe that this was sufficient to submit to the jury the issue of whether in fact there was ever a written agreement.

Quantum next argues that the trial court was in error in submitting to the jury an issue not disclosed by the pleadings, to wit, whether the agreement was in fact oral. An instruction conference was held at which time the defendant objected to any instruction which purported to submit to the jury the question of whether there was an oral agreement and to any instructions which would allow the plaintiff to recover on the basis of an oral agreement. Quantum contends that the theory of the plaintiff's cause of action was based on a written contract. Since the plaintiff did not plead an oral contract, the defendant was thereby not allowed to raise in its defense section 36-202, R. R. S. 1943; the Statute of Frauds, i. e., whether the oral contract would be a contract not capable of being performed within a year and therefore unenforceable. The threshold question is then whether or not the contract between Montgomery and Quantum, if oral, was a contract which could be performed within the period of 1 year and thus be exempt from the Statute of Frauds. The contract, according to Montgomery's testimony, was signed

by him in the latter part of August or early September 1972, and called for his immediate employment for a period from September 1, 1972, to December 1, 1973, a total of 15 months. The contract is for a period in excess of 1 year. It is subject to the terms of the act and unenforceable if it is an oral contract. Restatement, Contracts 2d, Tent. Dr. No. 4, section 198, which is unchanged from the original section 198 of Restatement, is as follows: "(1) Where any promise in a contract cannot be fully performed *within a year from the time the contract is made,* all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.

"(2) When one party to a contract has completed his performance, the one-year provision of the Statute does not prevent enforcement of the promises of the other parties." (Emphasis supplied.) Montgomery claims that his contract was substantially performed and cites Taylor v. American Radiator Co., 93 Neb. 24, 139 N. W. 685 (1913), where the plaintiff Taylor contracted orally to work for 3 years for the defendant and was discharged. The court allowed evidence of the oral contract holding it not to be within the proscriptions of the Statute of Frauds, now section 36-202, R. R. S. 1943, and cited the proposition that: "An oral contract for personal services which have been performed for almost the full time of the period for which they were engaged cannot be successfully questioned after they have been performed, because alleged to be within the statute of frauds." In that case Taylor had worked as a salesman under the contract for the 3-year period lacking only 10 days.

In the current case, the plaintiff worked for the defendant for approximately 8 of 15 possible months. The plaintiff sued on a written contract. He was entitled to have the jury instructed on his theory of the case but not on a theory that was not raised by

the pleadings. See, Newkirk v. Kovanda, 184 Neb. 127, 165 N. W. 2d 576 (1969); Mapledge Corp. v. Coker, 167 Neb. 420, 93 N. W. 2d 369 (1958). It is unlikely that the partial performance by the defendant was substantial enough within the meaning of Taylor v. American Radiator Co., *supra,* to prevent the defense of the Statute of Frauds. That issue need not be decided at this time because it is clear that, under the pleadings of the plaintiff, it was error for the court to instruct on a theory of an oral contract over the objection of the defendant without having afforded the defendant the opportunity to plead or present evidence that the oral agreement was unenforceable under the terms of section 36-202, R. R. S. 1943.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. NEIL HART, APPELLANT.

252 N. W. 2d 139

Filed March 30, 1977. No. 40969.

1. **Criminal Law: Bonds.** Where the defendant fails to appear in court as required by the conditions of his bond, the liability on the bond becomes absolute and forfeiture is proper.
2. **Criminal Law: Bonds: Judgments.** In the absence of a showing excusing the defendant's failure to appear as required by the conditions of his bond the trial court may on motion enter judgment on the bond.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Leonard P. Vyhnalek of Beatty, Morgan & Vyhnalek, for appellant.

Milton R. Larson and Marvin L. Holscher, for appellee.

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

BOSLAUGH, J.

An information charging the defendant with burglary was filed in the District Court on April 23, 1975. He was arraigned on July 21, 1975, pleaded not guilty, and trial was set for August 7, 1975. The defendant's appearance bond in the amount of $3,000 was continued.

On August 7, 1975, the trial was continued to October 9, 1975, upon a showing that the defendant was hospitalized with a severe virus infection. Later, the trial was continued to November 10, 1975, upon a showing that the defendant was hospitalized at Brownsville, Texas, with an apparent heart attack.

On February 11, 1976, the State moved for an order requiring the defendant to appear in court so that a trial date might be set. On March 11, 1976, the defendant moved for a continuance alleging that he had suffered a heart attack in Montana on February 17, 1976, and should not be exposed to a strain of any kind for at least 8 months. On March 16, 1976, the trial court ordered the defendant to appear in court on March 29, 1976. The defendant failed to appear on March 29. His bond was forfeited on the motion of the State and a bench warrant was issued.

On April 23, 1976, the State moved for judgment on the bond, and the hearing was set for May 3. On May 3 the hearing was continued to May 10 and Dr. John R. Burg of Billings, Montana, was appointed to examine the defendant. The hearing was again continued on May 10 and May 17. On May 24 the court refused a further continuance and entered judgment on the bond. The defendant has appealed and contends the judgment is contrary to law.

When the defendant failed to appear in court as the bond required, the liability on the bond became absolute and forfeiture was proper. § 29-1106, R. R. S. 1943; State v. Kennedy, 193 Neb. 472, 227 N. W. 2d 607.

The defendant made no showing on March 29, 1976,

to excuse his failure to appear. There is nothing in the record which would support a finding that a forfeiture of the bond was improper.

At the hearing on May 17, 1976, a letter from Dr. Burg was received in evidence. The substance of this report was that the defendant probably suffered from angina pectoris. There is nothing in the report to show the defendant was unable to appear in court at North Platte, Nebraska. No further showing was made at the hearing on May 24, 1976, although defendant's counsel was given an opportunity to attempt to contact Dr. Burg by telephone.

The record fully sustains the forfeiture. The judgment on the bond is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDDIE ADDISON, APPELLANT.

251 N. W. 2d 895

Filed March 30, 1977. No. 40970.

1. **Criminal Law: Right to Counsel.** Appointments of counsel other than the public defender shall be limited to situations in which there are multiple defendants requiring separate representation, or where exigent circumstances are present which, in the opinion of the court, require appointment of other than the public defender.
2. **Criminal Law: Courts: Records: Right to Counsel: Waiver.** A journal entry of an arraigning court stating facts showing an intelligent waiver of counsel is sufficient evidence of such waiver in the absence of proof that the journal entry is incorrect.
3. **Criminal Law: Right to Counsel: Waiver.** In a criminal case one has the right to represent himself after knowingly and intelligently waiving the assistance of counsel.

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

Eddie Addison, pro se.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

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

WHITE, C. THOMAS, J.

The defendant was convicted in the District Court for Sheridan County, Nebraska, of failure to appear as ordered by the District Court to answer a charge of uttering a forged instrument and not surrendering himself within 3 days thereafter. The charge is a felony. In the same information the defendant was charged with being an habitual criminal. After a jury trial the defendant was convicted and, at a separate hearing, was found to be an habitual criminal. The court sentenced the defendant to a term of 10 years. Defendant appeals.

The defendant appears pro se in this court and assigns as error the following: (1) The District Court erred in not determining the defendant's competence to waive counsel; (2) the court erred in disclosing the habitual criminal charge to the jury; and (3) the habitual criminal statute is unconstitutional.

The defendant was arraigned on January 28, 1976, in the District Court. Because the defendant was not represented by counsel, the trial judge asked him whether he wished to be represented by the public defender. The defendant refused the offer. At that time a motion to withdraw as attorney for the defendant was filed by the public defender and such motion was joined by the defendant. The court held that the law did not permit the defendant to choose what counsel would represent him at public expense and that the public defender, Charles Plantz, not being disqualified, should be appointed to represent the defendant. Following a request by the defendant for time to hire his own counsel, the court continued the matter until February 11, 1976. On that day the defendant again appeared in court and advised the court that he had not secured the services of an attorney. He requested the matter be set for trial and

stated that he would secure the services of an attorney before the date set. The court then again advised the defendant of the prior proceedings and of his option to proceed either without an attorney or with the public defender as his attorney. The defendant refused the appointment of the public defender and informed the court that, if necessary, he would conduct his own defense. The defendant was then arraigned and plead not guilty.

At the pretrial conference held on March 10, 1976, the prior proceedings were again reviewed by the court. The defendant stated that he did not have an attorney, however, he expected to retain one of two possible attorneys. The court again inquired whether the defendant wished to have an attorney appointed for him and the defendant stated that he did not. The trial date of March 29, 1976, was set.

On March 29, 1976, immediately before the selection of the jury, the court again reviewed the prior proceedings with the defendant and again asked the defendant if he wished to have the public defender represent him. The defendant was told that he had the right to counsel, but that the court would appoint the public defender only. The defendant again told the court that he was still trying to get an attorney and that he did not wish to have the public defender represent him or to sit with him at the counsel table. The court further advised the defendant that the public defender would be present throughout the trial to assist the defendant if and when the defendant desired such assistance. After selection of the jury, the trial was continued to the next day. On March 30, 1976, the court inquired of the defendant whether he wished to have the public defender sit with him at the counsel table and advise him should he request it during the course of the trial. The defendant agreed. Throughout the trial and at every recess the court continued to advise the defendant of his right to have the public defender appointed.

The defendant nonetheless conducted his own defense. After the return of the guilty verdict, the trial court again inquired of the defendant whether he wished the public defender to represent him. The same inquiry was made before the argument for new trial, the hearing on the habitual criminal charge, and the sentencing. Each time the defendant refused. The public defender, at all times, was present and available for advice should the defendant have wished to consult him.

Section 29-1805.10, R. R. S. 1943, provides in part: "* * * but appointments of counsel other than the public defender shall be limited to situations in which there are multiple defendants requiring separate representation, or where other exigent circumstances are present which in the opinion of the court require appointment of other than the public defender." The record is silent as to any justification for the defendant's objection to the public defender other than suggesting only that it was the defendant's impression that the public defender was not favorably disposed to the defendant. The trial court in view of the complete absence of showing of any reason to appoint outside counsel was compelled to abide by the plain dictate of the statute. There is no error in failing to assign other counsel. Records of the arraignment and the preliminary hearing are not shown in the bill of exceptions. What transpired there is reflected in the court's journal which the parties do not dispute. In State v. Morford, 192 Neb. 412, 222 N. W. 2d 117 (1974), we said: "We conclude that a journal entry of an arraigning court stating that a defendant has waived counsel will support such a finding on appeal in the absence of proof that the journal entry is incorrect." The proceedings had before trial are not before us. The journal, however, does state in some detail the dialogue between the court and the defendant. The bill of exceptions discloses that at trial essentially the same

message was repeatedly given the defendant.

At the conclusion of the case and before sentence, for reasons that are not disclosed in the record, the trial court ordered a mental examination of the defendant. Results of the mental examination were not introduced in evidence and are not before us in the bill of exceptions. There is no contention that the defendant was incompetent at the time of the trial but apparently, because of the examination, he concludes that he was not competent to waive counsel. The defendant also argues that the trial court was under some independent duty to hold a separate and distinct hearing before the court could find that the waiver of counsel was made competently, intelligently, and understandingly.

The defendant had the right to proceed without counsel. The record establishes that after being advised of this right on numerous occasions, he chose not to be represented. If he so elects, after being fully advised of his rights, the court may accept his decision if it has determined that the waiver was competently and intelligently made. See, State v. McGhee, 184 Neb. 352, 167 N. W. 2d 765 (1969); State v. Beasley, 184 Neb. 649, 171 N. W. 2d 177 (1969). There is no evidence in the record which supports a conclusion that the defendant was not mentally competent when he waived counsel. Without such evidence, a judge is under no obligation to order a mental examination or to hold a hearing to determine mental capacity.

The second assignment of error is based upon a newspaper which was marked as an exhibit in the case but not offered or received as evidence. On the back page under "Court news" this appears: "State of Nebraska vs. Eddie Addison, habitual criminal, willful failure to appear, filed 1-21-76." Due to that entry the defendant alleges that the statutory injunction against revealing to a jury the habitual criminal charge was violated by the District

Court. Nothing in the record supports this contention. There is no evidence that the jury knew of the habitual criminal charge or that section 29-2221, R. R. S. 1943, was violated. The assignment is without merit.

The third assignment of error is that the habitual criminal statute is unconstitutional. This court has previously discussed, considered, and rejected this contention. The defendant's assignment is without merit. See, State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589 (1975); State v. Losieau, 184 Neb. 178, 166 N. W. 2d 406 (1969); State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321 (1967).

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

WHITE, C. J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LAVELL FLYE, APPELLANT.

252 N. W. 2d 141

Filed March 30, 1977. No. 40994.

1. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
2. _____: _____. A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

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

Herbert M. Sampson, III, for appellant.

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

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

SPENCER, J.

Defendant entered a plea of guilty to a charge of stabbing with intent to kill. After a presentence investigation, the defendant was sentenced to a term of 12 to 15 years in the Nebraska Penal and Correctional Complex. Defendant appeals, alleging: (1) The court abused its discretion in failing to order evaluation previous to the imposition of sentence; and (2) in imposing an unduly harsh and excessive sentence. We affirm.

There is no merit to the defendant's first assignment. It is discretionary with the sentencing judge as to whether he shall order the offender to submit to an evaluation. Defendant had been evaluated on a previous offense. That examination found defendant had borderline mental retardation; was an habitual excessive drinker; and had a drug dependence involving marijuana. At that time, the Lincoln Regional Center found defendant competent to stand trial.

At the time of the commission of the offense herein, July 7, 1976, defendant was on probation for harboring a 13-year-old child with intent to conceal and detain her from her parents. He pled guilty to that charge November 25, 1975, and was placed on probation January 27, 1976.

Defendant pled guilty to stabbing his stepfather in the back with a butcher knife when the stepfather refused to give him $10 he had requested. Defendant said that he intended to kill the stepfather. The possible sentence for that offense is imprisonment in the Nebraska Penal and Correctional Complex for not more than 50 years nor less than 1 year. § 28-410, R. R. S. 1943.

Our law is well settled. This court will only reduce a sentence imposed by the trial court if there has been an abuse of discretion. See State v. Keen, 196 Neb. 291, 242 N. W. 2d 863 (1976), where we said: "A sentence imposed within the statutory limits will

not be disturbed on appeal unless there appears to be an abuse of discretion."

Has there been an abuse of discretion herein? We find there has not. Defendant was on probation for a prior felony at the time of the offense herein. He has had several arrests for intoxication. He was committed to the Hastings Regional Center following an arrest for being a minor in possession. He escaped several times before his release in January 1974. He assaulted a police officer in June 1974. In December 1974, he was sentenced to 30 days in jail for failing to appear for trial. On January 7, 1975, he was committed to the Lincoln Regional Center after being charged with assault with intent to do great bodily harm and with forcibly assaulting or resisting a law enforcement officer.

In State v. King, 196 Neb. 821, 246 N. W. 2d 477 (1976), we said: "We know that as a practical matter the minimum portion of an indeterminate sentence is that which measures the severity of the sentence." A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

In this instance, the minimum sentence imposed was 12 years. The longest minimum that could be imposed under the provisions of the pertinent statutes, sections 29-2221, R. R. S. 1943, and section 83-1,105(1), R. S. Supp., 1976, is 16⅔ years. This is one-third of the 50-year maximum.

It is apparent from defendant's record that he has a violent disposition. He has been involved in previous assaults. He showed no remorse for the stabbing of his stepfather, and at the time intended to kill him. The record indicates that he has wholly failed to cooperate with the courts or the probation officers, either during the investigations or while on probation. His record and disposition are such that we cannot say the sentence of imprisonment im-

posed herein is not consistent with the protection of the public, the gravity of the offense, or the rehabilitative needs of the defendant.

The judgment is affirmed.

AFFIRMED.

LINCOLN FIRE FIGHTERS ASSOCIATION, LOCAL 644, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

252 N. W. 2d 607

Filed April 6, 1977. No. 40798.

1. **Court of Industrial Relations: Labor and Labor Relations: Wages: Contracts.** The establishment of a pay lag is a change in wages, and cannot be established unilaterally during the term of an operative contract.
2. **Court of Industrial Relations: Trial: Evidence.** The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence.
3. **Court of Industrial Relations: Labor and Labor Relations: Wages.** Prevalent wage rates for firemen must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets.
4. **Court of Industrial Relations: Labor and Labor Relations: Municipal Corporations: Wages.** In selecting cities in reasonably similar labor markets, for the purposes of comparison in arriving at comparable and prevalent wage rates, the question is whether as a matter of fact the cities selected for comparison are sufficiently similar and have enough like characteristics to make comparisons appropriate.
5. **Court of Industrial Relations: Labor and Labor Relations: Wages.** A prevalent wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors.
6. _____: _____: _____. In determining prevalent wage rates for comparable services in reasonably similar labor markets, the Court of Industrial Relations is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates.
7. **Court of Industrial Relations: Labor and Labor Relations: Wages: Statutes.** In establishing wage rates under section 48-818, R. R. S. 1943, the Court of Industrial Relations is required to take into consideration the overall compensation received by the employees, including all fringe benefits.
8. **Court of Industrial Relations: Evidence: Judgments: Appeal**

and Error. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside.

Appeal from the Nebraska Court of Industrial Relations. Affirmed in part, and in part reversed and remanded with directions.

Charles Humble, Dana Roper, Nelson, Harding, Marchetti, Leonard & Tate, and William A. Harding, for appellant.

Bauer, Galter & Geier, for appellee.

Earl D. Ahlschwede, for amicus curiae.

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

SPENCER, J.

City of Lincoln appeals from an order of the Court of Industrial Relations increasing wages of Lincoln firemen and ordering the city to refund amounts withheld under a pay lag system. We affirm in part and reverse in part.

Lincoln Fire Fighters Association, Local 644, brought this action in the Court of Industrial Relations pursuant to section 48-811, R. R. S. 1943, alleging that its employment contract with the city of Lincoln had expired on September 1, 1975, and that the parties had failed to negotiate a new contract. A pretrial conference narrowed the issues to wages, longevity, clothing allowance, insurance, fire equipment operator pay, and prevailing rights in the contract.

By an order entered on April 5, 1976, the Court of Industrial Relations increased minimum wages by 12.3 percent and maximum wages by 8.6 percent, with intermediate wages increased by an amount equal to the average of the two figures. The court further ordered the city to refund money that had been withheld from pay checks in connection with the establishment of a pay lag system. No order

was made on any of the fringe benefits since the court determined insufficient evidence had been presented on those issues. We first discuss the pay lag portion of the order.

The city instituted the pay lag system for all city employees, effective September 1, 1975. Under this system the 2-week pay period begins on a Thursday. Pay checks are issued on the second Friday following the completion of the pay period. The net result is that the payroll department has 7 working days to prepare the pay checks. Rather than delaying pay checks for 7 work days, in order to convert to this new accounting system, the city withheld .7 of each city employee's biweekly pay checks, spread over eight pay periods. This money was placed in a pay lag fund to be paid out upon termination of employment. The employee receives no interest on the money placed in the fund.

All city employees except the firefighters received a 10 percent pay increase, beginning September 1, 1975. Because the firefighters had not renegotiated their contract, they were still paid the rate stipulated in the old contract less .7 for the pay lag fund for the 8 weeks. Even though this money would eventually be paid, each firefighter experienced a wage reduction of an amount equal to .7 of a biweekly pay check for eight pay periods.

We agree with the Court of Industrial Relations. The establishment of the pay lag is a change in wages, and cannot be established unilaterally during the term of an operative contract. We affirm that portion of the order which directs the city to pay the amount of the pay lag which was withheld from wages accruing under the existing contract.

The issue in this case was not whether the city could initiate a new accounting system referred to as a pay lag. The firefighters concede this may be done. It is the operation of the pay lag to the contract then in existence to which they object. Insofar

as the order of the Court of Industrial Relations may be construed to disapprove of the adoption of a pay lag system as to future contracts, it is reversed.

The Union presented evidence which compared the Lincoln, Grand Island, and Omaha fire departments with respect to both wages and fringe benefits. The city offered wage comparisons from four different groupings of eight cities. The court rejected the evidence offered by the Union as not being comparable. It concluded, however, that one of the comparisons presented by the city was appropriate for determining prevalent wages and working conditions.

The court selected the West North Central Array by city population for purposes of comparison. These cities, with the estimated 1975 population, are: Des Moines (194,000), Cedar Rapids (109,900), and Davenport (100,300), Iowa; Wichita (264,000), Topeka (126,580), and Kansas City (169,000), Kansas; St. Paul (291,000), Minnesota; and Springfield (128,000), Missouri. Lincoln's population estimate is 158,500. The city's expert testified these cities were chosen on the basis of geographical location and population. Four of the cities have a greater population than Lincoln, and four have a lesser population. In selecting this particular array of cities over the other three presented by the city, the court also considered similarity of working conditions, including such factors as the size of firefighting forces, population density, and climatic conditions.

The minimum rate of pay for Lincoln firefighters was shown to be 9 percent below the arithmetic mean of the minimum rate in the eight cities, as of September 1975. The maximum rate of pay was 5.3 percent below the arithmetic mean. The court ordered the wages for the Lincoln firefighters increased by these amounts.

The court also found that contracts in five of the

eight cities had January 1 for a starting date, and that Cedar Rapids and Omaha (which was not one of the cities in the array) showed an increase of 5 percent for calendar year 1976. Based on this fact, the court determined that an average increase of 5 percent could be expected for 1976.

It then determined that because the contract involved commenced on September 1, 1975, only 8 months would be subject to this 5 percent increase. Thus, the court ordered an additional increase of two-thirds of 5 percent, or 3.3 percent. In effect, the minimum wage was ordered increased by 12.3 percent, and the maximum wage by 8.6 percent with intermediate wages increased by an average of these two figures.

The city maintains the court should not have ordered a wage increase after rejecting the evidence presented by the Union. This contention is without merit. It is true the burden is on the moving party in a section 48-818, R. R. S. 1943, case, to demonstrate that existing wages are not comparable to the prevalent wage rate, but all evidence contained in the record may be considered for this purpose. There is no merit to the city's contention that the city's evidence cannot be used. The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence. 31A C. J. S., Evidence, § 104, p. 176.

In Omaha Assn. of Firefighters v. City of Omaha, 194 Neb. 436, 231 N. W. 2d 710 (1975), we held that prevalent wage rates for firemen must of necessity be determined by comparison with wages paid for comparable services in reasonably similar labor markets. In section 48-818, R. R. S. 1943, in selecting cities in reasonably similar labor markets, for the purposes of comparison in arriving at comparable and prevalent wage rates, the question was whether as a matter of fact the cities selected for

comparison are sufficiently similar and have enough like characteristics to make comparisons appropriate.

We conclude there was sufficient evidence for the court to find that wages received by Lincoln firefighters were not comparable to prevalent wage rates. In selecting the fire departments to be used for comparison, the court considered the size and complexity of the firefighting forces and the physical conditions under which the firefighters work is done. Among those factors considered were geographical proximity to Lincoln and similarities in population, population density, force size, and weather conditions. The method of selection employed was in accord with the requirements of section 48-818, R. R. S. 1943.

However, the method of comparison used by the court did not comply with the statutory requirements. The evidence in this case showed the eight cities selected for comparison had on the average more than twice as much manufacturing as Lincoln, and presumably more unionization. There was also evidence that the median income in the cities selected was generally higher than the median income in Lincoln. Because the evidence established the cities selected were economically dissimilar to Lincoln, it was error for the court to utilize directly the mean wage rate of those cities in determining the prevalent wage rate.

In Omaha Assn. of Firefighters v. City of Omaha, 194 Neb. 436, 231 N. W. 2d 710 (1975), we stated: "A prevalent wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. * * * It must be noted also that in this case the Court of Industrial Relations did not determine the prevalent wage rates for firemen by any direct computation or application of average or mean rates from seven cities nor from ten cities. Instead, it

weighed, compared, and adjusted all the factors involved in each of the cities which resulted in a determination of prevalent wages paid for comparable services in reasonably similar labor markets."

We hold that in determining prevalent wage rates for comparable services in reasonably similar labor markets, the Court of Industrial Relations is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates.

In Omaha Assn. of Firefighters v. City of Omaha, *supra,* we further stated: "In establishing wage rates under section 48-818, R. R. S. 1943, the Court of Industrial Relations is required to take into consideration the overall compensation received by the employees, including all fringe benefits." This was not done in this case as no evidence was presented on fringe benefits received by the firemen in those cities used for comparison.

The Court of Industrial Relations was further in error in adjusting wages upward by 3.3 percent to compensate for anticipated increases in 1976. The only evidence presented on this point was that contracts in five of the eight cities were subject to renewal in January 1976, and that in two cities, Cedar Rapids and Omaha, wages were to be increased by 5 percent. Omaha, however, was not one of the cities included in the comparison, and further, the court had specifically rejected it as not being comparable. It is evident this figure was arrived at by speculation, surmise, or conjecture. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Mitchell v. Eyre, 190 Neb. 182, 206 N. W. 2d 839 (1973).

We affirm the judgment of the Court of Industrial Relations insofar as it directs the payment of the pay lag withheld from the wages of the firefighters. We reverse the judgment in all other particulars,

and remand the cause to the Court of Industrial Relations with directions to make a determination of the prevalent rate of pay based upon a consideration of overall compensation received during the relevant period. We further direct that in its application to Lincoln, the court make an appropriate adjustment for economic variables as described heretofore.

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

McCOWN, J., concurring.

The opinion of the Court of Industrial Relations does not make separate findings of fact and conclusions of law. It does contain, however, the only record of the findings of fact and conclusions of law made by the Court of Industrial Relations. That record necessarily forms the basis for any appellate review. The opinion establishes that the wage rates for Lincoln were determined by making a direct mathematical computation of the mean (average) minimum and maximum wage rates for firefighters in the eight cities used in the array as of September 11, 1975. The only adjustment made to that mathematical average was a percentage increase based upon the estimated or anticipated percentages of increase which might be granted in the eight cities of the array in succeeding contracts. This adjustment was made to adjust the mathematical average of September 11, 1975, to a contract year of August 1, 1975, to July 31, 1976.

The record also shows that the mean population of the eight cities used in the array was 48.5 percent larger than Lincoln, and the median population of those cities was 36.5 percent larger than the population of Lincoln. The opinion specifically states that the Court of Industrial Relations was not comparing cities, populations, and amenities, but was comparing work done in fire departments in the eight locations.

It would be unusual indeed if any eight cities could be found which would be sufficiently comparable that an appropriate prevalent wage rate to be applied in a ninth city could be properly determined by simply making an arithmetical computation. Certainly it is appropriate for the Court of Industrial Relations to consider mean and median figures. Its determination of the prevalent wage rate to be applied in the case before it, however, needs to be made after weighing, comparing, and adjusting all comparable relevant factors in the cities making up the array. For purposes of appellate review the record presented in this court must support the determination of the Court of Industrial Relations. The record here does not support the determination.

BOSLAUGH, J., joins in this concurrence.

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

The majority opinion acknowledges that the evidence "was sufficient for the court to find that wages received by Lincoln firefighters were not comparable to prevalent wage rates" and expressly approves the selection of cities used in making comparison to determine the "prevalent wage." It goes on, however, to hold that the Court of Industrial Relations erred in its determination of the wage rate increase to which Lincoln firefighters were entitled, because the "court did not comply with statutory requirements." In so saying, this court relies upon our opinion in Omaha Assn. of Firefighters v. City of Omaha, 194 Neb. 436, 231 N. W. 2d 710. I am unable, however, to determine from the opinion with what "statutory requirements" the Court of Industrial Relations did not comply. An even more serious matter perhaps is the fact that the majority opinion offers no concrete guidance as to how the Court of Industrial Relations should go about making its wage determinations in this case on the remand. The majority opinion says: ". . . it was error for the court

to utilize directly the mean wage rate of those cities in determining the prevalent wage rate."

Section 48-818, R. R. S. 1943, prescribes the statutory standard. In Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172, we held that the statutory standard was constitutionally adequate. The statute says that the Court of Industrial Relations "shall establish rates of pay and conditions of employment which are comparable to the *prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.*" (Emphasis supplied.) It also requires that overall compensation and benefits be considered. It seems apparent to me that as applied to this case the statute requires comparison of the wages of firefighters, not a comparison of the income of persons in all other parts of the economy. Yet if one looks behind the words of the majority opinion to the record upon which it is based, that appears to be what this court would require.

The statement that the "comparison . . . did not comply with the statutory requirements" is, in my judgment, incorrect and apparently arises from three things, to wit, (1) a misunderstanding of what was being compared in Omaha Assn. of Firefighters v. City of Omaha, *supra;* (2) a failure to apply the provisions of section 48-818, R. R. S. 1943, which establishes the appropriate standard; and (3) perhaps a misunderstanding of the evidence in the case before us.

In Omaha Assn. of Firefighters v. City of Omaha, *supra,* the Court of Industrial Relations and we on appeal compared firemen's wages with firemen's wages, and everything that was said in that case was premised upon that fact. In the case now before us the majority opinion would require not a comparison of firemen's wages with firemen's

wages under comparable conditions, but holds as a matter of law that such comparison must be adjusted by a factor which compares income of other than firemen in Lincoln with income of other than firemen in the comparable cities. We will demonstrate this in a little more detail later.

The findings of the Court of Industrial Relations in this case was founded upon the City's evidence, not that presented by the Union. The Court of Industrial Relations simply did not buy the theory of the City's economist that after the comparison is made there must be a further adjusting factor arrived at by comparing nonfiremen's income in Lincoln with nonfiremen's income in other cities.

All this is contained in a relatively small portion of the bill of exceptions: Exhibit 27, pages 5 and 6, and pages 138, 139, 140, 141, 142, and 143 of the testimony of Dr. Sherman. Columns one and two (not numbered) of page 6 of exhibit 27 compares firemen's wages with firemen's wages in the various comparable cities and shows that a 9 percent increase in Lincoln firemen's minimum pay is needed for Lincoln firemen to reach the mean or average minimum wage of that in the other cities and that a 5.3 percent increase is needed to reach the maximum (or top of the pay scale) in Lincoln to reach the mean maximum in the comparable cities. This is the figure the Court of Industrial Relations used, disregarding for the moment the 3.3 percent additional increase which the Court of Industrial Relations added because of possible pay increases in other cities occurring after the date. This clearly conforms with the statutory standard for it compares firemen's salaries with firemen's salaries.

The remaining four columns (unnumbered) of page 6 of exhibit 27 compares nonfiremen's income with nonfiremen's income. This is explained on page 139 of the testimony where Dr. Sherman says: ". . . you have to make everything relative. So,

therefore, a wage should be relative to the *income in the prevailing city.*" (Emphasis supplied.) The witness is here comparing nonfiremen's income, including that of bank presidents, businessmen, professionals such as doctors and lawyers, salesmen, factory workers, government workers including judges, capitalists, and all other segments of society. Of course the statute requires no such thing, but by this means the witness arrives at required increases of 4.4 percent and 1.1 percent. See the appropriate line on columns 3 and 4. How ludicrous this is is highlighted by the fact that it is apparently undisputed that Lincoln offered a 10 percent increase to firefighters. I would suggest that doctors, lawyers, bank presidents, judges, etc., form no part of the market from which the firefighters come.

As already noted, the majority opinion relies upon Omaha Assn. of Firefighters v. City of Omaha, *supra,* and quotes that case as follows: " 'A prevalent wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. * * * It must be noted also that in this case the Court of Industrial Relations did not determine the prevalent wage rates for firemen by any direct computation or application of average or mean rates from seven cities, nor from ten cities. Instead, it weighed, compared, and adjusted all the factors involved in each of the cities which resulted in a determination of prevalent wages paid for comparable services in reasonably similar labor markets.' " As I read the Omaha case we were there speaking of the statutory standard, i.e., that as applied to that case firefighters' wages in similar labor markets.

A comparison of the opinion of the Court of Industrial Relations in the case now before us and its opinion in the Omaha firefighters case shows that in each that body did essentially the same thing.

In the Omaha case the seventh syllabus of the

Court of Industrial Relations opinion was as follows: "Section 48-818 does not fix any single formula or combination of formulas whereby the prevalent wage rate is to be determined. Rather the Court must make the pragmatic adjustments which may be called for by particular circumstances." In the Omaha case we approved what the Court of Industrial Relations did and its opinion was before us for review. An examination of that opinion shows that the Court of Industrial Relations was establishing a "hypothetical market," because no actual comparable market existed. In that case the Court of Industrial Relations had before it the testimony and statistics provided by two economists, one Kilgallon for the firefighters, and one Connell for the City of Omaha. In the case before us, just as it did in the Omaha case, the Court of Industrial Relations did not accept in their entirety theories and evidence of either side. Kilgallon's premises were in part rejected because his figures were bottomed solely on similarity of economic conditions. The Court of Industrial Relations said: ". . . it is clear that his testimony is bottomed on the premise that economic circumstances in the communities compared are irrelevant to wage determinations under Section 48-818. He, therefore, makes no effort to demonstrate any comparability of the communities he utilized with Omaha, other than his demonstration of comparability of firefighting circumstances." Connell testified that some adjustment for economic circumstances is required. The Court of Industrial Relations pointed out that there were weaknesses in Connell's testimony also, but said: "The problem raised by Connell's testimony is one which we have not previously been required to face. The great bulk of our 48-818 determinations have involved public school teachers in the State of Nebraska. None of these cases have required us to depart from Nebraska information in order to make a determina-

tion. The relative homogeneity of the Nebraska economy has largely prevented the type of variables which concern Connell from influencing our teacher pay cases. In addition, we have imposed certain control on the evidence we utilize, which prevent factors other than value of service from influencing our determination. Thus, in the teacher pay cases, we have either utilized the athletic conference to which the school district belongs, . . . or, where an appropriate athletic conference was not available, we have required the information upon which we base our wage determination to come from school districts in close geographic proximity to the litigating district and of comparable size to the litigating district, ... [T]his case poses for the first time the question of what controls we will impose upon data submitted in 48-818 cases in which information from the State of Nebraska is either not available or severely limited. . . . What the statute does not tell us is where we are to find 'the prevalent wage rates.' . . . We believe that the appropriate standards for selection are implicit in the statutory scheme.

"In an unregulated labor market, labor and management test their relative market power through bargaining. This testing may include resort to the strike or the lockout. However, the Legislature decided that the services provided by employees subject to our jurisdiction were too vital to allow interruption while employer and employees tested the merits of their claims by trial by battle. When discussion is barren, employers and employees in the public sector are routed here. Judicial mandate replaces economic power as the determinate of wages.

"However, the Legislature in providing for a judicial determination of wages did not deprive either management or labor of its market power. Rather, *it commanded that we so set wages and conditions of*

employment that employers are required to pay the market price of labor. In other words, we are to set wages at the level on which the parties ultimately would have settled if they were free to exert the range of leverage available in an unregulated labor market.

"The 'prevalent' then is to be found in the market where the employer before the Court hires labor and in which the employees before the court offer their services. However, in many instances, and this case is one of them, the only employer of a particular service in a relevant market area is the employer before the court. Because of the statutory limitation on the employees' right to strike, the wages paid by such an employer cannot be treated as determinative of the prevalent free market wage rate. *In such a situation, we must structure a hypothetical market in order to determine wages.*" (Emphasis supplied.)

The court went on to discuss the testimony of the expert witnesses for each side and to point out that the evidence did not show that firemen's salaries in the cities in the array varied in direct proportion to the amount of manufacture and unionization and that in fact in some instances the opposite was true.

The court then said: "We have already noted that Connell utilized state by state figures in his critique of Kilgallon's evidence. However, Kilgallon's evidence involves a comparison of cities. *The evidence in this case demonstrates that the presence of higher levels of unionization or higher wages in one state than in another do not directly lead to higher wages for firemen in cities in the higher state over those paid firemen in cities in the lower state. Connell's testimony indicates that both levels of unionization and wage rates are higher in Ohio than in Minnesota. However, as Table 2 of plaintiff's Exhibit 2 demonstrates, wages paid to firemen in Minneapolis*

and Saint Paul are higher than those paid to firemen in any of the four arrayed Ohio cities.

"Connell's testimony demonstrates that a direct determination of wages for Omaha firemen cannot be made from plaintiff's Exhibit 2, Table 2. Nevertheless, his testimony does not destroy the central point made by that exhibit. Even making due allowance for the variables of unionization and presence of manufacture, nevertheless, Exhibit 2, Table 2, demonstrates that Omaha firemen are entitled to a substantial wage increase." (Emphasis supplied.)

The Court of Industrial Relations then pointed out that: "While the Union may have presented us an array which is skewed upward, the City's array is skewed downward from the appropriate level. . . . *The evidence presented by the parties gives us a range within which we may act.* Clearly, the evidence presented by the City sets a bottom line. The City's proposed 8.2% wage increase is too low. Even accepting the City's theory that a differential with Lincoln should be maintained, at least 9% would be justified. On the other hand, the 12% requested by the Union is too high. It finds its base in an array of cities where wages should be higher than Omaha's because of economic circumstances not present in Omaha. Thus, somewhere between 9% and 12% lies an appropriate figure at which to find the prevalent. . . . In the teacher pay cases, *we have traditionally used the mid-point of arrayed data as the basis of decision. . . .*" (Emphasis supplied.)

The Court of Industrial Relations then went on to compare the salaries of firefighters in the various cities in the array and determined the Omaha firefighters' percentage of wage increase in the following language: "The differential which we believe to be justified lies in the range from 9% to 12%. The mid-point of this range is 10.5%. If we utilize the

City's 8.2% figure as the bottom line, the mid-point of the range from 8.2% to 12% is still 10.1%. We, therefore, believe that a wage increase of 10.2% over existing Omaha wages represents a conservative judgment as to a wage level comparable to the prevalent."

It is thus demonstrated that the Court of Industrial Relations in the Omaha case did not use any factoring method such as appears in exhibit 27, pages 5 and 6, and the results of which are shown in the columns on page 6 under the heading "To Lincoln Minimum Maximum." Yet that is apparently what the proposed opinion would require in the case before us.

In this case the Court of Industrial Relations did not so elaborately discuss the evidence, but it is clear that it was applying the same standards as it did in the Omaha case. Beginning on page 28 of the transcript, the Court of Industrial Relations' opinion is in part as follows: "The second issue for the Court to determine is the appropriate universe to consider in determining prevalent wages and working conditions. As the Court said in Verdigre Education Association v. The School District of Verdigre, at 111-4:

" '* * * The purpose of groupings (e.g. conference, locality, size) is basically to find a representative sample of manageable size within which comparable work, skills and working conditions exist. * * *'

"Before determining what the appropriate groupings are, the Court rejects the Plaintiff's contention that the grouping be limited to Grand Island, Lincoln, and Omaha for several reasons.

"First, there is no testimony that there is any similarity in working conditions between the firemen in all three cities. In fact, the testimony is quite the opposite. Second, this Court in both Grand Island Firefighters v. City of Grand Island and Omaha Firefighters v. City of Omaha essentially rejected

the comparability of Lincoln to either of the other cities; and third, and most important, the pay scales of each of the cities have already been set by this Court for Grand Island for 1976 and for Omaha for 1975. *The essential standard set in 48-818 relates to prevalent wages for similar work. The underpinning of this concept is the market.* If this Court looks to its own decisions as to what are the prevalent wages instead of market, its findings will become essentially circular and the standard will become simply what this Court thinks is fair, as such a standard was never contemplated in 48-818. The standard of pay in the act is what other employees similarly situated as to work and skills received. *The Court can receive evidence on this point and apply this evidence to this standard.*

"The Court also rejects the contention of the Plaintiff's that the cost of living is relevant. The fact that the cost of living has either gone up or down does not in any way affect what the firefighters should receive. There is no guarantee that a standard requiring that firefighters receive the prevalent wages for similar work insures that such workers maintain a particular standard of living. In fact, the law is just the opposite. If the market rate for such work being considered increases faster than the cost of living, then the workers are entitled to the market rate; the reciprocal, of course, is just as true.

"This Court recognizes that in labor negotiations that cost of living considerations are always present and probably more so in public employment than in the private sector. However, cost of living considerations will reflect themselves in wage determinations made in contracts of firefighters in the other cities and thus be indirectly considered." (Emphasis supplied.)

The court then went on to discuss similarity of working conditions and then said: "Turning then to

the salaries on Page 6, the pay raise necessary for Lincoln to reach mean (average) of minimum salaries of the array is 9% and the pay raise necessary to reach the mean (average) of the maximum salaries of the array is 5.3%."

Thus I think it is demonstrated that the Court of Industrial Relations applied essentially the same methods and standards in the case now before us that it did in the Omaha firefighters case. It determined the market price for similar labor under similar conditions. I do not see how we can say that the statutory standard contained in section 48-818, R. R. S. 1943, requires that the factoring method advocated by Lincoln's witness in this case must be applied. In both these cases the Court of Industrial Relations simply made a judgment based on a similar hypothetical market and on working conditions and arrived at a prevalent wage. This is all that the statute requires.

It is important to observe that: (a) The Court of Industrial Relations exercises a legislative function and we have said so in no uncertain terms. See Orleans Education Assn. v. School Dist. of Orleans, *supra,* pages 682, 685, and that despite what the statute says about review de novo in this court we cannot constitutionally review de novo legislative functions. Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683.

In any event, de novo review does not mean that we may disregard the provisions of section 48-818, R. R. S. 1943. That statute provides the principle which is applicable to wage determinations. It requires comparison of teachers' wages with teachers' wages, firefighters' wages with firefighters' wages, etc. We can determine only whether the Court of Industrial Relations applied the proper standard and whether there was evidence to support that it did.

I am at a complete loss to understand the significance of the concurring opinion of McCown, J. If

that opinion means that firefighters' wages are to be fixed directly in the proportion that the population of Lincoln bears to the population of the other cities in the array, then again such a principle finds no support in the statutory standard. One need not be an economist to know and the evidence here demonstrates that firefighters' salaries are not scaled in direct proportion to the population of the cities.

I would affirm the order of the Court of Industrial Relations insofar as the basic wage rate increase is concerned. In other respects I concur in the majority opinion.

DAVCO REALTY COMPANY, A MINNESOTA PARTNERSHIP, APPELLANT, V. PICNIC FOODS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

252 N. W. 2d 142

Filed April 6, 1977. No. 40836.

1. **Contracts.** It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.
2. _____. Absolute certainty in the terms of an agreement is not required, only reasonable certainty is necessary. A contract is not subject to the objection that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested.
3. _____. In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the structure will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.
4. **Contracts: Time.** In the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances.
5. **Contracts: Abandonment.** The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. An abandonment of a contract need not be express but may be inferred from the conduct of the parties and the attendant circumstances.
6. **Contracts: Rescission.** Where a contract has been rescinded by

mutual consent, the parties are, as a general rule, restored to their original rights with relation to the subject matter, and they are entitled to be placed in status quo so far as possible. All rights under the rescinded contract are terminated, and the parties are discharged from their obligations thereunder.

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

John C. Brownrigg and J. Patrick Green of Eisenstatt, Higgins, Kinnamon, Okun & Stern, for appellant.

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

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

WHITE, C. J.

This is an appeal from an action brought by the plaintiff, Davco Realty Company (hereinafter referred to as "Davco"), seeking to have a constructive trust imposed upon the assets of the defendant, Picnic Foods, Inc., (hereinafter referred to as "Picnic"), to the extent necessary to satisfy its claim of damages.

Initially, we note that, while this action is equitable in form in that the relief sought is the imposition of a constructive trust, in substance this is a law action with Davco seeking damages for an alleged breach of contract and will be so treated on appeal.

The District Court held that the agreement entered into between the parties was too indefinite and uncertain in its terms, with regard to the construction of asphaltic paving, and thus was unenforceable. The District Court further held that the purposes for which easements were mutually conveyed by the parties were abandoned and that they should be extinguished as a matter of law. The District Court directed the parties to execute appropriate releases of the easements. We affirm the judgment of the District Court.

The facts giving rise to this dispute are as follows: The plaintiff is a Minnesota partnership, consisting of Abraham and Miriam Davidson. The defendant Picnic is a Nebraska corporation which was dissolved by the Secretary of State on August 2, 1972, for the nonpayment of occupation taxes. Defendants Burden, Devaney, and Steffen were officers and directors of Picnic at that time. The defendant, Star Stations, Inc., provided all Picnic's capital and was the intended sole stockholder of Picnic.

The parties to this suit own adjacent properties in the City of Omaha, Nebraska. Picnic's property at the time of the agreement was undeveloped. On the Davco property, a building occupied by Davidson Furniture Company was located. Davidson Furniture Company's president, Arthur Davidson, is the son of Abraham and Miriam Davidson. In the winter of 1968 or spring of 1969, Joseph Wilkerson, then an officer of Picnic, approached Arthur Davidson about obtaining for Picnic an easement across Davco's property. This easement was desired so that Picnic could have ingress and egress to its property from U. S. Highway No. 30A, known as West Dodge Road. Picnic was intending to develop several business concerns on its property and needed the easement to get customers on its property to and from West Dodge Road.

At the direction of his parents, Arthur Davidson acted as agent for Davco during these negotiations. Davco had contemplated expanding the building on its property. If, however, the contemplated addition was to be built, there would be very little remaining area on Davco's lot for customer parking. Davco thus entered into an agreement with the idea and purpose of obtaining access to additional parking area, which would enable it to construct the addition.

As a result of negotiations between their respective agents, Wilkerson and Arthur Davidson, the parties entered into an agreement on January 7, 1970. Ac-

cording to this agreement, Picnic agreed to pave the areas covered by the easements and, in addition, certain areas on the Davco property with asphaltic concrete. Executed simultaneously with the paving agreement was an agreement providing for the exchange of easements across the parties' respective properties. The easement agreement was specifically mentioned in the recitals of the paving agreement and was incorporated by reference therein. It was further stated that the paving agreement was given as partial consideration for the easement agreement. The easement agreement was also dated January 7, 1970.

The record thus reveals an agreement between two adjacent property owners to mutually develop their respective properties for the benefit of both. Picnic agreed to do certain paving and granted Davco an easement across its property. In return Davco granted Picnic an easement across its property. Picnic thus would obtain ingress and egress to its property from West Dodge Road. Davco would obtain access to additional parking space enabling it to add onto the building on its property.

The first issue confronting us on appeal is whether the agreement was too indefinite and uncertain to be enforceable. The District Court found the agreement indefinite and uncertain specifically in regard to: The nature of the paving material to be used; the depth and thickness of the paving; the foundation work and site preparation work required; and the time within which Picnic was required to perform. The agreement provided that Picnic was to pave the areas covered by the easements in addition to certain areas on Davco's property. Some of the areas to be paved were unimproved, others had concrete paving which was not to be covered. All paving was to be "asphaltic concrete." Additionally, the agreement stated, "All of the said paving (including foundation work and site preparation) shall be done in

conformity with the specifications of the City of Omaha with respect to such pavement."

It is a fundamental rule that in order to be binding, an agreement must be definite and certain, as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto. See 17 Am. Jur. 2d, Contracts, § 75, pp. 413, 414.

In support of their contention that the District Court was correct in holding the paving agreement unenforceable for lack of definiteness, the defendants cite testimony to the effect that the composition of "asphaltic concrete" can vary, and that the depth of asphalt parking lots can vary. The agreement provided that paving would be done in conformity with the specifications of the City of Omaha with respect to such pavement. However, the defendants point out the City of Omaha has no specifications relating to parking lot construction. The only City of Omaha specifications dealing with asphaltic concrete relate to street construction. The defendants also argue that the terms "foundation work and site preparation" are vague, and that the agreement does provide a time for performance.

We disagree with the District Court's conclusion that the paving agreement failed for want of definiteness and certainty. We believe that despite the ambiguities present in the agreement, it was sufficiently definite to be an enforceable contract.

While the City of Omaha has no specifications for "asphaltic concrete" parking lots, it does have specifications for "asphlatic concrete" street construction. There is nothing in the record to suggest that the specifications given for asphaltic concrete street construction would not be appropriate for the construction of a parking lot, which essentially bears the same burden as a street. The term in the contract relating to compliance with appropriate specifications of the City of Omaha is no doubt one of

those clauses typically placed in a contract, requiring, as a contractual matter, compliance by the parties with the appropriate local government regulations and specifications dealing with the subject matter of the contract, should there be any.

"[T]he subject matter of the agreement must be expressed in such terms that it can be ascertained with reasonable certainty." 17 Am. Jur. 2d, Contracts, § 76, p. 416. "Absolute certainty is not required, however, only reasonable certainty is necessary. A contract is not subject to the objection that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested." Id. at 417.

In Henggeler v. Jindra, 191 Neb. 317, 214 N. W. 2d 925 (1974), we stated: "In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be *reasonably fit for the intended purpose.*" (Emphasis supplied.)

We believe that this is an appropriate standard by which Picnic's obligation under the agreement could be tested. Picnic was called upon to have certain areas paved with "asphaltic concrete," commonly known as "blacktop." Some of the areas to be covered had concrete paving on them, others were unimproved. The areas to be paved were to be used for parking and related vehicular traffic. Picnic was required to do the necessary site preparation and foundation work, and to lay asphaltic concrete of a type and thickness reasonably suited or adequate for the purposes to which these paved areas were to be put. This minimum requirement of fitness for the intended purpose cures any ambiguity otherwise inherent in the agreement. This standard provides an adequate basis for determining what was required under the contract.

The contract did not state a time for when Picnic's performance was to take place. However, in the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances. See, e. g. 1 Corbin, Contracts, § 96, pp. 411, 412; 1 Williston (3d Ed.), Contracts, § 38, pp. 112 to 115.

While we hold the paving agreement sufficiently definite so as to be enforceable, and although it is admitted that Picnic has not done, or caused to have been done, any paving pursuant to the agreement, we do not believe that Davco is entitled to any recovery. In our opinion, the record reveals an intention by the parties to this agreement to abandon it.

"A contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties." 17 Am. Jur. 2d, Contracts, § 494, p. 967. "Ordinarily abandonment of a contract by mutual consent may take place at any stage of the performance by the parties * * *." 17A C. J. S., Contracts, § 387, p. 461.

"The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. An abandonment of a contract need not be express but may be inferred from the conduct of the parties and the attendant circumstances." 17 Am. Jur. 2d, Contracts, § 484, p. 954.

"The cancellation, abandonment, or rescission of a written contract may not only be written but it may also be oral. Moreover, an implied agreement to rescind a contract may be given effect, and the assent of the parties to rescission may be shown by their acts or conduct, and the surrounding circumstances. Accordingly, in determining whether a rescission took place, the courts look not only to the

language of the parties, but to all the circumstances." 17A C. J. S., Contracts, § 388, pp. 462 to 464.

The parties stipulated to the fact that certain trees and stumps which existed on the real estate still existed at the date of the trial.

The record shows that Picnic abandoned its plans to develop and operate businesses on its property. Picnic conducted no operation on its property, nor did it ever make any use of the easement granted to it across Davco property. Picnic put its property up for sale in 1970, and large signs were placed on the property advertising it for sale. These signs remained on Picnic's property until some time in 1974. As was mentioned earlier, Picnic was dissolved as a corporation by the Secretary of State in 1972.

Davco has used the easement area granted it on Picnic's property only a few times in the years since the agreement was executed for parking. The proposed addition to the building on Davco's property has never been built. Arthur Davidson testified that Davco has never made a decision to proceed with the construction of this addition. He stated that in 1969, a tentative decision was made not to proceed with the building of the addition. However, he testified that there were still plans, at some indefinite date in the future, to construct this addition. No architect, contractor, or financial institution was ever contacted concerning detailed plans or information concerning the construction or financing of the proposed addition. Arthur Davidson testified that he did have some tentative plans drawn by an architect, but no final plans. He also talked to a contractor in 1969 about costs of such an addition. He also talked generally with two financial institutions about financing, the latest conversation being in 1972.

In the fall of 1974, Davco caused a demand to be made on Picnic for performance of the paving agreement. Arthur Davidson testified that at the time the

demand was made he was unaware that Picnic was dissolved or out of business. He stated, however, that he was aware, at the time he made this demand, that Picnic was attempting to sell its property.

In 1974, Picnic, anticipating a sale of its property, asked Davco for a release of the easement granted to Davco across Picnic's property. Don Burden testified that prior to the time the release was requested he had not received any demand from Davco for the performance of the paving agreement. Arthur Davidson denied that the demand for performance was in response to Picnic's request for a release from the easement agreement.

Based upon our review of the record, outlined above, we believe that both parties to this agreement manifested by their conduct their intention to abandon the agreement which was aimed at the mutual development of their adjacent properties.

"Generally rescission must be exercised in toto and is applied to the contract in its entirety with the result that what has been done is wholly undone and no contract provisions remain in force to bind either of the parties." 17A C. J. S., Contracts, § 387, p. 461.

"Where a contract has been rescinded by mutual consent, the parties are, as a general rule, restored to their original rights with relation to the subject matter, and they are entitled to be placed in status quo as far as possible. All rights under the rescinded contract are terminated, and the parties are discharged from their obligations thereunder." 17A C. J. S., Contracts, § 392, pp. 471, 472. See, also, 17 Am. Jur. 2d, Contracts, § 512, p. 994 to 996.

The District Court, in addition to denying the plaintiff's claim for damages, directed the parties to execute appropriate releases of the easements they conveyed. When this is done, each party will be in the same position it was prior to the agreement. We

note that neither party has materially shifted its position as a result of this agreement.

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

AFFIRMED.

McCOWN, J., concurring in result.

In my opinion the evidence is clear that the easements and what is referred to in the majority opinion as "the paving agreement" were all integral parts of a single agreement. Although they are contained in three separate instruments, there can be no real doubt of their interdependence. Since no subsequent purchasers of the real estate were involved, the failure to reflect the "paving agreement" in the easement, or to record it, was immaterial.

I am also convinced that "the paving agreement" was not sufficiently definite and certain as to be enforceable. A critical factor is that no time was ever specified for performance of the paving work by Picnic Foods, nor was any time specified within which Davco was to construct its addition. Nevertheless, it is virtually indisputable that Davco's addition was to be built before the paving work was to be done. While the agreement did not require Davco to build, or to build within any particular time, it treated the contemplated addition by Davco as the foundation for Picnic's obligation to pave. Any other interpretation would be unrealistic.

The District Court specifically found the agreement indefinite and uncertain with respect to the nature of the paving material to be used, the depth and thickness of the paving, the foundation and site preparation work required, and the time in which Picnic Foods was required to perform. That finding and determination was correct and the findings, as well as the judgment, of the District Court should have been approved and affirmed.

BOSLAUGH, J., joins in this concurrence.

CLINTON, J., dissenting.

I respectfully dissent. This action, as the majority opinion notes, is at law with jury waived. The judgment of the District Court must therefore be affirmed unless it is clearly wrong. I believe it is and that accordingly the judgment should be reversed. There is no dispute in the evidence on any material fact. Both the District Court and this court have, I believe, in a wholly unprecedented way, misapplied established legal principles.

The lower court found: ". . . that the parties to the easement agreement . . . both have abandoned *the purpose* for which the easements were mutually conveyed and, therefore, the easement should be extinguished *by operation of law.*" (Emphasis supplied.)

This court finds: "The record thus reveals an agreement between two adjacent property owners to mutually develop their respective properties for the benefit of both," and it finds "both parties . . . manifested by their conduct their intention to abandon the agreement which was aimed at the mutual development of their adjacent properties." These findings are without evidentiary support.

The majority opinion is somewhat vague as to rationale, but its findings of abandonment and mutual rescission seem to be bottomed on two findings of fact, viz, (1) Picnic did not do the paving it agreed to do; and (2) neither party erected the building each contemplated; in Davco's case, an addition to its existing building, and in Picnic's case, the construction of a restaurant. The first is simply a breach of contract by one party. As to the second the court, wholly without evidentiary support and by some sort of judicial legerdemain, reads into the transaction an agreement that the grants were conditioned upon each party carrying through with its separate, proposed plans. There is no evidence whatever of any such agreement. The defendant cites no authority which engrafts such a condition as a matter of law

and our research has disclosed no such authority. Davco by testimony denies it has abandoned its plans.

The record establishes only this: The parties, by grant, exchange easements on their respective properties. In addition, Picnic agreed, as part of the consideration for its easement, to pave the portion of its own property covered by the easement as well as part of the Davco property. Although there is no dispute about what each of the parties "proposed" to do in the way of building on its own property, and that they have not done it, there is not one scintilla of evidence supporting the proposition that there was any agreement that such improvements be made, or that the making of such improvements was a part of the consideration for the exchange of the easements and the agreement of Picnic to pave, or that the grants were conditioned in some way. There is not one scintilla of evidence in the record to support the majority opinion's finding that the contract was "rescinded by mutual consent." The instruments by which the easements were granted recite that their "purpose" is to give "ingress" and "egress."

The record establishes that Davco had done everything that it was required to do by the agreement. Its performance was complete. It conveyed the easement. Picnic's performance was partial. It conveyed the easement. It had not performed the balance of the agreement, that is, doing the paving.

In this case this court would enforce a forfeiture of an interest in real estate against a grantee who has fully performed its part of the contract. Then this court goes on to cancel the whole transaction, including the reciprocal deeds of grant. The sole beneficiary of this court's action is the property owner who is in default.

The court here completely misapplies established principles with reference to the abandonment of an

easement. There is no evidence here at all that Davco abandoned the easement. There is no evidence here that Picnic abandoned its easement. The evidence does show that Picnic needed the easement across a corner of the Davco property because that was the only way it could establish access to West Dodge Road. Its purpose in acquiring the easement, as recited in the grant itself, was to gain the needed access. That purpose was wholly accomplished. Davco's purpose was to acquire an easement for a driveway on the Picnic property, the effect of which was to expand its lot and also to give it an exit to the south. The recited purposes of both easements were wholly accomplished. The only part of the agreement which failed was Picnic's refusal to perform its agreement to pave.

The result the trial court reached, and which the majority of this court now reaches, is arrived at on the theory of abandonment, but in legal contemplation there is no evidence of abandonment of the easements.

Abandonment is the voluntary and intentional relinquishment of a right to property. 1 C. J. S., Abandonment, § 1, p. 4. Mere nonuser does not result in abandonment. 1 C. J. S., Abandonment, § 3(2), p. 10. Nonuser of an easement for a period less than 10 years will not of itself work an abandonment of a right. Agnew v. City of Pawnee City, 79 Neb. 603, 113 N. W. 236. Even if the owners of the servient estate maintain obstructions thereon for a period less than the period of limitation, the easement is not lost. Ballinger v. Kinney, 87 Neb. 342, 127 N. W. 239. There was no obstruction placed at all in this case, much less obstruction for the statutory period. An easement may be abandoned only by unequivocal acts showing a clear intention to abandon and terminate the right. Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334; Williams v. Lantz, 123 Neb. 67, 242 N. W. 269; Polyzois v. Resnick, 123 Neb. 663, 243

N. W. 864. The owner of an easement may abandon it by some affirmative act which renders the use of the easement impossible. Toelle v. Preuss, 172 Neb. 239, 109 N. W. 2d 293. Title to real estate is not lost by a mere failure to assert it. Hadley v. Platte Valley Cattle Co., 143 Neb. 482, 10 N. W. 2d 249.

In the case before us, neither party did any act which would evidence an abandonment of the easement which each acquired. After the exchange there was no communication between the parties until shortly before this action was commenced. Then Picnic asked Davco to execute a written surrender of the easement because Picnic wished to sell its property and to do so free of the easement. Davco refused except upon payment of a consideration. Picnic refused to pay consideration. Thereafter Davco demanded performance of the paving agreement by Picnic and this suit ensued. The easements were executed on January 7, 1970. Davco demanded performance on December 20, 1974.

It would appear in this case that the trial court confused "purpose of the easement" with the "proposed" business plans of each of the parties for their respective properties. There appears at 28 C. J. S., Easements, § 54a, p. 718, the following: "An easement granted for a particular purpose terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment." Numerous cases are cited in the accompanying footnote. This may be the principle on which the trial court was relying. An examination of the numerous opinions cited in the footnotes show that none support the result reached in this case. Some, in fact, require the opposite result. See, Kogod v. Cogito, 200 F. 2d 743; Gerbig v. Zumpano, 7 N. Y. 2d 327, 197 N. Y. Supp. 2d 161, 165 N. E. 2d 178. The trial court apparently confused "purposes" with the parties' separate motivations. This court carries the matter

one step further by finding an "agreement" when there is no evidence of such an agreement.

I would reverse the judgment of the District Court and remand for a new trial on the issue of damages.

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

MCDOWELL ROAD ASSOCIATES, A UTAH LIMITED PARTNERSHIP, APPELLEE AND CROSS-APPELLANT, V. WILLIAM T. BARNES ET AL., APPELLANTS AND CROSS-APPELLEES.

252 N. W. 2d 151

Filed April 6, 1977. No. 40861.

1. **Trial: Judgments: Evidence: Witnesses.** 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.
2. **Trial: Judgments: 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 C. BURKE, Judge. Affirmed as modified.

Michael Kelley of Kelley & Kelley, for appellants.

Ray C. Simmons, for appellee.

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

MCCOWN, J.

The plaintiff brought this action against the defendants to recover rentals guaranteed by the defendants. The District Court entered a partial summary judgment and determined the issues for trial. After trial to the court without a jury, the court found for the plaintiff and entered judgment against the defendants in the sum of $7,175.53, plus interest. Motions for new trial by both plaintiff and defendants were overruled. Defendants have appealed and plaintiff has cross-appealed.

In 1966, Dupree-East McDowell Development Company, as landlord, and Bronco's of Arizona, Inc., as tenant, entered into a lease agreement for the rental of space for a fast food operation in a shopping center owned by the landlord in Phoenix, Arizona. The landlord was to construct a building for the tenant. The lease was to commence on the date the tenant took possession of the leased premises and terminate 20 years thereafter. The tenant took possession of the premises on April 4, 1967. The rental was $1,250 per month. In addition, the tenant was to pay certain common area maintenance costs, insurance, and certain taxes and special assessments.

A separate guaranty agreement was executed by the defendants to induce the landlord to make the lease. The agreement guaranteed the payment of the monthly rentals, and the performance of all obligations of the tenant under the lease, for a period commencing on the date of the lease and ending 6 years thereafter. The total liability of the defendants was not to exceed the sum of $90,000, less the amount of rental payments made by the tenant.

In 1970, the plaintiff acquired the landlord's interest in the shopping center. The tenant continued to occupy the premises until September of 1972. At the end of September 1972, the tenant closed its operation because of continued financial losses. When the tenant vacated the premises, its trade equipment was subject to a statutory lien for rent and was left on the premises. The last rental payment was made in November 1972. During the next few months there were discussions between the plaintiff and one of the defendant guarantors, who was also an officer of the tenant. Plans for locating a new tenant and making disposition of the equipment left in the building were discussed.

In September of 1973, Mr. Kelley, one of the defendant guarantors and an officer of the tenant, sent

plaintiff a bill of sale and release. The instrument was executed by the president of the tenant, but it was never executed by the plaintiff. The defendants' evidence was that there was a verbal agreement by the plaintiff to release the defendant guarantors and the tenant as consideration for the execution of the bill of sale for the equipment. The plaintiff denied there was any such agreement. No new tenant was located for the building until May 1975.

On March 9, 1973, the plaintiff sent a notice of the default to the individual designated to receive such notice in the guaranty agreement, and demanded payment from the defendant guarantors. Under the guaranty agreement, payment was due 60 days after notice. On April 5, 1974, the plaintiff filed this action seeking $8,365.68 from the defendant guarantors. After hearing, the District Court sustained plaintiff's motion for summary judgment except for determining the net amount of the default and the alleged defense that there had been a mutual release of the defendant guarantors in exchange for the bill of sale to the equipment. After trial on those issues the court found for the plaintiff and entered judgment against the defendants in the sum of $7,175.53, plus interest from May 8, 1973. Plaintiff and defendants both filed motions for new trial which were overruled. The defendants appealed and the plaintiff has cross-appealed.

Defendants first contend that the District Court was in error in granting partial summary judgment because the lease was materially altered without defendants' consent and the notice of default was defective. The material alteration which defendants alleged involved a provision in the lease that "the Tenant shall have the right to install and maintain a large free-standing 'Bronco's' sign, the same or similar to that used in connection with Bronco's Drive-ins in Omaha, Nebraska." That provision was never altered, changed, or modified in any respect. The

sign was not erected because the ordinances of the City of Phoenix prohibited the erection of such a sign.

Defendants' complaint with respect to the notice of default is unfounded. The notice stated that "Bronco's Franchise, Inc." was in default rather than "Bronco's of Arizona, Inc." The notice was sent to the individual designated in the guaranty agreement and to the address designated. It is undisputed that the notice was received, and there is no evidence of any damage or prejudice to any of the defendants.

Defendants' contentions that the partial summary judgment was erroneously entered are wholly unfounded. The record fully supports the partial summary judgment. The action of the District Court was correct.

The defendants also contend that the District Court, at trial, erroneously determined that there was no agreement to release the defendants from their liability as guarantors upon the execution of a bill of sale for the tenant's equipment, and that the evidence does not support the verdict and judgment.

The case was tried to the court without a jury. The court specifically found that the bill of sale of the equipment was offered by defendants in consideration of a release, but that offer was never accepted nor the release executed. The evidence supports that finding. Although there was a conflict in the evidence, 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. Insurance Co. of North America v. Hawkins, 197 Neb. 126, 246 N. W. 2d 878.

The case now before us was a law action which was tried to the court without a jury. 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. Katleman v. U. S. Communities, Inc., 197 Neb. 443, 249 N. W. 2d 898.

The plaintiff's cross-appeal asserts that there was an error in computing the amount of the judgment for the plaintiff in the amount of $314.63. The record shows that the District Court, in computing the rental payments made by the tenant, which were to be credited against the guaranty, included $314.63 paid on obligations other than rentals. The correct amount of the judgment should have been $7,490.16, rather than $7,175.53.

The judgment is so modified, and as modified is affirmed.

AFFIRMED AS MODIFIED.

WAYNE HOSFORD, APPELLEE, V. THOMAS P. DOHERTY, DOING BUSINESS AS TOM'S TRENDWOOD MOBILE, APPELLANT.

251 N. W. 2d 154

Filed April 6, 1977. No. 40888.

1. **Trial: Verdicts: Evidence.** A motion for a directed verdict or for a judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Trial: Negligence: Damages: Evidence.** In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of the plaintiff's injury or a cause which proximately contributed to it.
3. **Trial: Evidence.** The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.
4. **Trial: Damages: Evidence.** The burden of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages,

does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies.

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

Walsh, Walentine & Miles, for appellant.

Michael McGill and Richard Anderson of McGill, Koley & Parsonage, for appellee.

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

SPENCER, J.

This is an action to recover damages for the destruction of plaintiff's motor vehicle by fire. The jury returned a verdict in favor of plaintiff in the sum of $3,750. Defendant appeals, alleging the evidence is insufficient to sustain the verdict. We affirm.

In July 1974, plaintiff, Wayne Hosford, took his 1973 Chevrolet van to defendant's place of business for a tune-up and some work on the alternator. The van performed well until the end of September when it started backfiring through the carburetor. He took it to the defendant's place of business on October 1, 1974. He advised defendant's mechanic of the backfiring problem and of the fact that the motor continued running after the ignition switch was turned off. The next time Hosford saw his van it had been totally destroyed by fire.

Defendant's mechanic checked out the ignition system and found nothing wrong. He then tested the cylinders and determined that all of them were firing correctly. He took off the cowl cover and the air cleaner cover. He reset the carburetor by adjusting two screws on the front of it. He did not feel that there was anything wrong with the engine, but asked another employee to road test it. This employee, William D. Casey, took the van out for testing without replacing the air cleaner cover or the cowl cover.

Casey knew the van was in the shop because of backfiring and he knew that backfiring could result in flame exploding back through the carburetor. It would have taken him approximately 3 minutes to replace both covers. As he road tested the vehicle he was watching the road and listening to the motor. He did not particularly watch the motor or the carburetor while testing the van.

Casey proceeded approximately 1 mile when he noticed smoke coming out of the speaker grill which is in the center of the dash just below the seam of the windshield. He did not see fire at that time. He pulled off into a nearby driveway and ran up to the house to make a telephone call. As he was knocking on the door he looked back and saw the windshield engulfed in flames and smoke coming out of the doors.

Defendant argues his motion for a directed verdict or his motion for judgment notwithstanding the verdict should have been sustained. A motion for a directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Jensen v. Shadegg, *ante* p. 139, 251 N. W. 2d 880 (1977).

On the record, the jury could have found the van had a history of backfiring through the carburetor. This was explained to the defendant by the plaintiff as a sputtering in the engine compartment which was immediately next to the driver and below the dashboard of the van. Plaintiff testified that when defendant's employee drove the car back for repairs after returning him to his home, the car was sputtering. Casey, who road tested the car, testified that just before he reached the intersection where he

noted the smoke, he heard a popping noise. He does not remember whether or not he turned off the engine, when he noticed the smoke and got out of the car.

Plaintiff's expert witness did not examine the van until after the fire. He noted that the carburetor had melted, which indicated to him that this was the hottest point of the fire. He also observed a crimp in the fuel line near the point where it is connected to the carburetor. From looking at this condition, he concluded there possibly could have been gasoline leaking or dripping from the fuel line where it entered the carburetor. Plaintiff's expert was of the opinion that there was fuel leaking. His testimony is: "My opinion is there was fuel leaking, possibly leaking onto the manifold."

There was evidence from which the jury could find that the backfiring resulted in an explosion, sending a burst of fire shooting 4 to 6 inches out of the carburetor. The testimony indicated that an air cleaner cover, by virtue of its function and construction, would act as a flame retardant should a backfire result in the engine system. The jury could have reasonably inferred that the cover would have insulated and isolated the flow of gas and vapors in the carburetor from any flame or spark originating outside the engine system.

There was evidence that the cowl cover acts as a fire wall due to its function and construction. Should a fire start in the engine system and attempt to spread, the cowl cover would retard its progress. Should a flame or spark arise outside the engine compartment, the cowl cover would act to isolate the fuel and explosive substance in the engine system from the flame or spark. There was sufficient evidence from which the jury could have concluded that it was dangerous to road test the automobile with the air cleaner cover and the cowl cover off.

In an action for negligence, the burden is on the

plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of the plaintiff's injury or a cause which proximately contributed to it. Jensen v. Shadegg, *ante* p. 139, 251 N. W. 2d 880 (1977).

Plaintiff was required to establish the cause of fire by circumstantial evidence. He was not present when the fire occurred. His expert testified from an examination of the vehicle that the carburetor had melted and this indicated to him it was the hottest point of the fire. He also observed a crimp in the fuel line near the point where it was connected to the carburetor.

It was the expert's opinion that the cause of the fire was the engine backfiring through the carburetor, and igniting vapors from fuel which may have been leaking. The flame shooting out of the carburetor ignited combustible material under the dash. Plaintiff's expert further testified that if the air cleaner cover had been in place over the carburetor, flames coming from the carburetor would have been contained within the air cleaner. Similarly, if the cowl cover had been replaced the passenger compartment would have been insulated.

In Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584 (1962), we stated: "The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved." We also held: "The burden of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies."

We are convinced from an examination of the

record that there was sufficient evidence of negligence on the part of the defendant's employees to require the submission of the case to the jury. There was evidence from which the jury could conclude that flame from the backfire ignited gas vapors causing the fire. The jury could have concluded that the fire would not have occurred if the air cleaner and cowl covers had been in place while the vehicle was being road tested.

Defendant's employees knew the engine had been backfiring, and they recognized that flame could come through the carburetor. The only reasonable inference that can be drawn from the evidence is that the damage sustained was attributable to the negligence of defendant's employees. A jury question was therefore presented. The motions for a directed verdict and judgment notwithstanding the verdict were properly overruled.

The judgment of the District Court is affirmed.

AFFIRMED.

JOSEPH E. HALLER, APPELLANT, V. CHILES, HEIDER & CO., INC., A CORPORATION, ET AL., APPELLEES.

JOSEPH E. HALLER, APPELLANT, V. CHILES, HEIDER & CO., INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

252 N. W. 2d 157

Filed April 6, 1977. Nos. 40903, 40984.

Appeal and Error: Res Judicata. Where it is disclosed that the record presents nothing but a moot question for the determination of the Supreme Court, ordinarily the judgment of the District Court will be affirmed.

Appeals from the District Court for Douglas County: JAMES A. BUCKLEY and JOHN E. CLARK, Judges. Affirmed.

D. C. Bradford, III, and Richard Lee Angell of Bradford & Coenen, for appellant.

James M. Bausch of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

WHITE, C. THOMAS, J.

These are successor cases to Haller v. Chiles, Heider & Co., Inc., 195 Neb. 65, 236 N. W. 2d 822 (1975). In order to understand the context of the present cases, it is necessary to review briefly the previous case.

Plaintiff Joseph E. Haller was an employee and stockholder in the defendant Chiles, Heider & Co., Inc. A provision in the articles of incorporation provided that the defendant corporation was granted an option to purchase the stock of an employee who ceased to be active in the corporation. The option was exercisable within 60 days of the effective day of the leaving. The plaintiff Joseph E. Haller left the corporation on December 31, 1973. A dispute then arose as to whether the defendant corporation properly exercised the option to purchase, causing Haller to file a lawsuit against the defendant corporation. In that case we determined that by letter of January 28, 1974, the defendant Chiles, Heider & Co., Inc., exercised its option to purchase the shares of stock for the total sum of $176,120, reversing the judgment of the trial court which had held that the option had not been effectively exercised. Related to that dispute was the attempted establishment of a reserve by the defendant Chiles, Heider & Co., Inc., for contingent liabilities. This court held that the reserve was not properly established since the option had been exercised for the total sum of $176,120 and Joseph E. Haller had been notified of the exercise prior to the information being discovered that a contingency reserve may have been necessary.

The opinion was filed by this court on December

24, 1975. On January 30, 1976, the trial judge entered judgment on the mandate. On that date the plaintiff Joseph E. Haller tendered to the defendant Chiles, Heider & Co., Inc., a certificate representing the 40,000 shares of capital stock and payment of the judgment was made by Chiles, Heider & Co., Inc., to Haller and acknowledged by him. Haller did not ask for interest either in the original action or after the mandate was filed.

Case No. 40903 is an action filed April 3, 1975, while Haller v. Chiles, Heider & Co., Inc., *supra,* was on appeal to this court. In his petition the plaintiff alleged that he was a stockholder of the defendant Chiles, Heider & Co., Inc., that he had made demand for inspection of the books and records of the defendant corporation pursuant to section 21-2050, R. R. S. 1943, and that the demand was refused. He prayed the court to compel the defendant corporation to allow the inspection. The case arose for trial after our opinion of December 24, 1975. The trial court sustained a motion for summary judgment on the ground that the issue was moot. We agree. The exhibits introduced in support of the motion for summary judgment show the judgment on the mandate entered January 30, 1976, the tendering of the 40,000 shares of stock, and the payment and acceptance of the total judgment price. Any issue of the ownership and any rights that may have heretofore existed between the plaintiff and defendant corporation ceased finally on January 30, 1976. This court will not discuss or decide moot issues. The judgment of the District Court should be affirmed. See, McFarland v. State, 165 Neb. 487, 86 N. W. 2d 182 (1957); Deines v. Schwind, 89 Neb. 122, 130 N. W. 1051 (1911).

Case No. 40984, an action filed April 3, 1975, is a companion case to No. 40903. This action was also based on section 21-2050, R. R. S. 1943, which provides in part: "Any officer or agent who, or a corporation which, shall refuse to allow any such share-

holder * * * to examine and make extracts from its books and records of accounts, * * * shall be liable to such shareholder * * * in a penalty of ten per cent of the value of the shares owned by such shareholder, * * * in addition to any other damages or remedy afforded him by law." The plaintiff alleged a refusal of inspection and prayed for damages. The trial court sustained the defendants' motion for summary judgment holding that the plaintiff was not a stockholder on the date of the demand for inspection and therefore was not eligible to collect any penalties. We agree. In the previous opinion this court determined that the option was properly exercised and that from December 31, 1973, the plaintiff Joseph E. Haller had sold his shares to the defendant corporation. A dispute existed not over the total price but only to the propriety or the amount of a proposed reserve contingency fund. The effect of this court's opinion of December 24, 1975, was that the owner of the shares of the corporation as of December 31, 1973, was the defendant Chiles, Heider & Co., Inc. The plaintiff then was entitled to be paid for the shares. The trial court was correct in determining that as of the date of demand in April 1975, the plaintiff was not a shareholder in Chiles, Heider & Co., Inc., and was not eligible under the statute to collect damages. Plaintiff here suggests that if he is not entitled to the statutory penalty then he is entitled to interest on the original purchase price. No interest was prayed for in either of the two cases now before us. The appropriate vehicle for the recovery of interest was the original case.

The judgment of the District Court is affirmed.

AFFIRMED.

LARRY G. PIESTER ET AL., APPELLANTS, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLEES.

251 N. W. 2d 159

Filed April 6, 1977. No. 40904.

1. **Municipal Corporations: Annexation.** A city of the first class has the power to annex lands, contiguous to its corporate limits, which are urban or suburban in character.
2. **Municipal Corporations: Annexation: Highways.** The character of a segment of an Interstate Highway sought to be annexed by a city of the first class is determined by the characteristic of the land immediately adjacent to the segment sought to be annexed.

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

Baskins & Rowlands and Robert E. Roeder, for appellants.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellees.

Leonard P. Vyhnalek of Beatty, Morgan & Vyhnalek, for amicus curiae.

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

WHITE, C. THOMAS, J.

The city council of the city of North Platte by ordinance No. 1699 annexed an area south of the present boundaries of the city of North Platte, Nebraska, including an area of Interstate 80 at the point where U. S. Highway No. 83 interchange provides ingress and egress to the city of North Platte. The boundaries of the city of North Platte were located at the north right-of-way line of Interstate 80 immediately prior to the annexation. Plaintiffs, landowners who would fall within the 2-mile zoning authority of the city of North Platte, a city of the first class, brought this action in the District Court to challenge the legality of the annexation. The District Court ap-

proved the annexation and dismissed the plaintiffs' petition.

"The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance * * * include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first class over any agricultural lands which are rural in character." § 16-117, R. R. S. 1943. The land annexed, exclusive of the portion of Interstate 80 included, is conceded to be urban or suburban in character and includes service stations, a motel, and a park acquired by the city of North Platte, Nebraska, for development and for the benefit of the residents of the city.

Section 16-118, R. R. S. 1943, prohibits the annexation of noncontiguous land. Contiguous land is defined as: "Lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits." In order for the annexation to be effective, it was necessary for the city of North Platte, under present law, to annex a strip of Interstate 80, the right-of-way of which is concededly in excess of 200 feet in width.

It is the contention of the plaintiffs that the portion of Interstate 80 to be annexed must be considered as urban or suburban in character or the annexation must fail. The plaintiffs argue in this court that there is only one interchange for entrance to Interstate 80 in the city of North Platte; the nearest exits or entrances to the interstate are 13 miles to the east and 13 miles to the west; and since there is no possibility of local traffic moving to and from points in

North Platte, Nebraska, that portion of Interstate 80 which is annexed cannot be said to be urban or suburban in character and the annexation must fail. The trial court, in upholding the annexation, relied on Sullivan v. City of Omaha, 183 Neb. 511, 162 N. W. 2d 227. In that case the annexation of the Interstate Highway ended on the south of Q Street and the north at L Street. That portion of Interstate 80 so annexed between L Street and Q Street was confined to the state right-of-way embracing Interstate 80. The area to be annexed was bounded on the east and the west by agricultural land, although a substantial residential development existed to the west of the strip being farmed. Authority to annex is granted to the City of Omaha by section 14-117, R. R. S. 1943: "The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, * * *." In Sullivan v. City of Omaha, *supra,* with regard to the question of whether a portion of Interstate 80 from L Street to Q Street could be annexed, the court stated: "We find the area from L Street to Q Street sufficiently joins the city so that it could properly be included in the annexation, provided that the area is of such character that the city had authority to include it. * * *

"This brings us to the crux of the problem. Does the annexation involve agricultural land rural in character? The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character. * * *

"Exhibits 1 and 2 are aerial maps of the southwest portion of the city of Omaha, embracing the area being annexed. The evidence indicates that portions of the right-of-way included in the annexation are bound on two sides by agricultural land

which is not included. The entire area being annexed goes through the heart of a rapidly developing residential and industrial area. On the facts of this case we cannot say that the appellants have met their burden to prove that the right-of-way included in the annexation was essentially rural in character." In effect, we there said that it is the general character of the area annexed which characterizes the particular tracts involved in the annexation.

The city of North Platte supplies through the annexed area of Interstate 80 essential services of water and sewer lines and electrical service to businesses and light industries on both sides of Interstate 80.

We hold that the character of a segment of an Interstate Highway sought to be annexed is to be determined from the areas immediately adjacent to the annexed portion. In this case the annexed portions are clearly and concededly urban or suburban.

The annexation was proper and the judgment should be and is affirmed.

AFFIRMED.

VELMA RORABAUGH, EXECUTRIX AND LEGAL REPRESENTATIVE OF THE ESTATE OF BEATRICE C. SCHROENROCK, DECEASED, APPELLEE, V. COLETTA KAY GARVIS, APPELLANT, IMPLEADED WITH UNION LOAN AND SAVINGS ASSOCIATION, A CORPORATION, APPELLEE.

252 N. W. 2d 161

Filed April 6, 1977. No. 40916.

1. **Gifts.** To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.
2. _____. The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.

3. _____. When the clear intention of the donor to make a gift can be carried out without doing violence to the established principles of law the courts should not seek highly technical reasons for defeating the gift.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

Duane L. Nelson, for appellant.

Pierson, Pierson & Fitchett for appellee Rorabaugh.

Douglas Curry, for appellee Union Loan & Sav. Assn.

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

SPENCER, J.

This is an action brought by the executrix of the estate of Beatrice C. Schroenrock to require Union Loan and Savings Association to pay her the funds held in a passbook savings account in the name of the decedent and Coletta Kay Garvis. Garvis claimed ownership of the fund, as a joint tenant with right of survivorship. The trial court held for plaintiff-executrix, and directed the payment of the funds to her. Garvis perfected this appeal. We find the account to be a joint one with right of survivorship, and reverse.

Decedent had a passbook savings account with Union. On March 19, 1974, decedent and her daughter, defendant Garvis, went to Union for the purpose of adding the name of Garvis to the account. They were directed to an employee of Union, Agnes Neal, who was authorized to make the change. Neal erroneously informed them that if the account were changed on March 19, the quarterly dividend to be paid the last of the month would be lost. Neal suggested she could change the account after the dividend was credited if decedent and Garvis would both

sign a signature card in blank and leave the passbook with her.

Neal testified she told decedent and Garvis she would change the account at the end of the month. Decedent told her when she did to mail the passbook to Garvis. Garvis testified Neal told them the account would be changed when the dividend was credited to the account. Decedent gave the passbook to Neal and she and Garvis both signed the new signature card on March 19, 1974.

Decedent died March 28, 1974. On March 29, 1974, Neal closed out the Schroenrock account and transferred the funds to an account in the names of decedent and Garvis as joint tenants with right of survivorship. The quarterly dividend was posted to the account on March 24, 1974, bringing the balance to $4,101.66. Neal completed the transfer on Union's books on March 29, 1974, the day after Schroenrock's death, and mailed the passbook to Garvis.

The testimony is undisputed that on March 19, 1974, Schroenrock and Garvis had done everything they needed to do to make an effective transfer of the account from Schroenrock to Schroenrock and Garvis. The only thing remaining to be done was for Union to complete the transaction on its records and to mail the passbook to Garvis.

Kenneth King, who was president of Union at the time, testified that it was possible on March 19, 1974, to change an individual savings account to a joint savings account without loss of dividends during a quarterly dividend period. Consequently, Neal was in error in the statement she made at the time Schroenrock attempted to make the transfer.

It is undisputed that deceased, Schroenrock, went to Union on March 19, 1974, with Garvis with the intent and for the express purpose of then and there making a completed gift to Garvis of a joint interest in her savings account. Only because Neal mistakenly introduced the specter of a lost quarterly divi-

dend, was the paper work at Union not completed on that day. However, everything required of decedent and Garvis to effectuate the transfer was done at that time. Directions were given to Neal to complete the transfer when it could be done and to mail the passbook to Garvis.

Was there an effective transfer of the funds into a joint account? "To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee." Kolc v. Krystyniak, 196 Neb. 16, 241 N. W. 2d 348 (1976). The District Court determined there was no immediate donative intent on the part of decedent and no delivery prior to her death. We believe the decedent had the specific intent to transfer the account to a joint account with her daughter and that she did everything possible to effectuate that transfer. The delivery of the passbook with instructions to make the transfer and to send the new passbook to Garvis was an effective delivery to carry out the intent to make the transfer.

The trial court viewed Neal as the agent of the decedent to complete the delivery. Neal was not the agent of decedent but the agent of Union. Delivery to her was delivery to Union for the purpose of the transfer. The intervening death of decedent did not change that situation. "The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. In such cases, the delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit." Crowell v. Milligan, 157 Neb. 127, 59 N. W. 2d 346 (1953).

While not exactly on point, the case of White v.

Bank of America Nat. Trust & Sav. Assn., 53 Cal. App. 2d 831, 128 P. 2d 600 (1942), is interesting because it is in some respects analogous. There, White asked a bank employee to convert her individual savings account to a joint account with Maria and David Torres. The bank employee prepared a signature card for deceased and the Torreses to sign. They did so, and the card was returned to the bank. On August 9, the bank employee had the deceased execute some documents transferring funds into the new account. On August 11, before the employee had recorded the transactions on the bank's books because of an intervening weekend, the deceased died. The following language from that case is equally applicable here: "When the clear intention of the donor to make a gift can be carried out without doing violence to the established principles of law the courts should not seek highly technical reasons for defeating the gift."

When decedent went to Union on March 19, all she was expecting Union would need to do would be to add the Garvis name to the existing account and to secure a new signature card to include Garvis' signature. At most, all that was necessary were bookkeeping entries on the part of Union. The delay was for the convenience of Union and not for the convenience of the decedent. Rather, the action taken by Union has been to the distinct disadvantage of Garvis and has created additional expense for her and decedent's estate.

We find that decedent created an effective joint tenancy and that the surviving tenant, Garvis, is the owner of the account.

The judgment is reversed and the cause is remanded with directions to dismiss the executrix' action.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., concurring.

I concur in the result, but disagree with the rationale.

The parties present this case to us in traditional terms of gifts of personal property, to wit, (1) donative intent on the part of the giver; (2) delivery by the donor; and (3) acceptance by the donee. In re Estate of Scott, 148 Neb. 182, 26 N. W. 2d 799. The problem with analyzing this transaction wholly in traditional terms is that title to certain types of property cannot be transferred simply by delivery. A case in point is United States government bonds. "A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy." Nelson v. Rasmussen, 164 Neb. 274, 82 N. W. 2d 418; Slocum v. Hevelone, 196 Neb. 482, 243 N. W. 2d 773.

A similar situation arises in connection with bank accounts. One does not transfer title to a bank account by delivering it. The relation between banker and depositor is created by contract. 9 C. J. S., Banks and Banking, § 267b, p. 545. Joint accounts are also created by contract. 9 C. J. S., Banks and Banking, § 286, p. 595. In Nebraska there is a specific statutory provision governing joint accounts. Section 8-136, R. R. S. 1943, provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of such persons or to the survivor or survivors in due course of business." It seems clear from our decided cases that where, as here, the deposit had already been made in the bank, execution of the signature card by the decedent and Garvis and the acceptance of the same by the bank created the necessary contract and was

sufficient compliance with section 8-136, R. R. S. 1943. Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117. Section 8-136, R. R. S. 1943, has the same binding effect as the statute of wills or any other valid statute prescribing the methods to be used to make a valid conveyance of property. Young v. McCoy, 152 Neb. 138, 40 N. W. 2d 540. A simple designation on the passbook and on the books of the bank that a certain person is to receive the proceeds of the account on the death of the survivor is not a compliance with section 8-136, R. R. S. 1943. Young v. McCoy, *supra*. It would seem to follow as a corollary that the mechanical process by the bank following execution and delivery of the deposit card to the bank is not a necessary part of either the contract or compliance with section 8-136, R. R. S. 1943. The contract was made by the execution of the signature card and its delivery to the bank.

Even if it were to be said that the decedent delivered the signature card to the bank conditioned upon later payment of the earned interest and that decedent could have revoked the transaction until the condition occurred (and I do not say that), it is indisputably clear that the condition was satisfied before the decedent's death without there having been a revocation of the transaction. Any discussion of the contention that Neal was the decedent's agent rather than an agent of the bank is unwarranted and wholly unnecessary.

BRODKEY and WHITE, C. THOMAS, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. ROBERT PRICE, APPELLANT.

252 N. W. 2d 165

Filed April 6, 1977. No. 40932.

1. **Criminal Law: Courts: Appeal and Error: Time.** An appeal shall be deemed perfected and the court shall have jurisdiction of

the cause when a notice of appeal has been filed and the docket fee deposited in the office of the clerk of the District Court within the time provided by statute.

2. **Criminal Law: Courts: Appeal and Error.** While this court may have jurisdiction, it will ordinarily not consider any error not presented to the trial court by a motion for a new trial if the trial court would have authority to correct the error assigned.
3. **Criminal Law: Guilty Plea: Verdicts: New Trial: Time.** When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction and a motion for new trial must be filed within 10 days thereafter.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. On motion for summary dismissal of appeal or summary affirmance of judgment. Motion for summary affirmance sustained. Judgment affirmed.

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

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

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

SPENCER, J.

The state has filed a motion for summary dismissal of this appeal, or, in the alternative, a motion for summary affirmance. The specific reason alleged is defendant's failure to file a motion for a new trial in the District Court. The State contends the filing of the motion for a new trial is mandatory and jurisdictional. The State argues that without it there is nothing for this court to review.

The public defender points out this appeal is from a guilty plea to a charge of burglary. He concedes no motion for new trial was ever filed. We sustain the motion for summary affirmance but not for the reason given by the State.

Section 25-1912, R. R. S. 1943, provides: "Except as otherwise provided in section 29-2306, an appeal

shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when such notice of appeal shall have been filed, and such docket fee deposited in the office of the clerk of the district court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional."

Section 29-2306, R. R. S. 1943, covers writs of error in criminal cases. This section states, so far as material herein: "* * * the Supreme Court shall acquire jurisdiction of the case when the notice of appeal is filed with the clerk of the district court."

The contention of the State that this court is without jurisdiction is not correct. A motion for a new trial is not mandatory to give this court jurisdiction of the appeal. However, while this court may have jurisdiction, it will ordinarily not consider any error not presented to the trial court by a motion for a new trial if the trial court would have authority to correct the error assigned. There are some errors on which the court does not have power to act, such as an excessive sentence in a criminal case. Errors of this type are not reached by a motion for a new trial, and will be considered in this court when presented.

In State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650 (1976), we determined that a motion for new trial in a criminal case must be filed within 10 days after the verdict is rendered. When a guilty plea is accepted and the court enters a judgment of conviction thereon, that is the verdict of conviction. The motion for new trial must be filed within 10 days thereafter. § 29-2103, R. R. S. 1943. In most instances this would be before sentencing, rather than within 10 days after sentencing. Another motion after sentencing would be futile because the trial court has no authority to change a sentence after it has once been pronounced and the defendant has left the courtroom.

In this case, defendant appeals from the entry of a sentence on a guilty plea. From his brief, which was filed December 28, 1976, the only assignment of error raised is as follows: "The District Court committed reversible error in accepting the defendant's plea of guilty without inquiring into and determining that the plea was voluntarily made without coercion or threats."

The only issue being raised by defendant is one that should have been presented to the trial court in a motion for a new trial. If there were any deficiencies in the acceptance of defendant's plea, it should have been called to the attention of the trial court within 10 days of the acceptance of the plea. The failure to do so waived it for the purposes of appeal. If the error is of constitutional dimensions, it may be reached in a post conviction proceeding.

It is evident from the files herein that defendant was satisfied with the procedure followed until after sentence was pronounced. At the time defendant was brought before the court for sentencing, he was reminded by the Court that he had pled guilty. He was informed of the nature of his plea, its consequences, and of the penalty attached by law thereto. The defendant, before sentence was pronounced, again advised the court that he adhered to his plea of guilty and desired to stand thereon. He was sentenced to the Penal and Correctional Complex for a period of not less than 3 nor more than 10 years on his conviction for burglary. This is within the limits of the penalty provided for that offense.

The State's motion for summary affirmance should be sustained, not for the reason urged by the Attorney General but because the only assignment of error raised by the defendant should have first been presented to the trial court by a motion for a new trial.

The motion for summary affirmance is sustained and the judgment is affirmed.

MOTION FOR SUMMARY AFFIRMANCE SUSTAINED.
JUDGMENT AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LUIS H. LEAL, APPELLANT.

252 N. W. 2d 167

Filed April 6, 1977. No. 40941.

1. **Criminal Law: Sentences: Probation and Parole.** This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion.
2. **Criminal Law: Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

Benjamin M. Shaver, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

WHITE, C. J.

The defendant was charged with the felony of driving while intoxicated, third offense. After a jury trial, he was found guilty. The District Court, at a subsequent hearing, determined that such offense was his third offense and sentenced the defendant to a term of 1 years imprisonment in the Nebraska Penal and Correctional Complex. We affirm the judgment and sentence of the District Court.

The sole assignment of error is that the sentence is excessive. The defendant contends that he should have received probation. "This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion." State v. Stahl, 197 Neb. 683, 250 N. W. 2d 639 (1977). The presentence report indicates that

past attempts with probation have been unsuccessful in altering defendant's conduct. The defendant received the minimum sentence, within statutory limits, for the crime for which he was charged and convicted. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. Holloman, 197 Neb. 139, 248 N. W. 2d 15 (1976). We cannot say that the District Court has abused its discretion in sentencing the defendant as it did.

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

AFFIRMED.

ELLEN M. DANGBERG, APPELLANT, V. SEARS, ROEBUCK AND COMPANY, A CORPORATION, APPELLEE.

252 N. W. 2d 168

Filed April 6, 1977. No. 40946.

1. **Pleadings: Demurrer.** A petition which fails to plead actionable facts is vulnerable to a general demurrer.
2. _____: _____. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded.
3. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means.
4. **Privileged Communications.** A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it, or stands in such relation that it is a reasonable duty or is proper for the writer to give the information.
5. **False Imprisonment: Words and Phrases.** False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go may constitute false imprisonment.

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

Henry J. Brown and Robert P. Miller, for appellant.

Marer & Lazer and Michael L. Lazer, for appellee.

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

SPENCER, J.

In this action to recover damages for slander and false imprisonment, the trial court sustained a demurrer and dismissed plaintiff's last amended petition.

The only issue involved in this appeal is whether plaintiff's amended petition states a cause of action. We affirm.

Plaintiff originally commenced this action against Sears, Roebuck and Company and J. L. Brandeis & Sons, Inc. After demurrers were sustained to the original petition and an amended petition, plaintiff was given leave to docket the cases separately against Sears and Brandeis. This appeal is from the dismissal of plaintiff's last amended petition against Sears.

A petition which fails to plead actionable facts is vulnerable to a general demurrer. Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp., 194 Neb. 810, 235 N. W. 2d 870 (1975).

A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717 (1956).

For the purposes of this opinion, we summarize all allegations of plaintiff's last amended petition which may be deemed pertinent. Sears and Brandeis operate stores in the Crossroads Mall in Omaha, Nebraska. Employees of both Sears and Brandeis held one or more meetings to discuss mutual security problems. Sears was represented at these meetings by Duane Berry and Brandeis by Mr. Muse.

At one of these meetings the name of the plaintiff was given by Berry in conjunction with the names of other parties who were known to Berry to be shoplifters or persons of unsavory character. Berry on that occasion advised Muse that plaintiff was a frequent shopper between the stores of the defendant and Brandeis. He further advised Muse that he suspected plaintiff of being a shoplifter because he had frequently observed her on the premises carrying shopping bags filled with merchandise. He stated it was his experience such a person usually was engaged in shoplifting but he had not been able to catch plaintiff in any criminal act.

Berry and Muse jointly agreed to attempt to catch plaintiff in the act of shoplifting. Mr. Muse instructed Berry to notify him of the presence of plaintiff whenever Berry saw her on the premises of Sears. Muse also requested that he be advised if plaintiff were to leave the premises of defendant for the premises of Brandeis. Berry agreed to so advise Muse.

On August 22, 1974, Berry observed plaintiff walk through the retail display of defendant's store. She made no purchase. He saw her enter the Brandeis store where she made a purchase. Pursuant to agreement, Berry notified Brandeis by telephone that plaintiff was in its store.

Subsequently, the person with whom Berry communicated notified a Brandeis security guard to pursue plaintiff. This security guard stopped her at a bus stop and there publicly and within the hearing of other people demanded that she accompany him to the premises of Brandeis so he could inspect the contents of her shopping bag and purse. Plaintiff alleges by this action she was imprisoned, detained, slandered, and held up to public ridicule, and that such slander was malicious and without reasonable cause.

Giving plaintiff the benefit of every inference

which may legitimately be drawn from her pleading, the Sears representative did no more than advise Brandeis that plaintiff was in its store. Sears had not detained plaintiff in any way. Its employee merely observed her while she was in the store to be certain she did not engage in any unlawful activity there.

It is evident the cause of action plaintiff is attempting to plead against Sears for slander and false imprisonment concerns the action of a Brandeis security guard at the bus stop. He there publicly accused her of shoplifting and actually took her into custody. No representative of Sears was present or involved at that time, or at any time she was in Brandeis. The most that Berry had done was to advise Brandeis by telephone that plaintiff was in its store.

Plaintiff is attempting to plead a civil conspiracy. She has failed to do so. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means. Buhram v. International Harvester Co., 181 Neb. 633, 150 N. W. 2d 220 (1967). Plaintiff's petition alleges only that the employees of Sears and Brandeis agreed to attempt to catch her in the act of shoplifting and a Sears employee was to notify Brandeis when plaintiff was in the store. There is nothing unlawful in this agreement.

The meeting of the Brandeis and Sears employees to discuss mutual security measures is within the ambit of their responsibilities and employment. There is no way their conduct in that respect can be characterized as unlawful or oppressive. Plaintiff has failed to plead a cause of action premised on conspiracy.

It seems to be plaintiff's position that Berry and Muse conspired to slander her at their meeting on security measures. If that is her contention, we

hold the statement Berry made at the security meeting that he suspected plaintiff of being a shoplifter would not be actionable. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it, or stands in such relation that it is a reasonable duty or is proper for the writer to give the information. Hall v. Rice, 117 Neb. 813, 223 N. W. 4 (1929).

Hall involved a situation in which plaintiff's employer stated to other employees that plaintiff had stolen money from a cash register. This court held the jury should have been instructed that the communication was one of qualified privilege. On the occasion when the communication made by Berry was made, there was a mutual exchange of security information between security people. We assume from plaintiff's pleadings that in the course of their meeting the parties exchanged all information they had on known or suspected shoplifters. We hold this to be within the rule enunciated in Hall.

In Schmidt v. Richman-Gordman, Inc., 191 Neb. 345, 215 N. W. 2d 105 (1974), we held: "False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment.

As we read plaintiff's amended petition, we find no pleaded facts even suggesting the element of unlawful restraint on the part of Sears. There is no allegation that any employee of Sears directed or even suggested that the plaintiff be apprehended. The petition only states that a Sears employee notified Brandeis that plaintiff had left the Sears store and had entered Brandeis. These allegations are not sufficient to charge defendant with false imprisonment. See Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238 (1958), where we stated:

"One who merely states to an officer what he knows of a supposed offense or gives information to an officer tending to show that a crime has been committed, without making any charge or requesting an arrest, does not thereby make himself liable for false arrest and imprisonment."

It is impossible to draw an inference that Berry suggested that plaintiff be apprehended. Actually, the inference would be otherwise. Berry stated he had never been able to catch plaintiff in an unlawful act, although he suspected her of shoplifting. At no time did he ever detain or question her. The most he ever did was to keep her under surveillance. It is reasonable to believe that he would expect no more of Brandeis unless she was observed in an unlawful act.

Plaintiff argues that Berry's communication to Brandeis concerning plaintiff prior to August 22, 1974, was a slander per se. We have heretofore held that the words spoken by Berry on the occasion in question were at the very least qualifiedly privileged. Berry did not say that plaintiff was a shoplifter. He said that he suspected she was a shoplifter and gave the reasons for his suspicion. He also stated that he had never been able to catch her in an unlawful act.

Even though a statement may be qualifiedly privileged, it may be slanderous per se in certain situations. Plaintiff, however, has pleaded no facts which would even indicate such situation. We can draw no inference from plaintiff's pleadings that Berry went further than he needed to go in order to exchange necessary security information with Brandeis. There is nothing in the pleadings to suggest that his manner of doing so was such as to raise a question about the qualified privilege. There is no inference we can possibly draw from plaintiff's pleadings to support her conclusion that the words spoken were slanderous per se.

We repeat, plaintiff's petition only states that employees of Sears and Brandeis agreed to attempt to catch plaintiff in the act of shoplifting, and that a Sears employee agreed to notify a Brandeis employee when he observed plaintiff in the Sears store. This involved neither an unlawful purpose nor the use of unlawful means to accomplish that purpose. It is not alleged that Berry directed that plaintiff be apprehended, or that he in any way participated in her apprehension.

Plaintiff refers to section 29-402.01, R. R. S. 1943, which absolves merchants or their employees of criminal or civil liability where they have probable cause for believing that goods held for sale by them have been unlawfully taken. Plaintiff, in her brief, states as follows: "Sears appears to be clearly outside the shelter of this Statute. Sears did not directly detain plaintiff for the purpose of recovering merchandise which its agent believed to have been stolen from its store. The actual detention of plaintiff was by Brandeis, and presumably for the purpose of recovery of merchandise taken from Brandeis."

There are no allegations in plaintiff's petition suggesting that any Sears employee believed that plaintiff had stolen merchandise from Sears on the occasion in question. We again reiterate that no inference can be drawn from plaintiff's pleadings that any Sears employee participated in, directed, or even knew that Brandeis had sent a security guard to apprehend the plaintiff.

We conclude plaintiff's amended petition alleged no facts which would sustain an action against defendant. The amended petition was properly dismissed. The judgment is affirmed.

AFFIRMED.

ROBERT V. HERINK, APPELLEE, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.

252 N. W. 2d 172

Filed April 6, 1977. No. 40968.

Administrative Law: Appeal and Error: Evidence. In a proceeding to review an order of the Nebraska State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Richard H. Williams, for appellant.

Robert V. Herink, pro se.

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

BOSLAUGH, J.

This is an appeal in a proceeding to review an order of the Nebraska State Real Estate Commission suspending the plaintiff's license as a real estate broker for 1 year.

The trial court found that the plaintiff had induced Edith Kugler and Leon Kugler to falsify and deliberately withhold information in order to induce the First Federal Savings and Loan Association of Omaha, Nebraska, to approve a loan to the Kuglers to purchase a home from First Omaha Realty Co., a corporation owned entirely by the plaintiff and members of his family. The court found this conduct demonstrated unworthiness on the part of the plaintiff to act as a real estate broker. The trial court modified the commission's order of suspension so that the plaintiff would be on probation after the

first 60 days of the 1-year period. The State has appealed. There is no cross-appeal.

Section 81-885.31, R. S. Supp., 1976, provides that in any judicial proceeding under the act the court shall consider the matter de novo upon the record. The trial court construed this provision to mean that the District Court should exercise independent judgment on the issues presented to and decided by the commission.

Under the statute as it existed in 1947, this court held that the review was intended to provide more than a determination of whether the order of the commission was arbitrary and capricious and, if raised, the District Court could determine whether the findings of the commission were contrary to the weight of the evidence. Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823.

We have recently held that where the licensing and regulation of the health profession was delegated to an administrative agency, the judicial review of an order made by the agency was limited to a determination of whether the order was supported by substantial evidence, whether the agency acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683. We think a similar rule is applicable here. Thus, the statutory provision for consideration of the matter de novo upon the record by the trial court refers to the procedure on the trial of the appeal rather than the determination of the appeal. See T & N P Co., Inc. v. Nebraska Liquor Control Commission, 189 Neb. 708, 204 N. W. 2d 809.

The order of the commission finding that the plaintiff's license to act as a real estate broker should be suspended for a year was not arbitrary, capricious, or unreasonable and should have been affirmed. The judgment of the District Court modifying the order of the commission is reversed and the cause

remanded with directions to reinstate the order of the commission.

As we understand the record, the commission on August 18, 1975, ordered the plaintiff's license as a real estate broker be suspended for 1 year from August 29, 1975. On September 2, 1975, the trial court temporarily restrained the enforcement of the order of suspension. The restraining order was continued in effect until the final determination of the action in the District Court on July 6, 1976.

There was no supersedeas of the judgment of the District Court pending the determination of the appeal in this court. The plaintiff should receive credit for the 60-day period of suspension under the judgment of the District Court which has now expired. The remaining period of suspension will commence to run upon the filing of the mandate of this court in the District Court.

REVERSED AND REMANDED WITH DIRECTIONS.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, UNIVERSITY OF NEBRASKA CHAPTER, UNIVERSITY OF NEBRASKA, LINCOLN, NEBRASKA, APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANT, UNIVERSITY OF NEBRASKA LAW FACULTY ASSOCIATION, INTERVENER-APPELLEE, FACULTY OF THE COLLEGE OF DENTISTRY, UNIVERSITY OF NEBRASKA-LINCOLN, INTERVENER-APPELLEE.

253 N. W. 2d 1

Filed April 13, 1977. Nos. 40655, 40734.

1. **Court of Industrial Relations: Labor and Labor Relations: Statutes.** The considerations set forth in section 48-838(2), R. S. Supp., 1974, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate.
2. **Court of Industrial Relations: Labor and Labor Relations: Employer and Employee.** A basic inquiry in bargaining unit determination is whether a community of interest exists among the employees

which is sufficiently strong to warrant their inclusion in a single unit.

3. _____: _____: _____. In determining whether a particular group of employees constitutes an appropriate bargaining unit where an employer operates a number of facilities, relevant factors include prior bargaining history; centralization of management, particularly in regard to labor relations; extent of employee interchange; degree of interdependence of autonomy of the facilities; differences or similarities in skills or functions of the employees; geographical location of the facilities in relation to each other; and possibility of over-fragmentation of bargaining units.

4. _____: _____: _____. The faculties of the College of Law and the College of Dentistry were entitled to separate bargaining units where the evidence showed that those faculty members shared a community of interest separate from other faculty members, in that they have separate buildings; have separate accreditation standards; have different academic calendars; have significant operational independence on a day-to-day basis; and receive higher salaries, and promotions and tenure in a shorter period of time, than do other faculty members of the University.

5. _____: _____: _____. Department chairmen are properly included in bargaining units of faculty employees at the University where their decision-making power is diffused among the department faculty under the by laws of the Board of Regents of the University of Nebraska, and pursuant to the principle of collegiality.

6. **Court of Industrial Relations: Labor and Labor Relations: Appeal and Error.** Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the Nebraska Court of Industrial Relations. Affirmed.

L. Bruce Wright of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Patrick W. Healey of Healey, Healey, Brown & Wieland, for appellee.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for intervener-appellee University of Nebraska Law Faculty Assn.

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

BRODKEY, J.

This is an appeal by the Board of Regents of the University of Nebraska from a determination of the Court of Industrial Relations establishing the scope and composition of bargaining units of academic employees under section 48-838, R. S. Supp., 1974. The issue raised on appeal is the propriety of the scope and composition of the bargaining units found to be appropriate by the Court of Industrial Relations (CIR). We affirm.

On July 28, 1975, the American Association of University Professors, University of Nebraska—Lincoln Chapter (AAUP/UN-L), the petitioner and appellee herein, filed a petition in the Court of Industrial Relations for election and recognition as the exclusive bargaining agent for a proposed unit of University of Nebraska employees, as described in the petition. The proposed unit included the full-time academic faculty of the University of Nebraska—Lincoln (UN-L), the members of which hold, or are eligible to hold, continuous appointments, including chairmen and directors of departments, but excluding persons holding a rank higher than a chairman or director of a department. The proposed unit did not purport to include faculty of the University of Nebraska—Omaha (UN-O), nor the faculty of the University of Nebraska Medical Center (UNMC). Subsequent to the filing of the petition, the petitioner agreed that the proposed unit also should not include the faculties of the College of Dentistry and the College of Law. The petition alleged that more than 30 percent of the employees of the proposed unit had signed appropriate authorization cards, which fact the clerk of the Court of Industrial Relations verified. Petitioner prayed that the CIR find the proposed unit to be appropriate, and order an election to determine whether it should be the exclusive bargaining agent for the unit.

The respondent, the Board of Regents of the University of Nebraska (the Board), denied the propriety

of the proposed bargaining unit in its answer, and alleged that the proper unit should be a multi-campus unit sufficient in scope to cover all University employees holding academic rank, not only those on the faculty of UN-L. The Board also alleged that chairmen and directors of departments should not be included in any bargaining unit because they are supervisors and a part of management.

The faculties of the College of Law and the College of Dentistry intervened in the action, each praying that they be designated as a separate bargaining unit, and that they be expressly excluded from the definition of any other bargaining unit proposed by the petitioner or the Board. Representatives of the faculty of UN-O and UNMC did not formally intervene in this case, nor did they appear at any proceedings or present to the CIR their position on what bargaining unit would be appropriate.

Hearing was had on September 25, 1975, at which time all parties introduced evidence on the issues. In its opinion filed November 26, 1975, the Court of Industrial Relations established three bargaining units, as follows:

"1. All full-time members of the University of Nebraska at Lincoln faculty other than members of the Faculty of Law and Dentistry, who are employees of the University of Nebraska at Lincoln and who hold faculty rank conferred on the recommendation of an academic department or academic school of the University of Nebraska at Lincoln, and who do not hold administrative positions higher than that of a chairman of a department or of director of a school or their equivalent. A faculty member holding an administrative position who reports directly to a Vice Chancellor holds a position higher than that of chairman of a department or of director of a school. County and Home Agents shall be included in this unit.

"2. All full-time 'A' line employees of the College

of Dentistry not above Department Chairman or equivalent.

"3. All full-time 'A' line employees of the College of Law not above Department Chairman or equivalent." The CIR ordered an election to be held within each of the above units within a reasonable time.

The Board's motion for rehearing filed December 3, 1975, was overruled February 10, 1976, and it then filed a notice of appeal and motions to stay the elections and fix the amount of a supersedeas bond, the motions being directed at postponing the elections until final resolution by this court of the propriety of the bargaining units established by the Court of Industrial Relations. The motion to stay the elections was overruled, and the CIR deferred judgment on the motion to fix the amount of a supersedeas bond until after the elections. Elections in each unit were held on February 16, 1976, and only the faculty of the College of Law voted in favor of establishing a bargaining representative for its unit. On March 9, 1976, the CIR certified the Nebraska Law Faculty Association as the exclusive collective bargaining agent for that unit. The Board then filed its second notice of appeal to this court.

Although the Board lists 28 assignments of error in its brief, essentially the issues involved in this appeal are: (1) Whether the CIR erred in establishing the three bargaining units, as set forth above, rather than finding that one bargaining unit for all academic employees of the University of Nebraska was appropriate, as claimed by the Board in its answer; and (2) whether it was error to include chairmen and directors of departments in the bargaining units.

The evidence presented in this case was voluminous, and a summary of the relevant facts is as follows. The University of Nebraska, established in 1869, is the state's most comprehensive institution of higher education. The College of Dentistry, the College of Law, and the College of Medicine all became

part of the University between 1891 and 1918. The University of Nebraska at Omaha did not become part of the University system until 1968, and prior to that time was Omaha's Municipal University. The addition of UN-O to the University of Nebraska system in 1968 was a significant change in the structure of the University, and to accommodate this change a Central Administration was established to deal with the management and coordination of the entire institution.

Both prior to and subsequent to the addition of UN-O, the University has been a statewide University with its general government vested in an executive body known as the Board of Regents of the University of Nebraska. Article VII, section 10, of the Constitution of Nebraska, provides that the general government of the University shall, under the direction of the Legislature, be vested in the Board, the members of which are elected from districts established by the Legislature.

The Board has, since the addition of UN-O, established a branch, entitled Central Administration, vested with the power and authority, subject to the direction and control of the Board, to (1) exercise executive powers for proper governance of the University; (2) enforce the regulations and orders of the Board and issue directives and executive orders in accordance with existing policy of the Board; and (3) direct planning and development, appraise all activities of the University, and be responsible for their coordination and implementation. The Central Administration is administered by the President of the University, and the Board has also created positions of executive vice president in the Central Administration.

The University is divided into three major administrative units, each of which has its own administrative staff headed by a Chancellor, who is also a University vice-president. These major administrative

units are UN-L, UN-O, and UNMC. Each administrative unit is divided into colleges and departments. A Dean administers each college, and a chairman or director administers each department.

Within the foregoing general organization framework, the University employs approximately 5,900 full-time employees, who are designated as either "A" line, "B" line, or "C" line individuals. "A" line employees are those individuals holding the positions of professional staff, academic-administration staff, or other academic staff. The University currently employs approximately 2,200 "A" line personnel. The employees involved in this case are all "A" line employees.

The governing document of the University is the by laws of the Board of Regents. Under these by laws, the Board has established its authority "to make such rules and regulations as it deems appropriate and necessary for the proper governance and administration of the University." The by laws set forth the structure of the University, and define the duties and responsibilities of the President and the Chancellors. The President, as previously stated, has the responsibility to exercise powers of the Central Administration, and carry out policies established by the Board. The by laws provide that the Chancellors of each administrative unit, subject to the guidelines and policies of the Board and the President, "shall do all things necessary for the development of the major administrative unit for which he is responsible." These duties include recommending personnel appointments to the President and the Board, planning and developing all activities of his unit, and submitting annual budgets for operations and construction to the President covering all activities assigned to his unit.

Under the by laws, the immediate government of each college within an administrative unit shall be by its own faculty. See, also, §§ 85-111 and 85-108, R. R.

S. 1943. Such power expressly includes adoption of attendance rules, determination of requirements for graduation and recommendations of candidates therefor, developing research and extension programs, discipline of students for conduct solely affecting the college, and providing to the Board recommended admission requirements, courses of study and other relevant material for meeting statutory requirements. Each college is to be administered by a Dean, who shall be recommended to the President and the Board by the Chancellor of the administrative unit.

The by laws further provide that the Board may create departments of a college or school, and that the chairman of the department shall be the officer primarily charged with the administration of the department. Appointment of a department chairman is by the Board upon recommendation of the Dean, after appropriate consultation with the department faculty, and with concurrence by the Chancellor and the President. The department chairmen have the responsibility of making recommendations to the Dean concerning the welfare of their departments, but shall consult with the appropriate departmental faculty before so doing.

The by laws also provide that the faculties of each major administrative unit shall establish a governing agency for dealing with matters of interest to more than one college. Such governing agencies may appeal directly to the Board in regard to matters of academic freedom and faculty status, after exhausting normal administrative channels. Both UN-L and UN-O, pursuant to this provision of the by laws, have established faculty senates. There is no system-wide faculty senate.

The Board has the sole power to make appointments or to contract for services of the academic-administrative staff, and every appointment by the University to such a position shall be in writing and signed by the Board or its authorized agent. It is pro-

vided that each major administrative unit of the University shall prepare written standards which shall be used in making all decisions on promotions, awarding continuous appointments, and merit salary adjustments. Each unit is also responsible for establishing procedures for gathering relevant information from all sources, including student evaluations and peer judgments, as part of an annual review of faculty performance, this review to be considered in determining merit salary adjustments, promotions, and in awarding continuous appointments. Each administrative unit shall also create an elected faculty Committee on Academic Freedom and Tenure which has specified powers under the by laws.

It is clear under the by laws, as well as under its constitutional grant of authority, that the Board is the ultimate governing body of the University of Nebraska, although under the direction of the Legislature. The parties agree that the Board has final formal authority to grant appointments, grant degrees, grant tenure and promotions, and establish a budget for the University as a whole and for each major administrative unit. It is also true, however, that the by laws themselves indicate that power and authority to make decisions affecting employees is diffused throughout the University; and that the Presidents, Chancellors, and Deans play an important role in the decision-making process; and also that the Board often acts upon the recommendation of such personnel.

The testimony at the hearing below shows that the petitioner (AAUP/UN-L) has approximately 200 members, 12 to 24 of which are department chairmen. There are separate chapters of the AAUP at UN-O and UNMC, but the petitioner is the only chapter of any size, and no other chapters have expressed the desire or decided to pursue collective bargaining.

The witnesses for the petitioner were professors who are currently, or who have previously been, officers of the petitioner; or who have been involved with

the AAUP/UN-L during various stages of its existence. In support of their position that a separate bargaining unit for UN-L faculty is appropriate, these witnesses testified that procedures of governance in the University are confined to the administrative unit boundaries, and that system-wide bargaining would disrupt long-standing, established practices of University administration. Although petitioner's witnesses recognized that the Board has the ultimate, formal authority to make decisions regarding the University, they stated that traditionally, historically, and realistically the faculty of each major administrative unit has been treated individually, has taken part in University government on a unit basis, and has a community of interest and sense of collegiality confined to the unit.

Although witnesses for the petitioner testified to a large number of facts which petitioner contends support its position, the following facts appear to be the most important. UN-O and UN-L have separate administrative unit by law faculty senates, committees, and catalogs at both the graduate and undergraduate level. A faculty member in one administrative unit has no claim of position in another unit, there is no interchange of faculty between the units except in limited and unusual situations, transfers of faculty from one unit to another are rare, and the faculty of the units do not have close contact with each other or understanding of each other's problems. Peer review and tenure are effectively departmental and college matters, even though the Board makes final appointments and officially grants tenure; and meaningful management decisions and faculty input to University government can only be made at a local level. The Chancellor of each administrative unit is charged with the development of standards for promotion, tenure, and merit salary increases, and these standards are promulgated in the first instance by colleges and departments. No employee group exists to represent all three administrative units, as faculty

organizations have previously been limited in scope to the administrative unit. Under the University 5-year plan, UN-L is, and should remain, the primary locus of doctoral education; and it is recognized that UN-O's primary mission is distinctly urban in its orientation, and will remain so. There is no system-wide committee on academic freedom and tenure, or range of faculty committees at the systems level comparable to that at the unit level. Finally, previously, and at the present time, matters relating to the faculty of each unit have been dealt with by the Board and Central Administration on a campus basis.

The AAUP/UN-L relies on these and similar facts in support of its position that the UN-L faculty has a community of interest confined to the boundaries of UN-L, and that there are fundamental differences between the major administrative units such that a bargaining unit for UN-L faculty is appropriate.

Witnesses for the petitioner also described the actual decision-making process in regard to tenure, promotions, hiring, and academic programs. Decisions on these issues are initially made at the departmental or college level, and recommendations are made to the Chancellor of the administrative unit. The Chancellor then makes his recommendations to the President, who in turn makes recommendations to the Board. The Board, in the vast majority of cases, follows the recommendations which were first made at the department or college level. Thus, the petitioner points out, although the Board does have the authority to make the final decision, each administrative unit, and the colleges and departments therein, play an important, if not dominant, role in the actual day-to-day decisions which affect the faculty of that unit. This fact is recognized in the by laws of the Board, which acknowledge and establish the unit structure of the University, and which acknowledge the authority and role of various parts of the unit in contributing to the decision-making process. The 5-

year plan adopted by the Board also acknowledges and reemphasizes the basic structure set out in the by laws.

The witnesses for the Board were officials in the Central Administration, and an expert on collective bargaining in institutions of higher education. The relevant testimony in favor of the Board's position was as follows: In 1972, the Board first adopted a policy that there should be a single, multi-campus bargaining unit. This policy was adopted in response to a petition by UN-O professors who sought to establish a bargaining unit for UN-O faculty. There was testimony that University labor policies operate within the confines of Board policies, and are carried out by Central Administration. The Board has adopted equalized fringe benefits for employees on a University-wide basis, is developing system-wide contract form procedures, and is establishing a unified academic calendar. Budget planning is done by the Central Admistration and the Board, although each Chancellor submits budget requests and is involved in the budgeting process, and represents the Deans and departments making budget requests to the Chancellor. The University has a central accounting, payroll, and computer network in regard to paying employee salaries. The University has a University-wide graduate college, although each unit has its own Dean of graduate studies and separate graduate catalogue. Inter-campus programs and committees exist, and there has been some interchange of faculty from one campus to the other. The amount of dollars a unit receives for delegation of funds to faculty for merit compensation is fixed by the Board. All decisions regarding tenure, promotion, merit increases in salary, and academic programs are made by the Board, and any recommendations by each major administrative unit are reviewed by the Central Administration before going to the Board. The University has an overall mission, and it is claimed that any differences

which exist between the units stem from the fact that units have different roles in contributing to the overall mission.

The expert witness for the Board was of the opinion that one, system-wide bargaining unit would be appropriate. He believed that the interests of all faculty, including the faculty of the Law, Dental, and Medical Colleges, could be accommodated in one unit. He stated that: "* * * I know of no exception of a public university — no exception to the rule that the bargaining unit consists of the institution as conventionally seen by faculty and the public." The expert felt that the structural organization of the University should be respected, and that a system-wide unit would avoid whipsaw tactics by different bargaining units, unnecessary bureaucracy, and unnecessary splintering. A single unit structure, in his opinion, would enhance the ease of agreement between the administration and the employees. The expert also admitted that he knew of no university in the United States where a law school wished to be excluded from a general bargaining unit, but was not allowed to have its own separate unit.

Additional facts relevant to the issue of whether department chairmen should be in a bargaining unit, and whether the Law and Dental Colleges should have separate units, will be discussed below.

In establishing the AAUP/UN-L as a separate bargaining unit, the CIR made the following findings of fact:

"1. There has never been any substantial continuing effort at organization at either of the other two campuses.

"2. There is no bargaining history at any campus. Respondent permits AFSCME and NAPE dues checkoff rights on its 'B' line and 'C' line employees, but denies this right to petitioner.

"3. Within guidelines and subject to central approval, hiring, firing, tenure and employment conditions

decisions are made not just at the local campus level, but at the Department or College level, rather than at the system-wide level.

"4. There is little interchange of faculty members between campuses.

"5. There is little integration of operations between campuses.

"6. While the University as a whole has a unified mission, the campuses each have a substantially different part in carrying out that mission.

"7. The University of Nebraska at Lincoln campus is predominantly the Doctorate and post-Doctorate locale. The University of Nebraska at Omaha campus has little doctoral emphasis, and is highly oriented toward urban problems. The University of Nebraska Medical Center is wholly directed toward producing professionals in the health and healing sciences.

"8. The College of Law, the College of Dentistry, and the University of Nebraska Medical Center are all separately accredited by professional bodies outside the academic atmosphere. All three have substantially more contact and interchange with the real world off campus than do the rest of the faculty.

"9. Each campus and the College of Law and Dentistry perceive themselves as separate and distinct entities. The faculty at the University of Nebraska at Lincoln still tends to regard the University of Nebraska at Omaha as a step-child."

In its brief, the Board contests most of these findings of fact. However, as indicated by the above summary of the evidence, we believe the findings of the CIR find support in the record.

Before proceeding to a discussion of the merits of this case, there is an initial procedural issue raised which is entitled to consideration even though it does not affect the outcome of the controversy. The Board sought to appeal to this court from the Court of Industrial Relation's determination establishing bargaining units, before elections in those units were held.

The CIR overruled the Board's motion to stay the elections pending the appeal. The Board contends that an order determining the composition of bargaining units is a final order, and thus it should not have been required to wait until the elections took place before it could appeal.

While no longer important in the instant case, we deem it advisable to settle this issue for guidance of future litigants. Section 48-812, R. R. S. 1943, provides that appeals from the Court of Industrial Relations to this Court are to be taken in the same manner as appeals from the District Court to this court. Section 25-1912, R. R. S. 1943, permits parties to appeal to this court from judgments and decrees rendered or "final orders" made by the District Court. Section 25-1902, R. R. S. 1943, defines a final order: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order * * *." Thus the issue is whether an order by the Court of Industrial Relations establishing bargaining units is an appealable order under sections 25-1912 and 25-1902, R. R. S. 1943.

In Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d 32 (1963), this court stated that an "order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto." In Lund v. Holbrook, 157 Neb. 854, 62 N. W. 2d 112 (1954), this court stated: "The law, as we understand it, is that an order is final for the purpose of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect." See, also, Sullivan v. Storz, 156 Neb. 177, 55 N. W. 2d 499 (1952). Under these cases, we believe that there is merit to

the Board's contention that it should have been permitted to appeal immediately from the order establishing the bargaining units. The only issue before the CIR was the propriety of the proposed bargaining units, and once that issue was decided, the only real controversy between the parties was terminated. All that remained to be done was the holding of elections in the units. When the propriety of the bargaining units established by the Court of Industrial Relations is to be contested in an appeal to this court, there is no economy of time or money in first holding the elections, as this court may determine that the bargaining units established by the CIR were erroneous. Courts in other jurisdictions agree that a party may appeal from an order establishing bargaining units prior to the holding of elections. See Civil Service Employees Assn., Inc. v. Helsby, 31 App. Div. 2d 325, 297 N. Y. S. 2d 813 (1969), affirmed 24 N. Y. 2d 933, 302 N. Y. S. 2d 822, 250 N. E. 2d 230 (1969). Therefore we hold that an order establishing bargaining units is a final order under section 25-1902, R. R. S. 1943, and a party may appeal therefrom prior to the holding of elections.

Section 48-837, R. R. S. 1943, grants public employees the right to be represented by employee organizations and to negotiate collectively with their public employers. A preliminary question to be determined in connection with collective bargaining is, of course, what bargaining unit of employees is appropriate. Subsection (2) of section 48-838, R. S. Supp., 1974, provides, in relevant part: "The court shall also determine the appropriate unit for bargaining and for voting in the election, and in making such determination *the court shall consider established bargaining units and established policies of the employer.* It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate." (Emphasis

supplied.) This statute was originally enacted by the Legislature in L.B. 1228 in 1972.

The Board contends on appeal, as it did below, that the provision in this subsection to the effect that "the court shall consider established bargaining units and established policies of the employer" places a limitation on what factors the CIR may consider in establishing bargaining units, and eliminates as considerations those referred to by this court in City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860 (1971). In City of Grand Island, we stated that in determining what is an appropriate bargaining unit, consideration should be given to mutuality of interest in wages, hours, and working conditions; the duties and skills of employees; the extent of the union organization among the employees; and the desires of the employees. In applying those factors to the facts of that case, we upheld a determination that three bargaining units of various municipal employees were appropriate, rather than one unit for all the employees in question.

The Court of Industrial Relations rejected the Board's contention on this issue, and found that the considerations set forth in subsection (2) of section 48-838, R. S. Supp., 1974, were not exclusive, and that they are a guide rather than a limitation. The CIR was correct in so finding. It is clear that in enacting subsection (2) of section 48-838, the Legislature properly sought to avoid *undue* fragmentation of bargaining units. The pertinent legislative history is reviewed in IBEW v. State, II CIR 133/134 (1975). As noted in that case, the decision primarily responsible for the introduction of L.B. 1228 was IBEW v. City of Lincoln, 1 CIR 48-1 (1971), a case which dealt with the issue of when a governmental unit is required to deal exclusively with a labor organization. The legislative history to L.B. 1228 indicates that the Legislature, as a result of IBEW v. City of Lincoln, *supra,* was concerned with the possibility of unduly fragmented bar-

gaining units arising in Nebraska municipalities. There is nothing in the legislative history to indicate that established bargaining units and established policies of the employer were to be the *sole* considerations to which the CIR should address itself when determining the appropriate bargaining unit. The subsection merely sets forth considerations which the CIR shall consider, but in no way limits the CIR in considering other relevant factors such as those mentioned in City of Grand Island v. American Federation of S. C. & M. Employees, *supra*. Therefore, we find that the CIR was correct in considering factors in addition to those listed in section 48-838(2); and, in deciding this case on appeal, this court will consider all factors it deems relevant to the determination of the appropriate bargaining unit, including, of course, those set forth in the statute.

Three primary issues are raised in this case by the parties. The first and most difficult issue to be resolved in this case is whether the faculty of UN-L should be permitted to have a separate bargaining unit, or whether the faculty of both UN-O and UN-L should be included in one unit. A review of cases in other jurisdictions indicates that courts have reached differing conclusions on the issue of whether single-campus bargaining units are appropriate, or whether units should be system-wide. In New York, for example, a single bargaining unit was ordered for 26 separate campuses of the State University of New York; while in Michigan and New Jersey, single-campus units were found to be appropriate. See Moore, The Determination of Bargaining Units for College Faculties, 37 U. Pitt. L. Rev. 43, 46-48 (1975). In Minnesota, a single, statewide bargaining unit was found to be appropriate, although this determination turned largely on mandatory statutory criteria, and on the fact that three out of four employee representatives and the employer favored a statewide unit. See Minnesota State College Board v. Public Employ-

ment Relations Board, 303 Minn. 453, 228 N. W. 2d 551 (1975). In Fairleigh Dickinson University, 205 NLRB 673 (1973), university-wide bargaining unit was found to be appropriate where many of the employees favored such a unit, and where the highest academic body responsible for formulating academic policies to the University Board of Trustees had members from all campuses.

In Oregon State Employees Assn. v. Oregon College of Education, Oregon PERB Cases Nos. C-277, C-319, C-326, C-375, and C-230 (1974), the court found single-campus bargaining units to be appropriate, relying on factors such as existence of a community of interest among faculty on each campus, little integration of operations and work functions between campuses, limited transfer of academic personnel between campuses, and the existence of a supervisory, administrative structure on the campus level which had primary importance in employee matters. A single-campus bargaining unit was also found to be appropriate in In re Unit Determination for Certain Professional Faculty Members of Kansas State College of Pittsburg, Kansas, PERB Case No. UE 2-1974 (1974), where the court found that each campus within the state system had been granted wide latitude and autonomy by University of Kansas Board of Regents.

Even this brief review of cases from other jurisdictions indicates that factual color-matching of cases is difficult, if not impossible. First, the statutory criteria for bargaining units vary from state to state, and secondly, each state university system is unique. Cases from other jurisdictions are helpful, however, in identifying important factors which are relevant in determining whether a single-campus, or a system-wide, bargaining unit is appropriate. It has long been held that a basic inquiry in unit determinations is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. See Note, 59 Va. L.

Rev. 492, The Appropriate Faculty Bargaining Unit in Private Colleges and Universities (1973). As stated in Cornell University, 183 NLRB 329 (1970): "In determining whether a particular group of employees constitutes an appropriate unit for bargaining where an employer operates a number of facilities, the Board considers such factors as prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or autonomy of the plants, differences or similarities in skills or functions of the employees, and geographical location of the facilities in relation to each other. * * * [W]e regard the above principles as reliable guides to organizations in the educational context as they have been in the industrial, and will apply them to the circumstances of the instant case." The same factors have been considered by the courts in those cases previously cited in this opinion in regard to the issue of single-campus bargaining units. We deem it appropriate, therefore, to apply the facts of this case to those, and other, relevant considerations.

Prior bargaining history. — There has never been formal collective bargaining at the University of Nebraska between academic employees and the administration; nor has there ever been an attempt by any employee organization to form a University-wide collective bargaining unit. The UN-L faculty senate has informally engaged in discussions with the various administration officials regarding matters of importance to UN-L. There is no system-wide faculty senate or committee on academic freedom and tenure, and it is those bodies which traditionally have been vehicles for faculty participation in University government.

Centralization of management and labor policy. — The Board's evidence was that all labor policy of the University is made by the Board or the Central Administration. Chancellors of each major administra-

tive unit, however, govern their units on a day-to-day basis, and play an important role in labor management.

Extent of faculty interchange between campuses. — Although there has been limited interchange of faculty between UN-L and UN-O, it has not been significant. Although witnesses for the parties disagreed on the precise number and effect of transfers, there was no evidence showing that transfers were common, or that there has been a significant number of transfers.

Degree of interdependence of autonomy of the campuses. — There appears to be little interdependence between UN-L and UN-O, as the campuses are generally regarded as distinct entities, and the faculty of the two units do not have close contact. The few system-wide programs which exist are in specific fields, and UN-O and UN-L in effect function independently of each other.

Differences or similarities in skills or functions of the employees. — Generally, the faculty at both UN-L and UN-O perform similar functions and have similar skills. It should be noted, however, that the University 5-year plan recognizes that UN-L shall remain the primary locus of doctoral education, and UN-O shall remain primarily urban in orientation. This fact affects the role of the faculty at each campus, and differences between faculty do exist due to the particular nature of each campus.

Geographical location of the campuses in relation to each other. — Here, obviously, the campuses are in two different cities, approximately 60 miles apart. Although this fact is not in and of itself determinative of the issue, the location of the campuses does affect the sense of collegiality and sense of community the faculty on each campus have with each other.

Uniformity of wages, benefits, and conditions of employment. — The University, through the Board, has attempted to provide uniform wage and fringe bene-

fits to all University faculty. Conditions of employment include, however, facilities in which employees work, and academic programs which exist or are available on each campus. These are clearly different at UN-O and UN-L. This fact is relevant in that the petitioner is concerned not only with wages, but also with academic planning, funding for programs, and the facilities available to the faculty.

Current means of governing the University. — It is undisputed that the by laws of the Board provide that the Board has the ultimate power to make decisions regarding tenure, hiring, firing, promotion, merit salary increases, academic programs, and budgeting. Although the formal governing procedure for the University is obviously a very important factor in this case, this court must examine how decisions are made in fact, as well as how they appear to be made under the by laws. It is clear that day-to-day decisions affecting employment issues are made at the campus level, and that many of the decisions which affect employees are made by the Board and the Central Administration on recommendation of Chancellors, and other administrators within the campus unit. It should be noted that in giving final approval of decisions in regard to hiring, firing, tenure, and employment conditions, the Board has previously acted on a campus basis rather than on an area of interest basis. The Board has, for example, previously approved the grant of tenure to faculty at UN-O and UN-L separately.

Established policies of the employer. — The Board adopted its position that there should be a single, system-wide bargaining unit in 1972, in response to a petition by faculty members at UN-O who requested a bargaining unit limited to faculty on that campus. No conclusive legal action was ever taken on that issue in 1972.

Community of interest of employees. — Witnesses for the petitioner emphasized their belief that UN-L

faculty share a community of interest with each other, and not with faculty at UN-O. The Board acknowledged differences between the two campuses, but attributed these differences to the fact that each campus contributes to the overall mission of the University in different ways.

Possibility of over-fragmentation of bargaining units. — The Board relies heavily on the argument that separate bargaining units would result in over-fragmentation of the bargaining process. Having one bargaining unit, witnesses for the Board stated, would avoid "whipsaw" tactics between different bargaining units, and unnecessary bureaucracy. Two commentators, cited by the Board, recommend that bargaining units in the public sector "should be as broad as is consistent with viable negotiations." See, Shaw, L.C. & Clark Jr., R.T., Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems, 51 Ore. L. Rev. 152 (1971); Gee, E.G., Organizing the Halls of Ivy; Developing a Framework for Viable Alternatives in Higher Education Employment, Utah L. Rev. 233 (1973). Gee, for example, argues that units should parallel the University structure, to "insure that unions bargain with officials having final bargaining authority and to avoid alteration or nullification of agreements by a higher authority."

Although the Board relies on factors such as its ultimate authority to make decisions affecting employee interests, its previous stance in 1972 on the issue of what bargaining unit is appropriate, the uniformity of wages and skills of University faculty, and the centralization of University management, its principal argument is that separate bargaining units would result in undue fragmentation of collective bargaining. In this case, however, that danger does not appear to be serious, as there is a limitation to the likelihood of over-fragmentation. Essentially, the issue is whether, in addition to the professional schools, here-

inafter discussed, one or two units is appropriate. It is not a case, as was true in New York, where single campus units would result in more than 20 bargaining units. Furthermore, at the hearing, the Board made no persuasive evidentiary showing in support of its assertion that a single-campus bargaining unit would result in undue fragmentation.

After carefully reviewing the entire record and considering the relevant factors set out above, we are of the conclusion that the Court of Industrial Relations was correct in establishing a bargaining unit which included UN-L faculty, but not UN-O faculty. Essentially, this conclusion rests on our belief that the UN-L faculty has a sufficient community of interest, separate from the faculty of UN-O, which warrants a separate unit. Recapitulating, we believe the following considerations, as previously discussed, support this conclusion. Employee bodies which represented faculty concerns, such as the faculty senate or committee on academic freedom and tenure, exist on a campus level, and not at the systems level. There is no significant faculty interchange between campuses. UN-L and UN-O function largely independent of each other so far as the faculty on each campus is concerned. Although the general skills of the University faculty are similar, the different missions and roles of each campus affect faculty interests and conditions of employment on each campus. The geographic location of the two campuses contributes to the lack of community of interest between the faculty on each campus. Although the Board has ultimate power to make decisions affecting the faculty on both campuses, this power in fact is diffused throughout the system, and administrators on each campus play a critical role in regard to employee matters. Faculty of UN-L perceive themselves as having a community of interest different from, and often in contrast with, the community of interest at UN-O. Finally, due to the unique situation presented, the likelihood of

undue fragmentations appears to be minimal under the evidence adduced. Although no one of the above considerations is, in and of itself, controlling, together they support the conclusion of the Court of Industrial Relations that a separate bargaining unit for UN-L faculty is appropriate.

We believe this conclusion is in accordance with the decisions from other jurisdictions cited previously in this opinion. Although the facts in this case are not precisely on all fours with the facts of any other case, they are more closely analogus to those cases where a single-campus bargaining unit was established.

The next issue for determination is whether it was error to establish separate bargaining units for the College of Law faculty and the College of Dentistry faculty. Cases in other jurisdictions have almost been unanimous in holding that the faculty of law schools, dental schools, and medical schools are appropriately excluded from a general bargaining unit of university faculty. In University of Miami, 213 NLRB 634 (1974), for example, the law faculty was held to be a separate bargaining unit for the following reasons: (1) It had buildings separate from the rest of the university; (2) the law school was accredited under ABA Standards, and adherence to those is needed to enable graduates of the law school to be admitted to state bar associations; (3) the law school had a different academic calendar; (4) law professors received higher salaries than the faculty of the rest of the university; (5) law professors received promotion and tenure in a shorter period of time than do other faculty members of the university; and (6) the law faculty and dean had significant operational independence on a day-to-day basis. Analogous rationale was used in University of Miami to support exclusion of the medical school from the general bargaining unit of other university faculty. In University of Vermont & State Agricultural College, 223 NLRB 46 (1976), a medical faculty was held to be ex-

cluded from the general bargaining unit because its faculty members shared a community of interest apart and separate from other faculty members; it had a significant lower student-teacher ratio; operated on a full-year basis; had a higher salary scale and a higher budget; and its students and faculty were detached from the rest of the university. In Fairleigh Dickinson University, 205 NLRB 673 (1973), the court stated the dental school could properly have been excluded from the general bargaining unit for reasons similar to those cited above regarding law schools and medical schools, but included the dental school in the general unit because no organization had requested that it be excluded. Underlying these decisions is the recognition that the number of members of law, medicine, and dental faculties is small, and they should not be subjected to having their higher salaries, separate calendars, and distinctive working conditions traded away in a system-wide bargaining process. See, e.g., Moore, The Determination of Bargaining Units for College Faculties, 37 U. Pitt. L. Rev. 43, 61 (1975).

Numerous other cases have held that law, medical, and dental faculties are properly excluded from the general faculty unit. See, In re Employees of Temple University, PERA-R-1123-E and PERA-R-1137-E (PLRB, 1972); University of San Francisco, 207 NLRB 12 (1973); Catholic University, 201 NLRB 929 (1973). In other cases it has been held that a law faculty may be included in the general bargaining unit if it so desires, and that the law faculty should vote on whether it wishes to have a separate unit. See, New York University, 205 NLRB 4 (1973); Syracuse University, 204 NLRB 641 (1973).

In our present case, the factors relied on in the above cases to exclude law school, medical schools, and dentistry schools were established by the evidence. The College of Law has separate buildings, is accredited under ABA Standards, sets its own calendar, the professors receive higher salaries and obtain

tenure more quickly than professors in the rest of the University, and the law faculty has significant operational independence on a day-to-day basis. There is also little doubt that the College of Law has an identifiable community of interest separate from the rest of the University. Similar factors are present in regard to the College of Dentistry. In light of the overwhelming precedent in other jurisdictions, and ample evidence to support the view that the law and dental faculties have a community of interest separate from that of other faculties in the University, we find that the CIR was correct in concluding that separate bargaining units were appropriate for the faculties of these two professional schools.

Finally, we turn to the question of whether department chairmen should have been excluded from the employee bargaining units because they are supervisors, and therefore part of the University administration and management. The Board contends that department chairmen are a part of the administration because they receive additional compensation for their administrative duties, and because they perform managerial functions such as class scheduling, review of class content, faculty evaluations and recommendation of appointments, promotions, grants of tenure, contract terminations, and merit salary increases. Petitioner and interveners contend that department chairmen in fact act in accordance with the sense of collegiality which exists among all department faculty, and that their role as administrators is secondary to their role as faculty in their departments. The Court of Industrial Relations found that department chairmen were "of the faculty, and not over it," and therefore included them in the bargaining units.

Cases in other jurisdictions are split on the issue of whether department chairmen should be included in faculty bargaining units. Cf. Fairleigh Dickinson University, 205 NLRB 673 (1973); Syracuse Univer-

sity, 204 NLRB 641 (1973); Point Park College 209 NLRB 1064 (1974); and Eastern Michigan University, M.E.R.C., No's. R70, K-470 and R71 A-2 (1972); with Fordham University, 193 NLRB 134 (1971); C.W. Post Center of Long Island University, 189 NLRB No. 109 (1971); State University of New York, 2 N.Y.P.E.R.B., paragraph 4010 (1969); and In re Employees of Temple University, PERA-R-1123-E and PERA-R-1137-E (PLRB, 1972). For a collection of cases, and commentary, see Moore, The Determination of Bargaining Units for College Faculties, 37 U. Pitt. L. Rev. 43, 48-54 (1975); and Note, The Bargaining Unit Status of Academic Department Chairmen, 40 U. Chi. L. Rev. 442. These cases and authorities indicate that the critical factor in regard to inclusion or exclusion of department chairmen is whether the chairmen in fact have the power to effectively make determinations on such matters as promotions, tenure, and salary in their departments. Cases where the issue has been raised, therefore, have been decided on a case-by-case basis, and the actual power and authority of the department chairmen has been analyzed in each case to determine whether they are supervisory personnel and a part of management.

The testimony of the petitioner in this case was that department chairmen are creatures of the faculty, not the administration, and act in accordance with the desires of the faculty of their departments. Department chairmen who testified stated that they were only secondarily administrators, and that they made decisions on the basis of interaction with their own department faculty. They stated that, although a chairman may make final decisions in regard to recommendations, he does so within the confines of the collegiality which exists among his faculty.

The Board offered little evidence to contradict witnesses for the petitioner, and essentially relied on the fact that, officially, department chairmen are charged with administrative duties for which they

are responsible. It also emphasized that the department chairman is the person charged with providing the administration with recommendations on such matters as promotions, tenure, and contract termination. We note, however, that section 2.11 of the by laws of the Board provides that the department chairman "shall be the presiding officer of its faculty and the chief advisor to the dean or director of the administrative unit to which the department is assigned. * * * The chairman of the department may make recommendations to the dean and the faculty of the college concerning the welfare of the department or its relations to other departments. *Before making such recommendations the chairman of the department shall consult with the appropriate departmental faculty.* Where the recommendation of the chairman differs from the advice given by the appropriate departmental faculty, the chairman shall so inform the dean." (Emphasis supplied.) This by law provision itself recognized that department chairmen are to consult with their faculty before making recommendations, and are to inform the Dean of their college when the departmental faculty disagrees with a recommendation.

After reviewing the evidence on this issue, we believe that department chairmen, do, except perhaps in extraordinary situations, act as a part of the faculty rather than part of the administration. As stated in Northeastern University, 218 NLRB 247 (1975), in determining whether department chairmen should be included, consideration has been given to the principle of "collegiality." Where the chairmen's powers have been effectively diffused among the department faculty pursuant to this principle, chairmen should be included in the bargaining unit. In this case the evidence clearly favors the view that department chairmen act as creatures of the faculty rather than the administration, and within the spirit of collegiality which exists in their departments. Therefore we

hold that the Court of Industrial Relations was correct in including the department chairmen within the bargaining units. See, Fordham University, *supra;* In re the Employees of Temple University, *supra.*

We conclude by noting the appropriate standard of review applicable in this case. Although in previous cases we have held that appeals from the Court of Industrial Relations to this court are heard de novo pursuant to section 48-812, R. R. S. 1943, we now believe that a more limited review is required because the function the Court of Industrial Relations exercises is a legislative one, and a statute which purports to delegate to the courts de novo review of an exercise of a legislative power is unconstitutional. See, Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683 (1976); Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172 (1975); School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752 (1972). We now hold that review by this Court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. To the extent prior cases hold that appeals from the Court of Industrial Relations are heard de novo in this court, they are overruled.

In applying the appropriate standard of review in the present case, we find that the decision of the Court of Industrial Relations is supported by substantial evidence, that the CIR acted within the scope of its statutory authority, and that its action was not arbitrary, capricious, or unreasonable. The decision of the Court of Industrial Relations was correct in all respects, and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion for three reasons: (1) The result reached by the Court of Industrial Relations, hereinafter designated CIR, is contrary to the substantial weight of the evidence; (2) the fragmentation of bargaining units among public employees of the State of Nebraska is contrary to the public policy of our state labor law as set forth in the provisions of section 48-802, R. R. S. 1943; and (3) department chairmen should be excluded from any bargaining unit organized to represent the academic employees of the Board of Regents.

Two predominant public policies lie at the heart of Nebraska's public sector labor law. These are the protection of the public interest in assuring the continuous operation and efficiency of governmental services, and providing public employees with a meaningful avenue through which they may negotiate wages, hours, and conditions of employment.

The majority opinion ignores the first of these problems by permitting undue fragmentation of the bargaining unit. Not only may every professional college — Law, Dentistry, Medicine, Teachers, Engineering, Pharmacy, Agriculture, etc., have its own bargaining unit, but other groups within the state University system may do likewise. The record indicates the Law College faculty numbers 18 and the Dental College faculty 52, exclusive of the Deans.

As Doctor Weinberg, Board's expert, testified, and as many of the commentators suggest, fragmentation leads directly to development of expensive and administratively unmanageable bargaining structures and to increased administrative costs once an agreement is reached. It fosters proliferation of personnel necessary to bargain and administer contracts on both sides of the bargaining table. It destroys the ability of public institutions such as the University to develop, administer, and maintain any semblance of uniformity or coordination in their employment poli-

cies and practices. In the long run, it results in an inefficient, ineffective, and unworkable relationship for all parties concerned. Its ultimate effect is to substitute litigation for negotiation as the principal dispute-resolving process in the public sector. In effect, it defeats the purpose of Nebraska's public sector labor law.

Shaw & Clark, in their article on Determination of Appropriate Bargaining Units in the Public Sector, Legal and Practiced Problems, 51 Ore. L. Rev. 152, epitomize the problem as follows: "The more bargaining units public management deals with, the greater the chance that competing unions will be able to whipsaw the employer. Moreover, a multiplicity of bargaining units make it difficult, if not impossible to maintain some semblance of uniformity in benefits and working conditions. Unfortunately, in many states and localities bargaining units have been established without consideration of the effect such units will have on negotiations or on the subsequent administration of an agreement. The resulting crazy-quilt pattern of representation has unduly complicated the collective bargaining process in the public sector."

We last considered the proper scope and composition of bargaining units in the public sector in City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860 (1971). In 1972, following that decision, the Legislature passed L.B. 1228. That bill, which became effective in July 1972, made two very important changes in Nebraska's labor law. First, it articulated an express legislative policy against fragmentation of bargaining units in the public sector of this state; and, second, it codified the criteria which were to be taken into account in resolving unit determination questions.

Further, City of Grand Island v. American Federation of S. C. & M. Employees, *supra,* delienated what I insist is the proper method of review in this case. We

there said: "The review in the Supreme Court of proceedings before the Court of Industrial Relations is in the manner provided by law for equity cases." See § 48-812, R. R. S. 1943. "We are required to reach an independent conclusion as to disputed issues of fact. § 25-1925, R. R. S. 1943."

It is significant that in adopting section 48-838, R. S. Supp., 1974, the Legislature did not allude to an appropriate bargaining unit as did this court in City of Grand Island v. American Federation of S. C. & M. Employees, *supra*. To the contrary, the statute reads: "The court shall certify *the* exclusive collective bargaining agent of employees affected by sections 48-801 to 48-823 * * *." (Italics supplied.)

In adopting L.B. 1228, the Legislature specifically incorporated a policy against fragmentation by providing: "It shall be presumed in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate." § 48-838(2), R. S. Supp., 1974.

It is not necessary to guess at the intent of the Legislature on the issue of fragmentation. The comments before the committee and on the legislative floor adequately portray the desire to avoid it. An attorney representing public employees testified: "Of the attorneys involved in preparing this bill, they represented both sides of the cases that have been before the court. They represented government bodies as well as unions and associations and they all agreed that broad industrial type bargaining units are advantageous for the public employer, and that there is no purpose served in fragmenting units."

Finally, the international representative for the International Brotherhood of Electrical Workers specifically stated: "LB 1228 provides that the Court of Industrial Relations shall determine what is a proper unit for the purposes of collective bargaining and for

the purposes of voting in collective bargaining elections, and provide some ground rules for the Court to use in making such determinations. The proper determination of a bargaining unit is important to both parties in a collective bargaining arrangement, because it adds to stability to the relationship between the employees and their employers. It provides first, that the employer can deal with the employees with a common interest to one representative, and secondly, it frees the employer from having to deal with a number of collective bargaining agents each representing a small segment of its employees."

Inexplicably, the CIR has failed to follow its own prior finding in a case involving University of Nebraska employees, specifically recognizing the statutory policy against fragmentation in the public sector. In his opinion in IBEW v. State, 3 CIR 133/134 (1975), Judge Dean Kratz specifically found as follows: "Respondent also argues that L.B. 1228 effectuated a clear policy against proliferation of bargaining units in public employment in the State of Nebraska and that the creation of units proposed by the Petitioner would be violative of the legislative pronounced policy against proliferation of bargaining units in the public sector and would irrevocably interfere with the public interest of assuring the economic continuity of governmental service.

"We agree that LB 1228 was precipitated by a desire to avoid fragmented bargaining units."

The CIR made a number of factual findings which were crucial to its determination herein. These findings are in some cases not supported by any evidence in the record whatsoever and in a large part appear to be based on the hearing judge's mistaken intuitive assessment rather than on the testimony and documentation adduced at the hearing.

Specifically, on page 4 of the order, the CIR found the University of Nebraska labor policy on unit determination to be based on outdated legal prece-

dents. There was substantial testimony that the University of Nebraska has a system-wide labor relations policy, administered by a single individual in the Central Administration. Yet, there is no direct evidence in the record whatsoever to support the CIR's finding.

Similarly, there is no evidence supporting the CIR's determination on page 5 of the order relative to the dues check-off question or its finding in paragraph 9 on page 6 of the order that the faculty of the University of Nebraska Lincoln still tends to regard the University of Nebraska at Omaha as a stepchild. Not only are these fact findings without basis in the record, they are of dubious relevance to the unit determination question herein, and indicative of a prior bias.

I take exception to the CIR's factual determinations because they wholly overlook the uncontroverted testimony of the Board's witnesses which established that the University of Nebraska is a highly integrated statewide University system which employs academic staff who, subject to the highly centralized direction and control of the Board and the Central Administration, enjoy substantial identity in wages, fringe benefits, and other terms and conditions of employment.

The CIR finds on page 5, paragraph 3 of its opinion, that hiring, firing, tenure, and employment condition decisions are made at the department or college level rather than at the system-wide level. This is wrong. In fact, the evidence below clearly establishes that these decisions are made by the Board of Regents on a system-wide basis pursuant to uniformly established and centrally administered board policies. Apparently, the CIR has taken the delegation of certain supervisory and administrative duties to the various campuses and their respective colleges, schools, and departments to be a carte blanche grant of autonomy or abdication of author-

ity by the Board of Regents and the Central Administration. Certainly, nothing could be further from reality.

In paragraph 7, on page 6 of its order, the CIR found that the University of Nebraska Lincoln campus is predominately the doctorate and postdoctorate locale, while the University of Nebraska at Omaha campus has little doctoral emphasis. The finding emphasizes doctoral studies but overlooks entirely the relationship between the two campuses and their emphasis on graduate studies as a whole. Doctor Steven B. Sample testified in terms of both credit hours and student enrollment: "There is a parity of graduate students between the Lincoln campus and the Omaha campus." Further, the CIR wholly failed to consider the fact that the graduate college of the University of Nebraska, which supervises all graduate studies including the doctoral and postdoctoral studies, is a campus-wide college and not limited to any single campus.

Finally, I note that although the CIR specifically finds in its opinion that there is little interchange or integration among the campuses, the record itself shows that there is a high degree of administrative and functional integration and substantial interchange in the common missions, common administration structures, common academic calendar and composition and structure, common budgetary planning, University-wide accreditation, common labor relation policies, common affirmative action, and central accounting and payroll programs. Further, the campuses are integrated through a number of duplicated programs, intercampus programs, University-wide councils and committees, a University-wide graduate college, and a substantial identity of employment practices. It is apparent to me that the findings of the CIR are not supported by the record.

The CIR has completely ignored other facts which are highly relevant herein. It failed to recognize the

common and centrally administrative and academic structure of the University. It has overlooked centralized control of curriculum and budgetary planning. It has largely ignored the University's uniform employment classification system, employment contract procedures, evaluation procedures, and uniform standards for promotion, tenure, and merit pay.

As the Board suggests, even more significantly, the CIR has not even mentioned the fact that all the Board's academic employees enjoy a common centrally controlled wage policy, and have identical fringe benefit programs. They enjoy the same terms and conditions of employment in the following areas: Vacation policies; salary determination; professional leave policies; outside employment policies; patent policies and political activity policies; and conflict of interest policies.

I do not accept the conclusions and findings of the CIR. If this court puts its stamp of approval on the findings of the Court of Industrial Relations in this case, it is abdicating its authority as a court of last resort and is in effect giving that authority to the Court of Industrial Relations.

The Board has directed our attention to several state university cases which support its position. The Minnesota Supreme Court, in Minnesota State College Board v. Public Emp. Rel. Board, 303 Minn. 453, 228 N. W. 2d 551 (1975), affirmed a holding that the appropriate geographical scope of a bargaining unit for faculty employed at seven state colleges was a statewide bargaining unit. In that case, unlike the instant one, there were local adaptations, different programs, local constitutions, grievance procedures, and local administrative policies on each of the college campuses. Also, the president of each state college had the apparent authority to recruit, appoint, retain, remove, sanction, grant salary increases, tenure, and promotions to and define the

duties of all persons employed by the college. The Minnesota court overlooked these factors and pointed to the existence of the state college board as a single employer with centralized budgetary and academic planning functions, and held that a statewide planning unit was appropriate.

In Board of Regents of Eastern Michigan University v. Eastern Michigan U., 46 Mich. App. 534, 208 N. W. 2d 641 (1973), the Michigan court noted that the objective to be obtained in unit determination was to constitute the largest possible unit consistent with the community of interest of the membership. Michigan has never split faculty units by campus or location, but has consistently held in favor of system-wide faculty units.

In Pennsylvania State University, P. L. R. B., case No. PERA-R-801-C (1973), the Pennsylvania Labor Relations Board refused to find a unit of academic employees limited in scope to only 1 of the 18 branch campuses appropriate, on the basis that such a decision would result in overfragmentation and would make integrated operation of the university impossible.

Similarly, in State University of New Jersey, P. E. R. C., cases Nos. RO-210 and RO-221 (1973), the New Jersey Commission reversed an earlier stand assumed in 1969, and determined that a statewide unit encompassing all academic employees of New Jersey's various state colleges was an appropriate bargaining unit.

In State University of New York, P. E. R. B., cases Nos. C-0253, C-0260, C-0262, C-0263, C-0264, and C-0351 (1969), the New York Public Relations Board refused to establish separate bargaining units for the State University of New York although it consisted of 4 university centers, 11 4-year colleges, 2 medical centers, a college of forestry at Syracuse, and Green College at Fort Schuyler, 4 contract colleges at Cornell, a college of ceramics at Alfred Uni-

versity, 6 2-year agricultural and technical colleges, and 31 community colleges.

Two of the cases relied on by the Court of Industrial Relations — Oregon State Employees Assn., cases Nos. C-277, C-319, C-326, C-375, and C-230 (1974), and In re Kansas State College of Pittsburgh, P. E. R. B., case No. UE2-1974 (1974), do not lend support to the decision. Both these cases are distinguishable by their facts, and the Oregon case is distinguishable on the basis of the law on which it is based.

The decision herein should be based on our own act. I have set out the Board's authorities merely to show how other states have met the problem. In my judgment, the bargaining units established by CIR are not appropriate, either in scope or composition. I believe the intent of L. B. 1228 (section 48-838, R. S. Supp., 1974), mandates a multi-campus bargaining unit, encompassing all academic employees, regardless of their physical location. At the very least, there definitely should not be any fragmentation on any campus.

Individuals holding the position of department chairmen are appointed by the Board of Regents and not elected by the faculty. They receive additional compensation for their administrative duties. In actual performance of management functions, the evidence indicates they are responsible within their departments for class scheduling, class assignments, review and approval of individual class content, and faculty evaluations. They are the individuals who recommend appointments, promotions, grants of tenure, nonrenewal of contracts, terminations, and merit salary increases. As one of petitioner's witnesses testified, chairmen are responsive to the needs and desires of the faculty within their departments, but when the decision has to be made, the department chairman has to make a decision. "That's what leadership is all about."

Historically, in the private sector, supervisors have been considered a part of management. The National Labor Relations Act specifically provides: "* * * no employer subject to the act shall be compelled to deem individuals defined herein as supervisors as employees * * *." N. L. R. A., § 14a, 29 U. S. C., § 164a (1970 Ed.). It seems to me this is even more important in the public sector. I agree with the position of the Board of Regents that department chairmen are not representatives of the faculty but are in effect administrative management personnel.

I would reverse the judgment of the Court of Industrial Relations for each of the three reasons delineated above.

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

JUNE R. BOKER, APPELLANT, V. ALLEN LUEBBE ET AL., APPELLEES.

252 N. W. 2d 297

Filed April 13, 1977. No. 40800.

Motor Vehicles: Statutes: Negligence: Minors: Parent and Child. The contributory negligence of a minor driver, operating a vehicle pursuant to section 60-407(4), R. R. S. 1943, may be imputed to a parent who is supervising the minor as he or she operates an automobile, where the parent assumes to direct, or has the power to direct, the operation of the automobile and to exercise control over it.

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

Gaines, Spittler, Otis, Mullen & Carta, for appellant.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, for appellees.

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

BRODKEY, J.

This is an appeal from a jury verdict in favor of

the defendants, Allen and Arnold Luebbe, in a negligence action filed by the plaintiff, June R. Boker, to recover damages for personal injuries sustained in an automobile accident. In her appeal, the plaintiff contends that the trial court erred in submitting to the jury the issue of whether negligence on the part of her daughter, Julie Boker, could be imputed to the plaintiff; and in failing to grant a directed verdict in favor of the plaintiff. We affirm.

The facts in this case are as follows. On April 3, 1972, at approximately 3 p.m., the plaintiff was a passenger in an automobile driven by her daughter, Julie, on Dodge Street in Omaha, Nebraska. At the time Julie was 15 1/3 years old and was operating the car on a learner's permit. She had had previous driving experience in Omaha, as well as on a relative's farm. The Bokers were proceeding east on Dodge Street, which at the time was a four-lane street, in the south lane. At approximately 96th and Dodge Streets, Julie began to pass the defendants' vehicle, driven by Allen Luebbe, son of Arnold Luebbe, owner of the vehicle, which was directly in front of her in the south lane, and in so doing moved the Boker car into the passing lane. As Julie began to pull along side the Luebbe car, Allen began to change lanes, moving toward the passing lane from the south lane. The plaintiff observed the defendants' car moving toward the Boker car, and threw up her hand and told Julie to "watch out." Julie subsequently slammed on her brakes, and the Boker car swerved to the north proceeding across the westbound lanes of Dodge Street. A westbound vehicle driven by Charles Hirsh struck the Boker car at the front passenger door, and the plaintiff suffered injuries from the collision. The Boker and Luebbe vehicles never actually collided, and when Allen became aware of the Boker vehicle in the passing lane, he turned his car back to the south lane of eastbound traffic.

The parties and witnesses gave differing accounts of the precise details of the accident. Julie testified that she heard her mother's warning, looked to her right and saw the defendants' car approaching her, and slammed on her brakes. At trial she stated that she looked over and saw the defendants' car before she applied the brakes, testimony which contradicted her pretrial deposition, when she stated that her mother had startled her, and her mother's warning caused her to apply the brakes and swerve the car rather than her realization that the defendants' car was moving toward her lane. Julie testified that she did not actually see the defendants' car in her lane, but that it was so close to her that it must have been. The plaintiff, who had no memory of the accident, was unable to testify in regard to how it precisely occurred.

Allen acknowledged that he began to change lanes when Julie was about to pass him, but stated at trial that he never actually entered the passing lane. This testimony contradicted statements made shortly after the accident, when Allen stated that he may have been 1 foot over in the passing lane. Allen stated that his car and the Boker vehicle were 2 to 3 feet apart when Julie slammed on her brakes, and that the two cars never touched one another. He also testified that his turn signal was on at the time he began to change lanes.

Three other witnesses gave conflicting views of what occurred when the Boker and Luebbe vehicles approached each other. The driver of the vehicle which ultimately collided with the Boker car testified that both cars were at angles, entering the passing lane, when they appeared to come together. He stated that Allen then turned back to the south lane, and that the Boker car straightened out in the passing lane, proceeded east about 50 feet, and then swerved into the westbound lanes. Another witness, traveling behind the Boker car, stated that he saw

the Boker car go "out of control" and swerve into the westbound lanes at a time when no other eastbound cars were near it. A passenger in the defendants' car testified that Allen signaled before he began to change lanes, and that the Boker and Luebbe cars were never closer than 1 to 2 feet apart.

Finally, Julie Boker acknowledged at trial that the plaintiff was supervising her in her driving, and that she would have followed plaintiff's directions in regard to her driving. Although Julie chose the route she was traveling the day of the accident, she stated that had her mother objected to the route, she would have changed it; and that she would not pass another car in the course of driving if her mother instructed her not to.

At the close of the evidence, the trial court overruled both the defendants' motion to dismiss and the plaintiff's motion for directed verdict against the defendants. The case was submitted to the jury on the issues of whether the defendant Allen was negligent; whether the plaintiff was contributorily negligent; and whether Julie Boker was contributorily negligent, and if so, whether such negligence should be imputed to the plaintiff. In regard to the latter issue, the jury was instructed: "The defendants have raised the affirmative defense of the contributory negligence of plaintiff's driver, Julie Boker. In order for such contributory negligence to be imputed or charged to the plaintiff it is necessary that plaintiff exercised control over the operation of plaintiff's vehicle. * * * If you find that plaintiff did not exercise control over the operation of the vehicle, then the contributory negligence of Julie Boker, if any, would not be chargeable to plaintiff and you should not consider defendants' affirmative defense of contributory negligence * * *." The plaintiff objected to this instruction, and submitted a proposed instruction stating that the "negligence, if any, of Julie Boker is not imputed to June Boker." The primary

issue in this appeal is whether the trial court erred in instructing the jury that the negligence of Julie Boker could be imputed to the plaintiff if it found that the plaintiff exercised control over the operation of the Boker vehicle.

In Kremlacek v. Sedlacek, 190 Neb. 460, 209 N. W. 2d 149 (1973), an automobile negligence case with facts similar to those present in this case, the plaintiff was a passenger in a car driven by her minor son, who was driving the vehicle on a learner's permit. The minor testified that the plaintiff did not actually direct him how to drive or in which direction to go at the time of the accident, but stated that if the plaintiff had told him to take another route, he would have complied. In Kremlacek we held that the negligence of the minor could be imputed to the mother, stating: "Where the owner is a passenger in his own automobile while it is being operated by another, the negligence of the operator is imputable to the owner where the owner assumes to direct or has the power to direct the operation of the automobile and to exercise control over it. This is ordinarily a question for the jury, unless the evidence is so conclusive that the minds of men could not reasonably arrive at any other conclusion. * * * It is abundantly clear, considering the age of the driver, his relationship with the owner, the intent and purpose of the requirement that an adult accompany him under a learner's permit, and the actual inferences flowing from the power to control a child's action, that there was sufficient evidence to submit this issue of imputed negligence to the jury." 190 Neb. at 464. See, also, Weber v. Southwest Nebraska Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274 (1971); Sandrock v. Taylor, 185 Neb. 106, 174 N. W. 2d 186 (1970); Petersen v. Schneider, on rehearing, 154 Neb. 303, 47 N. W. 2d 863 (1951).

The present case falls squarely within the rule enunciated in Kremlacek, and the trial court in-

structed the jury in accordance with that rule. The plaintiff, however, contends that imputing the negligence of a minor driver to his parent, who is a passenger, is an antiquated doctrine which no longer has a place in the scheme of modern tort liability. In so arguing, she relies on cases such as Kalechman v. Drew Auto Rental, Inc., 33 N. Y. 2d 397, 353 N. Y. S. 414, 308 N. E. 2d 886 (1973); Smalich v. Westfall, 440 Pa. 409, 269 A. 2d 476 (1970); and Pierson v. Edstrom, 286 Minn. 164, 174 N. W. 2d 712 (1970). Those are cases which limited or abolished the doctrine of imputed negligence as applied between drivers and passengers in automobiles.

None of those cases, however, dealt with a factual setting of the driver operating the car being on a learner's permit under the supervision of his or her parent. In Pierson, the Supreme Court of Minnesota abandoned the doctrine of imputed negligence in cases where the driver and passenger were joint venturers, and reaffirmed a previous decision which abandoned the doctrine in cases where the driver and passenger were master and servant. See Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 144 N. W. 2d 540 (1966). In Kalechman, the New York Court of Appeals found that a passenger's right to recover should not be barred merely because he bears some special relationship to the driver, and abandoned the doctrine of imputed negligence in a case where the passenger was a lessee of a vehicle driven by his father. In Smalich, the court held that "only a master-servant relationship or a finding of a joint enterprise will justify an imputation of contributory negligence." 440 Pa. at 416. The court in Smalich noted, however, that the driver's negligence could possibly be imputed to the passenger if the driver were inexperienced or learning to drive. 440 Pa. at 417, n. 4.

Courts in other jurisdictions, faced with facts like those in the present case, have squarely held that

the negligence of a student-driver may be imputed to the passenger-teacher; and that if the negligence of the student-driver contributed to the proximate cause of the accident, the passenger-teacher may be barred from recovery from a third party. See, Hoeft v. Friedel, 70 Wis. 2d 1022, 235 N. W. 2d 918 (1975); Smithson v. Dunham, 201 Kan. 455, 441 P. 2d 823 (1968).

Plaintiff's attack on the doctrine of imputed negligence is far broader than the facts of this case warrant. Whatever the merit to her contention that the doctrine has previously been applied by relying on fictitious concepts of agency, the plaintiff's possible control over, or direction of, the operation of her automobile, when her daughter was driving on a learner's permit, was not fictitious. Section 60-407(4), R. S. Supp., 1972, in effect on the date of this accident, provided: "Any person who shall have attained the age of fifteen years or more may obtain a learner's permit from the county treasurer which shall be valid for a period of twelve months and he may operate a motor vehicle on the highways of this state if he is accompanied at all times by a licensed operator who is at least twenty-one years of age and who is actually occupying the seat beside the driver * * *." The purpose of this section is obviously to insure that persons learning to drive are supervised and directed by a responsible adult. In this case Julie Boker acknowledged that she was driving under the direction of her mother, and that she would have followed any directions given her.

We find the rule set forth in Kremlacek v. Sedlacek, *supra,* applicable and controlling in this case. There was sufficient evidence to submit the issue of imputed negligence to the jury, considering the age of the driver, her relationship to the plaintiff, the intent and purpose of the requirement that an adult accompany her while she was driving on a learner's permit, and her own testimony that she was driving

under the supervision and direction of the plaintiff. The issue decided is a narrow one, and we need not, and do not, decide whether the doctrine of imputed negligence should be applicable in factual situations different from the one presented in this case.

The plaintiff's other assignment of error, that the trial court should have granted a directed verdict in her favor on the question of the defendants' liability, was not argued in her brief and is without merit. The evidence, set forth above, clearly raised issues of fact in regard to the proximate cause of the accident and the negligence of the parties. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant, the contributory negligence of the plaintiff, and the degree thereof when one is compared with the other, the issues must be submitted to the jury. Treffer v. Seevers, 195 Neb. 114, 237 N. W. 2d 114 (1975).

The contentions of the plaintiff are without merit, and the judgment of the District Court is affirmed.

AFFIRMED.

HERMAN JUERGENS AND EVERETT ANDERSON, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CLARA J. CAVETT, DECEASED, APPELLEES, V. PAUL REDDING, APPELLANT.

252 N. W. 2d 291

Filed April 13, 1977. No. 40845.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law.
2. _____. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.
3. _____. Where the ultimate inferences to be drawn from the facts are not clear, the inferences are not conclusively established, and it cannot be determined whether a party is entitled to judgment as a matter of law.

4. _____. The issue to be tried 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.
5. _____. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment.

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

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Nichols & Meister, for appellees.

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

MCCOWN, J.

This is an action by the executors of the estate of Clara J. Cavett, deceased, for judgment on two promissory demand notes dated November 1 and November 30, 1971, in the total principal amount of $68,221.60, made by the defendant, Paul Redding. The defendant filed an answer in which he admitted the making of the notes and their delivery to the payee, Clara J. Cavett. He further alleged that in November 1971, the decedent made a gift to him of two groups of United States Series E bonds, which he cashed at that time, which had a value of $42,069.60 and $26,152 respectively; that it was agreed that defendant would report and pay the income tax on the accumulated interest on those bonds; that defendant thereafter reported $30,721.60 as his own income; that after the gift had been made, the decedent, in December 1971, suggested that to avoid paying United States gift tax, the defendant should make two notes payable to decedent, and decedent would, in turn, make a will forgiving the notes upon death; and that accordingly the defendant prepared and executed the notes in January 1972, but backdated them to the date the respective

groups of bonds were cashed. Defendant also alleged that prior to the death of the decedent no request for payment of principal or interest was ever made by decedent, and that on or about September 23, 1972, the decedent did execute a will forgiving any balance due from defendant on the notes. The defendant alleged that because of these facts the bonds received by him were a gift and not a loan, and that nothing was owed on the promissory notes. Plaintiffs replied denying defendant's allegations.

Thereafter each party moved for summary judgment, supporting the motions with affidavits, depositions, admissions, and answers to interrogatories. The District Court granted the motion of the plaintiffs, denied that of the defendant, and rendered judgment against defendant for the amount of the notes plus interest. The defendant has appealed contending that the showings made in the record establish that there was a genuine issue of material fact, and that he was entitled to a trial on the merits.

Clara J. Cavett was a resident of Bayard, Nebraska. Dale Redding, her nephew, and the defendant, Paul Redding, his son, farmed together in Texas on land owned by Paul. In July 1971, the decedent visited Dale and Paul in Texas. In Dale's deposition he states that he told the decedent that he and Paul were going to build a feedlot as soon as they could see their way clear to finance it, and that she told him she had some money that he could have. He replied that he would not take it unless she would forgive it in her will like her brothers had done. Her response was: "That is fine. I want you to have it." At a later conversation the decedent told Dale that she had bonds which had accumulated interest on them, and that she did not want to cash the bonds and give the money because she would have to pay income tax on the earned interest. Dale suggested that she could give the bonds to Paul and let him pay any tax. Paul had a loss carryback and could absorb

the interest income against that loss. He suggested that she check with her lawyer when she got home. There was no conversation about promissory notes.

After the decedent returned home to Nebraska, she advised Dale she had been informed that whoever cashed the bonds would have to pay the income tax on the accumulated interest. The decedent thereafter caused Paul's name to be placed on the bonds as coowner with her, and sent the bonds to Paul in Texas in care of a production credit association. Paul received the first group of bonds on November 1, 1971, and cashed them on November 3, 1971, for the sum of $42,069.60. The second group of bonds were received and cashed by Paul on November 30, 1971, for the sum of $26,152. On the same day Paul wrote to the decedent thanking her for the gifts and advising her of the purchase cost and interest amounts on both groups of bonds. The $30,721.60 interest was later reported by Paul on his 1971 income tax return and it was not reported by the decedent.

Dale testified in his deposition that in December of 1971, he visited the decedent in Nebraska. At that time she was concerned about having to pay a gift tax on the bonds given to Paul. Dale suggested that if notes were issued to her, then she could establish to the Internal Revenue Service that the gift was intended to be made at death if there was a provision in her will that the notes were to be forgiven. She agreed to do so. On his return to Texas, Dale directed Paul to make and deliver the notes and told him that the decedent would make a will forgiving the indebtedness, and that Paul would not have to repay the notes. On January 12, 1972, Paul obtained two bank note forms, filled them out in accordance with the instructions from Dale, backdated them to the dates of receipt of the bonds, and executed the notes. On or shortly after January 12, 1972, he mailed the notes to the decedent.

The decedent died in April 1973, leaving a will

made a few days before her death, which was admitted to probate, which revoked former wills, and which did not forgive any indebtedness. After her death, Dale and Paul discovered that in September 1972, the decedent had executed a previous will in which she forgave "any balances remaining due" on notes of Paul Redding and certain other named persons.

Following their appointment as executors, the plaintiffs brought this action for the collection of the notes. Herman Juergens, as executor, made the following assertions in support of the motions for summary judgment on the notes. He stated that around Christmas of 1972, the decedent told him that Paul had not paid interest on the notes, and that she was not going to give him his $3,000 Christmas gift until he did. In several other conversations, the decedent mentioned the fact that Paul had not paid any interest, and that she hoped he would pay the notes on time since they had been made at a very decent interest rate. He also asserted that in a conversation with the decedent concerning her final will she had inquired if Juergens intended to pay his note due her, and also stated that she expected Paul to pay his. The worksheet for the decedent's will, which Juergens wrote on her instructions, stated that the loan to Paul was to be included and the will itself made no mention of forgiving the notes. Juergens also asserted that the decedent was a good businesswoman and that when he had borrowed money from her, she had the note prepared and delivered to him for execution.

There is also evidence that after decedent's death there was some discussion by Dale about using his share of the residue to pay Paul's notes, and that after learning of the September 1972 will, he advised the attorney for the estate that he would not assign his share, nor would the notes be paid off.

There is also evidence that the decedent came to

live with Juergens in October 1972, because she was sick and needed someone to take care of her, and that during the time she lived with Juergens prior to her death, she received numerous X-ray treatments and took a substantial amount of prescription drugs.

There is a great deal of additional evidence in the record which would be material and relevant on the ultimate issue of fact as to whether the delivery of the bonds by the decedent to Paul was intended to be a gift or was intended to be a loan. Many other substantive issues of material fact which bear directly or indirectly on the ultimate issue are also in conflict. The ultimate issue and these issues, however, are for resolution by a fact finder and not for determination on a motion for summary judgment.

The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508.

Where the ultimate inferences to be drawn from the facts are not clear, the inferences are not conclusively established, and it cannot be determined whether a party is entitled to judgment as a matter of law. Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152.

The issue to be tried 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 a motion for summary judgment, the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may

reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits. Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541.

The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Hiram Scott College v. Insurance Co. of North America, 187 Neb. 290, 188 N. W. 2d 688.

On the basis of the record here, substantial material facts are in dispute and the ultimate inferences to be drawn from uncontroverted facts are far from clear and conclusive. The record fails to establish the plaintiffs' right to judgment as a matter of law, and the facts and inferences are not subject to determination on a motion for summary judgment. The judgment is reversed and the cause remanded to the District Court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CLINTON, J., dissenting.

I respectfully dissent. After having examined the record, I believe that the issue of whether there is a dispute of material fact turns upon the sufficiency of the facts attested to in the deposition of Dale Redding, defendant's father, and the legal sufficiency of the affidavit of the defendant offered and received in evidence at the hearing on the motion. I believe the facts in those instruments are insufficient and I would affirm the judgment of the District Court.

Clara J. Cavett, whom I will hereafter refer to as Aunt Clara, was a resident of Bayard, Nebraska. Dale Redding, her nephew, and the defendant Paul Redding, son of Dale, farmed together in Texas on land owned by Paul. In July 1971, Aunt Clara visited Dale and Paul in Texas. With reference to

the matter before us Dale testified in his deposition that on the occasion of that visit the following occurred: ". . . when we got down there she saw the farm land and the fish ponds and she said, 'I thought you were going to build a feed lot?' And I said, 'We were going to as soon as I see our way clear to finance it.' And she said, 'I have some money that you can have.' And I said, 'I wouldn't take it unless you will forgive it in your will just like your brothers did in their wills.' And she said, 'That is fine, I want you to have it.' " He further testified that Aunt Clara told him: ". . . that she had these bonds that had more interest due on them than the bonds cost originally and she didn't want to cash the bonds and give the money to Paul because she would have to pay the income tax on the earned interest. And I said, 'That is simple. Paul has had several years of financial setbacks here and he could handle the interest real well in a loss carry back or whatever you do in income taxes.' And I said, 'Don't take my word for it ask somebody that knows. Ask your lawyer when you get home.' " He testified there was no conversation about promissory notes on that occasion and that after Aunt Clara returned home she advised Dale that she had been informed that whoever cashed the bonds would have to pay the income tax on the interest from the bonds when cashed.

Later Aunt Clara caused Paul's name to be placed on the bonds as coowner with her and they were sent to Paul in Texas in two groups in care of a Production Credit Association which delivered them to Paul, who cashed them and used the money.

In December of 1971 Dale visited Aunt Clara in Bayard. In Dale's deposition inquiry was made as to conversations with Aunt Clara at that time. He responded: "She was concerned about gift tax and again I told her about my father being so unhappy with his gift tax having paid it and wished that he hadn't done it that way and wished that he would

have left it in his estate. And I suggested the possibility that if we would issue her notes that she could have in her file and then if the Internal Revenue Service or estate people, whoever checks, ever checked, well, she could say, 'Here are the notes. I didn't have to declare it as a gift. The notes are to be forgiven in the will. So, it carries it over to my death.' And she thought it was a good idea. So that is what she did." Dale, on his return to Texas, directed Paul to make and deliver the notes and testified: "I told him that I insisted that she forgive it in her will." On November 30, 1971, Paul wrote Aunt Clara a letter which said: "Thank you very much for the use of the proceeds of the bonds." (It is to be here noted that this is the evidence, not as the majority opinion implies that he was thanking Aunt Clara for a gift.) He then in the letter went on to advise Aunt Clara of the amounts of principal and interest in each group of bonds.

The affidavit of the defendant Paul Redding is in part as follows: "During the middle of July, 1971 my Aunt Clara Cavett visited me at my home and at our farm near Kamay, Texas. She had talked with Dale Redding, my father, and myself in reference to helping us build a feed lot we wanted to construct on my land. From conversations I had with her at that time, she offered to give, either myself or my father, U. S. Savings Bonds which she said she didn't need and didn't want to pay the Income Tax on the accrued interest. At this time promissory notes for repayment to her were not mentioned. The transaction was to be a gift, and the only question was to whom, either myself or my father. She had stated 'she wanted to at least help in some way'."

Aunt Clara died in April 1973, leaving a will made a few days before her death which was admitted to probate, which revoked former wills, and which did not forgive any indebtedness. There was evidence to show that in September 1972 Aunt Clara had made

a will in which she forgave "any balances remaining due" on notes of Paul Redding and certain other named persons.

As the majority opinion notes, there is a good deal of other evidence in the record which would be material and relevant on the burden of persuasion if the case were to be tried on the merits. However, the basic question is whether the testimony of Dale and Paul above recited is sufficient to support a finding of donative intent on the part of Aunt Clara in connection with the delivery of the bonds, thus raising a disputed material question of fact so as to entitle the defendant to a trial on the issue of whether there was any consideration given for the promissory notes.

The essential elements of an inter vivos gift of personal property are (1) donative intent on the part of the giver, (2) delivery by the donor, and (3) acceptance by the donee. In re Estate of Scott, 148 Neb. 182, 26 N. W. 2d 799. The evidence of donative intent must be clear and unmistakable and inconsistent with any other theory. Hild v. Hild, 135 Neb. 896, 284 N. W. 730; In re Estate of Sternecker, 136 Neb. 813, 287 N. W. 659; Ralston v. Marget, 138 Neb. 358, 293 N. W. 124; In re Estate of Scott, *supra;* Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797. It is clear in this case that title to the bonds was effectively transferred by change of ownership in accordance with government regulations applicable thereto and acceptance and cashing of the bonds by Paul. The disputed issue here is donative intent.

The testimony of Dale, the substance of which was that the money would not be accepted unless Aunt Clara would forgive the debt in her will and that she agreed thereto is completely inconsistent with any donative intent on the part of Aunt Clara. A debt can be forgiven. Such language is not applicable to a completed gift.

Dale's affidavit does not with specificity contra-

dict Dale's testimony as to the nature of the contemplated transaction. He says: *"From conversations* I had with her at that time (July 1971 in Texas) she offered . . . . The transaction was to be a gift . . . ." (Emphasis supplied.) These are statements of conclusions. They do not set forth facts which would be admissible in evidence.

Section 25-1334, R. R. S. 1943, provides in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In applying this statute in Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643, we said, referring to 3 Barron and Holtzoff, Federal Practice and Procedure, and the federal rule comparable to section 25-1334, R. R. S. 1943: " 'Under this provision, therefore, statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments, and of statements which would be inadmissible in evidence * * *,' " and " 'Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment.' "

The purpose of summary judgment is to pierce allegations of the pleadings and to show that controlling facts are clear and that no genuine issue of fact remains for trial. Johnson v. Evers, 195 Neb. 426, 238 N. W. 2d 474. Motion for summary judgment may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Johnson v. Evers, *supra.*

The defendant having not shown in the manner required by statute that a genuine issue of fact existed on the claimed defense of no consideration, I would affirm the judgment of the District Court.

ROBERTA I. SEMPEK, APPELLEE, V. LAWRENCE J. SEMPEK, APPELLANT.
252 N. W. 2d 284

Filed April 13, 1977. No. 40858.

1. **Motions, Rules, and Orders: Contempts: Trial: Statutes.** A motion for new trial under section 25-1143, R. R. S. 1943, is required in cases involving constructive contempts committed outside the presence of the court.
2. **Motions, Rules, and Orders: Trial: Time.** A motion for new trial must be made within 10 days of the verdict or decision rendered, except where a person is "unavoidably prevented." That term refers to circumstances beyond the control of the party desiring to file a pleading in our courts, and signifies something that was beyond the ability of the person affected to have avoided.
3. **Motions, Rules, and Orders: Trial: Time: Appeal and Error.** A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect, and this court will not review alleged errors occurring during trial unless a motion for a new trial was made in the trial court and a ruling obtained thereon.
4. **Trial: Pleadings: Contempts: Affidavits.** Contempts may be prosecuted by affidavit, and such an affidavit serves the purpose of a pleading.
5. _____: _____: _____: _____. Although affidavits not included in the bill of exceptions will not be considered as evidence by this court, an affidavit charging contempt may be considered by this court, even if not offered and received in evidence, for the limited purpose of determining whether the pleadings support the judgment.
6. _____: _____: _____: _____. Where the reading of an affidavit for contempt clearly indicates that the alleged violation of a court order was willful, the failure to use that express word does not render the affidavit defective.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

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

Mary P. Clarkson, for appellee.

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

BRODKEY, J.

Lawrence J. Sempek appeals a sentence of 30 days

imprisonment in the Sarpy County jail imposed upon him by the District Court for Sarpy County, which found him to be in contempt of court for failure to comply with a decree of dissolution of marriage, ordering him to pay and to hold the appellee, Roberta I. Sempek, harmless from all debts incurred prior to the filing of the petition for dissolution between the parties. We affirm.

In his appeal to this court from that finding and sentence, Lawrence makes only two assignments of error. First, he alleges that there was a total lack of evidence to support his conviction and sentence for contempt. Secondly, he alleges that the decree in the dissolution proceedings did not impose upon him the duty for the breach of which he was found in contempt; and the decree contained no order for him to pay the debts incurred during the marriage or to hold his ex-spouse harmless therefrom. We consider the latter assignment of error first.

In the decree of dissolution entered November 21, 1975, the court found, among other things, that the parties had entered into a property settlement and alimony agreement and that the agreement was fair and reasonable; and incorporated the agreement into the decree. The court also ordered and adjudged in the decree: "That the property of the parties be awarded to the respective party pursuant to their property settlement agreement." The property settlement and alimony agreement referred to, a copy of which was attached to the decree, not only assigned property to the petitioner and the respondent, respectively, but also contained provisions for the payment of attorney's fees. Paragraph V, entitled "Debts," specifically provided: "Respondent shall pay and hold harmless the Petitioner of all debts incurred prior to the filing of the Petition for Dissolution." Although the court did not specifically mention the payment of the marital debts in the ordering and adjudging portion of the

decree, it did find that the property settlement agreement between the parties was fair and reasonable, and incorporated the settlement into the decree, and did order and direct that the property of the parties be awarded to the respective parties pursuant to their property settlement agreement. We think the intention of the court was clearly manifested by its actions in that regard. There is no claim on the part of the appellant that he did not know or fully understand what he was required to do under the terms of the voluntary property settlement agreement entered into by him; and we therefore hold that under the terms of the decree of dissolution, he was obligated to hold his wife harmless from the payment of the marital debts existing at the time of the filing of the petition. Appellant's claim to the contrary is without merit.

We now consider appellant's first assignment of error that there was a lack of evidence to support his conviction for contempt and sentence imposed thereon. It is true, as reflected by the record, that at the hearing on the contempt charge, following the filing of an affidavit for that purpose by Roberta, there was no formal evidence introduced in the nature of testimony from witnesses sworn under oath for that purpose. The entire hearing appears to have been conducted in the nature of an informal dialogue and arguments between the respective attorneys, and between the court and the attorneys. The affidavit of contempt which was filed in the court to commence the proceedings was called to the attention of the court, but was not introduced in evidence at the hearing. However, the court stated that the affidavit made a prima facie case of contempt and placed the burden on Lawrence to proceed.

The attorney for the appellant, Lawrence, at that time, pointed out that Mr. Sempek had been trying to straighten out the situation with the creditors; that Sempek realized he had an obligation to take

care of the debts, and had been hoping to obtain a call for employment from his union, but realized that he would have to make other efforts; that he had attempted to obtain a job at the Holiday Inn as a bookkeeper but did not have the educational background; and that he had started a new job that day driving an ambulance. He hoped to be able to keep that job until the following summer when there would be more construction work available for laborers. Lawrence' attorney also told the judge at that time that his client had no property, and had debts approximating $9,000, which he was in process of discharging in bankruptcy. He also pointed out that his client had made efforts to meet his responsibilities, and had been able to obtain approximately $2,000 to pay off an indebtedness on his former wife's automobile.

Counsel for Roberta also pointed out to the court that they had had litigation in three different courts over the debts of the parties; that Mr. Sempek did not have to support anyone other than himself; that he was a single individual and was living at home with his parents; that he was 25 years old, strong and able-bodied; that her client desired protection from further harassment by the creditors; and finally that Mr. Sempek did not seem to realize that he had obligations and must meet them.

At the end of the final comments by counsel for Roberta, the court made the following statement to appellant's counsel: "Any rebuttal, Mr. Troia? Is the matter submitted to the Court? Mr. Troia: Yes, your honor." The court then stated: "Let the record show that this decree was entered on the 13th day of November — rather, the property settlement was entered on that date. The decree was entered on the 21st day of November. And the evidence shows that the respondent has not complied to the decree, and the Court, from the evidence and the testimony, does find him in contempt of court. It is

the order of this Court that the respondent be sentenced to thirty days in Sarpy County Jail." The court then suspended the execution of the sentence for 30 days to afford Lawrence an opportunity to purge himself of contempt but specifically provided that at the end of 30 days, if he had not complied with the court's order, then he would serve his 30 days in the jail for contempt.

Although it is true, as previously stated, that no sworn testimony was received by the court at the contempt hearing, nevertheless, it might well be argued that counsel for the parties agreed that the testimony relative to the alleged contempt might be presented to the court by way of their oral statements. This is substantiated, it seems, by the inquiry of the court, immediately preceding the pronouncement of its decision, as to whether Mr. Troia had anything further to present in rebuttal, or whether he submitted the matter to the court, and his answer that it was.

Counsel for Roberta also contends that the statements made by the attorney for Lawrence during the contempt hearing amounted to judicial admissions which supplied any lack of formal evidence, and that those admissions contained in the statements of Lawrence' attorney were sufficient to sustain the action of the court in finding him guilty of contempt. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. Savorelli v. Stone, 168 Neb. 419, 96 N. W. 2d 222 (1959); Vermaas v. Heckel, 170 Neb. 321, 102 N. W. 2d 647 (1960). Assuming, without deciding, that the statements made by counsel for Lawrence at the contempt hearing did in fact amount to judicial admissions, as claimed by counsel for Roberta, there would, it appears, still be a

serious question as to whether those statements were sufficient to establish a violation of the decree of the court on the part of Mr. Sempek under the circumstances, so as to justify the finding of contempt entered by the court. However, for reasons hereinafter stated, we are not permitted to make a determination as to the sufficiency of evidence under the facts of this case.

Lawrence was found to be in contempt of court and sentenced on April 27, 1976. Shortly thereafter he secured the services of a new attorney. That attorney, who was retained on May 13, 1976, filed two motions on May 18, 1976, one of these motions being a motion for a new trial, which was heard on May 21, 1976, and overruled. Section 25-1143, R. R. S. 1943, provides that an application for a new trial must be made within 10 days, either within or without the term, after the verdict, report, or decision was rendered, "except (1) where unavoidably prevented, * * *." We recognize that in cases of direct contempts committed in the presence of the court, no motion for new trial is required. See, Crites v. State, 74 Neb. 687, 105 N. W. 469 (1905); Muffly v. State, 129 Neb. 334, 261 N. W. 560 (1935). In such cases, judgment of contempt may be summarily pronounced. However, in cases such as the one before us, involving constructive contempts committed outside the presence of the court, a motion for a new trial is required. This rule is applicable in contempt proceedings, even though the error alleged is insufficiency of evidence. Zimmerman v. State, 46 Neb. 13, 64 N. W. 375 (1895). See, also, State v. Rhodes, 192 Neb. 557, 222 N. W. 2d 837 (1974); Wright v. Wright, 132 Neb. 619, 272 N. W. 568 (1937). In this case, appellant attempts to come within the exception provided in section 25-1143, R. R. S. 1943, on the ground that he was "unavoidably prevented" from filing his motion within the requisite 10-day period.

In the motion for a new trial filed by his counsel,

appellant alleges that he was unavoidably prevented from filing his motion within 10 days of the entry of the finding of contempt because of his lack of mental competency and the lack of services of competent counsel. At the hearing on the motion for a new trial held on May 21, 1976, appellant's first counsel testified with reference to his failure to file a motion on a new trial within the 10-day period. He stated that a week after the finding of contempt, appellant came to his office and stated that he was going to contest the finding of contempt, but that he was getting another attorney to do so. Appellant's first attorney did not engage in any active representation of him after that time, although he never formally withdrew as appellant's counsel. He felt he was out of the case once appellant told him he was getting another attorney. Appellant testified that he was not advised that a motion for new trial would have to be filed within 10 days, and was not aware of that fact and had no prior legal experience which would have made him cognizant of that fact. It also appears from the record that the appellant sought the services of a psychiatrist during the divorce proceedings, had had a history of mental illness, and was a somewhat unstable and unsophisticated person. The foregoing testimony was offered to prove that appellant was unavoidably prevented from filing a motion for a new trial within 10 days under section 25-1143, R. R. S. 1943. At the conclusion of the testimony, the trial court overruled the motion for a new trial. We conclude the court was correct in so doing.

The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys, and the mere neglect of either will not enable a party to relief on that ground. Nebraska Children's Home Soc. v. Collins, 195 Neb. 531, 239 N. W. 2d 258 (1976).

For cases reaching the same result for similar reasons, see, Community Credit Co. v. Gillham, 191 Neb. 198, 214 N. W. 2d 384 (1974); Vacek v. Marburger, 188 Neb. 180, 195 N. W. 2d 515 (1972). In Vacek v. Marburger, *supra,* we held that a defendant in the Nebraska Penal and Correctional Complex was under no disability barring the prosecution of an action in the courts of this state by reason of his imprisonment. We held that confinement in a penal institution does not unavoidably prevent a party from making a defense to an action against him. In that case the appellant had had counsel whom he discharged. He had been in contact with his wife, whom he expected to secure counsel for him. In Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894 (1955), we stated that an "event or a result is unavoidable which human prudence, foresight, and sagacity cannot prevent. The words of the statute 'unavoidably prevented' signify something that was beyond the ability of the person affected to have avoided."

Under these principles, the question is whether appellant's failure to file his motion within 10 days of the decision was due to circumstances beyond his control or ability. It undoubtedly was not, as he could have hired a new attorney immediately after the decision, rather than waiting more than 2 weeks to do so. The above-cited cases indicate that "mere neglect" of either the party or his attorney is not sufficient to invoke the statutory exception. We conclude that appellant was not "unavoidably prevented" from filing his motion for a new trial within 10 days, as that term is used in section 25-1143, R. R. S. 1943.

The law is well established that a motion for a new trial which is not filed within the time specified by statute, and not within one of the exceptions, is a nullity and of no force and effect; and that this court

will not review alleged errors occurring during a trial of a case in District Court, unless a motion for a new trial was made in that court and a ruling obtained thereon. Nebraska Children's Home Soc. v. Collins, *supra;* Parker v. Christensen, 192 Neb. 117, 219 N. W. 2d 235 (1974). It is also well established that in a law action, where no motion for a new trial was filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings; and in the absence of a motion for a new trial, where a judgment is sustained by the pleadings, it will ordinarily be affirmed. Nebraska Children's Home Soc. v. Collins, *supra;* Lincoln Nat. Bank & Trust Co. v. School Dist. No. 41, 131 Neb. 773, 270 N. W. 311 (1936).

In order to determine whether the judgment of contempt in this case is supported by the pleadings, we must first determine what the pleadings in this contempt action are. The Nebraska statutes dealing with contempt, sections 25-2121 to 25-2123, R. R. S. 1943, do not specifically set out the manner or procedure for commencing a contempt action. Section 25-2122, R. R. S. 1943, merely states: "Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." It is not specified in what manner the party is to be notified of the accusation, but historically and traditionally notification has been made in several ways, including an affidavit for contempt, a motion to hold in contempt, and an information charging contempt. In 17 C. J. S., Contempt, § 72(1), at p. 180, it is stated: "Ordinarily, contempts may be prosecuted by affidavit of any party, and such an affidavit is regarded as constituting, or serving the purpose of, a complaint or pleading." We therefore examine the sufficiency of the

affidavit for contempt filed in this proceeding by Roberta, the appellee, against her husband.

Appellant contends, however, that since the affidavit in question was not first introduced and received in evidence and included in the bill of exceptions, notwithstanding it is included in the transcript, we may not consider it in this appeal to the Supreme Court. It is true that we have on occasions stated the rule to be that in order for an affidavit to be considered by this court it is necessary that it be offered in evidence in the trial court and preserved and made a part of the bill of exceptions, and that merely filing it in the office of the clerk of the District Court and making it a part of the transcript is not sufficient. See, Anderson v. Autocrat Corp., 194 Neb. 278, 231 N. W. 2d 560 (1975); Frye v. Frye, 158 Neb. 694, 64 N. W. 2d 468 (1954). A review of those cases, however, reveals that the context within which the rule was announced was that the rule was to be applicable to attempts or efforts to use the affidavit in question in an evidentiary manner, or in lieu of evidence, and not where the use of the affidavit was merely for the purpose of testing the sufficiency of the affidavit as a pleading. For example, in Anderson v. Autocrat Corp., *supra,* we stated: " 'An affidavit *used as evidence* in the District Court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.' " (Emphasis supplied.) Also in Frye v. Frye, *supra,* we held that affidavits not included in a bill of exceptions will not be "considered as evidence" by the Supreme Court. In the instant case, the use sought to be made of the affidavit in question is not for its use as evidence, but rather as a pleading, to test whether or not the pleadings in this contempt action sustain the judgment of contempt against the appellant entered by the District Court. The rule previously stated obviously does not apply

to the situation before us; and the affidavit in question may be considered and tested as a pleading in the same manner that a petition, answer, or reply might be tested in an ordinary civil law suit.

In the affidavit for contempt filed by Roberta in this case, she first alleged that on November 13, 1975, the court ordered and directed the appellant to pay all debts incurred prior to the filing of the petition for dissolution and hold Roberta harmless for same; and then, in the following paragraph, she alleged that: "The Respondent, though able to do so, has not paid said sums of money as ordered by the Court, but has failed, neglected and refused to pay the same and still contemptuously refuses to make such payments." Appellant contends that the foregoing affidavit is deficient for the reason that it fails to allege that his failure to pay was willful and contumacious. Malec v. Malec, 196 Neb. 533, 244 N. W. 2d 82 (1976); Wright v. Wright, *supra;* Thuman v. Thuman, 144 Neb. 177, 13 N. W. 2d 117 (1944); Frye v. Frye, *supra.*

The affidavit in this case does allege that the appellant was ordered to pay; and also that he had the ability to pay. The actual language used in the affidavit is: "That the Respondent, though *able* to do so, has not paid said sums of money as ordered by the Court, but has failed, neglected and *refused* to pay the same and still contemptuously refuses to make such payments." (Emphasis supplied.) The word "willfully" is not actually used in the affidavit, but it is clear from the context that the allegation of appellant's refusal to pay is intended as an allegation of a "willful refusal to pay." In Kammer v. State, 105 Neb. 224, 180 N. W. 39 (1920), we held that where an information for contempt for the violation of a remedial judicial order in a civil case shows clearly that the disobedience was "willful," the failure to use that word in making the charge is not a fatal defect. In that case we stated: "The informa-

tion states the jurisdictional facts. The making of the court's order and its violation by defendant are charged. It is also charged that, though often requested, defendant refuses to return the child to its mother. While the information does not use the word 'wilful,' the charge as a whole shows clearly that the disobedience was wilful. This is sufficient in that respect, where the proceeding is remedial to compel obedience to a judicial order." See, also, Thuman v. Thuman, *supra*. Our conclusion is that the contempt affidavit in this case was sufficient to state a cause of action in contempt against the appellant and is sufficient to support the judgment of the court in finding him in contempt and in sentencing him.

Finding no error, the judgment of the District Court must be affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

IN RE INTEREST OF JEREMY JENKINS, A MINOR UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. WENDY JENKINS, APPELLANT, IMPLEADED WITH ROBERT H. JENKINS, JR., APPELLEE.

252 N. W. 2d 280

Filed April 13, 1977. No. 40863.

1. **Parent and Child: Minors.** The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children.
2. **Courts: Statutes: Evidence: Parent and Child: Minors.** In a proceeding in juvenile court under sections 43-202(2) and 43-209, R. S. Supp., 1976, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection.
3. **Courts: Judgments: Parent and Child: Evidence: Appeal and Error.** In cases involving custody of neglected or dependent chil-

dren and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion.

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

Gary B. Thompson, for appellant.

Charles W. Balsiger, for appellee State.

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

MCCOWN, J.

This is a proceeding to declare an infant a neglected and dependent child, and to terminate parental rights. The county court of Gage County found the child to be a neglected child as defined under section 43-202(2), R. S. Supp., 1976, terminated all parental rights, and placed the infant in the temporary custody of the Gage County department of public welfare until the child could be delivered to the Nebraska Children's Home Society to be placed for adoption. The parents appealed to the District Court. The District Court affirmed the judgment of the county court. The mother of the child has appealed to this court.

Robert and Wendy Jenkins are the parents of Jeremy Jenkins, who was born December 25, 1974. Robert was 18 and Wendy was 19 years old when the baby was born. Jeremy was their first child and was a normal, healthy baby at birth. In March 1975, Robert Jenkins joined the military service and left his wife and son in an apartment in Beatrice, Nebraska. In June 1975, Robert returned to Beatrice on leave before departure for overseas duty. Before he left he helped Wendy move out of the apartment she and the baby had occupied. When they left the apartment was filthy. Garbage and milk cartons

were piled up to the windowsills. Used diapers were piled in a corner. The place was infested with bugs, and the toilet was clogged with dried fecal material although the toilet was not out of order.

The remainder of that summer and fall Wendy and the baby primarily lived in a house in Beatrice with two girl friends of Wendy's. Wendy's housekeeping had not improved. One of the roommates, who took her furniture and moved out on November 9th, testified that the sink had been clogged since September, the toilet stool was clogged and had overflowed, and the house was filthy. She also testified that Jeremy was left for long periods of time with wet diapers, and that he had diaper rash during all the time she lived with them.

From June through mid-September Wendy left the baby at a babysitter's home almost every day, and, on occasion, for several days at a time. On one occasion the babysitter had the baby for 6 days without knowing where Wendy was, nor how long she would be gone, nor where she could be reached. The babysitter refused to sit for Wendy after mid-September 1975, because she had not been paid. On one occasion in August, Jeremy's paternal grandmother removed him from the babysitter's home because she was not satisfied with his care. She arranged a discussion with Wendy and Wendy's parents to attempt to obtain better care for the child.

In the summer of 1975, Wendy worked as a waitress and cook at a drive-in restaurant on the north edge of Beatrice. On one occasion on a hot day in July, Wendy left Jeremy alone in a car in the parking area for a substantial part of the afternoon. Three witnesses verified the incident, although their time estimates varied from 1½ hours to 5 hours, and they disagreed as to which window was open, if any.

During the fall of 1975, Wendy and Jeremy spent considerable time at the house of a male friend of Wendy's in Barneston, Nebraska. Their visits

sometimes lasted for days at a time. On one occasion in November, Wendy left Jeremy alone in the house in Barneston in a "baby-proofed" bedroom while she went to another town with some friends. The parents of her Barneston friend learned that Jeremy was in the house alone, went to the house at 11 p.m., and took him to their home for the rest of the night. When they returned the baby to the Barneston house the next day at noon, Wendy did not know Jeremy had been gone.

On December 3, 1975, this proceeding was filed and the county court ordered immediate removal of Jeremy and placed temporary custody in the Gage County department of public welfare pending hearing. Two Beatrice police officers and a county welfare worker went to Wendy's Beatrice house and took custody of Jeremy. Their testimony and pictures establish that the house was as filthy as before. The house had been without most of its furniture since November 9th, and a mattress on the floor was the only bed.

Jeremy was taken to the hospital and examined by Dr. Stratton. The examination showed a small burn on Jeremy's right cheek which looked as if it might have been made by a cigarette; a bruise at least 4 days old on his left cheek; four circular burns or puncture wounds on the palm of his right hand; three vertical burns or abrasions on the wrist of his left hand; a cross-hatch burn about 7 days old on his lower right leg that looked as if he might have come into contact with a floor furnace grate; and a floor burn on his left knee. He had a slight case of diaper rash. X-ray examination showed a severe trauma about 4 weeks old to his lower left leg with indications of bleeding under the lining of the bone. The injury could not have occurred from the normal activities of an 11-month-old child but would have had to be caused by falling or being grasped or struck in some manner.

The doctor also testified that Jeremy's height and weight at birth were normal; that at 6 months his weight gain and growth were inappropriately low; that at 11 months, Jeremy's growth pattern was still low; and that he was a small infant for his age. In the 1 month after he was placed in the foster home, there was a substantial change and improvement both in weight and height. In the doctor's opinion the sudden change in the growth pattern was due to the changed environment.

Wendy testified that she had made mistakes in taking care of Jeremy but that she loved him and wanted him back. Robert, who was home on special leave for the hearing, testified that he would take Jeremy and see what arrangements he could make, or he might put Jeremy up for adoption.

The county court determined that Jeremy's best interests dictated that the parental rights of both parents should be terminated and Jeremy placed in the custody of the department of welfare, to be placed for adoption. The District Court affirmed the judgment of the county court and the mother has appealed to this court.

The appellant contends that the evidence is insufficient to establish that she was unfit to have custody of her child. She argues that there is no affirmative evidence of child abuse, nor lack of proper feeding, nor of any other conduct on her part which would justify the termination of her parental rights.

Section 43-202(2), R. S. Supp., 1976, grants jurisdiction to declare a child neglected or dependent within the meaning of the section: "(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 or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; * * * or (e) who is in a situation or en-

gages in an occupation dangerous to life or limb or injurious to the health or morals of such child."

Section 43-209, R. S. Supp., 1976, provides that the court may terminate all parental rights between the parents and such child when the court finds such action to be in the best interests of the child and it appears from the evidence that one or more of the following conditions exist: "(2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection; * * *."

The county court found Jeremy to be a child as described in section 43-202(2), R. S. Supp., 1976, and found that the parents had substantially and repeatedly neglected the child and had refused to give him the necessary parental care and protection. The District Court confirmed that finding and judgment.

While the natural and superior rights of parents to have the custody of their children has always been protected and maintained by the courts, those rights are not inalienable. The public also has a paramount interest in the protection of the rights of children. See State v. Tibbs, 197 Neb. 236, 248 N. W. 2d 330. This court has consistently held that in a proper case the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. State v. Johnson, 196 Neb. 795, 246 N. W. 2d 591.

In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence. The judgment of the trial court will be upheld on appeal unless there is an

abuse of discretion. See State v. Johnson, *supra*. Those rules are followed by this court even though an appeal of such a case in this court is heard de novo on the record.

In this case, while there may be no direct affirmative evidence of child abuse, there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child. Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. In such a case, the best interests of the child become paramount.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY PHILLIP MOORE, APPELLANT.

252 N. W. 2d 617

Filed April 20, 1977. No. 40747.

1. **Criminal Law: Sentences.** A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant.
2. _____: _____. Proportionality in sentencing mandates that the more serious offenses generally merit the greater punishment and that those offenders who offer the greater menace to society deserve the greater punishment.

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

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

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

McCOWN, J.

The defendant pleaded guilty to a charge of uttering a forged instrument and was sentenced to 5 to 10 years imprisonment. The only issue on appeal is whether the sentence was excessive.

The check which forms the basis of the charge here was for $213.43 on the account of the Dominican High Athletic Club, drawn on the North Side Bank of Omaha. The defendant attempted to cash it on December 16, 1975. The presentence investigation report shows that defendant admitted cashing some 19 checks drawn on that account over a period of several months for a total sum of approximately $3,600. A number of checks had been stolen from Dominican High School sometime in the summer of 1975. The defendant denied any knowledge of that burglary, but told several different stories as to how he had acquired the stolen checks.

The defendant had also allegedly forged six checks totaling $1,200 drawn on the Wall Corporation, for which he had been separately charged at the time of arraignment. At the time of sentencing, the State of Minnesota had issued a bench warrant for the defendant on a charge of receiving stolen property.

Defendant's juvenile record shows that he was found to be a child in need of special supervision on charges by a complaining witness that he snatched a $20 bill from her hand. He was placed on 10 months probation and successfully completed it when he was 14 years of age. From that time on he had no "criminal" convictions until the conviction here. He was charged with four traffic offenses, all in the year 1975. Two of those were dismissed. He was fined $50 on one, and disposition was pending on the other.

The defendant was 1 month over 18 years old and living in his mother's home at the time of this offense. The conviction here was his first felony conviction. His only prior "criminal" conviction of any kind was for snatching a $20 bill when he was 13 years of age.

The statutory sentence range for the crime of uttering a forged instrument is from 1 to 20 years.

A sentence of imprisonment should not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Foutch, 196 Neb. 644, 244 N. W. 2d 291.

Proportionality in sentencing mandates that the more serious offenses generally merit the greater punishment and that those offenders who offer the greater menace to society deserve the greater punishment. State v. King, 196 Neb. 821, 246 N. W. 2d 477.

The defendant was 18 years old. This was his first felony conviction and his first criminal conviction. The crime was a nonviolent one. His juvenile record is minimal and also nonviolent. These facts, together with a comparison of the sentence with forgery sentences generally, lead us to conclude that the sentence was excessive under the circumstances here. Section 29-2308, R. R. S. 1943, gives this court the authority to reduce a sentence imposed by the District Court when it appears to be excessive. We believe a sentence of 2 to 5 years in the Nebraska Penal and Correctional Complex is appropriate. We therefore reduce the sentence imposed to 2 to 5 years and affirm the judgment as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD D. COLGROVE, APPELLANT.

253 N. W. 2d 20

Filed April 20, 1977. No. 40788.

1. **Criminal Law: Police Officers and Sheriffs: Stop and Check: Probable Cause: Statutes.** A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. R. S. 1943.

2. **Criminal Law: Police Officers and Sheriffs: Stop and Check: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.
3. **Criminal Law: Constitutional Law: Stop and Check: Searches and Seizures: Probable Cause.** An investigatory stop and search is not constitutionally permissible where the officer has no reasonable suspicion a person is committing, has committed, or is about to commit a crime.
4. **Criminal Law: Constitutional Law: Searches and Seizures.** A search prosecuted in violation of the Constitution of the United States or the Nebraska Constitution is not made lawful by what it brings to light.

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

James T. Hansen and Hugh Kenny, for appellant.

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

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

CLINTON, J.

The sole issue on this appeal is whether certain physical evidence, seized in a search of the defendant's person and automobile and received in evidence at trial over the defendant's objection, should have been suppressed because the search and seizure were without the probable cause required by the Fourth Amendment to the Constitution of the United States and Article I, section 7, of the Nebraska Constitution. See, Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933; Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726. Previous to trial defendant had filed a timely motion to suppress under the provisions of section 29-822, R. R. S. 1943. After a pretrial evidentiary hearing the motion to suppress was denied. We find that the motion to suppress should have been sus-

tained and that therefore the defendant's conviction on charges of possession of marijuana and possession of a concealed weapon must be reversed.

The essential facts upon which a determination of the issue depends are not disputed in the record and are as follows. On the evening of August 28, 1975, at about 11 p.m., officer Miller of the Minatare, Nebraska, police department and deputy sheriff Aeschliman of Scotts Bluff County met, pursuant to previous arrangement, on a street in Minatare. Aeschliman had requested that Miller meet him to assist in locating the Arapahoe sisters, who lived some place north of Minatare and for whose arrest Aeschliman testified he had warrants. At about 11:15 p.m., the officers, each in his own vehicle, were parked in an off-street parking area immediately south of the intersection of Main and Railroad Streets in Minatare. While the officers were parked, an automobile belonging to the defendant Colgrove and driven by a young man by the name of Evans, in which Colgrove and a young man by the name of Boyer were passengers, was traveling west on Railroad Street. It stopped at a traffic sign on the east side of Main Street and then made a right-hand turn to go north on Main Street. At the time the Colgrove car stopped at the stop sign the officers were within 50 to about 100 feet from the place where the car stopped. Earlier Miller had informed Aeschliman that the Arapahoe sisters might be in a car belonging to the Herrera family. When Miller saw the defendant's car he informed Aeschliman that it might be the Herrera car. Aeschliman then stated, " 'I will check that car out,' " and asked Miller to back him up. Aeschliman proceeded to follow the defendant's car as it traveled north on Main Street and Miller followed in his own police car. Evans drove several blocks north on Main Street and then into a parking lot, and turned the car about preparatory to returning to Main Street and going back in the direction

from which he had come. At that point the car was stopped by Aeschliman who signaled and shouted at its occupants. At about the same time the two officers parked their cars respectively to the front and to the rear of the Colgrove automobile. When the officers stopped their own cars they became aware that there were three males in the car and no women. Aeschliman acknowledged at trial that his only purpose in stopping the car was to serve warrants on the Arapahoe sisters and that when he got out of his own car he knew they were not in the Colgrove vehicle. The officers acknowledged that they had observed no violations of law by the driver of the car or its occupants. Neither the car nor its occupants had done anything to arouse the suspicion of the officers. Neither were the officers investigating any crime which would give them occasion to make an investigatory stop of the Colgrove vehicle. Nonetheless, Aeschliman announced to Miller that he was going to check the identity of the occupants of the car. He testified that his purpose was to determine that the occupants of the car were not the Arapahoe sisters. He testified he had no other reason or purpose for stopping the car, nor was he making a traffic stop. Both Miller and Aeschliman were acquainted with Colgrove who was a resident of Minatare, as were apparently the other two young men. Minatare has a population of about 1,000.

Aeschliman went up to the car and asked the persons in the car for identification. He then determined that Evans did not have a driver's license on his person. Colgrove, who was in the front seat with Evans, then got out of the car, told Aeschliman that the car was his, and he handed Aeschliman his operator's license and the motor vehicle registration. Aeschliman then directed Evans to come to the sheriff's vehicle and there made a check by radio to determine whether Evans might be driving a vehicle while his operator's permit was under suspension.

The report was negative. At that time he directed Evans to exhale so he could smell his breath to test for alcoholic odor. He detected no such odor. However, he testified he smelled a slight odor of burned marijuana and that Evans' speech was slurred and he looked glassy-eyed.

Aeschliman then got out of his own car and went to the Colgrove car and directed Colgrove and Boyer to get out. At the same time he directed Miller to search the car. He ordered the defendant and Boyer to "spread eagle" against the car and then searched them. It was in the course of these searches that a small quantity of marijuana, some roach clips, a pipe, and the gun were found, none being in plain view with the possible exception of the roach clips. Colgrove and Evans were then told that they were under arrest and were handcuffed. Boyer was released. There is some dispute in the record as to whether the gun was found before or after the arrest was announced, but it is clear that Colgrove and Evans were in the process of being searched before the items were found. Aeschliman testified that the search of the car and of the other two parties were made because of the detection of the odor of marijuana on Evans.

The initial question in this case is, was a stop and a brief investigation reasonable in this instance? A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address, and an explanation of his actions. § 29-829, R. R. S. 1943; State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90. A police officer may, in appropriate circumstances and in an appropriate manner, approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Brewer, *supra*. In State v. Aden, 196 Neb. 149, 241 N. W. 2d 669, we referred to Terry

v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, and said: "Terry v. Ohio, supra, authorizes a limited search in the form of a patdown to determine whether a person *whose actions are suspect* is armed." (Emphasis supplied.) The undisputed facts in this case show that the actions of the defendant and his companions gave no reasonable ground to suspect, nor did the officers have information of any kind which could reasonably lead them to any conclusion that the occupants of the Colgrove car were committing, or were about to commit, or had committed any crime. Neither were the officers in the process of any criminal investigation which might have made it reasonable to make inquiry of the car's occupants. In short, there was nothing in the circumstances or within the officers' knowledge, as demonstrated by the record, which gave any ground whatever for an investigatory stop such as is approved by Terry v. Ohio, *supra,* and by this court in State v. Brewer, *supra;* and State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129. See, also, Carpenter v. Sigler, 419 F. 2d 169; Brewer v. Wolff, 529 F. 2d 787.

Neither does this case come within the purview of State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, where we considered and construed section 60-435, R. R. S. 1943, which authorizes the stopping of a vehicle for the purpose of checking registration and operator's license. There is no claim in this case that the stop in this instance was for that limited purpose. The admitted purpose here was to determine, for some reason which the record does not disclose, the identity of the car's occupants. It is readily apparent that if an officer without any cause for suspicion whatever may stop any and all vehicles for the purpose of determining the identity of the occupants, then the expectation of privacy to which persons traveling in motor vehicles are entitled under the Fourth Amendment to the Constitution of the United States, and under Article I, section 7, of the Nebraska

Constitution, is of no value whatever. In State v. Aden, *supra,* we said, quoting from Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790: "It would be intolerable and unreasonable if a[n] . . . agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." In State v. Holmberg, *supra,* we said, in pointing out the possibility of abuse of the rights under section 60-435, R. R. S. 1943: "We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment." We find that the investigatory stop in this case was in violation of the Fourth Amendment to the Constitution of the United States, and Article I, section 7, of the Constitution of Nebraska.

When it became apparent that the persons for whom the officers were looking were not in the Colgrove car that vehicle should have been permitted to proceed. Even if the persons sought had been in the car, it could not, under the facts of this case, have justified the subsequent action of the officers.

It is axiomatic, of course, that if a search is without either warrant or probable cause, the fact that the search itself discloses contraband does not justify the unlawful search. Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134. In Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520, the United States Supreme Court noted that a search prosecuted in violation of the Constitution is not made lawful by what it brings to light. This is also the effect of our opinion in State v. Aden, *supra.*

Accordingly it is clear that the trial judge erred in denying the motion to suppress.

REVERSED AND REMANDED.

McCOWN, J., concurring.

It needs to be emphasized, as the opinion points out, that this case does not come within the purview of State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672. Neither is the basic holding in Holmberg involved.

Although the majority opinion here makes no reference to State v. Romonto, 190 Neb. 825, 212 N. W. 2d 641, for all practical purposes it overrules that case and should be read accordingly.

WHITE, C. THOMAS, J., joins in this concurrence.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. I do not agree with the statement that: "When it became apparent that the persons for whom the officers were looking were not in the Colgrove car that vehicle should have been permitted to proceed." After the sheriff's deputy had stopped the car he could have done one of two things. He could have acknowledged that he had made a mistake and permitted the car to proceed, or, as he did in this instance, checked the driver's license and the registration certificate for the vehicle.

Aeschliman, the sheriff's deputy, had a legitimate reason for making the stop. It definitely was not a pretext for any other purpose. He had been told that the persons for whom he had warrants were possibly in that car. That was his purpose for stopping it. It was not until the car was actually stopped that it became apparent to him that the persons for whom he was seeking were not in the car. This stop happened at 11:30 p.m., so visibility was not the best. When he noticed his mistake he did what he had a perfect right to do, ask the driver for his driver's license. When the driver told him he had none, the deputy sheriff properly ran a check to see if he was driving on a suspended license. The driver, who was only 16, had probably never obtained one. It was while running this check that it became evident from the driver's actions and the

smell of his breath and clothing that he had been smoking marijuana. Faced with these law violations, Aeschliman did what any good officer would do. The procedure he followed thereafter was in strict accord with good police work.

I emphasize that the stop in this case was not a mere pretext to have a reason to search the car. There was a reason for the stop. 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. State v. Sotelo, 197 Neb. 334, 248 N. W. 2d 767 (1977). The search was not undertaken until it became apparent to Aeschliman that the driver had been smoking marijuana.

This case is not too different from State v. Benson, filed March 16, 1977, *ante* p. 14, 251 N. W. 2d 659, where the stop was made pursuant to a radio alert. Here, also, there was a definite reason to stop the vehicle. We upheld the search in Benson because the officer smelled a strong odor of marijuana. We there stated that was sufficient to furnish probable cause to search the vehicle without a warrant.

I reemphasize, in this case this was not a stop made on the open highway in broad daylight. It was a stop made at 11:30 at night in an attempt to accomplish the purpose for which Aeschliman had made the trip from Gering to Minatare.

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

WHITE, C. J., dissenting.

The issue in State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, was whether a peace officer was authorized to stop any automobile for the purpose of ascertaining whether the operator possessed a valid operator's license. We held section 60-435, R. R. S. 1943, authorized such a stop and rejected a conten-

tion that such a stop was unlawful unless the officer had some other reasonable cause for stopping the vehicle.

In this case the majority seems to hold that an officer who stops a motor vehicle and asks the operator to produce his license has made an illegal stop if the officer has any other motive or purpose in mind at the time. This argument was rejected in United States v. Turner, 442 F. 2d 1146 (8th Cir., 1971), where the court said: "Defendant was operating a 1964 Chevrolet Impala on August 13, 1970, in the City of St. Louis. The car had been reported missing the day before by its owner in the State of Indiana. A St. Louis police officer testified that he noticed the car being driven with the trunk lock punched out. He stopped the car as a matter of routine check and inquired if the defendant operator had a driver's license. The defendant replied that he did not. He was then arrested under V.A.M.S. § 302.020, for operating a motor vehicle without a driver's license. After being informed of his rights, the defendant told the officer that the car belonged to a friend of his in Indianapolis. The police officer made a check to see if the car had been stolen. On the following day the police were notified that it was a stolen vehicle.

"The police officer clearly had probable cause to arrest the defendant for failure to have a proper driver's license under Missouri law. It is argued, however, that the officer's motive in stopping defendant's car was not to check his driver's license, but merely to pursue his suspicion of some other crime. Thus, it is contended that the officer wanted to make an unwarranted search for evidence of some unidentified crime. We do not find it unreasonable for an officer to inquire as to a driver's license under these circumstances. It is conceded under the state law of Missouri that an officer has a right to stop an automobile to make a routine check for an operator's license. See Jackson v. United

States, 408 F. 2d 1165, 1168 (8 Cir. 1969); Rodgers v. United States, 362 F. 2d 358, 362 (8 Cir. 1966). Cf. Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Carpenter v. Sigler, 419 F. 2d 169 (8 Cir. 1969). Under these circumstances it is difficult to rationalize that this right of preliminary inquiry may be obviated because suspicious circumstances, even though they may be unfounded, might have motivated an officer to investigate."

In State v. Holmberg, *supra,* we pointed out that after a driver, who has been stopped and asked to produce his license, has produced his license, he must be allowed to continue on his way if the license is in order. In this case the driver, Evans, could not produce a license. The officer was then justified in ascertaining whether a license had been issued to Evans. It was during this investigation that the officer noticed the odor of marijuana which in turn justified a further investigation.

BOSLAUGH, J., joins in this dissent.

VIOLA M. FISCHER, APPELLANT, V. VOLDEMARS GRINSBERGS ET AL., APPELLEES.

252 N. W. 2d 619

Filed April 20, 1977. No. 40881.

1. **Easements: Adverse Possession: Property.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement for the full prescriptive period.
2. **Easements: Adverse Possession: Burden of Proof.** The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive.

3. _____: _____: _____. A permissive use is not adverse, and cannot ripen into an easement. Where a person proves uninterrupted and open use for the necessary prescriptive period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right and that presumption prevails until it is overcome by a preponderance of the evidence.
4. **Easements: Adverse Possession: Property: Streets and Alleys.** It is the general rule and weight of authority that where adjoining proprietors lay out a way or alley between their lands, each devoting a part of his own land to that purpose, and the way or alley is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close the part which is on his own land; and in these circumstances the mutual use of the whole of the way or alley will be considered adverse to a separate and exclusive use by either party.
5. **Easements: Adverse Possession: Property.** The extent of an easement is determined from the use actually made of the property during the running of the prescriptive period.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

Robert D. Zimmerman and James L. Haszard, for appellant.

Joseph H. Badami of Dean, Badami & Radke, for appellees.

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

BRODKEY, J.

This is an appeal from a District Court judgment dismissing a petition which prayed for injunctive relief on the basis of an alleged acquisition of a prescriptive easement for the purpose of access to a garage, over a driveway located along and on both sides of the property line between two adjacent lots of land in Lincoln, Nebraska. We reverse and remand with directions to grant the injunctive relief requested.

On June 5, 1975, Viola M. Fischer, plaintiff and appellant herein, filed a petition in the District Court for Lancaster County, alleging that she had acquired

a prescriptive easement over part of a driveway located on the property of the defendants and appellants, Valdemars and Parsala Grinsbergs. The petition alleged that plaintiff and defendants owned adjoining lots of land in Lincoln, Nebraska; that a driveway runs parallel to the boundary line between the two lots, and is situated on both sides of that boundary; that plaintiff has acquired a prescriptive easement over the driveway for the purpose of access to her garage by virtue of adverse possession; and that the defendants had interfered with plaintiff's use of the driveway. The petition prayed that defendants be enjoined from interfering with plaintiff's use of the driveway. For answer, defendants generally denied all allegations of the petition other than the fact that they were owners of one of the lots in question.

The evidence adduced at trial was as follows. The plaintiff appellant is the owner of a lot of land, hereinafter referred to as "Lot 25," located at 2007 South 16th Street in Lincoln. The defendants own an adjoining lot, described as "Lot 26," which lies to the south of Lot 25. Deeds on both lots reflecting current and prior ownership were entered into evidence, and show the following chain of ownership: With reference to Lot 25, now owned by the plaintiff, the deeds and evidence reveal that one Coralie S. Wilterdink deeded that lot to Benjamin H. McConnel and wife in 1942; and that in 1949, McConnel deeded an interest in the lot to his daughter, Marjorie H. Corr. Ten years later, in 1959, the McConnels and the Corrs deeded the lot to Roy and Bertha Graham, who were the parents of the plaintiff. Subsequent thereto, in 1970, Roy Graham, his wife having died in the interim, deeded the lot to his daughter, the plaintiff herein, who has owned it continuously since that time. With reference to Lot 26, owned by the defendants in this action, which lot lies to the south of Lot 25, owned by the plaintiff, it appears that in 1945,

the property was deeded by Maude Young and her husband to Paul C. Baldwin and his wife, who in 1952 deeded the lot to Michael L. and Helen M. Starita. In 1954, the Staritas deeded the lot to the defendants, who have owned it continuously since that time.

It appears from the record that prior to 1945 a cinder driveway ran along and on both sides of the property line between Lots 25 and 26. There is, however, no evidence as to how and under what circumstances this cinder driveway was originally constructed. The driveway ran from South 16th Street toward the back of the lots, and then branched in a "Y" shape toward garages located on each lot. In 1945, the driveway was made into a concrete driveway. The owners of the lots in 1945, Benjamin McConnel and Paul Baldwin, both worked on the new concrete driveway, and each paid one-half of the costs. Subsequent to 1945, until at least 1972, the owners and/or tenants of Lots 25 and 26 both used the driveway as a means of access to their respective garages without any controversy. It is undisputed that the owners or tenants of Lot 25 frequently and openly used the driveway, helped repair it, and helped scoop snow from it in winter months. It is also undisputed that, to the knowledge of the parties and witnesses, no written agreement in regard to the driveway ever existed between the current or prior owners of the lots.

In 1972 an attorney for the defendants wrote the plaintiff, stating that the plaintiff could no longer use the driveway. Apparently there had been a survey of the lots in 1972, which showed that 6 or 7 feet of the driveway were on the property of the defendants; and that 2 to 3 feet of it were on plaintiff's property. No action resulted from the letter written in 1972, and the plaintiff or her tenants continued to use the driveway as a means of access to her garage.

In 1975 the defendants tore up the part of the drive-

way on their property, and replaced it with new concrete. In so doing, a small portion of the old cement on plaintiff's property was destroyed, but most of it remained intact. The defendants then built a barrier or fence on the property line, effectively preventing plaintiff from using the driveway as a mean of access to her garage. Photographs admitted into evidence indicate that plaintiff's house is located so near the property line that it is impossible for her to build a driveway which would lie entirely on her property and be wide enough to permit passage of an automobile to her garage. The evidence does not show the reason for the defendants' decision to prevent plaintiff from using the driveway.

With regard to the issue of whether the defendants or previous owners of Lot 26 had ever given owners of Lot 25 permission to use their part of the driveway, there was no evidence that express permission had ever been given. Leonard Corr, who had an interest in Lot 25 from 1949 to 1959, stated that he had no real knowledge of whether Paul Baldwin, who owned Lot 26 from 1945 to 1952, ever gave the owners of Lot 25 permission to use his part of the driveway. Corr had never discussed the matter with the defendants, who became owners of Lot 26 in 1954. Corr stated that he "assumed" that the owners of Lot 26 granted permission to use their part of the driveway, but had no knowledge of this fact.

Edwin V. Fischer, plaintiff's husband, stated that he "assumed," on the basis of defendants' "inaction" on the matter, that they had given permission to use the driveway; but he clarified this statement by stating unequivocally that to his knowledge the defendants had never given him or anyone else permission to use the driveway. The defendant, Mr. Grinsbergs, gave no testimony whatsoever on the issue of permission. He stated that no written agreement existed in regard to the driveway, and that he had received no explanation in regard to it when he

acquired Lot 26 in 1954. He stated that Leonard Corr, previous owner of Lot 25, had told him that the driveway was on the Grinsbergs' property. Mr. Grinsbergs stated that he had never requested that plaintiff or her tenants not use the driveway.

Finally, although Mr. Grinsbergs stated that there is an opening at the back of plaintiff's garage such that a car can be driven in and out of the garage from an alley, plaintiff testified there is no opening in the back of her garage.

Following the submission of briefs in the case, the trial court entered judgment in favor of the defendants on April 28, 1976, and made the following findings: (1) That the use of the driveway was a permissive use, (2) that there was not an agreement made between the parties or the prior owners of the real estate in question which would constitute an agreement sufficient to constitute an easement, and (3) the evidence was insufficient to establish a location for the easement claimed by the plaintiff. In accordance with these findings, the trial court dismissed plaintiff's petition. Plaintiff's motion for new trial was overruled, and she has now appealed to this court.

In her assignments of error, the plaintiff contends that the foregoing findings and judgment of the District Court are not sustained by the evidence and are contrary to law.

The general rules applicable to prescriptive easements are well settled in this state, and are set forth in Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196 (1952) as follows: "The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement,

for the full prescriptive period. See, Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547. See, also, 28 C. J. S. Easements, § 10, p. 645.

"To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. See, 28 C. J. S. Easements, § 70, p. 743, cases cited under note 2; 19 C. J. Easements, § 197, p. 964, note 33; 17 Am. Jur., Easements, § 73, p. 982; Beckley Nat. Exch. Bank v. Lilly, 116 W. Va. 608, 182 S. E. 767, 102 A. L. R. 462.

"The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. See, 17 Am. Jur., Easements, § 72, p. 981, and cases cited under note 12. See, also, Majerus v. Barton, 92 Neb. 685, 139 N. W. 208; Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560; Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94; Stubblefield v. Osborn, supra." See, also, Mehling v. Deines, 191 Neb. 287, 214 N. W. 2d 627 (1974); Dunnick v. Stockgrowers Bank of Marmouth, 191 Neb. 370, 215 N. W. 2d 93 (1974); Pierce v. Rabe, 177 Neb. 745, 131 N. W. 2d 183 (1964); State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535 (1959); Hopkins v. Hill, 160 Neb. 29, 68 N. W. 2d 678 (1955).

It is also established law that a permissive use is not adverse, and cannot ripen into an easement. Messersmith v. Klein, 189 Neb. 471, 203 N. W. 2d 443 (1973); Connot v. Bowden, 189 Neb. 97, 200 N. W. 2d 126 (1972).

There is no question under the evidence in this case that plaintiff's use of the driveway was continu-

ous, uninterrupted, and open and notorious for a period exceeding 10 years. The evidence was undisputed that plaintiff or her predecessors openly used the driveway without interruption from at least 1945 to 1975. Use of predecessors in title may be tacked on to plaintiff's use to meet the 10-year requirement. See 25 Am. Jur. 2d, Easements and Licenses, § 58, p. 467. Plaintiff's use also was "exclusive" under the meaning of that word as applied in cases involving prescriptive easements. See, Jurgensen v. Ainscow, *supra;* Scoville v. Fisher, 181 Neb. 496, 149 N. W. 2d 339 (1967). Acquiescence and knowledge of the defendants were also established under the test set forth in Jurgensen v. Ainscow, *supra,* as acquiescence means "passive assent or submission, quiescence, consent by silence," and the owner is charged with the knowledge when the claimant's use has been open, notorious, visible, uninterrupted, and undisputed.

The primary question remaining, therefore, is whether plaintiff's use was adverse and under a claim of right, since the other requirements of establishing a prescriptive easement have been met. Nebraska law is clear and well established that where "the evidence establishes the open, visible, continuous, and unmolested use of the land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. In such a case the owners of the servient estate, in order to avoid the acquisition of an easement by prescription, have the burden of rebutting the prescriptive right by showing that the use was permissive." Smith v. Bixby, 196 Neb. 235, 242 N. W. 2d 115 (1976). The presumption of adversity and claim of right which exists when there has been open, visible, continuous, and unmolested use for the prescriptive period of 10 years is well established in a long line of Nebraska cases. See, Dunnick v. Stockgrowers Bank of Marmouth, *supra;* Pierce v. Rabe, *su-*

pra; Martin v. Norris Public Power Dist., 175 Neb. 815, 124 N. W. 2d 221 (1963); State ex rel. Game, Forestation & Parks Commission v. Hull, *supra;* Hopkins v. Hill, *supra;* Jurgensen v. Ainscow, *supra.* As long ago as 1912, this court stated in Majerus v. Barton, 92 Neb. 685, 139 N. W. 208 (1912), that if a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence. Butts v. Hale, 157 Neb. 334, 59 N. W. 2d 583 (1953); Jurgensen v. Ainscow, *supra.*

Plaintiff relies on the above cases and contends in her brief that the presumption of adverse use and claim of right is applicable in this case, and that the defendants did not overcome this presumption by a preponderance of the evidence. The defendants contend that the presumption is not applicable in this case, and argue that the trial court was correct in finding that plaintiff's use of the driveway was permissive.

The defendants rely on three cases: Bone v. James, 82 Neb. 442, 118 N. W. 83 (1908); Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547 (1948); and Scoville v. Fisher, 181 Neb. 496, 149 N. W. 2d 339 (1967). In Bone, the claimant of the easement admitted that he used the land by permission of the owner, and the court appropriately found that no prescriptive easement was acquired when the use was permissive.

In Stubblefield, the plaintiff sought to establish an easement over the defendant's land for the purpose of hunting. The court stated: "In the instant case the evidence by the plaintiffs shows the original en-

try and use to have been permissive. The plaintiffs did not inform Bolton that they claimed a right-of-way and perpetual easement across his land. They crossed the land on occasions to go hunting, as did others. There was no claim of right or exclusive use. The most that can be said as to their crossing the lands in question is that it was permissive only, a neighborly act on the part of the owners or tenants on the land."

In Scoville, the plaintiff sought to establish an easement over the town lot of the defendant. The lot was unenclosed and unimproved, and was used by the public generally for parking and other purposes. The evidence showed that the original use of the lot was permissive, and the court held that "when an owner permits his unenclosed and unimproved land to be used by the public, or by his neighbors generally, a user thereof by a neighboring landowner, and others, however frequent, will be presumed to be permissive and not adverse in the absence of any attendant circumstances indicative of the contrary." The court noted the general rule that a presumption of adversity arises when there has been open, visible, continuous, and unmolested use for the prescriptive period, but stated that this general rule must be interpreted in the light of the facts of each case. The court stated: "Here we have unenclosed land with no defined pathway across it and where, paraphrasing Stubblefield v. Osborn, supra, the most that can be said of the plaintiff, the public, and the many other various users of the whole area was that their use was permissive only, a neighborly act on the part of the owners or tenants on the land. Applicable here is what this court said in Burk v. Diers, 102 Neb. 721, 169 N. W. 263, as follows: 'Oftentimes farmers or owners of city lots, out of mere generosity and neighborly feeling, permit a way over their land to be used, when the entire community knows that the use is permissive only, without thought of

dedication or adverse user. This use ought not to deprive the owner of his property, however long continued. Such rule would be a prohibition of all neighborhood accommodations in the way of travel.'

"We think the proper rule applicable to the facts in this case is well stated in 4 Tiffany, Law of Real Property (3d ed.), § 1196a, p. 565, as follows: 'While ordinarily, as above stated, the user of another's land is presumed to be adverse, such a presumption does not exist, it seems, in the case of unenclosed land, or, as it may be otherwise expressed, evidence that the land is unenclosed is sufficient to rebut the presumption. And it has been decided that when one throws his land open to the use of the public, or of his neighbors generally a user thereof by a neighboring landowner, however frequent, will be presumed to be permissive and not adverse, in the absence of any attendant circumstances indicative of the contrary.' "

A review of Stubblefield and Scoville indicates that those cases present different and distinguishable factual situations from the one presented in the present case. It would appear that the cases cited earlier in which the presumption of adversity and claim of right was applied, control in this case. The defendants' claim that the presumption does not apply in this case is not supported by the case law.

If we apply the presumption of adverse holding referred to, the evidence clearly does not sustain the trial court's finding that plaintiff's use of the driveway was a permissive use. Defendants, in their brief, do not contend that the presumption was rebutted, but argue that the presumption should not apply. There was no evidence whatsoever that the defendants, or their predecessors in title, gave permission to use the part of the driveway on their land. Defendant Grinsbergs, in his own testimony, said nothing at all about granting permission. Our conclusion is that the defendants failed to overcome the

presumption referred to by a preponderance of the evidence.

A second issue raised by the parties is whether the mutual use of a driveway by adjoining landowners can ripen into a prescriptive easement. Defendants claim it cannot, relying on two Michigan cases, Wilkinson v. Hutzel, 142 Mich. 674, 106 N. W. 207 (1906); and Hopkins v. Parker, 296 Mich. 375, 296 N. W. 294 (1941). Hopkins is clearly distinguishable on the facts from the present case, and the court found that the use by the claimant was permissive at inception, and therefore not adverse.

Wilkinson, however, does generally support the defendants' position. In that case predecessors of the parties had established a private right-of-way between two adjoining lots of land for the mutual convenience of both landowners. Both owners used the way for more than 30 years, until one owner blocked the way. The court found that from the beginning there was an accommodation agreement between the parties for their mutual convenience, and that there was no hostile and adverse use by either owner as against the other. The court stated that the way was based on a license which was revocable at any time by either party.

The Wilkinson case, however, represents a minority position, and must be read in conjunction with a later Nebraska decision, Jensen v. Showalter, 79 Neb. 544, 113 N. W. 202 (1907). In Jensen neighboring landowners established an alley along the boundary between their properties, each contributing 6 feet of land. The alley was used continuously by both landowners until one blocked it with a fence built along the division line. There was no written agreement in regard to the alley, and no easement by deed was involved. The court first noted the following rule: "The defendant claims that the agreement between the parties was a mere license, one to the other, to use their respective share of the lots in

question for an alley for their mutual convenience, and that such license is revokable by either one at their pleasure. The rule is well established that, where one enjoys a right of way under a claim of right, the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the right claimed by the other party." Reviewing numerous cases from other jurisdictions, the court concluded that an agreement of the kind involved in the case gave to the parties a prescriptive right in the alley. The court specifically found the Wilkinson case to be inapplicable. See 79 Neb. at p. 548. Plaintiff relies on the Jensen case, pointing out that the evidence showed that the owners of Lots 25 and 26 agreed in 1945 to construct a driveway, and each paid for one-half of the cost.

It should be noted that the Wilkinson and Hopkins cases relied upon by defendants are both Michigan cases. In an annotation entitled "Rights derived from use by adjoining land owners for driveway, or other common purpose, of a strip of land lying over and along their boundary," 27 A. L. R. 2d 332, at p. 351, it is stated: "In a minority of instances in which no oral agreement as foundation of the common use was directly shown (although, of course, the existence of some sort of understanding is usually inferable from the circumstances), the use was regarded as permissive only so as not to give rise to a prescriptive right in either owner as against the other. The Michigan cases it should be noted, disclose a pronounced leaning against the claim of adverse use in common driveway cases, and elsewhere some tendency in the same direction has occasionally appeared — compare the cases infra, § 8."

The following statement in 28 C. J. S., Easements, § 18 (j), p. 673, should also be noted: "As stated in Corpus Juris, which has been cited and quoted with

approval, while there are some decisions to the contrary, the weight of authority is to the effect that, where adjoining proprietors lay out a way or alley between their lands, each devoting a part of his own land to that purpose, and the way or alley is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close the part which is on his own land; and in these circumstances the mutual use of the whole of the way or alley will be considered adverse to a separate and exclusive use by either party. However, where the owners of land used an alleyway for their mutual convenience, the user being occasional, permissive, and for broken periods of time, no right of way in the alley was established by prescription."

In 25 Am. Jur. 2d, Easements and Licenses, § 45, p. 456, it is stated: "In the case of a private way or alley lying over and along the boundary between lots or tracts of land that has been used without interruption by the adjoining owners for the full prescriptive period for a common purpose, the user of each owner is generally regarded as adverse to the other so as to establish an easement by prescription and either owner against the other. There is, however, some authority to the contrary."

Two cases from other jurisdictions are particularly relevant and worthy of note as their facts are substantially the same as those present in the instant case. In each of those cases the court found that an easement existed and that a presumption arose that the use of a driveway on a boundary line was adverse, when the use was continuous, uninterrupted, and with knowlege and acquiescence of the owner. See, Czebiniak v. Woloszyn, 159 N. Y. S. 2d 632 (1956), affirmed, 5 App. Div. 2d 807, 170 N. Y. S. 2d 1023 (1958); Causey v. Lanigan, 208 Va. 587, 159 S. E. 2d 655 (1968). It appears that the overwhelming weight of authority favors the plaintiff's position that her use of the driveway was not permissive, and

we conclude that the trial court erred in holding that her use of the driveway was permissive.

The second finding of the trial court, that there was not an agreement between the parties or prior owners which would constitute an agreement sufficient to constitute an easement, need not be considered and is immaterial in light of our conclusion as heretofore discussed.

The final finding of the trial court was that the evidence was insufficient to establish a location for the easements by the plaintiff. We believe this finding to be erroneous. It is true that a claimed easement must not be such that the extent of the claim is too indefinite for a determinate description. See Harvat v. Clear Creek Drainage Dist., 197 Neb. 352, 249 N. W. 2d 209 (1977). In the present case, however, deeds covering the lots in question were admitted into evidence, and the testimony was undisputed that the driveway extended approximately 6 feet on the defendants' land and 3 feet on plaintiff's land. Photographs showed the location of the driveway in relation to the houses and garages on the lots. We do not believe that a more precise description of the claimed easement is necessary to afford injunctive relief, especially since the driveway to the garages has existed for years. The extent of an easement is determined from the use actually made of the property during the running of the prescriptive period. Jurgensen v. Ainscow, *supra;* Hopkins v. Hill, *supra.* In this case it is clear the easement would be limited to the width of the driveway as is reasonably necessary for access to plaintiff's garage. See Smith v. Bixby, *supra.*

We conclude, therefore, that the presumption of adversity and claim of right applies in this case, and the defendants did not rebut that presumption, although it was their burden to do so. It is clear that plaintiff is entitled to a prescriptive easement under the facts of this case, and the evidence appears suffi-

cient to establish a location for the easement claimed. This being an equity action, review by this court is de novo. Satterfield v. Dunne, 180 Neb. 274, 142 N. W. 2d 345 (1966). In a de novo review this court can reach its own conclusions on the facts as well as the law, and it is not limited to ascertaining whether the trial court abused its discretion.

The judgment must be reversed and the cause remanded with directions to grant the injunctive relief requested by plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD F. PEITZ, APPELLANT, V. HERSCHEL HAUSMAN, APPELLEE.

252 N. W. 2d 628

Filed April 20, 1977. No. 40892.

1. **Torts: Damages: Property: Venue.** An action in tort for damage to personal property is a transitory action, i.e., one which arises from a transaction which could have occurred anywhere, and such action may, in the absence of statutory restriction, be tried any place the defendant may be summoned.
2. **Torts: Domicile: Venue.** Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants, may be summoned. § 25-409, R. R. S. 1943.
3. **Venue: Waiver.** Venue in a transitory action is a matter which may be waived by failure to make timely objection.
4. **Venue: Pleadings: Waiver.** The matter of improper venue in a transitory action must be raised in the answer, or earlier, or it is waived.
5. **Pleadings: Evidence.** Matters admitted by the pleadings need not be proved.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Reversed and remanded.

C. J. Galvin, for appellant.

John P. Blackburn of Goetz, Hirsch & Haar, for appellee.

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

CLINTON, J.

This is an action brought in the District Court for Cedar County, Nebraska, for property damage arising from the collision of two automobiles on an icy and snowpacked road in that county. A jury was waived and the matter tried to the court. After the plaintiff presented his evidence and rested, the defendant moved for a dismissal in the following language: "At this time, Your Honor, the defendant would move that the plaintiff's case be dismissed on the grounds that there is no showing that the collision occurred in the jurisdiction of this Court." The court immediately sustained the motion without stating any grounds therefor. The plaintiff filed a motion for a new trial which was overruled and he then appealed to this court. We reverse.

In the absence of an appropriate motion, the court is not required to give any reasons for its rulings. It is also elementary that a ruling of the trial court will not be reversed if it is correct merely because it announced a wrong reason.

At the time of the collision the two cars were approaching each other from opposite directions. The left side of the plaintiff's car was damaged. The left front of the defendant's car was damaged. The plaintiff testified that he was on his own proper side of the highway when the collision occurred and that the defendant's automobile came into the plaintiff's lane, striking the side of the plaintiff's car. This testimony, of course, made a prima facie case. The direction of a verdict on the ground of failure to prove a prima facie case would therefore have been premature, at least until the defendant's evidence had been presented.

If the reason for the dismissal was the apparent one of failure to prove venue, the ruling was clearly erroneous for several reasons. An action in tort for damage to personal property is a transitory action, i.e., one which arises from a transaction which could have occurred anywhere, and such action may, in the absence of statutory restriction, be tried any place the defendant may be summoned. 92 C. J. S., Venue, § 7, p. 677, § 8, p. 678.

Section 25-409, R. R. S. 1943, provides in part as follows: "Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants, may be summoned." See, also, Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462; Grosc v. Bredthauer, 136 Neb. 43, 284 N. W. 869. Venue in a transitory action is a matter which may be waived by failure to make timely objection. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N. W. 2d 845. The matter of improper venue in a transitory action must be raised in the answer, or earlier, or it is waived. Baker v. Union Stock Yards Nat. Bank, 63 Neb. 801, 89 N. W. 269. In this instance the issue was not raised by answer, but for the first time on the motion to dismiss. In this case the petition alleged, and the answer admitted, that the collision occurred in Cedar County. It is an elementary rule of pleading that matters admitted by the pleadings need not be proved. Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59; Stahlhut v. County of Saline, 176 Neb. 189, 125 N. W. 2d 520. For this reason also the ruling was erroneous.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. LARRY J. MARTINEZ, APPELLANT AND CROSS-APPELLEE.

252 N. W. 2d 630

Filed April 20, 1977. No. 40897.

1. **Constitutional Law: Jurors.** A prima facie case of discrimination in jury selection can be established upon demonstration that a significant disparity exists between the percentage of a particular minority chosen for jury duty and the percentage of that minority available in the population from which the jurors are drawn.
2. _____: _____. The Nebraska system of selecting jurors is clearly within constitutional limits.
3. **Constitutional Law: Criminal Law: Motions, Rules, and Orders.** A motion to suppress can only be urged by one whose Fourth Amendment rights were violated and not by one aggrieved solely by the introduction of the incriminating evidence.
4. **Criminal Law: Evidence.** It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
5. **Criminal Law: Statutes: Appeal and Error: New Trial.** Because of the provisions of section 29-2315.01, R. R. S. 1943, the State cannot cross-appeal from an order granting the defendant a new trial in a criminal case.
6. **Criminal Law: Sentences.** A sentence, in the absence of an abuse of discretion, will not be disturbed on appeal if it is within the range of the statutory penalties.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

David M. Geier, of Bauer, Galter & Geier, for appellant.

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

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

WHITE, C. THOMAS, J.

After trial to a jury the defendant was found guilty on three counts, two counts of assault with intent to commit great bodily injury and one count of rob-

bery. The trial court granted a new trial on the robbery count and overruled the motion for new trial on the conviction of the other two counts. The defendant was sentenced to terms of 2 to 5 years to be served consecutively. The defendant appeals and the State cross-appeals.

Defendant assigns three errors: (1) That the trial court erred in failing to sustain the defendant's motions attacking the method of selection and composition of the jury; (2) the trial court erred in failing to grant the defendant's motion for new trial on the two counts of assault with intent to inflict great bodily harm; and (3) that the sentences are excessive. The State cross-appeals asserting here that the trial court erred in granting the motion for new trial on the robbery count.

We shall take the defendant's errors in order. In his motion for an order dismissing the case or, in the alternative, dismissing the prospective panel of jurors, the defendant alleged that no persons of American Indian descent were included in the panel; that the panel did not evidence a reasonable cross-section of the community, that the panel was not selected in a manner reasonably calculated to encompass a reasonable cross-section of the community, and that the panel was in violation of the defendant's rights guaranteed him under the Sixth Amendment of the Constitution of the United States. The defendant, in support of his contention, introduced evidence that the 1970 census showed approximately 750 Indians living in Lancaster County. That total could be possibly as large as 1,000 Indians at any one time. The 1970 census shows Lancaster County to have a total population of 167,972. The Indian population of Lancaster County then was approximately one-third of one percent of the total population of the county. To support his contention that no American Indian had been summoned for jury duty in the last 18 years, the defendant relied on the testimony of the

jury commissioner who stated that he personally could not recall any Indian serving on a jury during his tenure but "there would be a lot of people that might be Indians that I wouldn't recognize as Indian, * * *." The jury commissioner also testified that surnames are an unreliable indicator of Indian heritage and that he was familiar with Indian families with names like Sheridan and Phillips while he also knew non-Indian people of the same name. An indication of the difficulty of ascertaining the heritage by surnames is the disclosure by the voir dire that a Mrs. Smith, a prospective juror, disclosed that she had Indian blood.

A prima facie case of discrimination in jury selection can be established upon demonstration that a significant disparity exists between the percentage of a particular minority chosen for jury duty and the percentage of that minority available in the population from which the jurors are drawn. See Gibson v. Blair, 467 F. 2d 842 (5th Cir., 1972). For example, in Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935), proof that a substantial segment of the population was of negroid descent, coupled with proof that no black American, although several were qualified, was ever called for jury service over an extended period of time, was held to constitute a prima facie case of systematic exclusion of a distinct minority from jury service.

The cases cited by the defendant in support of his contention that he has shown a prima facie case of systematic exclusion of American Indians from jury service in Lancaster County, Nebraska, are not at all similar to the facts in the current case. In Patton v. Mississippi, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1947), evidence was introduced that for 30 years no Negro had sat on a jury in the county even though the county's population was about one-third Negro. In Alexander v. Louisiana, 405 U. S. 625, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972), 6.75 percent of

the persons on the jury lists were Negro even though 21.06 percent of the total population from which the jurors were drawn was Negro. The failure of the State of Nebraska to be able to demonstrate that a population group consisting of less than one-third of one percent of the total population to have been called for jury duty even over an extended period of time is not sufficient evidence to raise a prima facie case of discrimination.

This court has previously approved of the statutory method of jury selection from voter registration lists. See State v. Gutierrez, 187 Neb. 383, 191 N. W. 2d 164 (1971). As shown by that opinion, Nebraska's jury selection process is racially neutral. Because members of minorities are not identified, Nebraska's jury selection process does not encounter the problems as did the jury selection processes in Avery v. Georgia, 345 U. S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953), where Negroes were identified by colored cards; or in Whitus v. Georgia, 385 U. S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967), where the letter "(c)" was placed after the names of Negroes. While some Indians may be easily identifiable by their surnames, many have names which are not obviously Indian. That fact fails to separate Indians from other ethnic groups. The defendant has failed to show evidence creating a presumption of discrimination. We find the assignment of error to be without merit.

The evidence shows that on November 29, 1974, the defendant and two other persons, Garrett Wounded Head and Laurence V. Redshirt, spent the evening in taverns in Lincoln, Nebraska. The defendant and the two other individuals were American Indians and were residing at the barracks at the Lincoln Air Park because of their connection to the defense of the Wounded Knee cases. At about 1:30 a.m. on November 30, 1974, the parties left a tavern to attend a party given by other Indians in the vicinity of the

residence of the complaining witness, Michael J. Williamson, at 614 New Hampshire Street, Lincoln, Nebraska. When the defendant and his two companions arrived, the Indian party had not yet started. Their attention was directed to a party being held by Williamson at the above address. Among those at the party was a recent acquaintance of Williamson, Leland E. Carmichael, also a complaining witness. The defendant and his two companions peacefully gained entrance to the Williamson apartment and, after remaining ½ hour to 45 minutes, they left the premises. They went to the party to which they had originally intended to go, remained there until approximately 3:30 a.m., returned to their car, and met a fourth person, Johnny Moore. The four then returned to Williamson's apartment. The evidence is conclusive that the four walked down the outside stairs to a basement apartment, forcibly broke into the apartment, tearing the lock from the door frame, and demanded liquor from Williamson who replied that he had none and that the party was over and asked them to leave. At this time Carmichael was in a spare bedroom in the Williamson apartment. The evidence is undisputed that the complainants were then brutally beaten by fists, pop containers, boots, and in the case of Williamson, a chair. Both suffered painful injuries requiring medical attention. During the course of the encounter, Carmichael's money was demanded of him, presumably by Moore. Following threats and after blows to the head by a boot, Carmichael gave his wallet to Moore. At the same time or shortly thereafter, a cord was jerked from the stereo set, the telephone was pulled out, and both complainants' hands were tied. The Indians then left. Williamson testified at trial that after he returned from receiving treatment for his injuries at Lincoln General Hospital, he noticed several items were missing from his apartment including a Westinghouse portable radio, a

cassette tape recorder player, and a carrying case for cassette tapes.

Subsequently, on December 2, 1974, officers of the Lincoln police department, acting pursuant to a search warrant, searched the A.I.M. barracks at the Lincoln Air Park and located exhibits 16, 17, and 18, the portable radio, the cassette player, and the cassette carrying case, in a room occupied by Belva Thunderhawk and Garrett Wounded Head. The defendant Martinez, prior to trial, filed a motion to suppress which was overruled. We agree. Without going into the technical aspects of the sufficiency of the affidavit and the search warrant and the manner of executing the same, it is sufficient to point out that a motion to suppress can only be urged by one whose Fourth Amendment rights were violated and not one aggrieved solely by the introduction of the incriminating evidence. State v. Waechter, 189 Neb. 433, 203 N. W. 2d 104 (1972); State v. Van Ackeren, 194 Neb. 650, 235 N. W. 2d 210 (1975). The defendant did not contend at the trial court level and does not assert in this court that he had any reasonable expectation of privacy in the room of Belva Thunderhawk and Garrett Wounded Head.

At trial the defendant again objected to the introduction of exhibits 16, 17, and 18. The court overruled the objection and allowed those exhibits into evidence. The cause was submitted to a jury which returned a guilty verdict against the defendant on all three counts. The defendant then filed a motion for new trial alleging, among other errors: "Errors of law whereby the state was allowed to place into evidence certain items of personal property seized as a result of the execution of a search warrant, which items did not constitute evidence of the offences (sic) charged, and the introduction of which was prejudicial to the defendant to an extent which outweighed any possible probative value." Defendant points out to this court that the robbery offense of

which he was charged was that of taking property of value from the person of Leland E. Carmichael, to wit, money, and that the defendant was not charged with the offense of taking by force and violence the property of Michael J. Williamson. He then argues that the introduction of exhibits 16, 17, and 18 was prejudicial because those exhibits were not evidence of the crime of which he was charged but of possibly another or separate crime. The trial court overruled the motion for new trial in the assault counts and granted the motion for new trial as to the robbery count, suggesting that it had improperly admitted the exhibits. We disagree. As part of one incident the four Indian males, including the defendant, forcibly entered Williamson's apartment and thereafter assaulted and robbed Williamson and Carmichael. Both Williamson and Carmichael identified Wounded Head and Martinez as participants in the assaults and robberies as did Redshirt, a participant in the assault and robbery. The exhibits tended to lend credence to the testimony of Williamson, Carmichael, and Redshirt which verified the participation of Wounded Head. The evidence thereby affords credibility to their identification of the defendant Martinez as a participant. Evidence introduced relating to the robbery of Williamson would certainly be relevant to prove the requisite knowledge, motive, and intent of Martinez in the entering of the Williamson property, the assault on Williamson and Carmichael, and the robbery of Carmichael. As this Court has stated previously: "It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167 (1966). See, also, State v. Riley, 182 Neb. 300, 154

N. W. 2d 741 (1967). The evidence was properly admitted. The court was correct in denying the motions for new trial on the assault counts and was incorrect in granting the motion for new trial on the robbery count.

The State cross-appeals from the order granting a new trial on the robbery count and asks that we reinstate the verdict and remand to the District Court for sentencing. We decline. The rule in this State is that in a criminal case the State cannot cross-appeal from an order granting the defendant a new trial. State v. Taylor, 179 Neb. 42, 136 N. W. 2d 179 (1965). The State's right to appeal in criminal cases is limited by section 29-2315.01, R. R. S. 1943, which provides that the State may appeal only after a final order has been filed in the case.

The third assignment of error relates to the alleged excessiveness of the sentence. The defendant was sentenced to consecutive terms of 2 to 5 years on each of the assault counts. The assaults and robbery were particularly brutal. We have examined the presentence report. The defendant has an extended criminal record dating back to 1964. His juvenile record includes convictions for petit larceny and reckless driving. He was placed on probation for robbery. He has been arrested for the offenses of assault and battery on a police officer, rape, and resisting arrest. The sentence is well within the limits of the statute. The statute defining assault with intent to inflict great bodily injury provides for imprisonment for not less than 1 year nor more than 20 years. § 28-413, R. R. S. 1943.

We have often said that a sentence, in the absence of an abuse of discretion, will not be disturbed on appeal if it is within the range of the statutory penalties. State v. Tweedy, 196 Neb. 251, 242 N. W. 2d 629 (1976).

The judgment and sentences of the District Court are affirmed.

AFFIRMED.

RANDALL L. CROMER ET AL, APPELLANTS, V. FARMLAND SERVICE COOP, INC., APPELLEE.

252 N. W. 2d 635

Filed April 20, 1977. No. 40934.

1. **Trial: Evidence.** Rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced by the adverse party.
2. _____: _____. It is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case-in-chief or should have been introduced at that time.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded for a new trial.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellants.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier and Dale A. Romatzke, for appellee.

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

PER CURIAM.

The plaintiffs' mobile home was destroyed by fire on November 11, 1972. The furnace in the home had been converted from natural gas to propane by employees of the defendant on October 21, 1972. This action was brought to recover the damages caused by the fire. The jury returned a verdict for the defendant and the plaintiffs have appealed. The plaintiffs contend the judgment is not supported by the evidence; the trial court erred in refusing to allow the plaintiffs to introduce rebuttal evidence; and the trial court erred in failing to grant a new trial on the

basis of statements made by several of the jurors after the verdict had been received.

The record shows the plaintiffs' mobile home was equipped with a Payne gas furnace that was designed to burn natural gas as a fuel. In October 1972, the plaintiffs moved their mobile home from Grand Island, Nebraska, to the Lake Jeffrey area in Lincoln County, Nebraska. Natural gas was not available at Lake Jeffrey so the plaintiffs asked the defendant to convert their furnace so that it could be fired with propane.

The work was performed by Keith Fickenscher, an employee of the defendant. Fickenscher testified that he installed a regulator on the bank, laid approximately 100 feet of copper tubing in a trench from the tank to the home, and then installed a second regulator at the point where the line connected to the existing gas line in the home.

In converting the furnace from natural gas to propane he installed a new pilot assembly designed to burn propane and resized the orifices in the manifold. He also installed a blank in the internal regulator on the gas valve so that it would permit the furnace to operate on propane.

The allegations of negligence relate primarily to the resizing of the orifices. The orifices are small brass fittings in the manifold that control the amount of gas which is supplied to the burners in the furnace. Since propane has a higher BTU content than natural gas and is delivered at a higher pressure it is necessary to reduce the size of each orifice in order to maintain the same BTU rating of the furnace after the conversion. Fickenscher resized the orifices by filling them with solder and then redrilling each orifice with a smaller sized drill.

On October 29, 1972, the furnace malfunctioned. There was some smoke, the heat went off, and the furnace would not operate. Mr. Cromer took off the back of the furnace and saw that some of the control

wires had been burned and a plastic control knob had burned or melted. Mr. Cromer called the defendant and Irvin Williams, an employee of the defendant, came out to repair the furnace.

Williams repaired the wiring and then discovered that the solder was missing from one of the orifices and it was allowing too much propane to reach the burner. He resized that orifice by pounding or "peening" it shut and then redrilling it. He relighted the furnace and recycled the thermostat several times to make sure that it was operating properly before he left.

On November 11, 1972, the home caught on fire. The plaintiffs were in Wyoming when the fire broke out. Jerry Kort, a neighbor whose mobile home was about 100 feet away, was awakened by a loud noise. He looked out the window and could see smoke coming from the furnace room door of the plaintiff's home. He reported the fire and then went to the plaintiffs' home. He opened the furnace room door and saw that smoke and flames were coming out of the furnace "right at the bottom." He then shut off the propane supply. It took from 30 to 45 minutes to bring the fire under control and there was severe damage to the home and its contents.

The plaintiffs, in their case-in-chief, called two witnesses who testified concerning the cause of the fire. Kort testified concerning what he saw and heard at the time of the fire. Leonard Simon, the distributor of Payne furnaces for this area, testified as an expert witness.

Simon testified that the proper method of conversion would have been to install new orifices and burners, and the pilot light should have been relocated. He further testified there was no known way in which an orifice can be filled with lead or "peened" shut and then redrilled accurately in the field. He examined the orifices removed from the plaintiffs' furnace and found they were too large and

would admit an excessive amount of propane. He testified that it was his opinion the fire was caused by too much propane entering the furnace, due to the fact the burners had not been changed and the orifices were oversized. The excessive amount of propane resulted in a flashback or small explosion which blew the burner out of alignment and the door out of the compartment. The result was an uncontrolled fire. The safety devices did not operate because the insulation on the wiring burned off.

The defendant produced the testimony of Fickenscher and Williams, the employees of the defendant, who had made the original conversion and had repaired the furnace on October 29, 1972, after it had malfunctioned. The defendant also called three expert witnesses, Roy Hill, who had been in the propane business in North Platte, Nebraska, since 1946; Robert Gerrard, the gas superintendent of Northwestern Public Service Company at North Platte; and Burdette Lundberg, who has been in the propane business in Kearney, Nebraska, since 1951.

The defendant's evidence tended to prove that the method used by the defendant's employees to convert the plaintiffs' furnace was proper; that the orifices were properly resized; and there was no reason why the same burners could not be used for both natural gas and propane. There was also evidence that if the furnace is over-fired, soot collects on the heat exchanger and other parts of the furnace. The absence of heavy soot deposits and the absence of damage to the plastic knobs and other components near the manifold, including the wiring and wiring diagram on the front panel, indicated there had been no over-firing or "roll-out."

The defendant's evidence tended to disprove the allegations of negligence made by the plaintiffs and created a question for the jury. The plaintiffs' contention that the verdict for the defendant is not supported by the evidence is without merit.

On rebuttal the plaintiffs offered the testimony of an additional expert witness, Herbert R. Pearson. Pearson had retired in 1974 after having been in the propane business in North Platte, Nebraska, since 1942. Roy Hill, who had testified for the defendant, had been employed by Pearson for 9 years.

Pearson testified that the proper way to convert a furnace from natural gas to propane was to follow the manufacturer's specifications; and that it is improper to resize an orifice by soldering or peening it shut and then redrilling it. Objections to further testimony by this witness on the ground that it was not proper rebuttal were sustained. The plaintiffs then made the following offer of proof: "MR. PEDERSON: The plaintiff would move to prove by this witness on rebuttal that it is significant to him, in his opinion, that this fire was caused — started in the lower portion of this furnace for the reason that he has been made aware of the fact that a witness immediately in the area, Mr. Kort, heard an explosion. He went over to the furnace door, opened it and saw flames coming out beneath. This is offered in rebuttal for the reason that the testimony of a witness has previously been offered to say that the fire couldn't have started from a lower portion; no soot, not a furnace started fire. MR. KAY: I will object to the offer and the question for the following reasons: 1) There is no proper foundation for this man to give any opinion to start with. THE COURT: This is true. MR. KAY: That is 1. And 2) — There is absolutely no evidence on the part of the defense as to where this fire started or the cause of the fire. THE COURT: I want to ask a question. Didn't you use your witness to testify where it did start; how can you come back. . . . . MR. PEDERSON: But it is significant to him it started down in the lower portion. THE COURT: Overruled."

As we understand the record, the defendant's objection to the offer of proof was sustained. The rul-

ing on the objection was announced as "overruled" but the parties seem to have understood this to mean the offer to prove was overruled.

In their case-in-chief the plaintiffs had produced evidence which tended to prove the fire was caused by an over-firing or "roll-out" in the furnace. The defendants' evidence tended to disprove this theory and suggested that the condition of the furnace after the fire indicated there had been no over-firing or "roll-out." This evidence tended to support an inference that the fire started somewhere other than near the bottom of the furnace. The question here is whether the plaintiffs were entitled to produce additional evidence in rebuttal to show there had been an over-firing or "roll-out."

The general rule is that rebuttal evidence should be confined to that which explains, disproves, or counteracts evidence introduced by the adverse party. McClellan v. Hein, 56 Neb. 600, 77 N. W. 120. It is within the discretion of the trial court to allow the introduction of evidence in rebuttal which would have been proper evidence upon the case-in-chief or should have been introduced at that time. Sacco v. Gau, 188 Neb. 808, 199 N. W. 2d 605. The issue is whether the trial court abused its discretion in refusing to allow the plaintiffs to introduce additional evidence in rebuttal as to the cause of the fire.

We are of the opinion that the ruling of the trial court was too restrictive and the plaintiffs should have been allowed to explain if possible that the condition of the furnace after the fire was consistent with their theory as to how the fire started. The judgment must, therefore, be reversed and the cause remanded for a new trial.

It is unnecessary to consider the other assignment of error.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

LYLE WITTWER ET AL., APPELLEES, V. CETHA FLOY DORLAND, DECEASED, BY HOME STATE BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF CETHA FLOY DORLAND, DECEASED, APPELLANT, IMPLEADED WITH WARREN BRUCE DORLAND, APPELLEE, IMPLEADED WITH LEONA M. DORLAND, ALSO KNOWN AS LEONA M. MURPHY, ET AL., APPELLANTS, IMPLEADED WITH PHOENIX MUTUAL LIFE INSURANCE COMPANY, A CONNECTICUT CORPORATION, ET AL., APPELLEES.

253 N. W. 2d 26

Filed April 20, 1977. No. 40952.

1. **Mortgages: Foreclosure: Liens.** A foreclosure action is not a suit to quiet title but for the purpose of determining the existence of a mortgage lien, to ascertain the amount thereof and its priority, and to obtain a decree directing the sale of the premises in satisfaction thereof in case no redemption is made.
2. **Mortgages: Pleadings.** Where title has been made an issue by the parties to the foreclosure action, the court may properly consider and decide that issue.
3. **Mortgages: Judgments: Statutes: Evidence: Notice.** A party seeking to open up a judgment secured upon constructive service must show by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense.
4. **Pleadings: Judgments: Statutes.** One seeking to open up a judgment under sections 25-525 and 25-2001, R. R. S. 1943, must file a meritorious answer.
5. **Judgments: Statutes.** The opening up of a judgment upon complying with sections 25-525 and 25-2001, R. R. S. 1943, is a matter of right.
6. **Rules of Supreme Court: Appeal and Error.** The Supreme Court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Reversed and remanded.

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary and Martin, Koutouc, Koutouc & Fankhauser, and Loren Joe Stehlik, for appellant.

Virgil R. Demerath, John C. Mitchell, and Thomas J. Gist, for appellee Dorland.

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

WHITE, C. J.

On October 24, 1973, Lyle and Mae Wittwer filed a petition in the District Court for Richardson County, Nebraska, to foreclose a mortgage on approximately 900 acres of land located in Richardson County. Named among the defendants were Cetha Floy Dorland and her son, Warren Bruce Dorland, appellee in this case. The Wittwers' petition made reference to a deed being held in escrow at the Farmers State Bank in Sabetha, Kansas, which purported to transfer the real estate, which was the subject of the foreclosure action, to the appellee upon the death of Cetha Floy Dorland.

In her answer to the Wittwers' petition, Cetha Floy Dorland disputed the validity of the deed being held in escrow, alleging that there was no consideration or delivery; that she never intended to pass a present interest; that the deed was intended to have no effect until her death; and that the deed was therefore invalid, void, and of no effect.

At the time of this foreclosure action, the whereabouts of the appellee were unknown. Service by publication as to him was requested and granted. On July 2, 1974, on its own motion, the District Court appointed a guardian ad litem to protect the interests of appellee in the foreclosure action.

On August 23, 1974, Cetha Floy Dorland was killed in an automobile accident. Subsequently the suit was revived in the name of the executor of her estate. On January 7, 1975, the appellee's guardian ad litem filed an answer to the Wittwers' petition, on behalf of the appellee, alleging that the deed referred to in the Wittwers' petition was valid and that title to the subject real estate was in the appellee; and asking for the court to vest title to all remaining land in Warren Bruce Dorland.

Trial was held on January 13, 1975. On January

16, 1975, the District Court entered a decree of foreclosure, granting the foreclosure requested by the Wittwers. Additionally, in its decree, the District Court found that there was no delivery of the 1960 warranty deed being held in escrow in the Farmers State Bank in Sabetha, Kansas; that Cetha Floy Dorland did not intend the deed to operate as a muniment or title, or that she intended to relinquish all dominion, control, and authority over the real estate described in the warranty deed; and that the deed was therefore void. The court further found that the purported conveyance was testamentary in character, without consideration, and not executed in accordance with the laws of the State of Nebraska, and that the appellee acquired no interest in the real estate by reason of this purported conveyance.

Thereafter, the executor of the estate of Cetha Floy Dorland entered into a contract for the sale of the subject real estate to a third party.

At the time the foreclosure action was filed and during the pendency thereof, no one had seen or heard from, or knew the whereabouts of, the appellee. Thereafter the appellee reappeared and sought to have the foreclosure decree opened up. On March 11, 1976, more than a year after the foreclosure decree, he filed a petition in the District Court for a new trial.

The matter of the appellee's right to a new trial was tried on June 10, 1976. Following a motion for a directed verdict, the District Court denied the appellee's petition to vacate, modify, or set aside the prior foreclosure judgment. On June 23, 1976, the District Court filed its journal entry, which was in accord with the judgment entered on June 10, 1976, in that appellee's motion was denied, but which contained the following language which has led to this appeal: "The court further finds that the other matters raised by Warren Bruce Dorland in his motion for a new trial are not applicable to this case and do not come

within the terms of Nebraska Statute 25-2001 because the question of the title or ownership of the land at the time of the foreclosure action as between the defendants, was not put in issue or presented by Plaintiff's Petition or other pleadings, and the Court had no jurisdiction to find or determine that issue in this mortgage foreclosure case."

We reverse the judgment and remand the cause to the District Court for further proceedings in accordance with this opinion.

The appellant contends that the District Court erred in modifying the foreclosure decree by holding that it had no jurisdiction in the foreclosure action to determine the issue of title as between Cetha Floy Dorland and Warren Bruce Dorland at the time of the mortgage foreclosure.

"A foreclosure action is not a suit to quiet title but for the purpose of determining the existence of a mortgage lien, to ascertain the amount thereof and its priority, and to obtain a decree directing the sale of the premises in satisfaction thereof in case no redemption is made * * *." Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545 (1943), cert. den. 320 U. S. 781, 64 S. Ct. 259, 88 L. Ed. 469. However, where title has been made an issue by the parties to the foreclosure action, the court may properly consider and decide that issue. Shellenbarger v. Biser, 5 Neb. 195 (1876); Lounsbury v. Catron, 8 Neb. 469, 1 N. W. 447 (1879).

In their petition the Wittwers raised the issue of title to the mortgaged property. In her answer Cetha Floy Dorland disputed the validity of the deed referred to in the Wittwers' petition and alleged that title to the mortgaged land was in her. Pursuant to its general equity powers, the District Court appointed a guardian ad litem to protect the interests of the appellee, whose whereabouts were then unknown. See 27 Am. Jur. 2d, Equity, § 69, p. 592. In his answer filed on behalf of the appellee, the guard-

ian alleged that the deed was valid and that, by virtue of its terms and the death of Cetha Floy Dorland, title to the remaining real estate should be vested in the appellee.

The question of title to the mortgaged property was before the District Court, having been put into issue by the pleadings of the parties to the foreclosure action, and the District Court acted properly in deciding this issue. Once a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes and proceed to a determination of all the matters put in issue by the pleadings, and thus avoid unnecessary litigation. Dixon v. O'Connor, 180 Neb. 427, 143 N. W. 2d 364 (1966); Miller v. Knight, 146 Neb. 207, 19 N. W. 2d 153 (1945). The District Court has jurisdiction to determine the title to real estate in the State of Nebraska. The finding by the District Court in its journal entry of June 23, 1976, that it had no jurisdiction to decide the issue of title to the mortgaged property in the earlier foreclosure action was error.

The appellee sought to open up the foreclosure judgment pursuant to the provisions of section 25-2001, R. R. S. 1943, and section 25-525, R. R. S. 1943. The District Court denied the appellee's motion for a new trial. In his brief and on oral argument, the appellee contends that this was error.

Section 25-2001, R. R. S. 1943, as is relevent here, provides: "A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made. * * * (2) by a new trial granted in proceedings against defendants constructively summoned as provided in section 25-517."

Section 25-525, R. R. S. 1943, provides that a party against whom a judgment or order has been rendered without other services than by publication, may, within 5 years after the date of judgment or order, have the judgment or order opened up and be

let in to defend. The person seeking to open up the judgment must give notice to the adverse party, file a full answer, pay all costs if the court so requires, and make it appear to the satisfaction of the court that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense.

A party seeking to open up a judgment under section 25-525, R. R. S. 1943, must show by a preponderance of the evidence that he had no actual notice of the pendency of the action in time to appear and make his defense. McNally v. McNally, 152 Neb. 845, 43 N. W. 2d 170 (1950). One seeking to open up a judgment under this section must file a meritorious answer. Oaks v. Ziemer, 62 Neb. 603, 87 N. W. 350 (1901); Waters v. Raker, 1 Neb. (Unoff.) 830, 96 N. W. 78 (1901). The opening up of a judgment, upon complying with this statute, is a matter of right. Brown v. Conger, 10 Neb. 236, 4 N. W. 1009 (1880).

The appellant points out that, while the appellee argues in his brief and on oral argument that the denial of his motion for a new trial was error, the appellee failed to file a cross-claim contesting the denial of his motion for a new trial. The appellant argues that we are thus without power to review the denial of the appellee's motion for a new trial.

It is true that we have a procedural rule that an appellee may not question a portion of a judgment at issue on appeal in the absence of his having properly filed a cross-appeal. See, e.g., Edquist v. Commercial Sav. & Loan Assn., 191 Neb. 618, 217 N. W. 2d 82 (1974); Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492 (1959); Rules 1 d, 8 b 3, Revised Rules of the Supreme Court, 1974. However, this court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice. Rule 8 a 2(3) specifically provides that the court may, at its option, notice a plain error not assigned. In

Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 215 N. W. 2d 105 (1974), we recently held that this court may, at its option, consider a plain error not specified in appellant's brief. See, also, § 25-1919, R. R. S. 1943; Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217 (1957); Adams v. Nebraska Savings & Exchange Bank, 56 Neb. 121, 76 N. W. 421 (1898); 4A C. J. S., Appeal and Error, § 1154, pp. 1240 to 1244.

The appellee clearly met all the statutory requirements to entitle him to open up, as a matter of right, the foreclosure judgment. Brown v. Conger, *supra*. The appellee brought his action within 5 years of the date of the foreclosure judgment. Service on him in that action was obtained by publication. The appellee testified, without contradiction, that he had no knowledge of any kind concerning the foreclosure action until May 1975. His tendered defense was meritorious on its face. It was plain error to deny his motion to open up the foreclosure judgment.

The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

All costs are taxed to the appellant Home State Bank and Trust Company because the relief ordered by this court is a reversal of a judgment against the appellee Warren Bruce Dorland on a motion for a new trial in the trial court.

REVERSED AND REMANDED.

CLINTON, J., concurring in result.

I concur in the result. The trial court should have set aside its judgment determining the status of the deed to Warren Bruce Dorland. The only service on Dorland was constructive notice of a mortgage foreclosure. The court had no jurisdiction to try issues of which Dorland had no constructive notice. The guardian ad litem had no power or authority to expand the issues by joining issue with Cetha Floy Dorland when she sought to expand the issues in her answer. Walker v. Sanchez, 13 La. An. Rep. 505;

Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212. SPENCER, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. EDGAR BEAR RUNNER, APPELLANT.

252 N. W. 2d 638

Filed April 20, 1977. No. 40971.

1. **Rules of Supreme Court: Appeal and Error.** Under the rules of this court only errors assigned and discussed in the brief will be considered.
2. **Criminal Law: Trial: Due Process.** The general rule is that an accused has a right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings.
3. **Criminal Law: Trial: Due Process: Instructions.** The defendant has no right founded in the common law or in the Constitution to be present in chambers while jury instructions are formulated by counsel and the trial judge.
4. **Evidence: Trial.** 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.
5. **Criminal Law: Arrest: Evidence.** Where the arrest of the defendant and the circumstances surrounding it are material to the issues of the case, evidence to explain the arrest of a defendant and the circumstances surrounding it is admissible even if other crimes are disclosed.
6. **Trial: Instructions.** All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudical error.
7. **Criminal Law: Arrest: Police Officers and Sheriffs: Statutes.** The use of force is not justifiable under section 28-836(2), R. R. S. 1943, to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.
8. **Courts: Instructions.** The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given.
9. **Trial: Instructions: Appeal and Error.** Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law.

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

Charles Plantz and Wade H. Eldridge, Jr., for appellant.

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

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

SPENCER, J.

Defendant, Edgar Bear Runner, appeals from a judgment of conviction entered on a jury verdict finding him guilty of assault on a police officer. Defendant sets out 11 assignments of error, only 6 of which are argued in the brief. Under the rules of this court only errors assigned and discussed in the brief will be considered. Rule 8a 2(3), Revised Rules of the Supreme Court, 1974. The assignments will be noted and discussed in the same order as they appear in the defendant's brief. We affirm.

The incident resulting in the charge occurred on the evening of March 1, 1976, in Gordon, Nebraska. Officers Etzelmiller and Jensen of the Gordon police force received a radio report of a fight in front of a bar in downtown Gordon. When they arrived on the scene there was no fight but they did observe a car driving away in an erratic manner. The officers stopped the car. The driver of the car, Leo Plenty Arrows, Jr., appeared to have been beaten recently.

Officer Etzelmiller testified he was informed by Leo Plenty Arrows that Dennis and Edgar Bear Runner had beaten him up and that they were in a car further up the street. He was also informed by Leo Plenty Arrows that they had guns. At the trial, Leo Plenty Arrows denied he told the officers who beat him up or that he pointed out any particular car.

Etzelmiller approached the car containing defendant and three other occupants and asked their names. Officer Jensen arrested the driver of the

car, Archie Two Eagles, because he believed there was a warrant outstanding for his arrest. It was later determined that there was no outstanding warrant.

Etzelmiller testified that after the arrest of Archie Two Eagles he asked the other occupants of the vehicle for the keys in order to conduct a search. Someone started to hand him the key but defendant grabbed them and asked for a search warrant. It was at this point that defendant was placed under arrest for interfering with a police officer. Defendant was placed in the patrol car.

Etzelmiller then returned to the car belonging to Archie Two Eagles. He saw someone open the door of the patrol car and the defendant got out. Etzelmiller approached defendant and told him to get back into the patrol car. Defendant hit him in the side of the face with his fist. Officer Jensen grabbed the defendant and Etzelmiller struck the defendant back. A state patrolman also helped subdue defendant and put handcuffs on him.

Edgar Bear Runner denied that he ever had the car keys. He testified Etzelmiller assaulted him with a pistol when he asked for a search warrant. He further testified when he got out of the patrol car Etzelmiller and two other officers jumped him and started hitting him. He insisted he was not swinging his fists and did not intentionally assault Etzelmiller. He testified that one of his hands might have contacted Etzelmiller as he was trying to ward off the blows. It is evident the jury did not accept the defendant's version of the affair.

Defendant first contends it was error for the trial court to refuse his request to be personally present at the conference on jury instructions. The general rule is that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. Faretta v. California, 422 U. S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d

562 (1975). This court has stated: " 'Defendant has a right to be present at all times when any proceeding is taken during the trial, from the impaneling of the jury to the rendition of the verdict, inclusive, unless he has waived such right; * * *.' " Strasheim v. State, 138 Neb. 651, 294 N. W. 433 (1940). Section 29-2001, R. R. S. 1943, provides in part: "No person indicted for a felony shall be tried unless personally present during the trial."

The foregoing rules, however, do not require the defendant's presence at a conference on jury instructions. This issue was raised in United States v. Gregorio, 497 F. 2d 1253 (1974). The Court of Appeals for the Fourth Circuit held: "* * * defendant has no right founded in the common law or in the Constitution to be present in chambers while jury instructions are formulated by counsel and the trial judge."

This exact question has not arisen in Nebraska. However, in State v. Nevels, 192 Neb. 668, 223 N. W. 2d 668 (1974), we determined that no error was committed where a juror was questioned in chambers in defendant's absence when defense counsel was present. We have also held that a defendant has no constitutional right to be present at the hearing on a motion for a new trial. State v. Wells, 197 Neb. 584, 249 N. W. 2d 904 (1977). There is no merit to defendant's first assignment.

Defendant next argues that Etzelmiller was not justified in arresting him for interference because he was not justified in his demand to search the trunk of the car in which defendant was riding. Defendant contends these issues were at the heart of the controversy and the court should have ruled on his motion to suppress previous to the trial. There was no search of property belonging to the defendant. The only search was of the vehicle in which he was riding. There is no need to consider on what basis defendant could assert any standing to challenge

the search as no evidence was seized as a result of that search.

It appears that defendant's objection is not to evidence seized but whether the officer had probable cause to arrest him or, alternatively, the defendant's companion, Archie Two Eagles, prior to the assault. The question is not relevant to the question of whether or not an assault occurred. The jury, by accepting the officer's testimony, concluded that prior to the assault no force had been exercised by the officers that could be characterized as unlawful. There is no merit to defendant's second assignment.

Defendant's third assignment of error is that the court erred in allowing Etzelmiller to testify what Leo Plenty Arrows had told him. Defendant argues it was hearsay and constituted evidence of another crime which was inadmissible. As defined by section 27-801 (3), R. R. S. 1943: "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; * * *." The statement made by Leo Plenty Arrows to Etzelmiller was not admitted for the purpose of proving the truth of the matter asserted. It was received only for the limited purpose of explaining the officer's actions and the jury was so advised. A cautionary instruction was also given to the jury.

The officers responded to a radio report of a fight. They found Leo Plenty Arrows driving his car in an erratic manner and obviously suffering from the results of a recent beating. His statements were sufficiently close in time and sufficiently spontaneous to justify the conduct of the officers in approaching the car in which the defendant was present.

We said in State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973): Well-established rules have developed concerning the admission of evidence of other criminal conduct. Although this evidence is generally inadmissible since it suggests that the defend-

ant has a propensity to commit crime, the trial court can, in its discretion, admit relevant evidence of other criminal acts and reversal is only commanded when it is clear the questioned evidence has no bearing upon any of the issues involved.

The questioned evidence here provided the reason why the officers approached the car in which the defendant was present. Evidence to explain the arrest of a defendant and the circumstances surrounding it, even if other crimes are disclosed, is admissible. See State v. Sharp, 184 Neb. 411, 168 N. W. 2d 267 (1969). There is no merit to defendant's third assignment.

In his fourth assignment of error, defendant objects to the giving of the following instruction: "You are instructed that Roger Etzelmiller had probable cause to arrest the defendant at the time in question." Defendant appears to focus his argument on the fact that the jury could interpret this as an instruction by the court that Etzelmiller had probable cause to arrest defendant for the assault of Leo Plenty Arrows. The defendant was arrested for interfering with a police officer. However, he was not tried on that charge. He was tried upon the charge of assaulting or resisting a police officer after his arrest.

Probable cause for the arrest was not an issue in the case. As we will point out later, the trial court correctly determined that the issue of the legality of defendant's arrest was not material. While instruction No. 15 was unnecessary, it is not prejudicial. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Ralls, 192 Neb. 621, 223 N. W. 2d 432 (1974).

From the charge and the evidence it is obvious the jury believed the defendant was interfering with the

officer's performance of his duties related to the investigation of a reported fight or disturbance in the vicinity of the tavern. Even by the defendant's testimony, there can be no doubt that he in some way interfered with that investigation. It is obvious the jury believed that defendant did in fact assault Etzelmiller. Whether or not defendant was properly under arrest, whether the officer was authorized to arrest him or had probable cause to arrest him prior to the assault, is totally irrelevant to the issue in this case. The question was whether or not the defendant forcibly assaulted or resisted a police officer. There is no merit to defendant's fourth assignment.

Defendant's fifth assignment of error is an expansion of his fourth: That the giving of instruction No. 15 assumed a controverted material fact upon which there is a conflict of testimony. This brings us to the central issue in the case: Does a person have the right to use force to resist arrest? Defendant contends that the question of probable cause for arrest is material to a determination of this issue. This clearly is not the law. Section 28-836(2), R. R. S. 1943, provides: "The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful." This section is identical to section 3.04(2)(a)(i) of the Model Penal Code.

In the comments to the Model Penal Code section, the drafters noted that while prior law may have allowed the use of force to avoid unlawful arrest, "* * * Legislative reconsideration of the issue should result in the conclusion that there ought not be a privilege to employ force against a public officer who, to the actor's knowledge, is attempting only to arrest him and subject him to the processes of law. It should be possible to provide adequate remedies against illegal arrest, without permitting the arrested person to resort to force — a course of action highly likely

to result in greater injury even to himself than the detention."

The comments continue: "The paragraph, it should be noted, forbids the use of force for the purpose of preventing an arrest; it has no application when the actor apprehends bodily injury, as when the arresting officer unlawfully employs or threatens deadly force, unless the actor knows that he is in no peril greater than arrest if he submits to the assertion of authority." Comments, Model Penal Code, Tent. Dr. No. 8, pp. 18, 19. Section 28-836, R. R. S. 1943, adequately covers these contingencies.

Defendant's last assignment of error pertains to the refusal to give his tendered instructions Nos. 7, 8, 9, 10, 11, and 12.

Defendant's instructions Nos. 7, 8, and 9 were adequately covered in the instructions given by the court. The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given. State v. Bolden, 196 Neb. 388, 243 N. W. 2d 162 (1976).

Requested instructions Nos. 10, 11, and 12 are not applicable to this case. These instructions are based on section 28-839, R. R. S. 1943, which sets out what force is justifiable when making an arrest. This section is designed to provide protection to law enforcement officers in criminal prosecutions, and it would be erroneous to apply it in this case. This is made clear by section 28-843, R. R. S. 1943, which provides that justification is an affirmative defense. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Boss, 195 Neb. 467, 238 N. W. 2d 639 (1976). There is no merit to defendant's fifth assignment.

In the discussion on the failure to give the tendered instructions defendant also objects to the giving of instruction No. 13. Defendant states in his brief that the instruction was "that one cannot use

force to resist any arrest, even an unlawful one, if one knows he is being arrested by a law enforcement officer." The actual wording of the instruction was: "The use of force is not justifiable to resist an arrest which the actor knows is being made by a law enforcement officer." This was a correct statement of the law as noted earlier. § 28-836, R. R. S. 1943.

There is no merit to any of the assignments discussed by the defendant. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE JAMES FORD, APPELLANT.

252 N. W. 2d 643

Filed April 20, 1977. No. 40989.

1. **Criminal Law: Guilty Plea.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.
2. **Criminal Law: Post Conviction.** In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Order dismissing proceeding vacated and cause remanded to District Court for further proceedings.

Thomas A. Vakulskas, for appellant.

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

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

MCCOWN, J.

This is a post conviction proceeding to vacate and set aside a 15 to 25 year sentence imposed against the defendant following a plea of guilty to a charge

of rape. The District Court determined that the files and records in the case showed to the satisfaction of the court that the defendant was entitled to no relief, denied an evidentiary hearing, and dismissed the motion.

The defendant, Jesse James Ford, pleaded guilty to a charge of rape pursuant to a plea bargain in which the State dismissed charges of robbery and kidnapping arising out of the same incident. He was represented by appointed counsel. The direct appeal is reported in State v. Ford, 194 Neb. 400, 231 N. W. 2d 515.

In his pro se motion for post conviction relief the defendant alleges that his guilty plea was not voluntary because his court-appointed attorney told him that he would not receive a sentence in excess of 3 to 15 years imprisonment, and that he would not serve more than 2 years on the sentence. He also alleged that he was threatened with "five (5) fifties (50) back to back"; that he was told that the rape victim was pregnant and a local jury would hang him; and that his attorney threatened to quit if he did not follow his advice.

The record establishes that at the arraignment the court asked the defendant: "Has anyone offered you anything or made any promises or threats to you to get you to plead guilty?" Before defendant had an opportunity to respond, the county attorney interrupted and proceeded to inform the court of the plea bargaining agreement which had been entered into. The agreement was that in exchange for the guilty plea the State would dismiss the robbery and kidnapping charges, and would make no recommendations at sentencing on the rape charge. Upon concluding his explanation of the plea bargain he had made with defendant's attorney, the county attorney asked the defendant if there was any other stipulation or matter which was a part of the plea bargain and the defendant responded "no." There-

after the defendant was never asked by anyone whether any promises or threats had been made to him by anyone, and at no time did the defendant ever respond to or answer such a question.

In Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, the United States Supreme Court held that a waiver of rights cannot be presumed from a silent record and that the record must affirmatively disclose that a defendant entered his plea understandingly and voluntarily.

In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, in compliance with Boykin, this court held that the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. Turner also held that there must be substantial compliance with the Standards Relating to Pleas of Guilty adopted by the American Bar Association as a minimum procedure in the taking of guilty pleas. Those standards require the court to "address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea." Standard 1.5, p. 8, Standards Relating to Pleas of Guilty. The record establishes that the standards were not complied with in this case. Because of the failure to affirmatively show the absence of promises or threats, the record fails to establish that the defendant entered his plea understandingly and voluntarily, and it also fails to affirmatively establish that defendant's allegations as to promises and threats do not entitle him to relief. An evidentiary hearing was necessary to determine whether or not defendant's allegations were supported by evidence that his plea was not understandingly and voluntarily entered, and that he did not have the effective assistance of counsel. In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted.

The State contends that allegations as to incompetence of counsel were not sufficiently pleaded. The District Court, however, considered the issue sufficiently raised since the court found that defendant was ably and competently represented, even though the determination was made without an evidentiary hearing. The State also contends that an issue as to whether the State violated the plea bargain by making recommendations as to sentencing cannot be considered here because the issue was not presented to the District Court. In view of the disposition made here it is unnecessary to determine whether the pro se motion appropriately and properly raised these issues.

The order of the District Court dismissing the proceeding is vacated and the cause remanded with directions to grant an evidentiary hearing on defendant's motion to vacate and set aside his sentence.

ORDER DISMISSING PROCEEDING VACATED AND CAUSE REMANDED TO DISTRICT COURT FOR FURTHER PROCEEDINGS.

HAROLD D. JEFFERS, APPELLANT, V. PAPPAS TRUCKING, INC., A CORPORATION, ET AL., APPELLEES.

253 N. W. 2d 30

Filed April 27, 1977. No. 40826.

1. **Workmen's Compensation: Statutes.** An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. S. Supp., 1976, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial.
2. _____: _____. Where an injury falls under either subdivision (1) or (2) of section 48-121, R. S. Supp., 1976, a determination must be made as to the employee's loss of employability or earning capacity; and loss of bodily function is not at issue.
3. _____: _____. An injury to the ball and socket of the hip joint, where the residual impairment of the injury is not limited to the

leg, is not a schedule injury under subdivision (3) of section 48-121, R. S. Supp., 1976.

4. **Workmen's Compensation: Statutes: Appeal and Error.** Under section 48-185, R. S. Supp., 1976, a judgment, order, or award of the Workmen's Compensation Court may be modified, reversed, or set aside by this court when there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or when the findings of fact by the court do not support the order, judgment, or award.
5. **Workmen's Compensation.** The Workmen's Compensation Act is to be liberally construed so that its beneficent purposes may not be thwarted by technical refinements of interpretation.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded for further proceedings not inconsistent with this opinion.

Harry R. Meister, for appellant.

Holtorf, Hansen, Kovarik & Nuttleman, James W. Ellison, Paul L. Douglas, Attorney General, and Harold S. Salter, for appellees.

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

BRODKEY, J.

This is an appeal from an award and findings of the Nebraska Workmen's Compensation Court that the plaintiff was entitled to compensation because a job-related injury had caused a 50 percent permanent partial disability to his right leg. The plaintiff has appealed, contending that the injury was to his body as a whole rather than only to his leg, and that he is totally and permanently disabled rather than partially disabled.

On July 28, 1975, Harold D. Jeffers, the plaintiff and appellant herein, filed a petition for benefits in the Nebraska Workmen's Compensation Court. As amended, the petition alleged that the plaintiff sustained personal injury on October 31, 1974, in a motor vehicle accident arising out of and in the course of his employment by the defendant. The plaintiff prayed for the relief to which he may be entitled un-

der the provisions of the Nebraska Workmen's Compensation Law, sections 48-101 et seq., R. R. S. 1943. In their answer, defendants Pappas Trucking, Inc., and Great West Casualty Company admitted that the plaintiff was employed by Pappas Trucking, Inc., on October 31, 1974, and that he was injured on that date. The answer alleged that plaintiff's injury would not have been as great, nor would disability have resulted, had an older injury to the plaintiff not existed. On September 30, 1975, the plaintiff and defendants stipulated that the plaintiff should be allowed to amend his petition to join the State of Nebraska, Second Injury Fund, as a defendant for the reason that plaintiff had a preexisting permanent partial disability as the result of a prior accident. The Second Injury Fund denied the allegations of the amended petition.

After a hearing before a one-judge compensation court, plaintiff was, on December 10, 1975, awarded compensation. The plaintiff, however, applied for rehearing, which was granted; and on April 14, 1976, the three-judge court found that the plaintiff was entitled to benefits, that he sustained a 50 percent permanent partial disability to his right leg due to the job-related accident which occurred on October 31, 1974, and granted the plaintiff the award from which he now appeals. The court found: "That plaintiff's claim for compensation for his permanent partial disability comes under subdivision (3) of Section 48-121 of the Nebraska Workmen's Compensation Law; that disability to a member is compensable exclusively under subdivision (3) of Section 48-121 of the Nebraska Workmen's Compensation Law except under unusual or extraordinary circumstances not present in this case; that it is thus immaterial whether an industrial disability is present or not." Plaintiff contends these findings were erroneous.

The compensation court also found that plaintiff's case against the State of Nebraska, Second Injury

Fund, should be dismissed because the plaintiff had failed to prove that a preexisting permanent partial disability, as defined in section 48-128, R. R. S. 1943, existed. Plaintiff does not contest this finding on appeal, and thus no issues are presented in regard to the State of Nebraska, Second Injury Fund.

The evidence shows that the plaintiff, employed as a truck driver for the defendant, suffered an injury to his right hip in a motor vehicle accident in Nevada on October 31, 1974. He was briefly treated for his injury in Nevada, and then was treated by Dr. Wendell F. Ropp in Scottsbluff, Nebraska. Plaintiff's medical history reveals that in 1958 he injured his right hip in an automobile accident, fractured his right femur, and had pins inserted into the hip. After the accident in 1974, X-rays were taken and showed that the pins had migrated through the hip joint and were gouging the hip socket. Dr. Ropp advised the plaintiff to have a total hip replacement; and on January 14, 1975, the plaintiff had a total arthroplasty in his right hip, which is a replacement of the ball and socket of the hip joint. Dr. Ropp stated that the plaintiff's progress was better than average, and that after a 6-week convalescence, plaintiff progressed until he could walk with a minimal limp, with some pain in the soft tissues of the hip. The plaintiff's range of motion in the hip permitted him to sit comfortably, climb stairs, and bend and stoop at the waist. The plaintiff did, however, have a range of motion considerably less than normal, and had residual pain.

Dr. Ropp's opinion was that the plaintiff had a permanent partial physical impairment of 50 percent to his right lower extremity. He advised and encouraged the plaintiff to return to work activity, but stated that the plaintiff should not do work which would require lifting weights in excess of 20 to 30 pounds, standing on his feet for extended periods of time, or climbing, bending, or twisting. In sum-

mary, Dr. Ropp believed that the plaintiff should not do work which would place stress on his hip joint, pushing it beyond its range of limit.

The plaintiff was also examined by Dr. Emil J. Massa, of Denver, Colorado, who, as did Dr. Ropp, believed that the 1974 accident aggravated the injury the plaintiff suffered in 1958. Dr. Massa stated: "I would estimate his [plaintiff's] present residual permanent partial orthopedic disability to be in the neighborhood of fifty percent as measured at the level of the right hip, with thirty percent antedating the episode of October 1974 and twenty percent in all liklihood in some way related to the episode of October 1974. I do not feel that any orthopedic therapy is in order. From an activity standpoint, I feel that Mr. Jeffers should be encouraged to resume all usual activities of one in his age group, including driving a semi-rig."

Francis T. Hardin, a truck owner and driver, testified that the plaintiff had accompanied him on three trips in December 1975. On trips with two drivers, the usual procedure is for each to alternate driving in 5-hour shifts. The plaintiff's pain, however, permitted him to drive only 2 to 3 hours at a time on the first trip. The plaintiff's pain became progressively worse on each trip, despite the fact that he took pain pills. On the third trip, Hardin stated, the plaintiff limped so badly that he could hardly walk, and he could drive only 2 hours before requiring rest. Hardin believed that the plaintiff could never again drive a truck alone, and that he could not undertake long trips even if with another driver.

The plaintiff corroborated Hardin's testimony in regard to the trips made in December 1975. He stated that he had pain in his beltline and back, and that he was unable to drive a truck more than 2 hours at a time, despite the use of pain pills and pillows in the truck. The plaintiff's prior job experience consisted mainly of truck driving and unloading trucks.

He had also worked as a telephone lineman, a window washer, and filling station attendant. He stated that in his previous truck driving jobs, he was required to either load or unload the cargo, which often involved lifting objects which weighed more than 30 pounds. The plaintiff is 37 years old, and has a sixth grade education. The plaintiff stated that he knew that he would never be able to drive a truck again.

The issues raised by plaintiff in this appeal are whether the lower court erred in (1) finding that the injury was a schedule member injury to his leg under section 48-121(3), R. S. Supp., 1976, rather than an injury to the body as a whole under section 48-121 (1); (2) failing to find he is permanently totally disabled; and (3) finding that there were no unusual or extraordinary circumstances present such that it was necessary to determine the extent of the industrial disability suffered by him.

Section 48-121, R. S. Supp., 1976, provides for compensation for three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore. Disability under subdivisions (1) and (2) refers to loss of employability and earning capacity, and not to functional or medical loss alone. Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275 (1962); Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700 (1957). Thus losses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability. Colgrove v. City of Wymore, 184 Neb. 712, 171 N. W. 2d 639 (1969).

For claims falling under subdivision (3), however, it is immaterial whether an industrial disability is

present or not. Sopher v. Nebraska Public Power Dist., 191 Neb. 402, 215 N. W. 2d 92 (1974). "We have said that it was clearly the intent of the Legislature to fix the amount of the benefits for loss of specific members under subdivision (3), section 48-121, R. S. Supp., 1963, without regard to the extent of the subsequent disability suffered with respect to the particular work or industry of the employee." Burrious v. North Platte Packing Co., 182 Neb. 122, 153 N. W. 2d 353 (1967). See, also, Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186 (1964). There is, however, an exception to this rule. Where "an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or any other part of the body has developed," he may be compensated under subdivision (1) or (2) of section 48-121. Mead v. Missouri Valley Grain, Inc., 178 Neb. 553, 134 N. W. 2d 243 (1965). See, also, Runyan v. Lockwood Graders, Inc., *supra;* Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152 (1957); Burrious v. North Platte Packing Co., *supra;* Ottens v. Western Contracting Co., 139 Neb. 78, 296 N. W. 431 (1941).

The above cases indicate that if an employee suffers a schedule injury which falls under subdivision (3), of section 48-121, R. S. Supp., 1976, he is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to other members or other parts of the body has developed. The presence or absence of industrial disability is immaterial in cases falling under subdivision (3). If the injury falls under either subdivision (1) or (2), however, a determination must be made as to the employee's loss of employability or earning capacity, and loss of bodily function is not at issue.

The plaintiff's first contention in this case is that his injury was not a schedule injury to his right leg

under subdivision (3) of section 48-121, R. S. Supp., 1976, but an injury to a part of his body which is not covered by subdivision (3). An understanding of the anatomy of the human leg and hip will be helpful at this point. Briefly summarizing, the bone in the upper leg is known as the femur. The femur has a neck and head where it joins the hip, and the head of the femur is hemispherical in shape and rests in the corresponding socket in the pelvis. The hip joint is a ball and socket joint, and through it the entire weight of the body is transmitted to the femur. The hip joint is composed of the femoral ball shaped head, and the socket in the pelvis, which is a deep cup-like cavity.

In this case, the plaintiff sustained a severe fracture of his right hip in 1958, and he received surgical treatment for that injury, which consisted of the pinning of the fractured right proximal femur. Essentially, the surgery consisted of inserting a pin or nail into the upper femur. According to Dr. Ropp, after the accident in 1974, X-rays showed that "the previous internal fixation device, the nail, with collapse of the femoral head, had migrated through the joint and was gouging into the socket. We discussed that if he continued to have significant pain and was not able to sleep, that we remove the nail and probably because of the deterioration of the joint, he should have a total hip replacement." Dr. Ropp described "total hip replacement" as "the replacement of the ball and socket surfaces of the hip joint."

In 52A C. J. S., Leg, p. 754, the leg is defined as consisting of three parts, "that from the hip joint to the knee, from the knee joint to the ankle joint, and that portion below the ankle joint." As used in workmen's compensation cases, the leg extends from where the ball of the femur fits into the socket of the hip to the ankle or foot. Ujevich v. Inspiration Consolidated Copper Co., 44 Ariz. 16, 33 P. 2d 599 (1934).

Cases from other jurisdictions have dealt with the issue of whether injuries to the hip are schedule injuries to the leg under workmen's compensation acts similar to the Nebraska act. In Texas Employers' Ins. Associates v. Sevier, 279 S. W. 2d 473 (Tex. Civ. App., 1955), a workmen's compensation case, the court stated: "An injury confined to the femur is also confined to the leg. In our opinion, however, injuries to the joint connecting the femur or the thigh to the trunk, that is the hip joint, were not intended to be included in injuries to the leg as contemplated by the statute. The femur extends to and into the hip but it stops at the joint. It does not include the joint and the court did not err in so instructing the jury." See, also, Yanez v. Skousen Constr. Co., 78 N. M. 756, 438 P. 2d 166 (1968), where the court held that a finding that an employee should be compensated for a schedule injury to the leg was erroneous where the evidence showed that the injury involved disability to the hip and limited the range of the employee's hip motion. Two Pennsylvania cases also have language to the effect that an injury to the hip joint is not a schedule injury to the leg. Yanik v. Pittsburg Terminal Coal Corp., 150 Pa. Super. 148, 27 A. 2d 564 (1942); Manno v. Tri-State Engineering Co., 159 Pa. Super. 267, 48 A. 2d 122 (1946).

Pertinent to the issue before us is a line of Arizona cases. In Miller v. Industrial Commission, 110 Ariz. 229, 517 P. 2d 91 (1973), an employee sustained a fracture of his pelvis extending into the socket of the right hip. The court stated that the "question presented is whether petitioner must be compensated for the *impairment to his hip, an unscheduled injury,* or for a scheduled injury, the loss of use of his right leg." (Emphasis supplied.) Medical evidence indicated that the employee had suffered some "thinning" of the joint space in his hip, and restriction of motion of the right leg due to the injury to the right hip. The employee had pain over the region of

the right hip extending up to the right iliac crest and down into the right groin. The court, following Ujevich v. Inspirational Consolidated Copper Co., *supra,* noted that by legal definition the leg extends from where the ball of the femur fits into the socket of the hip to the ankle or foot, and stated: "The evidence elicited from each of the doctors is that petitioner's residual injury is to his hip and there is no pretense of any injury to the leg. The injury to the hip has resulted not only in the restriction of motion of the right leg, but disabling pain in the hip region to the petitioner." The court concluded: "We hold that a scheduled injury is exclusive unless there is evidence of separate and distinct impairment to other parts of the body. As stated by 2 Larson Workmen's Compensation Law, § 58.20: 'The great majority of modern decisions agree that, if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive.' "

The rule set forth in Miller v. Industrial Commission, *supra,* was followed in State Compensation Fund v. Industrial Commission, 25 Ariz. App. 316, 543 P. 2d 154 (1975), (disability to hip joint not a schedule injury to the leg); and Eggleston v. Industrial Commission, 24 Ariz. App. 444, 539 P. 2d 918 (1975), (injury to shoulder is not schedule injury to arm). Miller, however, did not overrule the general rule in Arizona that the "criterion upon which it is determined whether an award should be 'scheduled' or 'unscheduled' is not the situs of the actual injury but rather the location of the residual impairment." State Compensation Fund v. Industrial Commission, *supra,* 25 Ariz. App. at 318, 543 P. 2d at 156. Thus if an injury occurred to the hip joint or shoulder joint, but only the leg or arm suffered residual impairment, and there was no impairment to the shoulder or hip, the rule in Arizona is that a schedule injury

to the leg or arm would result. See, State Compensation Fund v. Industrial Commission, *supra;* Eggleston v. Industrial Commission, *supra.* However, if the injury is clearly to the hip joint, and the joint itself is impaired, the injury is not a schedule injury to the leg. Jaynes v. Industrial Commission, 7 Ariz. App. 78, 436 P. 2d 172 (1968).

In their brief defendants rely heavily upon Smith v. Pyles, Inc., 20 Md. App. 478, 316 A. 2d 326 (1974). In Smith, the employee suffered an intertrochanteric fracture to his left femur. The "trochanter" is the upper part of the femur shaft, located just below the neck and the head of the femur. Thus the employee in Smith suffered a fracture to his left femur, not an injury to the hip joint itself. The fracture was treated by the insertion of a nail through the femur, the femur neck, and partially into the head of the femur. The surgery did not involve the socket of the hip joint, but only the femur. The lower court found that the employee had suffered a schedule injury to his left leg, and not an injury to the body as a whole. The appellate court in Smith upheld this finding, noting that the leg extends from the head of the femur to the ankle of the foot. Since the employee's injury was to his femur, and not to the socket in his hip, the injury was within the definition of leg, and was a schedule injury to the leg. The court also noted that there was no evidence establishing that the injury to the leg had affected other parts of the body, and therefore only compensation for a schedule injury was appropriate. The Smith case obviously turns on the fact that the employee's injury was a fractured femur, an injury which clearly is within the legal definition of an injury to the leg.

In the instant case, Dr. Ropp testified that the plaintiff received a total hip arthoplasty in his right hip. When asked what that consisted of, he stated: "With collapse of the femoral head or ball, or the

ball socket joint, secondary to injury and avascular necrosis, the gliding surfaces of the joint were destroyed. Total hip replacement, then, is the replacement of the ball and socket surfaces of the hip joint." The surgical process of total hip arthoplasty has been used in the medical profession for about 12 years. A major concern in regard to the procedure is that the artificial hip will wear out or the prosthesis will loosen, requiring replacement of the failed or loosened part. Dr. Ropp stated that the operation gave the plaintiff significant relief from pain, but that he "does have some residual pain. He has considerable less than normal range of motion. The tolerance of the artificial joint is not, in our opinion, as good as a normal hip." When asked for an example of what kind of work the plaintiff should or should not do, Dr. Ropp stated: "In looking for work which in our opinion would not stress this hip joint to an extent where it would wear out quicker or loosen quicker than necessary. We hope to avoid stresses such as weight bearing across the hip joints, high impact stresses, stresses pushing the hip beyond its range of limit." Dr. Ropp estimated that the plaintiff "has a permanent partial physical impairment to his right lower extremity of fifty percent." As noted in Miller v. Industrial Commission, *supra,* medically, doctors use the term "lower extremity" to include both the leg and the hip. 110 Ariz. at 230, 517 P. 2d at 93. In this case Dr. Massa stated that he "would estimate his [the plaintiff's] present residual permanent partial orthopedic disability to be in the neighborhood of fifty percent as measured at the level of the right hip, * * *."

It would appear that the injury to the plaintiff was not a schedule injury to the right leg, and that the lower court erred in finding that subdivision (3) of section 48-121, R. S. Supp., 1976, was controlling in this case. The plaintiff's injury was clearly to both the ball and socket of his hip joint, and as such was

not limited to the leg, as legally defined in the cases cited herein. The plaintiff received a total hip replacement, not merely a replacement of the head of the femur, or a pin in the femur, as was the case in Smith v. Pyles, Inc., *supra*. The medical testimony was that there was residual pain in the hip, as well as loss of motion in the hip joint, and the consequence of the injury was that the hip joint was weakened such that it could no longer tolerate stresses such as lifting heavy objects, climbing poles, or extended bending and standing. All the doctors who gave evidence referred to the injury as a hip injury, not as an injury to the leg.

Section 48-185, R. S. Supp., 1976, sets forth the standard of review in this case; and provides that the judgment or award may be modified, reversed, or set aside by this court when there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or when the findings of fact by the lower court do not support the order or award. The issue as to whether the plaintiff's injury was a schedule injury is largely one of law, as the facts are undisputed in regard to the nature and location of the injury. Therefore, we need not weigh the evidence and reach our own conclusion, but need only find that the lower court came to an incorrect conclusion of law based on the facts presented to it. We have repeatedly held that the compensation act is to be liberally construed so that its beneficent purposes may not be thwarted by technical refinements of interpretation. Haler v. Gering Bean Co., *supra*. As previously stated, compensation for schedule injuries under subdivision (3) of section 48-121, R. S. Supp., 1976, is limited to the amount provided for in that subdivision, but can be recovered regardless of whether industrial disability is present. Compensation for non-schedule injuries under subdivisions (1) and (2) is not as limited as that provided in subdivision (3), and depends on loss

of earning capacity or employability. In this case it would clearly be a technical refinement of interpretation to hold that an injury to the hip joint is a schedule member injury to the leg, and thus the beneficent purposes of the compensation act would be thwarted. The plaintiff should be given the opportunity to prove the industrial disability caused by his injury under subdivisions (1) and (2).

It appears that this case must be remanded to the Workmen's Compensation Court for further proceedings, as that court did not make findings of fact on the issue of *industrial* disability, having determined that only a subdivision (3) injury was present. On remand, the compensation court will be able to determine the plaintiff's loss of earning capacity or employability due to the injury, if any, and make an appropriate award under subdivisions (1) or (2) of sections 48-121, R. S. Supp., 1976.

In view of our finding, it is unnecessary to discuss plaintiff's other assignments of error.

We conclude that the judgment of the Workmen's Compensation Court must be reversed because of our finding that the plaintiff's injury was not a schedule injury to his leg, and the cause is remanded for a determination of the plaintiff's loss of earning capacity or employability under subdivisions (1) or (2) of section 48-121, R. S. Supp., 1976.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

LEO J. DURRETT, APPELLANT, V. BAXTER CHRYSLER-PLYMOUTH, INC., A CORPORATION, ET AL., APPELLEES.

253 N. W. 2d 37

Filed April 27, 1977. No. 40902.

1. **Motor Vehicles: Warranties: Burden of Proof.** In order to sustain an action on an express or implied warranty the plaintiff must prove, among other things, that the goods did not comply with the

warranty, that is, that they were defective, and that his injury was caused by the defective nature of the product or goods.

2. **Trial: Evidence: Burden of Proof.** In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed.

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

William H. Mecham, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Theodore J. Stouffer of Cassem, Tierney, Adams & Gotch, for appellees.

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

MCCOWN, J.

This is an action by plaintiff for breach of warranty that plaintiff's automobile had an "energy absorbing steering column." The petition alleged that the breach of warranty directly and proximately increased the personal injuries and damages sustained by plaintiff as a result of an automobile collision. The action was brought against the manufacturer and the dealer. By stipulation the trial was restricted to the issue of liability, with damages reserved for later determination, if necessary. At the conclusion of plaintiff's evidence the District Court sustained the defendants' motions to dismiss. Plaintiff has appealed.

In December 1967, plaintiff purchased a new 1968 Plymouth automobile from defendant Baxter Chrysler-Plymouth, Inc. The automobile was manufactured by the defendant Chrysler Corporation. Upon purchase the plaintiff received both oral and written warranties that the automobile contained a standard safety feature described as an "energy absorbing steering column."

On May 28, 1970, plaintiff was involved in a collision while operating his automobile on Cuming Street in Omaha, Nebraska. The plaintiff was traveling east at 30 miles per hour when a westbound car crossed the median of the divided highway and collided with his car. The exact angle of the impact was not established, although the greater damage to plaintiff's car was to the left front and side, and the left front wheel was driven back 14 inches. The impact threw the plaintiff forward over the steering wheel, and the steering wheel and column struck his chest and face. The steering wheel was bent down and the steering column was bent up and to the left. As a result of the impact the plaintiff sustained various injuries.

Sometime after the accident the steering column was removed from plaintiff's automobile. The plaintiff, an attorney for one of the defendants, and a mechanic employed by plaintiff, all of whom were present, based on their visual observation of the steering column, testified that it had not collapsed or telescoped, or did not appear to have collapsed or telescoped as a result of the accident. No measurements or tests were made at the time.

Thereafter the steering wheel and column were examined by an engineer for Chrysler Corporation. He testified that the outer mesh section of the steering column had shortened 4/10's of an inch, and that the inner ring of the steering column had telescoped into the outer tube by 1 inch. He also testified that the steering wheel had a permanent deformation of 2½ inches centered around the upper left portion of the wheel. The steering column was designed to absorb both primary and secondary impacts. The lower portion of the column could telescope up to 6 inches to prevent rearward penetration from primary impact and was designed to begin when the front of the car had been pushed back 2 or 3 feet. The upper system, including the steering wheel,

could give about 7 inches in a secondary impact. The steering wheel is designed to absorb up to one-third of the energy generated by a secondary impact, and a mesh jacket and telescoping ring and tube also absorb energy. The steering wheel is designed to give at lower speeds and the mesh jacket does not accordion until higher speeds. The amount of foreshortening in the whole system depends on the severity of the impact. The evidence also established that an impact at a 45 degree angle would produce a maximum of half the force of a direct head-on impact. The only expert testimony was also that the energy absorbing steering column was built in conformity with standards set by the United States government, and that it functioned in this accident in conformity with those standards. The engineer also testified that there were no parts of the steering column that had not been manufactured in conformance with those standards and the standards of the manufacturer. At the conclusion of plaintiff's evidence on the liability issue, the District Court sustained the defendants' motions to dismiss.

Plaintiff's basic contention is that the court erred in dismissing plaintiff's cause of action, and that there was sufficient evidence to go to the jury on the issue of breach of warranty. Plaintiff argues that the evidence that the energy absorbing steering column did not appear to have collapsed or telescoped was sufficient evidence that the steering column was defective and not as warranted.

In this case there is no dispute that the defendants expressly as well as impliedly warranted that the steering column in plaintiff's automobile was an energy absorbing steering column. That was the only express or implied warranty involved here. In order to sustain an action on an express or implied warranty the plaintiff must prove, among other things, that the goods did not comply with the warranty, that is, that they were defective, and that his

injury was caused by the defective nature of the goods. See, White & Summers, Uniform Commercial Code, § 9-1, p. 272; § 2-314, Comment 13, U. C. C. Plaintiff contends that the testimony of eyewitnesses that the steering column did not appear to have collapsed or telescoped is sufficient to establish a jury issue as to whether the steering column did or did not comply with the warranty and was or was not defective. The only expert evidence on the issue, however, is flatly to the contrary and is uncontradicted. The reliance on eyewitnesses alone is not fatal when a defect is obvious to a layman, but when standards of performance of the product are not generally known, other evidence, usually expert testimony, is necessary to prove proper or acceptable standards of performance. That evidence may be by evidence as to usages in the trade, the characteristics exhibited by similar goods manufactured by other sellers, or by government standards and regulations in the area. White & Summers, Uniform Commercial Code, § 9-7, p. 294. The only evidence on those issues in this case was that the steering column here was not defective but complied with the warranty, and functioned and performed as it was designed to do. Plaintiff's case rests on the assumption that an energy absorbing steering column must collapse in a collision, regardless of the force of the collision or the angle of the impact. That assumption collapses under the weight of the evidence in this case.

Conjecture, speculation, or mere choice of quantitative possibilities are not proof. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed.

Bohling v. Farm Bureau Ins. Co., 191 Neb. 141, 214 N. W. 2d 381.

Plaintiff also contends that the court erred in excluding certain letters and a technical service manual for the car in question. The information contained in the exhibits offered and excluded was, for the most part, already reflected in evidence from the testimony of witnesses called by the plaintiff. While the evidence might have been admissible, under the circumstances it was cumulative and added nothing more to plaintiff's case. Under such circumstances, the error, if any, cannot be said to be prejudicial.

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

AFFIRMED.

CAROLYN K. (LONG) REINERTSON, APPELLEE, V. MARVIN L. R. LONG, APPELLEE, PAUL H. LONG, INTERVENER-APPELLANT.

253 N. W. 2d 40

Filed April 27, 1977. No. 40972.

Judgments: Appeal and Error. A party cannot appeal from an order or judgment which was made with his consent or upon his application.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

James R. Kelly of Johnson, Kelly & Spencer, for intervener-appellant.

Robert A. Munro and Andrew J. McMullen, for appellee Reinertson.

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

BRODKEY, J.

This is an appeal from a District Court judgment sustaining a motion to strike a petition in interven-

tion in an action for modification of a divorce decree. We affirm.

In a petition filed in the District Court for Custer County on May 25, 1967, Carolyn K. (Long) Reinertson, appellee, herein, prayed for an absolute divorce from her husband, Marvin L. R. Long. In a decree filed on December 29, 1967, a divorce was granted; and incorporated into the decree was a property settlement agreement between the two parties. Under the property settlement agreement, Carolyn assigned to Marvin her equitable interest in certain real estate in return for his agreement to assume and hold her harmless from all claims imposed on the real estate, and from all other bills outstanding against the parties at the time.

On March 17, 1976, Carolyn filed a petition in equity for modification of the decree. In her petition she alleged that she had assigned to Marvin her interest in the real estate in consideration of his representation that he would assume all the bills outstanding against the parties at the time of the divorce; and that he would hold her harmless from all claims imposed on the real estate and all other bills outstanding at that time. The petition also alleged that the real estate had been conveyed by the parties in 1967, in trust, to intervener-appellant, Paul H. Long, as trustee. Carolyn alleged that Marvin had failed to hold her harmless from debts as he agreed to in the property settlement agreement, and prayed that the assignment of her interest in the real estate to Marvin be set aside, and that her interest in the realty be restored to her.

A summons was served on Marvin, ordering him to answer the petition on or before April 26, 1976. Marvin did not answer within the time prescribed, and on May 21, 1976, the court entered judgment, finding that the allegations of the petition for modification were true, and reinstated and restored Carolyn's interest in the real estate. On that same day,

Paul H. Long, intervener-appellant herein, filed a petition of intervention in the case, alleging that in equity he had an absolute right to full title and ownership of the real estate in question. He requested that the court declare that he be the owner of the real estate subject to the interest of a third party under a land contract.

On May 25, 1976, Carolyn moved the trial court to strike the petition in intervention, alleging that it was irrelevant to the case; that it was filed without notice to the parties and without leave of court; and that the petition in intervention showed on its face that Paul H. Long had no claim or interest in the matter in litigation, or in the claims or interests of the parties. A hearing was had on the motion to strike the petition in intervention on June 25, 1976. At that time counsel for Carolyn stated: "It is my understanding, Your Honor, that Mr. Kelly, counsel for the Petitioner in Intervention, is willing at this time to submit the matter of our Motion to Strike the Petition in Intervention without further argument and the Court enter its order striking it as prayed in the Motion. Is that right Mr. Kelly?" Mr. Kelly responded: "That is fine." Counsel for Carolyn then stated to the trial court: "Accordingly we ask that the Court order the Petition for Intervention, filed by Paul Long, stricken from the file." The trial court replied: "You can journal it and send it to me." On June 25, 1976, the trial court issued an order sustaining the motion to strike the petition in intervention.

The appellant filed no motion for new trial after the trial court sustained the motion to strike, but filed a notice of appeal from the decision on July 15, 1976. In his brief, appellant lists two assignments of error: (1) The trial court erred by not requiring the plaintiff (Carolyn) to introduce evidence at the hearing on the motion to strike the petition in intervention; and (2) the decision of the trial court to dismiss

the petition in intervention, without a hearing on its merits, was not supported by the evidence and was contrary to law.

In his brief, the appellant contends that he had an absolute right to intervene in the action, and that Carolyn did not sustain her burden of establishing necessary facts to support the motion to strike the petition in intervention. It is true that under section 25-328, R. R. S. 1943, any person who has or claims an interest in the matter in litigation may intervene. Our reading of the bill of exceptions, however, indicates that counsel for the appellant at the time of the hearing on the motion to strike, agreed that the motion be sustained. At oral argument, counsel for appellant contended that no such agreement was reached, and that the agreement was only that the motion be submitted to the court without argument. This argument is without merit. The dialogue between counsel for the parties and the trial court, set forth in full above, is not ambiguous. Counsel for the appellant not only agreed that the motion should be submitted without argument, but also that "the Court enter its order striking it as prayed in the Motion." Accordingly, counsel for Carolyn asked that the petition be stricken, and the trial court, at that time, indicated that it would be so stricken.

In Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367 (1950), this court stated that a party can not be heard to complain of an error which he himself has been instrumental in bringing about; and that a party is not entitled to prosecute error upon the granting of an order when the same was made with his consent. "It is the long-established rule in this court that a party will not be heard to complain of errors which he himself invited." Anzalone Investment Co. v. City of Omaha, 179 Neb. 314, 137 N. W. 2d 857 (1965). The appellant had a full opportunity to present argument or evidence at the hearing in the trial court, or to simply require Carolyn to go

forward with her burden on the motion. Instead the appellant chose to consent to the trial court sustaining the motion. He cannot now complain of the decision of the trial court when he consented to it, and was instrumental in bringing it about.

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

AFFIRMED.

JIMMY D. PERKINS, APPELLANT, V. STELLA L. PERKINS, APPELLEE.

253 N. W. 2d 42

Filed April 27, 1977. No. 40973.

1. **Divorce: Courts: Statutes: Infants.** We interpret section 42-364, R. S. Supp., 1976, to authorize the court to make subsequent changes in the decree to cover children conceived during a marriage but born after the divorce.
2. **Divorce: Infants: Trial: Evidence.** Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock.

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

Cronin, Shamberg & Wolf, for appellant.

John Story for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

This appeal is from an order entered on a motion to modify a dissolution of marriage decree finding a child of the parties was born after the dissolution of the marriage, and fixing child support. The modification was granted after term time. The trial court found that Stella L. Perkins, the respondent, was pregnant at the time of the decree; that the peti-

tioner, Jimmy D. Perkins, is the father of Jimmy J. Perkins, born subsequent to the decree; and ordered Jimmy D. Perkins to pay the sum of $60 per month as child support. Jimmy prosecutes this appeal, attacking the jurisdiction of the court to enter the decree. We affirm, but for a different reason than that given by the trial court.

Jimmy filed suit for dissolution of the marriage on August 6, 1974. On August 7, Stella's voluntary appearance was filed. This appearance was witnessed by Jimmy's attorney. The marriage was dissolved on November 13, 1974. Stella was not represented by counsel, did not appear in court, and her default was entered. A property settlement, prepared by Jimmy's attorney, which made no mention of the child Stella was then carrying, was approved by the court. At the time of the dissolution of the marriage, Stella was a little over 4 months pregnant. She had been living with Jimmy at the time of conception. The child was born March 24, 1975, 4 months and 11 days after the decree was signed.

The motion to modify was filed December 10, 1975, after the term at which the dissolution was decreed. On March 24, 1976, pursuant to agreement, the cause was set for hearing on May 14, 1976. On that day, Jimmy moved for dismissal on the grounds that the decree had become final and the time for appeal had gone by. This motion was overruled.

The trial court stated default dissolution hearings in his court are not reported where the petition contains an allegation of no children. The trial court further stated that his notes indicated the petitioner, Jimmy, testified there were no children born of the marriage. The court ruled that whether or not the plaintiff misled the court or may have made a fraudulent statement gave a court of equity an opportunity to reopen the case after term and he did so.

After hearing, the court determined that under section 25-2001, R. R. S. 1943, for irregularity in the

proceeding and also under general equity powers, the relief requested by Stella should be granted.

The only issue discussed in appellant's brief is the authority of the court to modify the decree after term time. Section 42-364, R. S. Supp., 1976, provides in part as follows: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing."

We are specifically concerned herein with the sentence: "Subsequent changes may be made by the court when required after notice and hearing." It is evident the intent of the statute is to provide for the custody and welfare of children. Changes covering minor children of the marriage may be made at any time.

The child, who was in ventre sa mere, was not mentioned or considered in the decree. He was born 4 months and 11 days after the decree was entered. The court's attention should have been directed to the pregnancy of the wife. The court specifically found this was not done. The proper procedure when a wife is pregnant is to call the court's attention to the future birth of a child, but to reserve the question of support for the child until after his birth. We interpret section 42-364, R. S. Supp., 1976, to authorize the court to make subsequent changes in the decree to cover children conceived during a marriage but born after the divorce.

Stella testified that Jimmy had been informed that she was pregnant and this testimony is undisputed in the record. Jimmy's main thrust was to endeavor to throw doubt on the paternity of the child. The

trial court had sustained appellant's request for blood testing on January 23, 1976. Jimmy, however, had failed to make arrangements for the tests and when he moved for a continuance on May 14, during the trial, for an additional 30 days, the trial court properly denied the request. Jimmy had had 4 months to set up the necessary appointments. It would have been an abuse of discretion to delay the matter further.

Section 42-377, R. R. S. 1943, provides that in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown. In Ford v. Ford, 191 Neb. 548, 216 N. W. 2d 176 (1974), we held: "Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock." Jimmy had the affirmative on this issue. He attempted to meet the burden by innuendo. There is not one iota of proof in the record to meet this burden.

The trial court properly exercised jurisdiction herein. The judgment is affirmed. Appellee is allowed $300 to be taxed as costs for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS J. KOLOSSEUS, APPELLANT.

253 N. W. 2d 157

Filed April 27, 1977. No. 40983.

1. **Public Officers and Employees: Prosecuting Attorneys: Courts.** Judicial notice is taken of the status of public officers and their official positions within the jurisdiction of the court.
2. **Criminal Law: Words and Phrases: Wiretaps: Statutes.** The phrase "punishable by imprisonment for more than one year" as

used in the statute permitting interception of communications when such interception may provide evidence of commission of, among other things, murder or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than 1 year, modifies only the catch-all category of "all other crimes"; thus, enumerated offenses such as gambling need not be felonies before wiretapping may be authorized; the statute was not simply aimed at major crimes.

3. **Criminal Law: Ordinances: Wiretaps: Gambling.** A prosecution for gambling in violation of a city ordinance which is punishable by imprisonment is a criminal prosecution both in form and in substance and is one of the crimes for which wiretap may be authorized if the requirements of the pertinent statutes are met.
4. **Criminal Law: Wiretaps: Evidence.** The statutes require suppression of the contents of any wiretap interception and any evidence derived therefrom if the communication was unlawfully intercepted.
5. **Criminal Law: Wiretaps: Words and Phrases.** In a wiretap application, allegations under subsection (1)(c) of section 2518, Title 18 U.S.C.A., play a "substantial role" in judicial authorization and if the allegations are insufficient to meet these statutory requirements, the interception is unlawful.
6. **Criminal Law: Wiretaps.** Congress did not attempt to require "specific" or "all possible" investigative techniques be tried before orders for wiretaps could be issued.
7. _____: _____. Wiretap procedures cannot be routinely employed as an initial step in criminal investigation, but neither is government required to use a wiretap only as a last resort.

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

J. William Gallup, for appellant.

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

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

CLINTON, J.

The defendant was charged in the municipal court of the city of Omaha with 34 counts of gambling in violation of sections 25.77.010 and 25.77.020 of the ordinances of the city of Omaha. He was found guilty on all counts and fined the sum of $100 on each count.

On appeal to the District Court the judgments were affirmed. The evidence on which the convictions were founded was obtained by means of a wiretap interception of oral communications over the defendant's telephone lines, such wiretap having been authorized by an order of the District Court for Douglas County, Nebraska, pursuant to an application filed by the county attorney of Douglas County under the provisions of section 86-701 through 86-707 R. R. S. 1943. On appeal to this court the issues raised by the defendant are: (1) Whether the defendant's motion to suppress the evidence obtained by means of the wiretap was improperly denied because the wiretap was unlawful. (2) Whether the penalties imposed were excessive and so constituted an abuse of discretion by the court. We affirm.

The pertinent portions of the municipal ordinances are as follows: "For the purposes of this Chapter gamble shall mean to enter into an agreement with another person whereby a person risks the loss of money or property to realize a profit in any game; to make use of any mechanical device or instrument in which the element of chance is the controlling factor to realize a profit; or to enter into a wager wherein the risk of the loss of money or property to realize a profit is dependent upon the outcome of any future happening." § 25.77.010, Ordinance 24314, § 1, City of Omaha.

"It shall be unlawful for any person purposely or knowingly to gamble, offer to gamble, or provide facilities for gambling; provided, however, the provisions of this Section shall not make unlawful any act permitted by state law." § 25.77.020, Ordinance 24314, § 1, City of Omaha.

The application for the wiretap was executed by Donald L. Knowles as county attorney of Douglas County, Nebraska. The cases were prosecuted by Gary Bucchino, city prosecutor of the city of Omaha.

The defendant's contention that the interceptions were illegal is founded upon the following: (1) Gary Bucchino, as city prosecutor, had no power to prosecute in a case where evidence is obtained by wiretap. (2) Title 18 U.S.C.A., section 2516, authorizes a state prosecutor to apply for a wiretap insofar as the crime of gambling is concerned only where the interception will provide evidence of a felony offense and gambling in Nebraska is not punishable as a felony. (3) A prosecution for violation of a city ordinance is a civil action and evidence obtained by wiretap interception under the above statute is inadmissible in such civil action. (4) The application is insufficient under the pertinent statutes because it does not adequately state that other investigative procedures have been tried and failed, or why other investigative methods reasonably appear to be unlikely to succeed if tried. Title 18 U.S.C.A., § 2518; § 86-705(1)(c), R. R. S. 1943.

Even if we assume arguendo that the status of the prosecutor who conducts the trial is relevant to the issue of the validity of the wiretap authorization, the defendant's first point regarding the alleged lack of standing of Gary Bucchino is not well taken. Section 29-104, R. R. S. 1943, provides as follows: "The term prosecuting attorney shall mean any county attorney. Such term shall also mean any city attorney or assistant city attorney in a city of the metropolitan class when such attorney is prosecuting any violation designated as a misdemeanor or traffic infraction." Judicial notice is taken of the status of public officers and their official positions within the jurisdiction of the court. Rhodes v. Crites, 173 Neb. 501, 113 N. W. 2d 611; § 27-201, R. R. S. 1943. We also take judicial notice of the fact that Gary Bucchino is by appointment a deputy county attorney of the County of Douglas. He therefore had authority to prosecute misdemeanors in a court of competent jurisdiction.

The defendant's second point involves the construction and application of Title 18 U.S.C.A., section 2516(2), and section 86-703, R. R. S. 1943. Federal law preempts the field in the area of interception of oral or wire communications and prohibits the use of such intercepted communications or any evidence derived therefrom, if the disclosure is in violation of Title 18 U.S.C.A. Federal law authorizes such interceptions and use of such evidence if a state statute permits it and the authorizing state statute meets the minimum requirements of the pertinent provisions of the federal statute. Title 18 U.S.C.A., § 2516. See, also, Senate Report No. 1097, 90th Congress, 2d Session, 1968, U. S. Code Cong. & Admin. News, p. 2187.

Title 18 U.S.C.A., section 2516(2), provides that the principal prosecuting attorney of any state or the principal prosecuting attorney of any subdivision thereof, if authorized by statute of the state, may make application to a state judge for an order authorizing interception or wiretap and the judge may grant, in conformity with Title 18 U.S.C.A., section 2518, "and with the applicable State statute," an order authorizing an interception in the investigation of certain specific offenses, i.e.,: ". . . when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception." Section 86-703, R. R. S. 1943, provides in part: ". . . or any county attorney may make application to any district court of this state for an order authorizing or approving the interception of wire or oral communications, and such court may grant, subject to the provisions of sections 86-701 to 86-707, an order author-

izing or approving the interception of wire or oral communications by law enforcement officers having responsibility for the investigation of the offense as to which application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, robbery, bribery, extortion, dealing in narcotic or other dangerous drugs, gambling, or any conspiracy to commit any of the foregoing offenses."

Since federal law governs, it is apparent that the more strict provision, whether federal or state, must be followed. Defendant argues that the federal statute authorizes an interception in the case of specified crimes, in this instance, gambling, and only if that offense is a felony under state law punishable by imprisonment for more than 1 year. This argument is founded upon the position that the phrase in Title 18 U.S.C.A., section 2516(2), "and punishable by imprisonment for more than one year, modifies all the previously listed offenses. On the other hand, the State argues that logically and grammatically the above phrase modifies only the first immediately preceding antecedent, to wit, "or other crime dangerous to life, limb, or property."

The vast majority of state and federal courts which have had occasion to consider the proposition have resolved the issue contrary to the defendant's contention. People v. DiFiglia, 374 N. Y. S. 2d 891, 50 App. Div. 2d 709; United States v. Carubia, 377 F. Supp. 1099; United States v. Curreri, 388 F. Supp. 607. We recognize that the last two cited opinions are those of a trial court, but we have examined their reasoning and found it sound. Our examination of the federal statute leads us to conclude that the State's position is clearly the correct one.

Title 18 U.S.C.A., section 2516(2), describes two general categories of crime, to wit, certain crimes described by name, to wit, murder, kidnapping, gambling, etc., and "other crime . . . ." These two

categories are separated by the disjunctive conjunction "or." The two following modifying phrases are connected by the copulative conjunction "and". The grammatical, as well as the logical, consequence of this use of language is that the "or" divided the two categories mentioned. The "and" connects the two modifying phrases which constitute the two characteristics of the second category, viz., "dangerous to" and "punishable by imprisonment." The imprisonment provision, therefore, does not modify the specifically named crimes. The legislative history of this language in the statute has been examined and it likewise supports this construction. This is true even though the rules of punctuation were violated in this instance by the placement of a comma before the modifying phrase "and punishable by imprisonment." See United States v. Carubia, *supra*.

The defendant next argues that a prosecution for a violation of a municipal ordinance is, under Nebraska law, a civil proceeding and since section 86-703, R. R. S. 1943, and Title 18 U.S.C.A., section 2516, authorize interception of communications only for the purpose of obtaining evidence in the investigation of certain specified crimes, the interceptions were unlawful and the wiretap evidence inadmissible under the prohibitions of section 86-705(9), R. R. S. 1943, and Title 18 U.S.C.A., section 2518(9).

The defendant's contention would be well taken if the prosecution here were in fact a civil proceeding. In support of his claim that the proceeding is civil in nature defendant cites State v. Amick, 173 Neb. 770, 114 N. W. 2d 893. The State additionally cites State v. Johnson, 191 Neb. 535, 216 N. W. 2d 517; State v. Peterson, 183 Neb. 826, 164 N. W. 2d 649; State v. Lookabill, 176 Neb. 254, 125 N. W. 2d 695; and State v. Hauser, 137 Neb. 138, 288 N. W. 518. We have, in some of those cases and others, stated that while in form such prosecutions are criminal, they are in

fact civil proceedings to collect a penalty. McLaughlin v. State, 123 Neb. 861, 244 N. W. 799. More recently, however, we have found it unnecessary to rely upon the proposition that such proceedings are civil in substance. State v. Johnson, *supra.* That case was a prosecution under the same ordinance involved in the present case and we there said: "The Nebraska statute, section 24-536, R. S. Supp., 1972, excludes *criminal offenses of the nature* involved in this case from the availability of a jury trial." (Emphasis supplied.) The maximum penalty for the offenses here involved is 6 months imprisonment. State v. Johnson, *supra.* Such an offense is a misdemeanor by definition. § 29-102, R. R. S. 1943. State statutes define and make criminal various types of gambling offenses. Some are misdemeanors. Some are felonies. §§ 28-941 to 28-952, R. R. S. 1943.

The reasons for the usefulness of the criminal-civil dichotomy as it relates to prosecution for violation of municipal ordinances is somewhat obscure. This court apparently had occasion for the first time to classify an ordinance violation as civil in Foley v. State, 42 Neb. 233, 60 N. W. 574, and cited as authority for the distinction 1 Bishop, Criminal Law, § 32; 1 Bishop, Criminal Procedure, § 892; and Liberman v. State, 26 Neb. 464, 42 N. W. 419. Liberman v. State, *supra,* is not authority for the proposition for which it was cited in the Foley case. The court in Liberman v. State, *supra,* simply pointed out that our Constitution does not require a jury trial in prosecutions for minor offenses in violation of municipal ordinances and involving acts which are not made criminal by state statute. The body of the opinion in that case did not even discuss the nature of the action although the syllabus described it as quasi-criminal. The source of text authority above cited is apparently the statement in some ancient cases that the collection of a monetary penalty for violation of a city ordinance is accomplished by the common law

action of debt. It is upon that scant foundation that the classification rests. This court and others thereafter seized that wholly unnecessary distinction either to justify or to offer additional make-weight grounds for (1) tolerating loose pleading of the charge as in Foley v. State, *supra;* (2) a lesser standard of burden of proof than in a regular criminal prosecution as in State v. Peterson, *supra*; and (3) no constitutional requirement of a jury trial for petty offenses where no such trial was required at common law. The latter constitutes the bulk of the cases mentioned.

Whatever justification the classification may have historically had, it has no application where, as here, the offense charged is punishable by imprisonment; the offense charged is also a violation of state law; and is an offense which has been historically treated as criminal.

We hold, therefore, that a prosecution for gambling in violation of a city ordinance which is punishable by imprisonment is a criminal prosecution both in form and in substance and is one of the crimes for which wiretap may be authorized if the requirements of the pertinent statutes are met.

The fourth and principal point raised by the defendant is the sufficiency of the application's allegations to support the finding of the District Judge with respect to the failure or futility of investigative procedures other than interception. Title 18 U.S.C.A., section 2518, and section 86-705, R. R. S. 1943, are, in all substantive ways and in wording, virtually identical. They describe the information the application must contain, what the judge entering the order must be able to find, and what the order must contain, as well as certain other matters. The particular subsections of the statutes at issue here are (1)(c) and (3)(c). These subsections read as follows: "A full and complete statement as to whether or not other investigative procedures have been tried and

failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . . . normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . . ." The defendant makes no contention that the application is insufficient to meet the requirements of the other subsections of section 2518(1), Title 18 U.S.C.A., or to support the corresponding findings by the court as required by other sections of the statute.

Subsection 10(a) of section 2518, Title 18 U.S.C.A. (subsection (9) of section 86-705, R. R. S. 1943), requires suppression of the contents of any interception or evidence derived therefrom if "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." No contention is here made that the order was insufficient on its face, or that the interception was not made in conformity with the order. Hence, the question before us is whether the communications were unlawfully intercepted because the allegations were insufficient to permit the judge to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried." We find the allegations were sufficient and the interception was lawful.

In United States v. Donovan, 429 U. S. 413, 97 S. Ct. 658, 50 L. Ed. 2d 652, the Supreme Court of the United States indicated that interceptions were unlawful and suppression required if the deficiency was such that it played a "substantive role" with respect to judicial authorization. There can be no question that subsections (1)(c) and (3)(c) lay down substantive requirements. In United States v. Giordano, 416 U. S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341, the court said that wiretaps were not to be routinely em-

ployed as a first step in the investigation, but were to be used only when it is alleged and found that the other investigative procedures "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." The only issue in Giordano, however, was whether execution of the application by a person not authorized by statute was a substantive defect. It was held to be, and the court pointed out, that the "informed judgment" of the person authorized by statute to sign the application was an important element.

The Supreme Court of the United States has not yet had occasion to specifically consider what allegations are sufficient to meet the requirements of subsection (1)(c). Four federal circuit courts have considered the question of exhaustion of other procedures. These are United States v. Smith, 519 F. 2d 516 (9th Cir.); United States v. Vento, 533 F. 2d 838 (3rd Cir.); United States v. Pacheco, 489 F. 2d 554 (5th Cir.); United States v. Kerrigan, 514 F. 2d 35 (9th Cir.); and United States v. Bobo, 477 F. 2d 974 (4th Cir.). A considerable number of federal trial courts have written opinions on the matter.

It is to be noted that the language of subsection (1)(c) does not require the exhaustion of all other possible or reasonable avenues of investigation. It does not, in fact, require that other methods even be tried if the application demonstrates other procedures are unlikely to succeed or are too dangerous. The requirements are alternative, that is, other methods must have been tried and failed "or" the second alternative must be demonstrated. In United States v. Smith, *supra,* the court said: "Congress, in its wisdom, did not attempt to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. As United States v. Giordano, 416 U. S. 505, 515, 94 S. Ct. 1820, 1827, 40 L. Ed. 2d 341 (1974), states—wire tap 'procedures were not to be routinely employed as the initial

step in criminal investigation,' but it is equally true 'that the statute does not require the government to use a wire tap only as a last resort.' United States v. Kerrigan, 514 F. 2d 35 (9th Cir. 1975); United States v. Staino, 358 F. Supp. 852, 856-7 (E.D. Pa. 1973)." United States v. Vento, *supra,* makes exactly the same point. In that case the court said: "In United States v. Armocida, this Court, in accord with the legislative history, adopted a 'pragmatic' approach to subsection (c). We held that the government's showing is to be 'tested in a practical and commonsense fashion.' There is no requirement that every investigative methodology be exhausted prior to application for a section 2518 authorization. Investigators are not obliged to try all theoretically possible approaches. It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion." United States v. Pacheco, *supra,* also points out that all possible, imaginable methods need not be tried. We conclude that what is required under the first alternative is that the application make a full and complete disclosure of all that has been done so that the court may make a judgment as to whether more should be required before a tap is authorized.

We now examine the application in the light of the language of the statutes and the principles of the above cases. The verified application of county attorney Knowles, in addition to the necessary formal parts, recites that the purpose of the requested taps was to "provide evidence of the commission of the offense of an Illegal Gambling Operation (Bookmaking) or conspiracy to commit the said offense." It recites that over a period of years as a result of state and federal investigations, a large number of

people have been arrested in Douglas County and convicted of bookmaking; and that as a consequence, other persons, some of whose identities are known and some of whom are unknown, are believed to have moved into the field and are filling the void left by the fact that the larger bookmakers have been put out of business. It describes how the bookmaking operations are carried on, including the reinsuring of bets by "layoff" bets with other parties; that much of the activity is done by telephone; that one of the persons believed to be filling in is Thomas J. Kolosseus; and that at the time the application was made he was believed to have been carrying on at least some of his operations through two certain telephone numbers at a particular address in Omaha listed in the name of J. C. Miller. The affidavit describes in great detail an extensive investigation covering a period of 18 months into the activities of Kolosseus and others who might be connected with him. The method used included surveillance, eavesdropping, tailing, use of informants, and obtaining information on telephone numbers from telephone utilities. The investigation disclosed that telephones used were changed frequently; that some telephones used had forwarding capabilities so that calls could be transferred to unknown numbers; that the defendant used a "Bell Boy" to summon his messengers so that he could communicate with them by telephones from numerous and undisclosed locations; that Kolosseus was, in fact, a bookmaker as shown by the statements of reliable informants; that he appeared to be communicating by telephone with persons in counties other than Douglas who were part of the bookmaking operation; that Kolosseus was operating a bookmaking "hole" in Omaha, but that the informant was unable to locate it; and that the informant had advised that two certain numbers were being used in the bookmaking operation. The application alleged that the communica-

tions to be intercepted "are the telephone communications of Thomas Kolosseus and other parties whose identities as yet are unknown."

It is clear from the contents of the application which we have briefly summarized that there existed probable cause for the arrest of Kolosseus as well as for a warrant for search of the premises where the telephones were located. The defendant contends that because probable cause was shown without the aid of wiretap, the wiretap was not authorized and asserts "the statute's command [is] that wiretaps can be used only as a last resort."

The difficulty with the defendant's position is that neither the statutes nor the cases support him. The statutory language does not require that every conceivable kind of investigation must first be tried. Neither does it require that all methods be either tried, or shown to be unlikely to succeed or to be too dangerous. One federal district court decision apparently considering an order made on an application which relied on the second alternative, United States v. Curreri, 388 F. Supp. 607, holds that where the second alternative is relied upon, in order to establish the unlikelihood of success requirement all possible methods of investigation must be negated, and states that the court to which application is made cannot take judicial notice of what avenues of investigation are possible and accordingly the application must list and negate the feasibility of all possible avenues. The court then went on in that case to list a number of avenues which might have been tried and which apparently were not. The defects of that opinion, it appears to us, are numerous. It lays down requirements beyond those of the statute. The possible avenues of investigation of any particular crime are multitudinous and can vary with the nature of the criminal operation. Even the Congress, had it so chosen, could not, as a practical matter, have listed all possible avenues. As we have previ-

ously noted, the cited cases confirm the statute makes no such requirement.

The application in this case was clearly sufficient. It would enable the court to find (1) that the application contained a full and complete statement of all that had been done; (2) that the investigation was not directed at the defendant alone, but at other persons whose identities were unknown, including those with whom defendant "laid off" bets; (3) that extensive investigation by various methods covering a period of 1½ years had not disclosed evidence sufficient to assure conviction of Kolosseus, or to discover all the persons involved in the alleged conspiracy; and (4) that an integral means by which the crimes were being committed was by use of telephone and other electronic means of communication such as the "Bell Boy," and that the only likely way by which the communications could be discovered and the identity of the unknown parties determined was by means of wiretap.

The defendant was fined the sum of $100 upon each of the 34 counts of which he was found guilty. He argues the sentences are excessive. We do not believe they are.

AFFIRMED.

MARLENE MINSHULL, APPELLEE, V. SCHOOL DISTRICT OF SUTHERLAND, IN THE COUNTY OF LINCOLN, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

253 N. W. 2d 45

Filed April 27, 1977. No. 40993.

Administrative Law: Labor and Labor Relations: Appeal and Error: Evidence. In an appeal to the Supreme Court from an order of the Court of Industrial Relations, the questions to be determined are whether the action was supported by substantial evidence justifying the order made, whether the Court of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the Nebraska Court of Industrial Relations. Affirmed.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, Dale A. Romatzke, and Gary D. Byrne, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

This is an appeal from an order of the Court of Industrial Relations interpreting a "personal leave" provision in an employment agreement between the School District of Sutherland and the Sutherland Education Association. The decision of the Court of Industrial Relations was in favor of the teacher, and the school district has appealed.

The appellee, Marlene Minshull, had been employed as a special education teacher by the School District of Sutherland, Nebraska, since 1965. On March 6, 1975, she told the superintendent and her supervisor that she wished to take personal leave on March 21, 1975, in order to see and hear her daughter perform at a school-sponsored music contest. Her supervisor told her to get a substitute and go to the music contest. She contacted her regular substitute on March 17, 1975, and arranged for her replacement. On the 18th of March 1975, the superintendent told the appellee that he did not consider going to a music competition personal business, and that she could not be paid for the day. The appellee left work at 10 a.m., on March 21st and attended the South Platte Valley Music Association competition and was docked $36. The appellee filed a grievance with the board of education. It was denied by the

board on May 14, 1975, and appellee brought this action in the Court of Industrial Relations.

Article IX, paragraph 1, of the employment agreement for the 1974-75 school year which is involved here provides: "Personal leave is defined to be a leave from classroom duties in order that the teacher can transact personal business. Two days of this type leave is available for each teacher per year. All arrangements for the taking of days of personal leave should be made with the Superintendent of Schools well in advance in order that the Superintendent can make arrangements for the teacher's absences. (This is according to the recommendations of the fact finding Board of 1972)."

The applicable paragraph of the recommendations referred to was: "The Fact-Finding Board recommends that each teacher be allowed two days of personal leave per year. All arrangements for the taking of the days of personal leave should be made with the Superintendent of Schools well in advance in order that the Superintendent can make arrangements for the teacher's absence."

The recommendations of the 1972 fact-finding board had been made following the breakdown of negotiations for a new contract for the 1972-73 school year. Under the prior contract a teacher was allowed 1 day a year personal leave subject to the approval of the superintendent. The association was asking for 2 days personal leave to be taken at the discretion of the teacher without approval by the superintendent, with the sole duty on the teacher being to give timely notice in order that a substitute could be found. The Court of Industrial Relations found that the recommendations of the fact-finding board adopted the teachers' position. Other leave provisions of the employment contract are not involved nor in dispute here.

The school district contends that "personal leave" is to be limited to commercial business purposes,

and is subject to the discretion of the superintendent as to what circumstances will constitute a personal business transaction. The appellee contends that a teacher may take 2 days personal leave a year at the discretion of the teacher, limited only by the requirement that the teacher must give adequate notice so that a substitute may be found.

The Court of Industrial Relations determined that the personal leave provisions of the contract did not make the taking of the leave subject to the approval of the superintendent, and that "Personal business" included any reasonable purpose that could not be accomplished outside school hours. It held that the contract grants teachers 2 days personal leave to be taken at their discretion, limited in two ways: First, the teacher must give adequate notice so that a substitute may be found, and, second, the leave must be taken for a reasonable purpose that could not be accomplished outside school hours. A purpose of mere entertainment or a vacation were determined to be unreasonable. The Court of Industrial Relations also held that the school board may not disallow pay for personal leave days unless it finds either that adequate notice was not given, or that the purpose was unreasonable, or that the purpose could have reasonably been accomplished outside school hours. It is apparent on the record that the interpretation of the contract made by the Court of Industrial Relations in the case now before us was reasonable and is fully supported by the evidence.

In an appeal to the Supreme Court from an order of the Court of Industrial Relations, the questions to be determined are whether the action was supported by substantial evidence justifying the order made, whether the Court of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents, *ante* p. 243, 253 N. W. 2d 1.

The Court of Industrial Relations acted within the scope of its statutory authority, its order is supported by substantial evidence, and its action was not arbitrary, capricious, or unreasonable. The order of the Court of Industrial Relations is affirmed.

AFFIRMED.

SPENCER, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ROBERT B. FOWLER, APPELLANT.

253 N. W. 2d 47

Filed April 27, 1977. No. 41002.

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

Robert B. Fowler, pro se.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

The defendant pleaded guilty to a charge of contributing to the delinquency of a minor. The county court of Lancaster County sentenced him to 90 days in the county jail. On appeal the District Court affirmed the conviction and sentence. Defendant was represented by counsel in both the county and District Court, but has appealed to this court pro se.

After midnight on January 12, 1976, the defendant picked up three boys and drove them to a service station. The defendant waited in his car while the three boys broke in and took candy and cigarettes. Defendant then returned the boys to their residence.

There is no contention that defendant's guilty plea was not voluntary, nor is there any complaint

as to the validity and sufficiency of the arraignment. The only issue involved in this appeal is the excessiveness of the sentence.

The penalty for contributing to the delinquency of a minor is a fine not to exceed $500 or imprisonment in the county jail for up to 6 months, or both. The defendant's sentence was 90 days in the county jail.

The defendant was 28 years old at the time of his conviction. He has an extensive criminal record as an adult, and a juvenile record extending back to 1961, when he was 13 years old. His sentence was not excessive and there was no abuse of discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUGENE PAUL OZIAH, APPELLANT.

253 N. W. 2d 48

Filed April 27, 1977. No. 41007.

Criminal Law: Post Conviction. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

Appeal from the District Court for Adams County: FREDRIC R. IRONS, Judge. Affirmed.

Stephen A. Scherr, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. THOMAS, J.

The defendant Eugene Paul Oziah appeals from a denial of post conviction relief by the District Court. The sole issue raised in the petition is whether the defendant was denied his right to a speedy trial. We

decline to rule on that issue because the defendant has waived the right to relief on that ground.

The defendant's claim is based upon the delay between the filing of a complaint charging him with forgery on August 25, 1964, and his arrest on December 2, 1966. The delay was apparently caused by the incarceration of the defendant in the Nebraska Penal and Correctional Complex on another charge. He was not arrested on the forgery count until he was released from imprisonment on the other charge.

Prior to trial the defendant filed a motion to quash the information due to an alleged violation of his right to a speedy trial. The motion was heard and denied by the trial court. The defendant then plead guilty and was sentenced to probation for 18 months. The probation sentence was later revoked following the conviction of the defendant of robbery. He was then sentenced to a 5-year term which he had received from the robbery conviction.

The defendant did not appeal his case to this court directly following conviction in the District Court although he had presented the speedy trial issue to the District Court in his motion to quash the information. He instead chose to accept the advantages of a sentence of probation.

In State v. Lincoln, 186 Neb. 783, 186 N. W. 2d 490 (1977), it was held: "A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

"Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review."

Oziah was aware of his possible claim to a denial

of a speedy trial and acknowledged the claim through his motion to quash. By failing to raise that issue directly in an appeal, he waived the right to contest that issue in a post conviction review.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. PLESKAC, APPELLANT.

253 N. W. 2d 49

Filed April 27, 1977. No. 41072.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

Upon a plea of nolo contendere to issuing an insufficient fund check with intent to defraud the defendant was sentenced to imprisonment for 1 to 3 years. He has appealed and contends the sentence is excessive.

The defendant is 25 years of age, is married, and has two children. He has a tenth grade education and has been employed as a truck driver and as a carpenter. He has no criminal record other than traffic offenses and a history of writing insufficient fund checks.

The presentence report indicates the defendant has written approximately 100 insufficient fund checks since 1969. In 1970, the defendant was placed

on 2 years probation by the District Court for Washington County, Nebraska, for writing an insufficient fund check. One of the conditions of probation was that the defendant make restitution in the amount of $684.68 at the rate of $30 per month. It was necessary to extend the probation period twice in order to secure compliance with this condition. In 1973 the defendant was fined $100 each on two counts of issuing insufficient fund checks in Adams County, Nebraska. Similar charges were filed in Clay, Nuckolls, and Thayer Counties.

In May 1975, the defendant was sentenced by the District Court for Saunders County, Nebraska, to imprisonment for 1 year for issuing an insufficient fund check. This sentence was commuted and the defendant was discharged from the penal complex on October 18, 1975. The present offense was committed on April 4, 1976.

In view of the defendant's history the sentence imposed in this case was clearly not excessive. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT MARTIN KEESECKER, APPELLANT.

253 N. W. 2d 169

Filed May 4, 1977. No. 40841.

1. **Criminal Law: Right to Counsel.** An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.
2. **Criminal Law: Right to Counsel: Confessions.** An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver.
3. _____: _____: _____. After such warnings as set out in Miranda have been given, and such opportunity afforded him, an individual may knowingly and intelligently waive those rights and agree to answer questions or make a statement.

4. **Criminal Law: Confessions: Evidence: Trial.** The rule is that where the evidence as to what occurred immediately prior to and at the time of making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence.
5. _____: _____: _____: _____. Generally, a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to sustain a conviction.

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

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

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C.J.

This is an appeal by the defendant from his conviction for the second degree murder of Ronald H. Wilson in Omaha, Nebraska, on November 5, 1975. The defendant was found guilty by a jury and sentenced by the District Court to a term of 25 years imprisonment in the Nebraska Penal and Correctional Complex. We affirm the judgment and sentence of the District Court.

On appeal the defendant raises two contentions. First, that the District Court erred in admitting into evidence various exhibits which were tape recordings and written transcripts of his confession to the police. Second, that the District Court committed reversible error in overruling his motions for a directed verdict in that the evidence at trial was insufficient as a matter of law to sustain his conviction. We shall deal with each of these contentions in order.

The defendant argues that the tape recordings and written transcripts of his confession to the police should have been excluded because they were obtained in violation of his constitutional rights.

In Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court held: " * * * we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation * * *. * * *

"If the individual states that he wants an attorney the interrogation must cease until an attorney is present. At any time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

The defendant was first interviewed by police on November 5, 1975, the date of the shooting. At this time, the police performed a gunshot residue test upon the defendant. On December 22, 1975, the results of the gunshot residue test on the defendant were received by the Omaha police department. The test results indicated that the defendant had fired the gun which killed Wilson.

On the basis of these test results, officers Brisby and Bruner of the Omaha police department decided to reinterview the defendant. They drove to the defendant's residence and told him that more evidence had been uncovered in the case. They asked the defendant if he would come with them to the central station to talk with them. The defendant testified that he was not placed under arrest on December 22, 1975, but voluntarily went with officers Brisby and Bruner to police headquarters. The officers had arrived at the defendant's residence at about 7 p.m. Nothing was said during the drive to

the police station. They arrived at approximately 7:30 p.m. at the police station.

The defendant was taken to an interview room in the detention area. According to officer Brisby, the defendant appeared normal at the time. The defendant was first advised of his constitutional rights. He answered "yes" to all the questions contained on the rights advisory form used by the officers and appeared to understand all the questions. Thereafter, in response to questioning by the officers, the defendant acknowledged that he had been responsible for shooting Wilson.

Officer Brisby then told the defendant that they wanted a taped statement, which the defendant agreed to give. Prior to this time, the defendant had not requested the presence of an attorney. As one of the officers started to put the tape onto the recorder, the defendant told the officers that he thought he should talk to an attorney. He then asked the officers to get an attorney for him. Officer Brisby testified he told the defendant that police officers do not contact attorneys, but that the defendant was free to do so if he desired. There was a telephone in the interview room, and the defendant was told that he could use it to call one if he desired. Officer Brisby stated that the defendant would have been allowed to call an attorney if he had wanted to.

The defendant then stated that he would go ahead and make the taped statement. He was again read his rights and made the taped statement. During the evening the taped statement was transcribed by police personnel. In the morning of December 23, 1975, officer Clark was assigned to take the transcript to the defendant for him to make corrections and sign. Officer Clark again read the defendant his rights. The defendant made several changes on the transcript and signed the statement. This was at approximately 4 a.m.

The defendant recalled being fully advised of his

Miranda rights. He testified that he repeatedly asked to be furnished an attorney but was told that it was too late to get one. He stated that he made the statement because he concluded that he had no alternative. Officer Bruner testified that the police interrogation never advised the defendant that it was impossible to get him a lawyer because of the lateness of the hour, but they did tell him that they could not get a lawyer for him.

In Miranda, *supra,* the Supreme Court held that an accused could voluntarily waive his constitutional right to have an attorney present during questioning. The court stated: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. * * *

"An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. * * *

"After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement."

In State v. Ransom, 182 Neb. 243, 153 N. W. 2d 916 (1967), we held: "The rule is that where the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence." See, also, State v. Perez, 182 Neb. 680, 157 N. W. 2d 162 (1968); State v. Deardurff, 186 Neb. 92, 180 N. W. 2d 890 (1970).

The District Court concluded that the defendant was advised of his constitutional rights; that the

statement he made was voluntary; and that there was an intelligent and knowing waiver of rights. The record shows that the defendant was advised of his rights at the onset and throughout the interrogation. This included his right to obtain an attorney and have him present during questioning. He was offered both the means and the opportunity to contact an attorney. Rather than contacting an attorney, or else cutting off the interrogation, the defendant decided to go ahead and make the taped statement. There is no evidence in the record of any form of police coercion upon the defendant. There was no violation of the defendant's constitutional rights under these circumstances, and the District Court correctly admitted into evidence the defendant's confession. There is no merit to this contention.

The defendant next contends that there was insufficient evidence to support his conviction. Generally, a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to sustain a conviction. State v. Moss, 182 Neb. 502, 155 N. W. 2d 435 (1968).

In addition to the defendant's confession, there was the following evidence. Carly Allen testified that he owned the house in which the defendant and Wilson shared an apartment. On the evening of November 5, 1975, Allen and several others got together at Allen's residence, about a half block from the house where the defendant and the victim, Wilson, lived. Both the defendant and Wilson were at Allen's house that evening. The defendant left twice during the evening for about 5 minutes each time. He appeared nervous and his hands were shaking. Around 8 p.m. Wilson left the Allen residence and returned to the apartment. Around 5 to 10 minutes later, the defendant left. The defendant was alone

with Wilson at the time of the shooting. The defendant returned about 10 minutes later and told those at the Allen house that Wilson had shot himself in the head. Beverly Allen, Allen's ex-wife, testified that the defendant and Wilson had argued on previous occasions.

A gunshot residue test was given the defendant. Richard Meyers, a forensic chemist, analyzed the test given to the defendant. He testified that the test results were consistent with the conclusion that the defendant had fired the weapon and not merely picked it up.

Dr. Jerry Jones, a pathologist, conducted an autopsy on the victim's body. An external examination of the victim's body revealed a rounded shotgun wound on the left side of the victim's head. He testified that this was not the typical contact wound found in suicides. He estimated that the wound was inflicted from about 10 feet.

Officer Williams of the Omaha police Department was the first officer to enter the victim's apartment. He found the victim slumped in a chair with blood coming from his wound. He testified that he observed the shotgun leaning against a table to the right of the chair. Marcellus Deats, an Omaha police criminalistics technician, handled the crime scene investigation. He also observed the shotgun leaning against a small table to the right of the chair in which the victim was slumped. Although the victim was covered with quite a lot of blood, the shotgun was quite clean.

This evidence, in addition to the defendant's confession, was sufficient to sustain his conviction.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. I. V. STARKS, APPELLANT.

253 N. W. 2d 166

Filed May 4, 1977. No. 40876.

1. **Criminal Law: Courts.** It is within the sound discretion of the trial court to remand a defendant to custody during trial.
2. **Criminal Law: Statutes: Bail: Bonds.** The provision in section 29-901, R. R. S. 1943, that a recognizance shall be continuous "until final judgment" relates to the obligation of the surety.
3. **Criminal Law: Courts: Bail.** A trial court has broad powers to insure the orderly and expeditious process of a trial, and this includes the power to revoke bail and remit the defendant to custody.
4. **Criminal Law: Bail.** In the absence of prejudice, an erroneous revocation of bail does not affect the merits of the case.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, 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, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

The defendant was found guilty of shooting at John R. Farmer with intent to kill, wound, or maim and unlawful possession of a firearm by a felon. He was sentenced to imprisonment for concurrent terms of 2 to 5 years and 2 to 3 years. He has appealed and contends the judgment should be reversed because the trial court failed to sustain his motion for a mistrial made at the close of the trial.

The evidence shows the shooting took place in Omaha, Nebraska at about 1:15 a.m. on February 13, 1976. Farmer, a police officer assigned to the vice and narcotics unit as an undercover investigator, was driving an unmarked Buick car and was not in uniform. Farmer stopped for a traffic light at the intersection of 30th and Binney Streets. When an

automobile operated by the defendant stopped to the west of the Buick, Farmer noticed the defendant was pointing a gun at him. Farmer fired at the defendant and then proceeded south on 30th Street with the defendant following him. Farmer radioed for assistance and fired a second shot at the defendant as they proceeded south on 30th Street. Frank J. O'Connor, a police officer assigned to the criminal investigation bureau, special events section, answered the call and proceeded to the intersection of Hamilton and 30th Streets.

After crossing the intersection at Hamilton Street, Farmer turned the Buick to the northeast and stopped across the center traffic lanes of 30th Street. The defendant pulled up close to the Buick and fired 4 or 5 shots at the car. Farmer at this time was south of the Buick using it for cover. O'Connor fired one shot from his riot gun at the defendant. The defendant passed to the right of the Buick and continued south on 30th Street. O'Connor followed the defendant and apprehended him after going 6 or 7 blocks. A pistol with one live round and five spent rounds was found under the front seat of the defendant's automobile.

After the jury had been instructed and was leaving the courtroom the trial court directed a deputy sheriff to place the defendant in custody. The defendant then moved for a mistrial which motion was overruled. The record shows the following: "MR. FRANK: Your Honor, at this time the Defendant will move for the Court to declare a mistrial on the grounds that after the instructions were read to the jury, at approximately twelve twenty P.M. this date, while the jury was still — while at least part of the jury was still in the Courtroom the Court, through Judge Tesar, very loud, boisterous manner directed the Deputy to place my client under arrest, and place him in custody pending the outcome of the decision. I will point out to the Court that my client

has been out on bond pending the disposition of this case, and has been on bond during the trial of this case, and that the Court's comments in front of, at least, a partial members of the jury panel was tantamount to the Court expressing its conviction of the guilt or innocence of my client, therefore, depriving the client, I. V. Starks, of a fair and impartial trial. THE COURT: Let the record show that the jury was instructed, and were leaving the Courtroom. It is true that probably some of them might have been still in the vicinity of the Courtroom. The Defendant got up in the Courtroom, and was going to leave the Courtroom with a couple of friends that he had, and I said the Defendant will be placed in custody. That's exactly what I said because I place a Defendant in custody after a jury is instructed because I want the jury — I want the Defendant to be present. I don't want to go through, and I will not have the reputation of having tried a case and the Defendant leaving after the jury is gone, and then failing to show up when the jury arrives at a verdict. It happened to me, and I have declared a mistrial in that case, and I will not do it again. It's a rule of this Court that after the case is submitted I put them in custody to insure their presence when the jury has arrived at a verdict. As to whether any of the jurors heard my remarks I cannot say. I doubt it if they did, but I make that comment now for counsel. If he doesn't know it that he should conduct himself he knows it now. MR. FRANK: While the comment was made by the Court to place my client in custody there were at least, within my view, four jurors still standing in line in the jury box waiting to leave the Courtroom, and that there was no indication, no evidence to the Court that my client would skip pending the disposition of the jury hearing. My client stood up, probably because when the jury was allowed to leave he assumed that the Court was in recess. At that point he had not left the Courtroom, but he just

started to stand. There were friends and some relatives, and witnesses in the Courtroom at the time. There is no indication to the Court he would leave. It's been my experience in the Court, through most of the Douglas County and District Courts, when one is out on bond pending the disposition of a trial they are usually held in custody for sentencing after a jury verdict not after the instructions. I still feel it was prejudicial to my client. THE COURT: The motion will be overruled."

We find no prejudicial error. The motion was supported only by the statement of counsel and there was no showing that any juror understood the statement of the trial court as a comment on the guilt of the defendant. The record does not show the defendant was deprived of a fair and impartial trial by any improper remarks of the trial court made in the presence of the jury.

It is generally held that it is within the sound discretion of the trial court to remand a defendant to custody during trial because the dangers of releasing a defendant on bail during the course of a trial are substantially greater than those existing before trial. United States v. Bentvena, 288 F. 2d 442. After the trial has commenced the defendant does not have the same right to bail that existed before the trial began. The provision in section 29-901, R. R. S. 1943, that a recognizance shall be continuous "until final judgment" relates to the obligation of the surety and does not mean that all defendants shall be free on bail until final judgment.

A trial court has broad powers to insure the orderly and expeditious process of a trial, and this includes the power to revoke bail and remit the defendant to custody. Bitter v. United States, 389 U. S. 15, 88 S. Ct. 6, 19 L. Ed. 2d 15. However, the power should be exercised only when it is necessary to avoid interference with the progress or order of the trial.

In this instance the trial court thought it was necessary to place the defendant in custody to insure that he would be present when the jury had finished its deliberations. The record does not affirmatively show an abuse of discretion.

Here there was no showing of prejudice. In the absence of prejudice, an erroneous revocation of bail does not affect the merits of the case. United States v. Allison, 414 F. 2d 407.

Upon a consideration of the entire record we are satisfied a miscarriage of justice did not occur. The judgment of the District Court is affirmed.

AFFIRMED.

THERESE C. HALLER, APPELLEE, V. STATE OF NEBRASKA EX REL. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.

253 N. W. 2d 280

Filed May 4, 1977. No. 40938.

1. **Legislature: Statutes: Constitutional Law: Courts: Administrative Law.** A statute which purports to delegate to the courts de novo review of an exercise of legislative power, in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power, is unconstitutional.
2. **Statutes: Constitutional Law: Courts.** In construing a statute, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done.
3. **Administrative Law: Appeal and Error.** In a proceeding to review an order of the State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

Paul L. Douglas, Attorney General, and Robert H. Peterson, for appellant.

Robert E. O'Connor, for appellee.

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

MCCOWN, J.

This is a proceeding by the State Real Estate Commission against Therese C. Haller, a real estate saleswoman, for an alleged violation of rules of the commission. Following a hearing on the charges, the commission found that the defendant had violated Rule 24(b), now Rule 6(3)(b), of the rules of the State Real Estate Commission, and suspended her real estate salesman's license for 30 days. Upon appeal to the District Court for Douglas County on the record made before the State Real Estate Commission, the court found that the findings of the real estate commission were in error, and that the real estate license should not have been suspended. The District Court then reversed and vacated the order of suspension and dismissed the proceeding. The commission has appealed.

Vintage, Inc., a real estate firm holding a broker's license, was the exclusive sales representative for a real estate development in Sarpy County, Nebraska. In 1974, the developer and Vintage were engaged in a sales promotion which involved the purported sale of an insignificant item of personal property by the purchaser to the seller for $1,000. No money was ever given to the buyer, but the amount was credited as part of the downpayment on the house. Sometimes the personal property was transferred, but often nothing was ever turned over to the seller. The promotion resulted in an effective reduction of the purchase price by $1,000.

The appellee, Therese C. Haller, was employed by

Vintage, Inc., and held a license as a real estate saleswoman. In a transaction involved in the complaint against her, she showed a condominium to a prospective buyer and explained to him that the purchase price was stated at $25,900, but that someone would buy a canceled rent receipt from him for $1,000, making the effective price of the unit $24,900. The purchaser then signed an agreement, presented to him by the appellee, to sell the canceled rent receipt, and made a cash deposit of $400. The appellee prepared the purchase agreement showing a purchase price of $25,900, but showing receipt of an earnest money deposit of $1,400. The purchaser's offer to purchase the property was contingent upon obtaining a 95 percent loan. The appellee then referred the purchaser to a building and loan association which took the information regarding the purchase price and the earnest money deposit from the purchase agreement. The loan was made in reliance on the purchase agreement and the transaction was closed on October 25, 1974.

A similar transaction was conducted by the appellee with another purchaser in January of 1975. Each transaction is the basis of a separate charge in the complaint filed against the appellee.

On July 18, 1975, the State Real Estate Commission filed charges against the appellee and another salesman, as salesmen, and against the appellee's supervisor, and Vintage, Inc., as brokers. It was alleged that in the transactions involved, they had all violated a federal statute which makes it unlawful to knowingly make any false statement or representation, or unlawfully overvalue any land upon any application or purchase agreement for the purpose of influencing in any way the action of any institution whose accounts are insured by the Federal Savings and Loan Insurance Corporation. The charges also alleged that they had all violated Rule 24(b), now

Rule 6(3)(b), of the rules of the State Real Estate Commission.

Under section 81-885.24, R. R. S. 1943, the commission has power to revoke or suspend any license if the licensee has been found guilty of any of numerous specified unfair trade practices, including the violation of any rule or regulation promulgated by the commission in the interest of the public, or actions demonstrating unworthiness or incompetency to act as a broker or salesman. Rule 24(b), now Rule 6(3)(b), provides that actions demonstrating unworthiness shall include, but not be limited to, "Representing to any lender, guaranteeing agency, or any other interested party, either verbally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon."

Following hearing, the real estate commission suspended the broker's license of appellee's supervisor and that of Vintage, Inc., for a period of 90 days, and suspended the salesman's license of the appellee for a period of 30 days. The proceeding against the other salesman was dismissed. Only the appellee appealed to the District Court. The District Court, under the provisions of section 81-885.31, R. R. S. 1943, considered the matter de novo upon the record without additional evidence. The court found that the findings of the real estate commission were in error, reversed and vacated the order of suspension, and dismissed the proceeding. The State Real Estate Commission has appealed to this court.

The fundamental issue here involves the standard to be used in a judicial review of orders of the State Real Estate Commission made and entered within its statutory power and jurisdiction. The District Court, in following the statutory mandate of section 81-885.31, R. R. S. 1943, substituted its judgment for that of the real estate commission.

The function which the State Real Estate Commission exercises is a legislative one delegated to it by the Legislature under standards set by statute. In several recent cases we have held that a statute which purports to delegate to the courts de novo review of an exercise of legislative power, in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has appropriately delegated the power, is unconstitutional. See, Herink v. State ex rel. State Real Estate Commission, *ante* p. 241, 252 N. W. 2d 172; Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683; American Assn. of University Professors v. Board of Regents, *ante* p. 243, 253 N. W. 2d 1; Orleans Educations Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172. In construing a statute, however, it is the duty of the court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. Scott v. State ex rel. Board of Nursing, *supra.*

Section 81-885.31, R. R. S. 1943, as so construed, does not provide for a de novo review in the District Court in the sense that the court may substitute its own judgment for that of the State Real Estate Commission. In a proceeding to review an order of the State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Herink v. State ex rel. State Real Estate Commission, *supra.*

The order of the State Real Estate Commission in the case now before us is supported by substantial evidence. The commission acted within the scope of its authority, and its action was not arbitrary, capricious, or unreasonable. The judgment of the District Court is reversed and the order of the State

Real Estate Commission suspending appellee's license is reinstated.

REVERSED AND REMANDED.

SPENCER, J., concurs in the result only.

STATE OF NEBRASKA, APPELLEE, V. EDDIE ADDISON, ALSO KNOWN AS EDISON CLOWN HORSE, APPELLANT.

253 N. W. 2d 165

Filed May 4, 1977. No. 41000.

Criminal Law: Constitutional Law: Jurors. The key-number system for the selection of jurors from voter registration lists is constitutionally valid.

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

Judy L. Raetz, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from a judgment of the District Court for Dawes County, Nebraska, convicting Eddie Addison, also known as Edison Clown Horse, of the offense of failing to appear for a preliminary hearing. Appellant's motion to quash the venire was overruled. This ruling is the only error assigned. We affirm the judgment of the trial court.

Appellant makes the broad claim that the operation of the statutory key-number system by which the names of prospective jurors are drawn by lot from voter registration lists produces a systematic

exclusion of Indians, and is thus unconstitutional. This claim rests upon two exhibits, No. 1 being a list of the registered voters of Dawes County; and No. 2 being an extract from the 1970 census showing the population of Dawes County to be 9,693 of whom 132 were Indians. Appellant claims that only 22 of the names on the voter registration list indicate Indian descent. We have held that examination of names on a voting list for indications of ethnic origin is not alone a valid method of determining the ratios of ethnic representation upon such lists. State v. Casados, 188 Neb. 91, 195 N. W. 2d 210.

Appellant cites Taylor v. Louisiana, 419 U. S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690, as a controlling precedent. There, the court held that a statutory system for the selection of jurors was invalid because it contained a provision excluding all women from such selection, except only those who filed written declarations of their desire to be subject to such service. The Nebraska statute does not authorize the exclusion of any class from the jury list; the only exclusion is of persons found individually not to have the qualifications of jurors, and the jury commissioner is required to record all names so stricken, such list being subject to inspection by the court and by the attorneys of record. § 25-1629, R. R. S. 1943. The Nebraska system is clearly outside the ambit of Taylor v. Louisiana, *supra*.

Appellant makes no claim that there was any kind of irregularity in the proceedings for the selection of the jury panel from which the trial jury was drawn.

We have previously held that the Nebraska key-number system for the selection of jurors from voter registration lists is constitutionally permissible. State v. Gutierrez, 187 Neb. 383, 191 N. W. 2d 164; State v. Casados, *supra;* State v. Wright, 196 Neb. 377, 243 N. W. 2d 66. No reason has been shown in law or in fact for departure from these precedents.

The judgment of the trial court in overruling the

motion to quash the venire is correct and is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

IN RE INTEREST OF D.L.H. STATE OF NEBRASKA, APPELLEE, V. A.H., HIS MOTHER, APPELLANT.

253 N. W. 2d 283

Filed May 4, 1977. No. 41201.

1. **Infants: Parent and Child.** The right of a parent to maintain the custody of his or her children is a natural but not an inalienable right and the public has a paramount interest in the protection of the rights of a child.
2. **Infants: Parent and Child: Courts: Appeal and Error.** An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, as amended, 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.
3. **Constitutional Law: Statutes: Due Process.** The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden.
4. **Infants: Parent and Child.** The first and paramount consideration in any case involving the custody of a child is the best interests of the child.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN BUCKLEY, Judge. Affirmed.

Michael T. Levy, for appellant.

Donald L. Knowles and Francis T. Belsky, for appellee.

John J. Liakos of Liakos & Kuhn, guardian ad litem.

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

This is an appeal by the mother from the termination of parental rights to the minor child, D.L.H. The name of the father is unknown. Jurisdiction over him was obtained by publication and his parental rights were also terminated. The mother alleges 11 assignments of error, which we condense to the following: (1) Sections 43-202 and 43-209, R. S. Supp., 1974, are unconstitutional; (2) the denial of procedural due process of law; and (3) the insufficiency of the evidence to sustain the finding. We affirm.

The proceedings resulting in termination of the appellant's parental rights were commenced on June 3, 1975, by the filing of a petition in the Separate Juvenile Court of Douglas County, Nebraska, alleging generally D.L.H. was dependent and neglected, without proper parental care, and was therefore a child within the provisions of sections 43-202(1) and 43-202(2)(b), R. S. Supp., 1974.

The court ordered the child placed in the temporary custody of the Douglas County welfare department until a hearing could be held upon the matter of custody pending adjudication. While one of the appellant's assignments is the insufficiency of the evidence, we do not deem it essential that the evidence adduced be set out in detail. We have carefully examined the record and are convinced that the evidence establishes beyond a reasonable doubt that the best interests of the minor child requires the termination of parental rights herein. We therefore will only briefly summarize the essential facts herein.

Appellant, at the time the petition was filed in 1975, was approximately 45 years of age. She separated from her husband in 1966, and was divorced 2

years later. Two children were born of her marriage. One is now emancipated and the other is with her father. D. L. was born July 4, 1969. A worker from adult protective services referred appellant to the board of mental health. On May 13, 1975, appellant was placed in the psychiatric unit of the Douglas County Hospital. D.L. was placed in foster care on the same date. While in the hospital, appellant was diagnosed as suffering from manic depressive illness, hypomania.

Appellant had also been hospitalized in 1972. The record indicates that the diagnosis at that time was of alcoholism and schizophrenia, chronic undifferentiated type. Several hearings were held in this matter: A detention hearing, two motion hearings, an adjudication hearing, and a disposition hearing.

The record indicates the social agencies worked extensively with appellant in an attempt to sufficiently rehabilitate her to the extent that she could properly take care of her child. The testimony of several case workers who had had contact with appellant since 1972, described her as an erratic, unstable person. Their testimony indicates she was addicted to alcohol and refused to respond or discuss any plans for herself and her child.

The testimony of several neighbors was adduced. One of them observed appellant talking to various trees. Another who observed her approximately 5 times a week, testified that appellant was intoxicated 80 percent of the time. On a number of these occasions her son was present with her. Another neighbor testified she observed appellant intoxicated on almost a daily basis from early September 1974, through May 5, 1975. This neighbor further testified that she observed appellant kick a child of 5 years of age, and pick him up and shake him. She further testified that on May 5, 1975, the first meal D.L. had eaten all day was the evening meal served at her home.

Appellant was called to testify on her own behalf at the detention hearing. She stated she was not taking her prescribed medicine. Her son D. L. doesn't have a father, couldn't have a father. She views the existence of D.L. as that of a donor situation. She further testified she did not feel she was mentally ill, but did admit she might have a drinking problem. She refused to elaborate on the drinking problem.

A psychiatric evaluation was made on October 12, 1976, under court order. The diagnoses of the psychiatrist was as follows: (1) Personality disorder — hysterical type; (2) manic depressive psychosis — hypomania; and (3) possible habitual excessive drinking. The psychiatrist stated: "The prognosis in the case is I think very guarded especially in view of the fact that she refused to recognize that she suffers from a mental illness and refuses to cooperate in any treatment program set up for her." The psychiatrist further stated, "The question of whether this patient is capable of providing proper parental supervision for her 7 year old child is a very difficult one. In this examiner's opinion she does suffer from a mental illness which at times reaches psychotic proportions — and certainly she has a history of periodic excessive drinking. She is unpredictable in her behavior at times.

"Therefore, in conclusion it must be this examiner's opinion that at the moment, at least, this patient is unable to adequately resume full responsibility for the care and welfare of a 7 year old child."

Appellant's problem had been continuous since at least 1972. The agencies had tried to work with her. The child had been under the custody of the welfare department for more than a year. During this time the mother refused to recognize her condition, or was unable to do so. In any event, the time is now past when the court can further experiment in this situation. The right of a parent to maintain the cus-

tody of his or her children is a natural but not an inalienable right and the public has a paramount interest in the protection of the rights of a child. State v. Tibbs, 197 Neb. 236, 248 N. W. 2d 330 (1976).

In appellant's favor, the record indicates that the child was generally properly fed and clothed, and the apartment was kept clean. There is no evidence in the record of abuse of the child who the evidence indicated appeared to be normal and healthy. However, during the 1974-75 school year, while the child was with appellant, he missed 48 days of school.

An appeal of a case brought under Chapter 43, article 2, R. R. S. 1943, as amended, 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. State v. Tibbs, *supra*.

We now consider appellant's contention that the statutes defining the acts constituting parental neglect, child dependency, and grounds for termination of parental rights provide constitutionally impermissibly vague standards. Appellant argues there are insufficient guidelines by which a violation of these statutes may be fairly and nonarbitrarily determined.

The due process command imposed by Amendment XIV to the Constitution of the United States, and Article I, section 3, Constitution of Nebraska, translates into two basic requirements. The statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must contain ascertainable standards by which it may be applied. This does not demand total absence of vagueness in a statute, but merely requires that a statute provide adequate notice of what conduct it requires or prescribes as well as guidelines by which a violation of

the statute may be fairly and nonarbitrarily determined.

The court found sections 43-202 and 43-209, R. S. Supp., 1974, to be applicable in this case. Although the court did not state the grounds on which it terminated appellant's parental rights, it is obvious it was relying on section 43-209(4) and (5), R. S. Supp., 1974. These involve the habitual use of intoxicating liquor and mental illness or deficiency.

Most decisions invoking the constitutional void for vagueness doctrine have dealt with statutes and ordinances imposing criminal sanctions. It is clear, however, that this doctrine applies equally to civil statutes. Yet even in criminal statutes the language adopted need not afford an interpretation approaching mathematical certainty. In determining the sufficiency of notice, a statute must of necessity be examined in light of the conduct with which a defendant is charged. Parker v. Levy, 417 U. S. 733, 94 S. Ct. 2547, 41 L. Ed, 2d 439 (1974).

Section 43-202, R. S. Supp., 1974, so far as material herein, provides: "(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 subsistence, education, or other care necessary for the health, morals, or well-being of such child; * * * or (e) who is in a situation * * * dangerous to life or limb or injurious to the health or morals of such child; * * *."

Section 43-209, R. S. Supp., 1974, so far as material herein, provides: "The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: * * * (4) The parents are unfit by reason of debauchery, habitual

use of intoxicating liquor or narcotic drugs * * * which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child; (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 indefinite period; * * *."

These provisions appear to us to be sufficiently specific to apprise the appellant of why the State felt it necessary to terminate her parental rights. This language does convey sufficiently definite warning as to prescribed conduct when measured by common understanding and practice. Due process requires no more. United States v. Petrillo, 332 U. S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947). Reasonable people, including this appellant, should understand that habitual drunkenness, when she had the sole custody and control of a 6-year-old child, would produce a situation and an environment detrimental to his welfare.

Appellant has been told that she is suffering from a mental illness. She has repeatedly failed and refused to take the medicines provided for its treatment. There is no uncertainty in the meaning of section 43-209, R. S. Supp., 1974, as it applies to the appellant.

We hold the statutes under attack provide standards which the average intelligent person should be able to understand and by which he or she can regulate his or her conduct. It is true, the terms of the statutes are somewhat broad, yet it is practically impossible to draw them with greater specificity and still adequately protect the dependent and neglected child.

As we said in State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359 (1977): "The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been

drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden." There is no violation of the constitutional right to due process in the statutes attacked by appellant.

It is apparent to us that the trial court properly found appellant was unable to properly discharge her parental responsibilities and that this condition would continue for a prolonged indeterminate period. Appellant's parental rights were properly terminated. The first and paramount consideration in any case involving the custody of a child is the best interests of the child. State v. Loomis, 195 Neb. 552, 239 N. W. 2d 266 (1976).

The judgment of the trial court is affirmed.

AFFIRMED.

CHERYL LYNN WATKINS, APPELLEE, V. JAMES RICHARD HAND, APPELLANT.

253 N. W. 2d 287

Filed May 11, 1977. No. 40656.

Torts: Negligence: Proximate Cause. A tort-feasor whose negligence has caused injury to another is also liable for any injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded.

J. Thomas Rowen of Miller & Rowen, for appellant.

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

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

MORAN, District Judge.

Plaintiff brought this action to recover damages from the defendant for personal injuries arising out of an automobile collision on December 15, 1971, at an intersection in Omaha, Nebraska. The vehicle driven by plaintiff was struck by a vehicle driven through a red light by defendant. Plaintiff sought recovery for permanent injuries, pain and suffering, and loss of earning capacity arising out of that accident as well as for injuries sustained in a one-car accident on October 7, 1972, which she claimed proximately resulted from the first accident. At the trial, the trial judge directed a verdict against the defendant on the issue of liability for the accident of December 15, 1971, from which the defendant has not appealed. The trial judge also instructed the jury to consider only injuries sustained in the second accident which proximately resulted from the first accident. The jury returned a verdict for the plaintiff and the defendant has appealed. Several errors are assigned but we consider only one. The defendant contends the trial court erred in failing to instruct the jury to assess damages only for the injuries sustained in the first accident. We agree and reverse.

After the first accident the plaintiff complained of neck and back pain and headaches. X-rays were normal and there were no objective findings of injury. Because of her complaints, she was examined by a neurologist whose findings were negative and she was referred to a physician specializing in rehabilitative medicine. The plaintiff testified that while operating her motor vehicle and traveling to a hospital for therapy prescribed by the physician, she blacked out and her vehicle struck a tree. She suffered severe facial injuries and aggravated the soft tissue injury she sustained in the first accident. The

plaintiff had never experienced a blackout before. The doctor testified that in the first accident the plaintiff sustained a cervical dorsal strain which made her more vulnerable to injury in the second accident; that she had permanent partial disability of 10 to 15 percent at the time of trial; but that if the second accident had not occurred the cervical dorsal strain would have cleared up and she would not have had the disability testified to. The doctor also testified that the medication plaintiff was taking was not the cause of the second accident, and that there was no way he could relate the second accident to the first.

The plaintiff contends that the failure of the defendant to make an adequate record of objections to proposed instructions at the instruction conference precludes him from asserting them at this time. The disposition we make of the case makes it unnecessary to discuss this argument. The record does disclose that at the close of the case the defendant did request an instruction that the jury was not to consider any damages which arose out of the second accident. The judge ruled on that motion by sustaining it as to those injuries not related in any way to injuries sustained in the first accident, and overruling it in part by permitting the jury to consider the effect the second accident may have had on injuries sustained in the first one. Objection to the trial court's ruling was asserted in the defendant's motion for a new trial.

On its facts, this case appears to be one of first impression in this state. The cases are annotated in 31 A.L.R. 3d 1000, in an annotation entitled: "Proximate Cause: Liability of Tortfeasor for Injured Person's Subsequent Injury or Reinjury." There the author of the annotation states the general rule which we adopt: "* * * a tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the

subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person." See, also, Restatement, Torts 2d, § 460.

While to state the rule is easier than to apply it, an analysis of the cases cited in the annotation and of the evidence in this case leads us to the conclusion that there was insufficient evidence to justify the trial court in submitting the issue of plaintiff's right to recover from the defendant for the second injury or reinjury. The proximate cause of the second accident and injury was the independent act of the plaintiff. The medical testimony did not support her claim, and the jury would have had to speculate that the blackout was caused by the injuries she sustained in the first accident. Cases cited by plaintiff are distinguishable on their facts.

While not essential to a disposition of this appeal, we note that the trial judge in instructing the jury used the pattern jury instruction on concurrent cause (N.J.I. No. 3.42) on the issue of damages and also instructed the jury that if it found the second accident was a concurring cause of injuries sustained by plaintiff she could recover for the whole thereof. The jury was further instructed that if it found the second accident to be a subsequent intervening cause the plaintiff could not recover for injuries which proximately resulted from the second accident, but if the jury could not separate the injuries which proximately resulted from one incident from the other, the plaintiff could recover for the whole thereof. These instructions were erroneous because they would have subjected the defendant to payment of damages for which he was not responsible. See Bruckman v. Pena, 29 Colo. App. 357, 487 P. 2d 566.

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

REVERSED AND REMANDED.

CONTOIS MOTOR COMPANY, APPELLEE, V.
DUANE SALTZ, APPELLANT.

253 N. W. 2d 290

Filed May 11, 1977. No. 40891.

1. **Trial: Pleadings: Demurrer.** A demurrer ore tenus is recognized by this court as a permissible practice, and if the pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading.
2. **Trial: Pleadings: Evidence.** Failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation, and an objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is proper, and if the petition is totally defective, the objection should be sustained.
3. **Trial: Pleadings: Time.** Questions relating to the sufficiency of the petition should be determined before the cause comes on for trial, and where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained; and any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded.
4. **Uniform Commercial Code: Notice: Sales: Time.** Where a secured party conducts a private sale of repossessed collateral security, the only notice required by section 9-504(3), Uniform Commercial Code, is reasonable notification of the time and place after which any private sale is to be made.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Richard L. Spittler of Mueting, DeLay & Spittler, for appellant.

James J. McNally, for appellee.

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

BRODKEY, J.

In February 1972, Contois Motor Company, plaintiff and appellee herein, filed a petition in the District Court for Holt County alleging that it was entitled to a deficiency judgment from Duane Saltz, the

defendant and appellant herein, after repossession and resale of an automobile which was collateral security on a promissory note executed by the defendant in favor of the plaintiff. Although a default judgment was initially entered in favor of the plaintiff, it was subsequently set aside, and the case proceeded to trial before the District Judge, sitting without a jury. The trial court found in favor of the plaintiff, and awarded it a deficiency judgment with interest thereon. The defendant's motion for a new trial was overruled, and he has now appealed to this court. We affirm the judgment of the District Court.

The relevant facts pertinent to this appeal are as follows. In its petition plaintiff alleged that the defendant executed an installment note and security agreement in favor of the plaintiff on July 27, 1971, to secure payment of the purchase price of a new automobile sold by the plaintiff to the defendant; that the defendant failed to make payments on the note and that the automobile was repossessed in October 1971; that the vehicle had been resold by plaintiff for an amount less than the balance due on defendant's contract; that repairs had been required to place the automobile in saleable condition; and that plaintiff made repeated demands upon defendant for payment on the note, but that the defendant had refused to make payment thereon. The plaintiff prayed for a deficiency judgment against the defendant, setting forth specific amounts allegedly owed by the defendant for the balance due on the note, the repair work, and interest.

In his amended answer, the defendant denied the allegations of the petition. In the part of the answer relevant to this appeal, the defendant alleged that "on or about December, 1971, plaintiff, without defendant's knowledge, permission or consent, sold defendant's said automobile to a third party. That defendant had no knowledge of plaintiff's intent or ac-

tion of repossession prior to the time said automobile was sold to a third party; that defendant had no notice or knowledge of the sale of said automobile and never consented thereto; that no accounting of said sale was ever made by plaintiff to defendant, all in violation of Section 9-504(2) and (3), U. C. C." In its reply to the answer, plaintiff denied all allegations other than those which stated that an installment note and security agreement had been executed by the defendant in favor of the plaintiff.

The defendant also filed a request for admissions. Defendant requested that plaintiff admit that it sold the repossessed automobile at a private sale on or about December 18, 1971; and that no notice was given by the plaintiff to the defendant of the private sale prior to completion of that sale. In its answer to the request for admissions, plaintiff admitted selling the automobile at a private sale on or about December 18, 1971; but specifically denied that no notice was given by it to the defendant of the private sale prior to the completion of the sale.

Finally, in reference to pretrial proceedings in this case, the defendant filed two motions for summary judgment. In each the defendant prayed that plaintiff's petition be dismissed "for the reason that the Pleadings, Request for Admissions, Answer to Request for Admissions, and the Affidavit attached hereto, * * * show that Defendant is entitled to Judgment as a matter of law." The trial court overruled both motions, finding that there was a dispute and an issue of fact to be resolved as to whether there was notice given to the defendant in reference to the sale of the automobile by the plaintiff.

The evidence adduced at trial showed that the defendant had executed an installment note and security agreement in favor of the defendant on the purchase of a new automobile in July 1971; that he had defaulted on the note; that plaintiff obtained possession of the car in October 1971, after the de-

fault; and that one of its salesmen resold the car to an individual on about December 18, 1971. The defendant does not dispute these facts on appeal. An employee of the plaintiff testified that on November 18, 1971, he had sent the defendant, by certified mail, a form notice stating that if the defendant did not pay the amount due on his contract within 10 days, the car would be sold at private sale. The plaintiff did not retain a copy of the notice, but did offer into evidence a postal receipt, dated November 18, 1971, showing that plaintiff had sent a certified letter to defendant on that date. At the time this receipt was offered into evidence, counsel for the defendant objected to any testimony regarding the issue of whether notice had been sent to the defendant, stating: "Then, Your Honor, I would object to any testimony regarding this notice being sent and ask the Court to strike the testimony regarding the same. It is irrelevant, immaterial, and certainly not the best evidence." The trial court overruled the objection and admitted the postal receipt into evidence.

The local postmaster also testified and produced records which showed that a certified letter had been sent to the defendant by the plaintiff on November 18, 1971. The postal records showed that the defendant's wife had picked up the letter from the post office and signed a receipt for it. The defendant's counsel objected to admission of the postal records on the ground they were irrelevant and immaterial, and the trial court overruled this objection. Also admitted into evidence was a copy of a form notice which plaintiff's employee testified was like the one he sent to the defendant.

At the conclusion of plaintiff's case, the defendant addressed the court as follows: "Comes now the defendant, Your Honor, and first off, would demurrer (sic) to plaintiff's petition ore tenus in that no where in the defendant's (sic) petition has he alleged compliance with the Uniform Commercial Code, which

provides that a condition precedent to any private sale, notice thereof must be given of the time and place, and that is not alleged anywhere in the plaintiff's petition or amended petition, * * *." In the alternative, the defendant moved for a directed verdict on the ground that there was no evidence that the plaintiff gave the defendant "any notice of the time of this public — this private sale." The trial court, stating that it was going to construe the pleadings broadly, overruled the demurrer ore tenus, and also overruled the motion for directed verdict on the ground that plaintiff had adduced some evidence that notice had been sent to the defendant.

In presenting his defense, the defendant testified that he had in fact received a certified letter on November 18, 1971, from the plaintiff. He stated, however, that no notice of the contemplated repossession sale of the car was included in this letter. Defendant stated that the letter included only a notice that there may be a factory defect in his car, and that he should have the relevant part of the car checked to see if it contained the defect. The defendant denied receiving any notice of the repossession sale.

The defendant's wife, however, acknowledged that she had picked up the certified letter from the plaintiff at the post office, and admitted that enclosed in the letter was a form notice like that which plaintiff's employee testified he had sent to the defendant. The defendant's wife also admitted that the form was filled out.

At the conclusion of the evidence, the trial court found in favor of the plaintiff, and awarded it a deficiency judgment, with interest thereon, under a computation not disputed in this appeal. The defendant's motion for new trial on the grounds that the judgment was not sustained by the evidence and contrary to law was overruled.

In his assignments of error, the defendant con-

tends that the trial court erred in allowing evidence of the notice of the repossession sale to be introduced into evidence when that issue was not before the court by the pleadings; and in not granting his demurrer ore tenus or his motion for a directed verdict. Defendant also contends that the trial court erred in not properly applying the appropriate provisions of the Uniform Commercial Code.

The defendant's primary contention is that it was error for the trial court to allow evidence that plaintiff sent defendant notice of the repossession sale when plaintiff did not specifically allege that fact in its petition. Defendant relies on cases such as Timmerman v. Hertz, 195 Neb. 237, 238 N. W. 2d 220 (1976), in which this court stated that the right to introduce evidence depends upon there being an issue of fact as to which it is relevant; that the issues are made by the pleadings; and that where there is no issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. In this case, the defendant himself in his answer raised the issue of whether proper notice had been sent to him. The plaintiff in its reply denied that no notice had been sent. The trial court denied summary judgment on the ground that an issue of fact had been raised as to whether notice had been sent. Under such circumstances, defendant's claim that plaintiff had no right to introduce evidence on the issue of notice is without merit. The pleadings clearly raised that issue, and it was not error for the trial court to permit evidence on the matter.

Related to defendant's contention that no evidence should have been permitted in regard to the issue of notice of the repossession sale is his claim that the trial court erred in overruling his demurrer ore tenus. The defendant relies on Bank of Gering v. Glover, 192 Neb. 575, 223 N. W. 2d 56 (1974), and De-Lay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N. W. 2d 745 (1976), in

which we held that compliance with the notice provisions of section 9-504, U. C. C., is a condition precedent to obtaining a deficiency judgment when security collateral is repossessed and resold; and that the burden is on the party seeking the deficiency judgment to prove such compliance. Defendant contends that plaintiff's failure to specifically allege proper notice of the repossession sale had been sent to him renders the petition defective, and that the trial court therefore erred in overruling his demurrer ore tenus. We adhere to our prior holdings that a person seeking a deficiency judgment must prove compliance with the notice provisions of section 9-504, U. C. C., and agree with defendant's contention that a plaintiff seeking a deficiency judgment should allege in his petition that proper notice has been given. Under the facts of this case, however, and for the reasons given below, it was not error in this case for the trial court to overrule defendant's demurrer ore tenus.

A demurrer ore tenus is recognized by this court as a permissible practice, and if the pleading to which it is addressed is totally defective, it is error to admit any evidence under such pleading. Gerard v. Steinbock, 169 Neb. 828, 101 N. W. 2d 194 (1960); State ex rel. Spillman v. Commercial State Bank of Omaha, 143 Neb. 490, 10 N. W. 2d 268 (1943); Dickinson v. Lawson, 125 Neb. 646, 251 N. W. 656 (1933). It is also the rule that failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation, and that an objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is proper, and if the petition is totally defective, the objection should be sustained. Gibbs v. Johns, 183 Neb. 618, 163 N. W. 2d 110 (1968).

It is also the rule, however, that questions relating to the sufficiency of the petition should be determined before the cause comes on for trial, and

where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed in light of the entire record, and, if possible, sustained. Dickinson v. Lawson, *supra;* Gibbs v. Johns, *supra.* Those cases provide that any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. See § 25-853, R. R. S. 1943.

In this case the defendant did not file a demurrer to the petition before trial. He alleged in his answer that no notice had been sent to him, and plaintiff denied this allegation in its reply, and in its response to defendant's request for admissions. The defendant did not demur ore tenus until after the plaintiff had rested, and objected to evidence regarding notice at the time it was offered by plaintiff only on the grounds that it was irrelevant, immaterial, and not the best evidence. In accordance with the principles set forth above, the trial court was correct in broadly construing the pleading attacked by the demurrer ore tenus in light of the entire record. Although the petition as filed did not specifically allege that the defendant had been given notice, that issue was injected into the case by defendant's answer, and by plaintiff's denial in its reply, that no notice had been sent. The case was unquestionably tried on the issue of whether notice had been given the defendant, and in fact, summary judgment was denied for the reason that an issue as to notice had been raised by the pleadings. Under the particular facts presented in this case, we conclude that the trial court was correct in overruling defendant's demurrer ore tenus. In this case, any technical defect in the petition did not affect the substantial rights of the defendant, and must be disregarded.

Defendant next contends that the notice of the repossession sale sent to him in this case was not rea-

sonable as required by section 9-504(3), U. C. C. That section provides that "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 * * *." Defendant contends that the notice given in this case was of a private sale, but that the automobile was sold at a public sale. Defendant relies on DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., *supra,* in which this court stated that a creditor who uses a private sale form for public sales violates section 9-504(3), U. C. C.

The notice which the evidence showed was sent to the defendant in this case provided that unless the defendant paid the amount due under his contract, including expenses of repossession and delinquency charges within 10 days after the date of the notice, the car would be sold at private sale thereafter. It is clear that this notice was one of a private sale. In contending that the sale made was a public sale, defendant relies on the testimony of an employee of the plaintiff, who responded affirmatively when asked if the car was "available for public sale to anyone" after it had been repaired by the plaintiff. An examination of the entire testimony of this witness indicates that the defendant has taken this one sentence out of context, and places undue reliance on it.

Although in some instances the manner in which repossessed collateral is sold raises questions as to whether the sale is public or private, a distinguishing characteristic of a public sale is competitive bidding between prospective purchasers. See White & Summers, Uniform Commercial Code, § 26-11, p. 993 (1972). In this case, the evidence indicates that the automobile was repaired by the plaintiff and placed on its lot for sale in the ordinary course of its business as an automobile dealer. The car was sold to an individual in the normal course of plaintiff's busi-

ness, the buyer trading in his old automobile. The testimony of witnesses, read as a whole, indicates that the sale was a private one, and not one made at an auction or under sealed bids where there was competitive bidding. Although an employee of the plaintiff stated that the automobile was available for public inspection and for public sale to anyone, the context of these statements indicates that the witness was referring to the fact that the vehicle was on plaintiff's lot, and was available to any interested purchaser who wished to negotiate a contract for its sale and purchase. We conclude that the sale was a private sale, and the only notice required under section 9-504(3), U. C. C., was notice of the time after which the collateral was to be sold. DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., *supra*. Such notice was given in this case, and the notice given was reasonable, as required by section 9-504(3).

Finally, defendant contends that it was error for the trial court to overrule his motion for a directed verdict, which he made at the close of plaintiff's evidence, on the ground that plaintiff's evidence did not show that notice of the time of the repossession sale had been given to the defendant. As previously noted, the sale was a private sale, and the notice required by section 9-504(3), U. C. C., does not include notice of the time of the private sale, but only the date after which the repossessed collateral will be sold at private sale. Plaintiff's evidence did show that the required notice had been sent to the defendant, and therefore it was not error to overrule the motion for a directed verdict.

The defendant's contentions in this appeal are without merit, and we therefore affirm the judgment of the District Court.

AFFIRMED.

EILEEN REJDA, APPELLEE, V. RONALD REJDA, APPELLANT, ROBERT A. BARLOW, GUARDIAN AD LITEM.

253 N. W. 2d 295

Filed May 11, 1977. No. 40924.

1. **Divorce: Infants: Parent and Child.** The natural rights of a parent to the custody of his children are not absolute.
2. **Courts: Infants: Parent and Child.** A court may terminate parental rights when it finds such action to be in the best interests of the child.
3. **Courts: Parent and Child: Judgments: Evidence: Appeal and Error.** In cases involving child custody determinations the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

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

Vestecka & Gorham, for appellant.

Duane L. Nelson, for appellee.

Robert A. Barlow, guardian ad litem.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

This case arose upon an application for modification of a divorce decree filed by the appellant, wherein he prayed that the custody of the two minor children of the parties be changed from the appellee to himself. The appellee filed her answer and cross-petition, praying for dismissal of the appellant's application and requesting an increase in the amount of child support. A guardian ad litem was appointed by the court for the two minor children. Trial was held over an extended period. During this period, on December 22, 1975, the District Court informed the parties that it might be the recommendation of the guardian ad litem that the parental rights of the

parties to the children be severed. On February 13, 1976, the District Court entered an order severing the parental rights of both parties and placing custody of the two minor children with the chief juvenile probation officer of Lancaster County, Nebraska, for permanent placement and adoption. The appellant's motion for a new trial, and the appellee's motion for modification of order, were both overruled, and this appeal followed.

The appellant assigns as error the termination of his parental rights by the District Court. The appellee does not appeal or contest the decision of the District Court to terminate her and the appellant's parental rights to the two minor children involved.

The appellant first asserts that the District Court was without power to terminate his parental rights. The appellant's argument in this regard is based upon our recent decision in Sosso v. Sosso, 196 Neb. 242, 242 N. W. 2d 621 (1976), wherein we held that: "Under the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose." Our ruling in that case, however, was made prospective: "It appears that in some instances District Judges have terminated parental rights in divorce cases. With that in mind, we wish to make it clear that the rule herein laid down, except as to this case, shall be prospective in nature and fully effective as of June 1, 1976."

The District Court's order was dated February 13, 1976. The motions of the parties for a new trial and for modification of order were overruled on May 27, 1976. The holding of Sosso is thus not applicable to this case.

On December 22, 1975, during the course of hearings in this case, the District Court announced the possibility that the guardian ad litem might recommend that the parental rights of both parents be severed. The parties were thus given notice of this

issue and had adequate opportunity to meet this issue. Under the circumstances of this case the District Court had jurisdiction to terminate appellant's parental rights. There is no merit to this contention.

The appellant next argues that there was insufficient evidence to support the court's decision to terminate his parental rights.

The natural rights of a parent to the custody of his children are not absolute. Pollard v. Galley, 178 Neb. 587, 134 N. W. 2d 261 (1965). " 'A court may terminate parental rights when it finds such action to be in the best interests of the child * * *.' " State v. Johnson, 196 Neb. 795, 246 N. W. 2d 591 (1976). In cases involving child custody determinations the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. State v. Norwood, 194 Neb. 595, 234 N. W. 2d 601 (1975).

The record shows that Monique was born in 1969 and was 6 years old at the time of the trial. Collette is approximately a year older than her sister. Both children lived with their father and mother until December of 1971, when the appellant and appellee were separated prior to their divorce. The appellee testified that at the time she left the appellant in December 1971, the appellant was drinking heavily and would consume 12 to 15 bottles of beer in one night. There were times, she stated, when he would blackout completely. During the time the original divorce action was pending, the appellant lost his job with the Lincoln police department, partly because of drinking.

After December of 1971, the appellee took the two children and moved into her mother's apartment. It was very small, just one bedroom. In February 1972, the appellee placed the girls in foster care. The

appellant was given custody to the children in the divorce action by the court. The children lived with him from March 1972 until November 1972.

The appellee stated that she visited the appellant's home during this period and found the beds unclean, dirty clothes piled up, and food and beer cans strewn about the house. The appellee's mother also visited the appellant's home during this period to babysit and visit her grandchildren. She testified that the house was filthy, with garbage piled up on the back porch and in the kitchen; dirty clothes and dishes piled up; beer cans, ashes, and ashtrays all over the place. She stated that the children were dirty at times, were not too clean, and had the run of the place. The appellee's father testified that he would visit his granddaughters two or three times per week. He stated that they usually wanted something to eat and that he would provide them with something. He stated that there was enough beer around the house, but little food, however.

Custody of the two girls was returned to the appellee in November 1972. The appellant voluntarily consented to this change of custody and was ordered by the court to pay $30 per month per child in child support commencing on December 1, 1972. The appellee testified that between November 1972, until October 1974, she received only about $90 from the appellant for child support. She also testified that between the spring of 1973 and the summer of 1974, the appellant did not visit the children. In 1974, the appellant was fired from a position with the University of Nebraska campus police because of a drunk driving offense.

In November 1974, the appellee voluntarily placed Monique with a couple in Seward, Nebraska, the Lees. In June 1975, the appellee voluntarily placed Collette with a Lincoln couple, the Websters.

At the court's instruction, both children were examined by a qualified psychologist. In her evalua-

tion of Collette, the psychologist stated that: "Feelings about her natural father that were elicited were largely negative, consisting of unpleasant memories and fears." She reported that both children had little emotional ties to their natural parents. She found that both children needed a permanent, stable placement and concluded that to place them with their natural father again would disrupt the emotional security they have. The psychologist stated that both children felt secure in their present environments and recommended that each child be permanently placed with the foster families. They were then with the Lees and the Websters.

The record shows that the Lees and the Websters have both the means and the desire to provide each girl with a stable, loving, and emotionally secure home.

These children have been passed back and forth between their natural parents. Each parent has had ample opportunity to provide an adequate home for these children. The appellant argues that he has now solved his previous problems and is able to provide the children with an adequate home. Both children are now in stable, healthy, and emotionally secure homes. The appellant asks us in effect to remove the girls from these stable homes and give him yet one more chance. This we will not do.

The decision of the District Court to terminate the parental rights of the natural parents to these children is overwhelmingly supported by the evidence and clearly is in the best interests of these children.

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

AFFIRMED.

WHITE, C. THOMAS, J., concurring.

The case of Sosso v. Sosso, 196 Neb. 242, 242 N. W. 2d 621, was decided prior to the time this writer joined this court. I would not have voted with the majority on that matter.

ROY J. SHOVER ET AL., APPELLANTS, V. GENERAL MOTORS CORPORATION, A CORPORATION, APPELLEE.

253 N. W. 2d 299

Filed May 11, 1977. No. 40948.

1. **Trial: Evidence: Witnesses.** An expert may testify by opinion "or otherwise." This includes the use of demonstrative evidence, the conducting of experiments, and the exposition of principles relevant to the issues.
2. _____: _____: _____. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment; an apparatus of suitable kind and condition was utilized; and the experiment was conducted fairly and honestly.
3. **Courts: Evidence: Appeal and Error.** The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion.
4. **Trial: Evidence.** It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence. Substantial similarity is sufficient.
5. _____: _____. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
6. _____: _____. Expert testimony is admissible if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.
7. **Trial: Evidence: Courts: Appeal and Error.** The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.

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

Alfred A. Fiedler, for appellants.

David A. Svoboda of Kennedy, Holland, DeLacy & Svoboda, and Frazer F. Hilder, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

The plaintiffs, Roy J. Shover, his wife Betty, his

daughter Sheryl, and his son Michael, were injured in an automobile accident on the Ohio Turnpike in Sandusky County, Ohio, on August 15, 1969. The plaintiffs had left Lowell, Massachusetts, on the evening of August 14 to return to Omaha. Roy drove through the night and until about 7 a.m., when they stopped near Cleveland for breakfast.

Betty commenced driving when they left the breakfast stop near Cleveland and was driving when the accident occurred. Sheryl Shover was riding in the front seat with her mother. Roy was riding in the rear seat. Michael Shover was riding in the cargo area of the station wagon behind the rear seat.

The accident occurred when the right front corner of the station wagon struck a guardrail on the right side of the highway. The station wagon continued along the guardrail until the right front struck the pier or abutment of an overpass. The rear of the station wagon then swung around to the west and the station wagon skidded across the highway and into the median where it overturned. The driver and all the passengers were injured. Roy sustained very severe injuries in the accident.

Separate actions were commenced by the plaintiffs to recover the damages resulting from the accident. The actions were consolidated for trial in the District Court and were briefed and argued together in this court.

The plaintiffs alleged that the accident was caused by a defective tie rod adjusting sleeve on the station wagon which fractured and caused the accident. The cases were submitted to the jury on the theory of strict liability. The jury returned verdicts for the defendant and the plaintiffs have appealed. The assignments of error relate to rulings of the trial court on objections to expert testimony offered by the defendant.

The automobile involved in the accident was a 1969 Buick Special station wagon purchased new from a

dealer in Glenwood, Iowa. The automobile operated satisfactorily except for a noise described as a "clunk" when the brakes were applied. The automobile was returned to the dealer for service but continued to make a "clunk" noise when the brakes were applied. The automobile had traveled about 2,500 miles at the time of the accident.

At the time of the accident Roy, Sheryl, and Michael were asleep. Betty, the driver, testified that she was wide awake when the accident happened. She said she had slept for 2 to 6 hours during the night while Roy was driving, and had several cups of coffee for breakfast. She had been driving for about 35 or 40 minutes and had passed some other traffic when "all of a sudden the car was over on the guardrail." She was traveling about 65 miles per hour, and was proceeding straight ahead in the outside lane when "all of a sudden we was over on the guardrail."

There were two eyewitnesses to the accident. Carl J. Kelly was driving a truck in an eastbound lane approaching the overpass when he saw the Shover station wagon come off the guardrail, skid across the westbound lanes, and turn over in the median.

Dominic Cicoretti was driving a truck in the outside westbound lane when the Shover station wagon passed to the left. After passing his truck the station wagon turned back into the right or outside lane but failed to straighten out. Cicoretti testified that the station wagon continued on a gradual curve from the left-hand lane across the berm or shoulder and into the guardrail. Cicoretti said the station wagon appeared to be operating in a normal manner and he did not see the brake lights come on at any time.

After the accident it was found that the right adjusting sleeve on the tie rod was broken. The adjusting sleeve connects the tie rod end to the center

portion of the tie rod which is a part of the steering gear. The tie rod assembly is connected to the front wheels and holds the wheels in a parallel alignment. The adjusting sleeve is threaded so that the length of the tie rod can be adjusted in aligning the front wheels. Clamps at each end of the sleeve fasten the sleeve to the tie rod and tie rod end so that the alignment will be maintained after the adjustment has been made.

The plaintiffs called an expert witness, Henry H. Durr, who testified that in his opinion the accident was caused by fatigue failure of the right tie rod adjusting sleeve. He further testified that the adjusting sleeve was defective and fractured causing the accident.

The defendant called several expert witnesses who testified that in their opinion the adjusting sleeve was broken in the impact, that a broken sleeve would not cause the automobile to go out of control and strike the guardrail, and that the most probable cause of the accident was the driver falling asleep.

Roger D. Olleman, a mechanical engineer and metallurgist, testified that the appearance of the sleeve after the accident indicated that it was broken by a large impact and did not fracture as a result of fatigue.

Norman B. Zauel, a staff analysis engineer employed by the defendant, testified that it was his opinion the sleeve failed as a result of impact damage and not fatigue damage. He further testified that a sudden fracture of the sleeve would not cause the vehicle to suddenly veer to the right. He had conducted an experiment at the defendant's test track using a 1969 Buick Special station wagon from which the right-hand tie rod assembly had been removed. In the experiment the witness demonstrated that a vehicle may be operated at 65 miles per hour with the right tie rod end removed and all steering accomplished with only the left front wheel

connected to the tie rod. The witness changed lanes several times with no difficulty. The experiment had been photographed and, over the objection of the plaintiffs, the defendant was allowed to show a moving picture of the experiment to the jury. A motion to strike this evidence made at the close of the testimony by this witness was overruled.

Section 27-702, R. R. S. 1943, now provides that an expert may testify by opinion "or otherwise." This includes the use of demonstrative evidence, the conducting of experiments, and the exposition of principles relevant to the issues.

The general rule is that evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment; an apparatus of suitable kind and condition was utilized; and the experiment was conducted fairly and honestly. Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643; Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627.

The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. Hawkins Constr. Co. v. Matthews, Co., Inc., *supra;* Ripp v. Riesland, 180 Neb. 205, 141 N. W. 2d 840. A judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion.

The plaintiffs objected to the evidence concerning the experiment on the ground the foundation was inadequate. Specifically, the plaintiffs claimed the circumstances were not similar because the entire tie rod had been removed, the witness driver knew the tie rod had been removed, it was not shown the vehicle used in the experiment had traveled only 2,500 miles, the test vehicle had only the driver and no cargo in it, the test was not made on the turnpike, and it required engineering knowledge to operate the test vehicle. None of these matters appear to

have been material so far as the validity of the experiment is concerned. The surface of the test track appeared to be similar to that of a turnpike, the witness used no special skills in driving the automobile, and no special weights of any kind were placed in the automobile. It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence. Substantial similarity is sufficient. Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597; Ripp v. Riesland, *supra*. It was within the discretion of the trial court to receive the evidence relating to the experiment and the assignment of error is without merit.

The defendant also called J. Stannard Baker, a traffic engineer and consultant in the field of traffic accidents, who was allowed to testify, over objection, concerning his opinion as to the cause of the accident. Baker stated it was his opinion, based upon the evidence as to the movement of the station wagon before it struck the guardrail, that the station wagon struck the guardrail because the driver fell asleep.

The plaintiffs contend this evidence should not have been received because it was an opinion as to the ultimate fact at issue and the evidence invaded the province of the jury.

The ultimate fact at issue in this case was the cause of the station wagon turning into the guardrail. There was no way this issue could be resolved without expert testimony. The plaintiffs' expert testified that a fatigue fracture of the adjusting sleeve caused the station wagon to turn into the guardrail. The defendant's expert witnesses testified that the sleeve fractured as a result of the impact, that a fractured sleeve by itself would not cause the driver to lose control of the automobile, and that the most probable cause of the accident was the driver falling asleep.

Expert testimony as to the ultimate fact is admis-

sible if the case is one to be wholly resolved by such evidence. Petracek, v. Haas O. K. Rubber Welders, Inc., 176 Neb. 438, 126 N. W. 2d 466. Section 27-704, R. R. S. 1943, now provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The question remaining is whether the opinion of the witnesses that the driver probably fell asleep was of any assistance to the jury.

The general rule has been that opinion evidence is admissible where it is necessary and advisable as an aid to the jury. Drahota v. Wieser, 183 Neb. 66, 157 N. W. 2d 857. Section 27-702, R. R. S. 1943, now provides that expert testimony is admissible if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. The admissibility of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. Dovey v. Sheridan, 189 Neb. 133, 201 N. W. 2d 245.

The witness Baker had spent many years investigating, studying, and analyzing traffic accidents. It can not be said that his opinion would be of no assistance to the jury in assembling and analyzing the facts of the case.

Although the jury could have decided this case without having the opinion of the witness Baker as to why the station wagon turned into the guardrail, that does not mean the evidence was not of some assistance to the jury in reaching its verdict. We think it was within the discretion of the trial court to receive this evidence.

The judgment of the District Court is affirmed.

AFFIRMED.