NEBRASKA SUPREME COURT REVIEW

*Nebraska Law Review* takes pride in presenting the third annual Supreme Court Review. This section is devoted to analyses of recent decisions which the Review staff believes are cases of first impression or landmark rulings which substantially alter a particular area of case law in Nebraska. We hope this critical discussion will provide attorneys with a comprehensive study of selected case holdings and an analysis of how these decisions relate to previous Nebraska decisions, and allow our staff to critically compare the resultant case law with that of other jurisdictions.

The cases discussed here were decided in the September term 1969 and the January term 1970, and update 49 *Nebraska Law Review* 537 (1970), which analyzed the January term 1969.

This section does not include those cases which are or may become the subjects of individual casenotes. Thus all recent important decisions are not contained herein. The Review welcomes suggestions and criticism of the form and content of the section from those interested in Nebraska law.

Douglas F. Duchek
Nebraska Editor

The subject areas and decisions discussed in this *Nebraska Supreme Court Review* are as follows:

I. Criminal Law*

A. Effective Waiver of Counsel
   State v. Beasley, 184 Neb. 649, 171 N.W.2d 177 (1969),
B. Lineup and In-court Identification Problems
C. Prejudicial Jury Instructions
D. Probable Cause
E. Right to a Speedy Trial

II. Real Property

A. State v. Bardsley, 185 Neb. 629, 177 N.W.2d 599 (1970).**
C. Westbrook v. Masonic Manor, 185 Neb. 660, 178 N.W.2d 280 (1970).***
III. Civil Procedure
   A. Abbott v. Abbott, 185 Neb. 177, 174 N.W.2d 335 (1970).**
   State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N.W.2d 5 (1970).**
   D. Schmer v. Gilleland, 185 Neb. 54, 173 N.W.2d 391 (1970).***

*Richard Kopf '72
**Kenneth L. Noha '72
***Patrick T. O'Brien '72

I. CRIMINAL LAW

A. EFFECTIVE WAIVER OF COUNSEL


Herbert Beasley was convicted in the District Court of Douglas County for robbery,\(^1\) and sentenced to ten years' imprisonment. Beasley appealed the conviction on the basis that his waiver of counsel was ineffective because he was mentally incompetent at the time. The Nebraska Supreme Court affirmed the conviction.\(^2\)

Defendant then filed a motion for a new trial on the basis of newly discovered evidence, which was denied. Beasley appealed and the Nebraska Supreme Court affirmed denial of the motion.\(^3\)

This review will consider Beasley's second appeal. The principal issue was whether the defendant had intelligently waived counsel. The Beasley decision involves the court's treatment of psychiatric evidence relating to competency to waive counsel, and the responsibility of the trial judge when deciding whether to accept a waiver of counsel.

The defendant was represented by counsel at the preliminary hearing, but subsequently refused further assistance of counsel and insisted upon defending himself. The public defender suggested that Beasley undergo a mental examination to determine if he should be allowed to waive counsel. The trial court did not order a mental examination, but it did appoint the public defender to act as advisor. The defendant was convicted. On his first appeal,

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Beasley argued that he had lacked sufficient mental capacity to intelligently waive counsel. The Nebraska Supreme Court found that the "record as a whole at this time does not show that the defendant was mentally incompetent to refuse the assistance of counsel."

Defendant then filed a motion for new trial on the basis of newly discovered evidence. This was denied and Beasley appealed. The new evidence presented related to his mental competence. The defendant was examined by a psychiatrist who concluded that he was in a psychotic state at the time he refused assistance of counsel and at the time of trial; the doctor also found the defendant to be a paranoid schizophrenic who appeared normal in many respects. It was revealed that Beasley had a mental breakdown while in the Ohio penitentiary and had been hospitalized for psychiatric reasons while he was in the army. It was also learned that the public defender had told the trial judge that: "There should probably be an examination to see if he is capable of defending himself."

The Nebraska Supreme Court, upon a "review and consideration of the entire record, including the evidence offered in support of the motion for new trial for newly discovered evidence, . . ." found that Beasley was capable of intelligently waiving counsel. The majority opinion concluded that the doctor's testimony was inherently weak because: "[H]is opinion relates to the condition of the defendant 8 months previous to the examination." The Nebraska court found indications that Beasley was mentally competent and had not been prejudiced by the lack of counsel. For example, the court found that Beasley was no stranger to the courtroom and that he was faced with an almost conclusive case against him. The court also found that Beasley was competent enough to have had certain evidence excluded during the trial.

First, the Beasley decision is important because of its treatment of psychiatric evidence as that evidence related to the issue of competency to waive counsel.

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4 183 Neb. at 683-84, 163 N.W.2d at 785.
7 Id. at 8-9.
8 Id. at 6-7.
9 Id. at 12-13.
10 184 Neb. at 652, 171 N.W.2d at 179.
11 Id. at 651, 171 N.W.2d at 178.
The court did not seriously consider the substantive material contained in the doctor's testimony. By relying almost exclusively on the time factor the court may have created extreme difficulty in effectively raising the issue of competency after a waiver of counsel has been accepted. The court placed its emphasis on the fact that the testimony was based on a mental examination conducted eight months after the waiver, rather than balancing the lateness issue with the substantive merits of the testimony.

Little attention was given to Beasley's continuous history of mental illness. For example, the doctor testified:

I think his behavior under stress was haughty, rigid, he would not listen to any type of counsel, and he says this, and strange as it may seem, the psychologist points this out in his behavior at the Lima State Hospital. . . .

Nor was any consideration given to the fact that Beasley was diagnosed by the doctor as a paranoid schizophrenic, a disease often characterized by delusions of persecution. Beasley had stated: "I have money and I am no tramp but you got me looking that way. I have dignity. . . . I look like a bum and I can't help myself and all the time you want to throw a lawyer on me." The apparent correlation between Beasley's statements and the doctor's testimony could have rebutted the inference that the examination was faulty due to its lateness.

It may be argued that the emphasis on the time factor with regard to the mental examination makes possible unintelligent waivers of counsel. For example, if the psychiatrist in Beasley was correct and paranoid schizophrenics appear normal in most respects, but are incapable of defending themselves in court, then it is entirely possible that such a defendant will be allowed to waive counsel unintelligently. A defendant may appear normal to a trial judge but in reality be incapable of critical judgment. Consequently, after trial the defendant may be found to have made an irrational choice due to his previously unknown incapacity. By emphasizing the time factor and virtually ignoring evidence of incapacity the court may well allow criminal defendants who suffer from some mental aberration to refuse assistance of counsel.

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13 Id. at 21.
14 Id. at 9. The psychiatrist stated: "There is usually in paranoid schizophrenia a pretty well preserved behavior pattern . . . . A person who has this condition can appear normal in many respects." See also B. Maloy, Medical Dictionary for Lawyers 548, 622 (3d ed. 1960).
In a Michigan case similar in many respects to Beasley, a defendant charged with rape had pleaded guilty, waived counsel and was examined some thirty days thereafter for a presentence report.\textsuperscript{15} The defendant, who had appeared normal at the arraignment, was diagnosed as a sociopath with strong feelings of hostility who would take the path of least resistance and consequently refuse counsel in order to end the proceedings and remove himself from stress. A motion for new trial and withdrawal of the guilty plea was made and denied. The Michigan court held the psychiatrist's affidavit raised "bona fide doubt"\textsuperscript{16} as to competence and vacated the sentence with orders to rearraign.\textsuperscript{17}

The time factor in the Michigan case was much shorter than that in Beasley. But the important aspect of the decision is that the Michigan court looked to the merits of the psychiatric evidence notwithstanding its ex post facto character. Perhaps the better rule would be to balance the time factor with the merits of the testimony. If a medical opinion raises a "bona fide" doubt as to competency to waive counsel but for the ex post facto character of the evidence, perhaps the integrity of the criminal justice system warrants a careful weighing of both the merit and the timeliness of the evidence.

Secondly, the Beasley decision is of interest because of the manner in which the decision approaches the responsibility of the trial court with regard to the defendant who wishes to waive assistance of counsel. The Nebraska Constitution provides that a defendant may represent himself.\textsuperscript{18} However, there is some question whether the right to counsel under the United States Constitution implies the opposite right to refuse counsel.\textsuperscript{19} The one thing that is clear is that a defendant may only waive counsel intelligently. The United States Supreme Court in Johnson \textit{v.} Zerbst\textsuperscript{20} suggested that a trial court has a duty to insure that waivers of counsel are intelligently made. The Court stated:

\begin{quote}
The constitutional right of an accused to be represented by counsel, invokes, of itself, the protection of the trial court... This protecting
\end{quote}

\textsuperscript{17} 20 Mich. App. at 67-68, 173 N.W.2d at 826.
\textsuperscript{18} \textit{NEB. CONST. art. I, § 11:} "In all criminal prosecutions the accused shall have the right to appear and defend in person."
\textsuperscript{19} Cf. Singer \textit{v.} United States, 380 U. S. 24 (1965), where a unanimous Court rejected the contention that a defendant had a constitutional right to refuse trial by jury, although guaranteed that right. But see Adams \textit{v.} United States \textit{ex rel.} McCann, 317 U. S. 269 (1942); United States \textit{v.} Plattner, 330 F.2d 271 (2d Cir. 1964).
\textsuperscript{20} 304 U. S. 458 (1938).
duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver. . . . 21

Mr. Justice Black has argued that a trial judge must "investigate as long and as thoroughly as the circumstances of the case before him demand. . . ." 22 when confronted with a defendant's wish to waive counsel. A California court expressed the same sentiment in a different manner when it stated: "The court cannot accept a waiver of counsel from anyone accused of a serious public offense without first determining . . . the education, experience, mental competence and conduct of the accused. . . ." 23

In Beasley the trial judge had been informed that the defendant should undergo mental examination, yet he ignored the public defender's suggestion and proceeded. The majority opinion did not consider what the responsibility of the trial judge was with regard to accepting the waiver.

It is possible, as the dissenting opinion in Beasley suggests, that "[t]he majority opinion blinks at the neglect of inquiry when inquiry would have been fruitful." 24 Even absent the trial judge's normal "protecting duty," Beasley seems peculiar in that the trial judge was forewarned of the need to examine the defendant. Thus the decision appears to have relaxed the rule relating to acceptance of waivers of counsel.

Realizing the Nebraska court's hesitance to attach significance to retrospective determinations of incompetency to waive counsel, perhaps the suggestion that the court might require a trial judge to expend every effort to determine competency is not ill-founded. 25 In terms of judicial economy and fairness, the extra time spent in insuring that a waiver of counsel is intelligently made would be well worthwhile.

21 Id. at 465. See also Westbrook v. Arizona, 384 U. S. 150 (1966) (per curiam).
24 184 Neb. at 653, 171 N.W.2d at 179.
25 It should be pointed out that the trial judge did appoint the public defender to act as an advisor to Beasley. The practice of appointing an attorney to act as advisor was approved in State v. Walle, 182 Neb. 642, 156 N.W.2d 810 (1968). However, this practice should not be used to circumvent the question of competency to waive counsel. See Note, The Right of an Accused to Proceed Without Counsel, 49 Minn. L. Rev. 1133, 1152 (1965).
As Justices Smith and McCown noted in dissent, the A.B.A. Standards Relating to Providing Defense Services § 7.2 should be adopted. That section provides:

The accused's failure to request counsel or his announced intention to plead guilty should not itself be construed to constitute a waiver. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of that offer and his capacity to make the choice intelligently and understandably has been made. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature and complexity of the case or other factors.\(^\text{26}\)

B. LINEUP AND IN-COURT IDENTIFICATION PROBLEMS


Fred Cannon was convicted of burglary in the District Court of Adams County.\(^\text{27}\) While the defendant appealed on a number of grounds, this review of State v. Cannon will only consider the question of the legality of an in-court identification subsequent to an illegal lineup.

The facts relating to the above question are as follows: the manager of a liquor store heard the sound of breaking glass and proceeded to investigate. He observed a man coming through a broken window. In front of the intruder was a bright light and the manager observed the intruder from some twenty feet. The intruder fled and the manager called the police. The police arrested Cannon on the basis of the witness's description. At the time of the arrest the defendant was dressed substantially in the manner described by the manager.

At the trial the manager identified Cannon as the intruder. No motion to suppress this evidence was made before or during the trial. On cross-examination, defense counsel elicited from the witness the statement that a short time after the arrest he identified the defendant in the absence of defense counsel. It is not clear, but apparently prior to the lineup the witness was shown five photographs of black males, four of whom were known to him;

\(^{26}\) ABA Standards Relating to Providing Defense Services § 7.2 (1967) (emphasis added).

the remaining man pictured was the defendant.\textsuperscript{28} Again, it is not clear but the same five men apparently composed the lineup.\textsuperscript{29} The state did not introduce evidence regarding the lineup.

The defendant did not raise as error in his motion for new trial or in his assignment of error the question of the validity of the in-court identification. However, due to its constitutional nature the Nebraska Supreme Court considered the question. The court suggested that since the defendant was aware of the prior illegal lineup but failed to object to the in-court identification he would normally be held to have waived the objection. The court stated: "While we believe this rule to be a proper one, especially in a case such as this, nevertheless, this case is not dependent upon the adoption of such a rule."\textsuperscript{30}

Parenthetically, the court's reaction to the failure of defense counsel to object to the in-court identification appears to be dictum. It does, however, provide a strong indication that the court may rule that a defendant who fails to object to an in-court identification subsequent to an illegal lineup will be precluded from challenging the validity of the identification on appeal. The adoption of such a rule would be understandable since it is premised on the concept that the trial judge should be given an opportunity to determine whether the prior illegal lineup "tainted" the subsequent in-court identification. Perhaps, however, the court might recognize that criminal defendants are often represented by appointed attorneys, as was the case in \textit{Cannon}, who are unfamiliar with criminal litigation. Consequently, the court might require trial courts, when confronted with an apparent problem of identification testimony, to inquire of the defense counsel, on the record, whether he wishes to object.\textsuperscript{31}

With regard to the in-court identification, the Nebraska Supreme Court appears to have taken a restrictive view of \textit{Wade v. United

\textsuperscript{28} Brief of Appellant at 6, 7, State v. Cannon, 185 Neb. 149, 174 N.W.2d 181 (1970). It was determined that during cross-examination the "witness was shown a picture of five colored men and that [he] looked at a lineup of five colored men . . . . It also became apparent that the witness knew the other four colored men, the defendant being the fifth man . . . ."

\textsuperscript{29} "Prior to the illegal lineup, he had viewed a picture of the defendant and four other colored men. The four other colored men were known to the witness. This was, therefore, in effect, a one-man lineup . . . ." 185 Neb. at 152, 174 N.W.2d at 183.

\textsuperscript{30} Id.

\textsuperscript{31} See Solomon v. United States, 408 F.2d 1306, 1309 (D.C. Cir. 1969).
States. In the Wade case the United States Supreme Court held that counsel must be present during the lineup to insure that it is conducted properly and that defense counsel will be able to effectively argue the identification issue. Throughout, the Court recognized and feared the possibility of misidentification because of the suggestive nature of an improper lineup. The Court concluded that the test to be used should determine

[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

The Wade Court recognized that a lineup may color a witness's initial perception so that an in-court identification would be invalid. Thus, it is not enough to find that the witness's observation of the defendant prior to the lineup was reliable. The trial court should also determine if the intervening lineup was suggestive to the point that the witness would be incapable of making a trustworthy in-court identification.

The Nebraska Supreme Court characterized the lineup in Cannon as a "one man lineup." The court did not, however, examine the import of that statement nor did they proceed to examine, in depth, the manner in which the lineup was conducted. Rather, the court argued that because the intruder was observed full face in a bright light from some twenty feet, the in-court identification was sufficiently reliable. The Cannon decision did not consider the possibility that an improper lineup might alter a well formed original perception so as to make an in-court identification merely a reflection of the bias instilled in the witness by the suggestive lineup—hence an exploitation of the primary illegality. The following analysis is suggested.

First, the fact that the lineup in question was essentially a one man affair indicates the possibility that a witness would be unfairly influenced. Putting one man in front of a witness might

33 388 U.S. at 232.
34 Id at 231, 232.
35 Id at 228.
36 Id at 241.
37 185 Neb. at 152, 174 N.W.2d at 183.
38 See Stovall v. Denno, 388 U.S. 293, 302 (1968) (where the Court recognized the undesirability of a one man confrontation); Bigger v. Tennessee, 390 U.S. 404, 408 (1968) (per curiam) (Black, J., dissenting); Foster v. California, 394 U.S. 440, 443 (1969). See also WALL, EYE-
strongly indicate to him that the police have found their man. The witness might conclude that the police, because they placed one man in a lineup, thought the suspect fit the witness’s description; consequently, the witness might feel he should agree rather than contradict his own description. For example, a witness was once asked whether the man he had identified fit the previous description. He answered: “Oh you certainly would not have brought him here if he were not the right man.” A one man lineup simply does not test the witness. Conversely, it graphically indicates the answer desired by the police.

Second, there were photographs shown to the witness prior to the lineup. The use of photographs was unnecessary because the defendant was in custody and available for observation. Since one of the photographs was of the defendant, the use of that picture could have been highly suggestive. This would be compounded if the other four men were known to the witness. In addition, since only five photographs were used this may have been an inadequate basis for a fair test of the witness’s ability to make an identification. In short, the use of the photographs could have reinforced in the witness’s mind the suggestion that the police had found their man. It has been suggested that

[b]ecause of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality, and which presents a “frozen” image . . . witnesses should be asked to examine photographs only where proper corporeal identification is impossible. . . .


GROSS, CRIMINAL PSYCHOLOGY 36–37 (1911).

“Equally serious can be the effect of showing a photograph of a particular suspect to a witness with questions whether he recognizes the man, if the same witness is afterwards to be confronted with this man at the parade. Subsequent identification of the accused shows nothing except the picture was a good likeness. The same objection applies, though in a reduced degree, where the witness has actually picked out this particular man from a whole series of photographs.” Williams & Hummelmann, Identification Parades—I, 1963 CRIM. L. REV. 479, 484. See also Simmons v. United States, 390 U.S. 377, 383 (1967); Comment, Photographic Identification: The Hidden Persuader, 56 IOWA L. REV. 408 (1970). Cf. Palmer v. Peyton, 359 F.2d 199, 201 (4th Cir. 1966).

See WALL, supra note 38, at 77 (“In England the usual number is eight or ten, and this number may be the minimum required by police regulations.”).

Id. at 70. See also United States v. Zeiler, 427 F.2d 1305, 1308 (3d Cir. 1970) (“In order for such in-court identifications to be admissible the
Third, presumably the witness was a white man.\textsuperscript{43} The witness's identification of a black man may therefore be suspect. Situations where white men identify black men have been deemed to indicate the possibility of misidentification:

In general, there is a much greater possibility of error where the races are different than where they are the same. Where they are different, there is more likelihood of error where the suspect belongs to a minority group and the witness to a majority group. . . . \textsuperscript{44} The police could well have capitalized on the possibility of error by placing, in effect, a lone black man in the lineup. The police, realizing that the witness would be unable to discriminate effectively among a panel of blacks not known to him, could have obviated the necessity of making a discerning choice by simply placing one black man in the panel. Once the possibility of confusion had been negated by putting Cannon alone in the lineup it may then have become impossible for the witness to make any other subsequent identification.

Had the Cannon court examined the manner in which the lineup was conducted and found it to be suggestive, the court would then have had to determine if the witness would have been able to disregard the conditioning inspired by the lineup so as to be able to make an accurate in-court identification. However, the Cannon decision did not seriously consider the possibility that the lineup affected the witness's initial perception. What the court ignored was the distinct possibility that an improper lineup would distort the witness's previous mental picture. The Wade Court recognized that "[i]t is a matter of common experience that, once a witness has picked out the accused at a lineup, he is not likely to go back on his word. . . ."\textsuperscript{45} While the witness may have had ample opportunity to make an identification independent of the lineup, the insertion of an improper lineup might have altered his original perception of the intruder.\textsuperscript{46} For example, as one commentator has suggested:

\begin{quote}
government must 'establish by clear and convincing evidence' that the witnesses were not influenced by the prior improper photographic confrontations."
\end{quote}

\textsuperscript{43} The court referred to members of the black race as being colored. See note 29 supra. Therefore, the absence of such a denotation may be construed as meaning the person referred to was white.

\textsuperscript{44} See Wall, supra note 38, at 122.

\textsuperscript{45} 388 U.S. 218, 229 (1967).

\textsuperscript{46} See State v. Redmond, 75 Wash. Dec. 2d 64, 67, 448 P.2d 938, 940 (1968) (psychologist testified that an untainted in-court identification made subsequent to an illegal lineup was impossible).
A determination that the witness can make an in-court identification on the basis of his original mental picture, unaffected by manipulative practices at the lineup, is probably ill-founded. The processes of perception and identification do not operate in such a manner. For legal analysis to comport with psychological theory, the inquiry must be into how much the in-court identification was affected by the lineup.\(^4\)

The *Cannon* decision fails to realize the malleability of the human mind. It is submitted that a determination of the reliability of the witness's original observation is not solely adequate. The court should then proceed to determine whether the illegal lineup could have significantly altered the initial perception. The Nebraska court's failure to probe the manner in which the lineup was conducted leaves the essential question in *Wade* unanswered—was the primary illegality of the lineup exploited?

C. PREJUDICIAL JURY INSTRUCTIONS


Steven Garza was convicted in the District Court of Cass County of stabbing with intent to kill, wound or maim.\(^4\) The principal issue on appeal was whether a supplemental instruction abridged the defendant's right to trial by jury.\(^4\) The *Garza* decision analyzes the fundamental problem of separation of function and power between trial judge and jury.

The jury in Garza's trial returned a guilty verdict after a supplemental instruction. Shortly before the jury returned the verdict the trial judge received a note from the jury foreman which read: "We are at 11 to 1 since 8:00 last night. There is no hope of change. What shall we do? Boyd Clements, Foreman."\(^5\) The trial judge then asked the foreman if he believed that the jury was hopelessly deadlocked or if there was any reasonable chance of the jury arriving at a verdict. After the foreman answered that the jury was

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\(^4\) *Neb. Const.* art. 1, § 11. See *U. S. Const.* amend. VI. See also Duncan v. Louisiana, 391 U.S. 145 (1968) (right to a jury trial in serious criminal cases must be respected by the states under the Due Process Clause of the Fourteenth Amendment).

indeed hopelessly deadlocked, the trial judge instructed the jury as follows:

Well, of course, I recognize and appreciate the fact that you have been out now for better than 15 hours, but in justice to all the parties, the State, and society, and the defendant, I feel, especially in view of the fact that the vote is now 11 to 1, that this case should be disposed of by your verdict, and it is certainly my earnest hope and, likewise, my firm belief that this can be accomplished. And, especially in view of the fact that the vote is 11 to 1, I just can't be convinced that there is no possibility of your agreeing. I certainly have every confidence in our jury system and I've got every confidence in you ladies and gentlemen as jurors in this case, and I am going to ask you again to retire to your jury room and I'm going to ask you to earnestly renew your efforts to come to a verdict in this case. And I will check with you later on again this afternoon. Thank you very much.51

The defendant moved for a mistrial on the grounds that the supplemental instruction was prejudicial, but the motion was denied. Less than an hour after the supplemental instruction was given the jury returned a verdict of guilty.

The Nebraska Supreme Court characterized the instruction as an "Allen charge"52 and reversed and remanded. Citing Potard v. State,53 the court found the language contained therein "sufficiently broad to cover the rejection of any genuine Allen-type instruction."54 The court added:

We are not inclined to approve the Allen-type instruction, but rather, to adhere to the rule found in Potard v. State, supra. We do believe that the rule advanced in United States v. Brown, 411 F.2d 930 (7th Cir., 1969), is consistent with our present rule and merits approval. This rule requires compliance with section 5.4 of the ABA Standards Relating to Trial by Jury . . . .55

51 185 Neb. at 448, 176 N.W.2d at 665 (emphasis added by court).
52 See Allen v. United States, 164 U.S. 492 (1896).
53 140 Neb. 116, 119-20, 299 N.W. 362, 364 (1941): "Any attempt by the court to encourage a verdict will be seized upon by the majority as a coercive argument against the minority, especially if the minority be small. Such a situation does not meet the constitutional requirements of a speedy, public trial by impartial jury. . . ." 185 Neb. at 448, 176 N.W.2d at 666.
54 Id. See United States v. Brown, 411 F.2d 930, 933-34 (7th Cir. 1969) (emphasis added): "We have concluded that it would serve the interests of justice to require under our supervisory power that, in the future, district courts within this Circuit when faced with deadlocked juries comply with the standards suggested by the American Bar Association's Trial by Jury publication. These standards specifically provide: . . . (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury: (1) that in order to return a verdict, each juror must agree thereto; (ii) that jurors have a duty to consult with one another and to deliberate with a view to
Jury trials that result in "hung" juries are not uncommon. Nor is the eccentric juror who prompts the jury foreman to request "eleven dinners and a bale of hay" an uncommon phenomenon. While the hung jury is commonplace, the attempts of trial judges to pressure deadlocked jurors is no less commonplace. The problem of the deadlocked jury places the trial judge in the unenviable position of allowing the judicial system, the litigants, and the public to be confronted with yet another time consuming, cost producing, and generally exhausting trial. Needless to say, trial judges motivated with good intentions attempt to insure that the juries will not "hang." For example, a judge apparently not acquainted with the word "subtlety" told a jury: "Don't you undertake to fool me by coming out and saying that you agreed to a mistrial. I would dislike to send such a good looking body of men to jail, and that is what I would have to do." In America, giving supplemental instructions to coax a verdict out of a deadlocked jury predates the Civil War. The culmination of judicial attempts to enforce the concept of unanimity among jurors found fruition in Allen v. United States, when the United States Supreme Court reaching an agreement, if it can be done without violence to individual judgment; (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors; (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict. (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

56 See H. Kalven & H. Zeisel, The American Jury 453 (1966): "[T]he hung jury is an important phenomenon, since more than 5 per cent of all juries, or some 3000 trials per year, end in such mistrials."

57 See Hammer v. United States, 259 F.2d 274, 281 (9th Cir. 1958).

58 Fairey v. Haynes, 107 S.C. 115, 91 S.E. 976 (1917). See Mead v. City of Richland Center, 237 Wis. 337, 297 N.W. 419 (1941) (judge threatened to turn off the water and heat in the jury room). See also 1 W. Blackstone, Commentaries 375 (Sharswood ed. 1865): "And it has been held, that if the jurors do not agree on their verdict before the judges are about to leave town . . . the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart."


60 164 U.S. 492, 501 (1896). The Court paraphrased the instructions given by the trial judge as follows: "[T]hat in a large proportion of cases
upheld the now famous "Allen" charge or, more colorfully, the "dynamite charge."

The Allen charge has met with a great deal of criticism.\(^6^1\) It is argued that the charge coerces jurors who are in disagreement with the majority of their fellow jurors. As at least two states have suggested, the Allen charge may be inherently coercive.\(^6^2\) The evil is, of course, that the defendant is thereby denied his constitutional right to trial by jury.\(^6^3\) The argument is simply that an accused is entitled to have his fate decided by men and women who are free from outside influence. As the court stated in United States v. Harris:\(^6^4\) "The possibility of disagreement by the jury and the lack of a unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution..."\(^6^5\) A jury may decide absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority..."

\(^{61}\) E.g., Huffman v. United States, 297 F.2d 754, 756 (5th Cir.) (Brown, J., dissenting), cert. denied, 370 U.S. 955 (1962). Judge Brown found an expanded Allen charge based upon irrelevant considerations, such as: a duty to decide and settle; a decision means much to the parties; it will not be easier for a different jury; the expense to the government; the inconvenience to the judge and others; the cost to taxpayers; the jurors' delays keep lawyers from other work; unless a decision is made all work must be done over; judges must courageously decide facts, so must the jury.


\(^{63}\) Cf. H. Kalven & H. Zeisel, supra note 56, at 463. The authors point out that a member of a group in an ambiguous situation will doubt and finally disbelieve his own correct observations if all other members of the group claim that he must have been mistaken.

\(^{64}\) 391 F.2d 348 (8th Cir.), cert. denied, 393 U.S. 874 (1968).

to do three different things: find against the defendant, find for
the defendant, or decide not to decide, and arguably, the defendant
is entitled to any one of the three findings. The Allen charge may
limit the alternatives to two.

The Garza court was not faced with a classic Allen charge,
although the court found the instruction Allen-like. The classic
Allen charge contains, at least nominally, an admonition to the
jurors not to agree for the sake of agreement. The Garza charge
did not caution the jurors that the verdict must be a statement of
each individual juror's convictions. In addition, the Garza charge
stated that a verdict "should" and "can" be arrived at. The Nebraska
court, however, did not address itself to the differences. The over-
riding concern was apparently that even a charge containing cau-
tionary phrases is likely to influence the jury.

Unlike other courts who have done away with Allen-like charges
on supervisory grounds, the Nebraska Supreme Court has rested
the Garza decision on constitutional grounds. The essence of the
court's finding is embodied in Mr. Justice Holmes's statement that
the "conclusions to be reached in a case will be induced only by
evidence and argument in open court, and not by outside influence.
. . ." Realizing that a jury is extremely sensitive to outside
influence the Nebraska Supreme Court stated that the Garza
instruction "was tantamount to telling the dissenting juror that
he was wrong. The prestige of the court was used to bring him into
line with his fellow jurors. . . ." Explicitly it appears that the
constitutional basis of Garza is jury sanctity in the fact finding
process. Implicitly the rationale for the Garza decision would seem

66 See note 60 supra.
67 See United States v. Brown, 411 F.2d 930 (7th Cir. 1969); United
States v. Fiovant, 412 F.2d 407 (3d Cir. 1969); United States v.
Thomas, 8 CRM. L. REP. (D.C. Cir. Nov. 6, 1970); State v. Thomas,
86 Ariz. 161, 342 P.2d 197 (1959); State v. Randall, 137 Mont. 534,
68 185 Neb. at 449, 176 N.W.2d at 666: '[The charge] presented a clear
invasion of the rights of the jury and prevented the defendant from
having his fate determined by an impartial and uncoerced jury." But
see United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969): "No
court has held that the Allen instruction itself is unconstitutional...."
70 185 Neb. at 449, 176 N.W.2d at 667. See Frank v. Mangum, 237 U.S.
309, 349 (1914) (Holmes, J., dissenting): "Any judge who has sat with
juries knows that in spite of forms they are extremely likely to be
impregnated by the envoirning atmosphere."
71 Cf. Parker v. Gladden, 385 U.S. 363 (1966) (bailiff's influencing the
jury was grounds for reversal); Sheppard v. Maxwell, 384 U.S. 333
(1966) (pretrial and trial publicity held potentially coercive); Turner
to be that the criminal process administered by judges needs to be checked, in most cases, by the sense of lay persons.

From the standpoint of judicial economy the Garza decision may well have a salutary affect. As an Arizona court remarked in rejecting use of the Allen charge: "It has given, and we believe each use will give us, harassment and distress in the administration of justice. . . ." When the Allen charge is utilized the appellate court is forced to examine a number of vexatious problems. By doing away with the Allen charge the Nebraska court has saved time consuming appeals and protected the sanctity of the jury.

However, ABA Standards Relating to Trial by Jury § 5.4, adopted by the Garza decision, leaves certain questions unanswered. For example, while the ABA Standards announce that the court must not force the jury to deliberate for an unreasonable length of time, the determination of "unreasonableness" would seem difficult. How long may the judge force the jury to deliberate at one time? May the judge inform the jury how much longer the jury

v. Louisiana, 379 U.S. 466 (1965) (two sheriff's deputies who appeared as witnesses were charged with the duty of driving the jurors to and from their quarters and had also eaten with the jurors; held that the close association of the witnesses with the jury could have prejudicially swayed the jury).

State v. Thomas, 65 Ariz. 161, 166, 342 P.2d 197, 200 (1959). Compare Andrews v. United States, 309 F.2d 127 (5th Cir. 1962), cert. denied, 372 U.S. 946 (1963) (25 minutes, affirmed) with Wissel v. United States, 22 F.2d 468 (2d Cir. 1927) (25 minutes, reversed) for an example of difficulty the courts have had in determining the relevance of the speed with which a jury returns a verdict after the Allen charge, as an indicator of prejudice. See Paschen v. United States, 70 F.2d 491 (7th Cir. 1934) for an example of the difficulty in determining whether the Allen charge was invoked too quickly. See Lias v. United States, 51 F.2d 215 (4th Cir. 1931) for an example of the problems of trying to determine if an Allen charge was prejudicial when the case against the defendant was conclusive. See Anderson v. United States, 262 F.2d 764 (8th Cir. 1959) for an example of the problem of determining the relevance of the judge's knowledge of the numerical split before invoking the Allen charge.

ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1967).

Cf. Shaffer v. State, 123 Neb. 121, 242 N.W. 364 (1932) (length of time for jury deliberation is within the discretion of the court); NEB. REV. STAT. § 25-1117 (Reissue 1964): "The jury may be discharged by the court . . . after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

will have to deliberate? Is the giving of any supplemental instruction coercive?

Perhaps the better solution would be to accept the word of the jury when it has reached an impasse. Present information suggests that most jurors are conscientious. Sending a jury back to deliberate after they have become deadlocked, even with a careful admonition that each juror should abide by his own convictions, may be coercive. The wear of time and the passions of the jury room might well overcome a minority juror after he has been told, in effect, that the judge is not yet ready to accept his decision. Thus, since most failures to reach verdicts are the consequence of genuine disputes, and not attempts to shirk responsibility, the best procedure may be to allow the jury to agree to disagree, without subtly prodding them to reach agreement.

In conclusion, society's need for reasonably quick adjudications of criminal matters is clear. But as the Garza court realized, time saving, on balance, does not overcome the need for an unshackled jury.

D. PROBABLE CAUSE


Larry LeDent was convicted of unlawful possession of narcotic marijuana. The principal issue on appeal was whether the search warrant affidavit in question was sufficient to establish probable cause to issue a search warrant.

The defendant was arrested and the defendant's residence searched after he had allegedly spoken to a man by the name of Schiern about the possible sale of narcotics on November 1, 1968. Schiern had been arrested after his talk with the defendant; Schiern thereupon informed on the defendant. The following affidavit was executed on November 4, 1968:

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78 Cf. H. Kalven & H. Zeisel, supra note 56, at 429-30. If judges are any indication, the authors found that judges were critical of juries less than 10 percent of the time.

79 There may be some support for allowing juries to "hang" without giving a supplemental instruction. Potard, cited as the controlling case in Garza, stated: "Any attempt by the court to encourage a verdict will be seized upon by the majority as a coercive argument against the minority . . . ." 140 Neb. at 119, 299 N.W. at 362.

(T)hat the said Larry LeDent is a resident of the above address and is the son of the registered title holder; that a reliable informant related to the investigative authorities the said Larry LeDent has offered to the said reliable informant certain narcotic drugs for resale; that on Friday, November 1, 1968, the said Larry LeDent told the said reliable informant that he had fifty (50) lids of marijuana available and also a homemade brick of grass available for resale and that he knows the reliable informant knows that the narcotics are kept at the residence at 13450 Frederick Street, Omaha, Douglas County, Nebraska . . . . The reliable informant has given your affiant other information that coincides with information received from other reliable sources. Said reliable informant's information has been verified and that information received has been the truth. The said Larry LeDent is now charged under an information charging him with possession of depressant or stimulant drugs in a separate incident. 81

The Nebraska Supreme Court stated that a search warrant affidavit based on an informant's tip must contain some of the circumstances underlying the informant's belief that the narcotics are located where he claims and some of the circumstances from which the officer concluded the informant was credible. The court then characterized the affidavit as one which complied marginally with constitutional requirements. It may therefore be concluded that the affidavit in question established a minimum standard. The face of the affidavit82 will be examined to determine the merit of the standard which it establishes.

In general, a search warrant may only issue on the basis of an affidavit which establishes the grounds for the warrant.83 Among other things, a warrant may issue to search and seize property possessed in violation of any law of Nebraska making such possession a criminal offense.84 Most importantly, a warrant may only issue upon probable cause;85 however, hearsay evidence may provide the probable cause necessary for the issuance of a search warrant.86 Probable cause may be defined as "the practical considerations of every day life on which reasonable and prudent men, not legal technicians, act."87

82 Cf. Giordenello v. United States, 357 U.S. 480, 487 (1957), where the Court stated that "the issue of probable cause had to be determined ... on the face of the complaint."
85 U. S. Const. amend. IV; Neb. Const. art. 1, § 7.
The leading case with regard to hearsay evidence as a basis for probable cause to issue a search warrant is *Spinelli v. United States.* The essence of the *Spinelli* rationale is that a judge and not a police officer must make the decision to issue a search warrant. As the Court stated, that decision must be made by "a 'neutral and detached magistrate' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.'" Consequently, if the judge is to make the decision to issue a search warrant he must be given specific information on which to act, not generalizations, conclusions, or speculation. Thus, the *Spinelli* Court reaffirmed its support of *Aguilar v. Texas,* in which the principle was established that a search warrant affidavit must provide the magistrate with reasons to believe the informant is reliable and obtained his information in a reliable manner. It should also be noted that *Spinelli* recognized that the issuing judge may evaluate the affidavit by a common sense analysis of the entire affidavit, but the Court cautioned that the "totality of the circumstances" approach should not be used to circumvent the question of reliability. The search warrant affidavit must be specific enough that the judge will be able to determine probable cause.

An analysis of the *LeDent* affidavit should first entail an examination of the issue of the reliability of the informant. Aside from the informant's specific description of the illicit goods, there was nothing concrete contained in the affidavit to establish that the informant was reliable. The affiant described the informant as "reliable" without giving any indication why he drew this conclusion. The affiant suggested that the informant had given "other" information which coincided with information from "other reliable sources." However, what information was received from the other sources was not specified, nor were the "other reliable sources" specified or shown in fact to be reliable. The affiant added that the

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89 393 U.S. at 415, (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).
91 Id. at 114.
92 393 U.S. at 415.
93 The *Spinelli* Court indicated that the use of the word "reliable" by the affiant in describing the informant was of no value in establishing the "reliability" of the informer. Id. at 416. See also United States v. Hood, 422 F.2d 737, 744 (7th Cir. 1970) (Will, J., dissenting); Gaston v. State, 440 S.W.2d 297, 304 (Tex. Crim. App. 1969) (Onion, J., concurring).
94 See McCray v. Illinois, 386 U.S. 300, 303 (1967) for an example of the quality of "other" information found to indicate the present reliability of the informant.
informant’s information was verified without explaining how the verification was performed.

To exceed the minimum standard of LeDent the affiant wishing to establish the reliability of an informant might elaborate with regard to the following: the period of time the officer has dealt with the informer; the reputation of the informer; whether the informant was then subject to prosecution or had previously been granted immunity; whether the informant had previously given information which resulted in convictions based upon the information given (for example, if the information pertains to narcotics then the conviction should relate to narcotics and not some unrelated offense); whether the informant observed the illicit goods in their location or concluded that the goods were where he alleged them to be on the basis of some other information; and whether in the case of narcotics the informer is an addict.

Secondly, an analysis of the LeDent affidavit should consider reliability as that issue pertains to the informant’s information. The affidavit in question indicated that the informant’s information was specific with regard to the character of the illicit goods. In addition, the affiant indicated that the informant’s information was three days old; therefore it was timely.

However, the affidavit did not indicate that the informer told the affiant his tale. If the affiant had no personal knowledge of the informant’s statements but was relying on other “investigative authorities,” then the problem of predicking probable cause on the basis of hearsay on top of hearsay might be involved. In addition, the affidavit related that LeDent had been charged with possession of narcotics in a separate incident; it is doubtful that this fact had any relevance. What is of greater interest, however, is the

97 Cf., e.g., Irvin v. State, 66 So.2d 288, 291 (Fla. 1953), cert. denied, 346 U.S. 927, rehearing denied, 347 U.S. 914 (1954), where the court held that testimony of a field representative with regard to certain research conducted by interviewers other than himself amounted to hearsay within hearsay and was not therefore competent to prove the community was biased against the defendant. The question becomes: how far can the witness be removed from the declarant and still provide an accurate account of the declarant’s statements?
98 See Spinelli v. United States, 393 U.S. 410, 418-19 (1969), where the fact that Spinelli was a “known” gambler was held to be of no significance.
fact that the affidavit did not give any information indicating that the informant knew where the illicit goods were located except the affiant's assertion that he "knew" that the informant "knew" the location of the narcotics.\textsuperscript{99} Thus, the most important part of the affidavit, the location of the illicit goods, was established without one specific fact to buttress the affiant's conclusion.

The affiant wishing to exceed the LeDent standard, with regard to establishing the reliability of an informant's information, might demonstrate the following. The affidavit should establish that the affiant has personal knowledge of the informant's information.\textsuperscript{100} And most importantly, the affidavit should clearly establish why the informant concluded that the contraband was located where the informant said it was.

In conclusion, the LeDent standard appears to be continuing the practice of minimal participation by judges in the decision to issue a search warrant.\textsuperscript{101} As Professors LaFave and Remington have remarked:

\begin{quote}
[A]ppellate court insistence \ldots on maximum judicial participation in the decision to issue process \ldots is aimed at preventing unconstitutional arrests and searches. Judicial review of law enforcement decisions is also premised upon prevention. In current practice, however, \ldots the goal of prevention is not being achieved.\textsuperscript{102}
\end{quote}

The fact that the Nebraska court approved a search warrant affidavit which failed to show why the police "knew" where the sought-after goods were located may indicate that the LeDent minimum standard is too low. The viability of the right of privacy in Nebraska may dictate that the LeDent minimum standard be increased.

\textsuperscript{99} It is difficult to see the connection between a description of illicit goods, based upon a conversation, and the location of the goods. Cf. W. LaFave, Arrest: The Decision to Take a Suspect Into Custody 43 (1965). Professor LaFave suggests that observed "buys" do not "afford probable cause to believe the seller has a cache of narcotics in his apartment."

\textsuperscript{100} At least some indication should be given why the affiant believes the person who told him of the informant's tale is credible. Cf. Proposed Rules of Evidence for the United States District Courts and Magistrates 8-05 (Preliminary Draft 1969).

\textsuperscript{101} See W. LaFave, supra note 99, at 34-46 n. 57, where a judge signed a warrant without examining it and handed it back to a pleased police officer, the whole transaction taking place in a hallway.

E. Right to a Speedy Trial


The defendant was convicted of breaking and entering a gasoline station with the intent to steal property of value. The principal issue on appeal was whether he had been denied a speedy trial.

Lee, an eighteen year old youth, was confined in jail for 311 days prior to trial. He was without counsel for 268 days. The prosecution had objected to the appointment of counsel because defendant's parents were able to provide counsel; however, they chose not to do so. Some six months after the first denial of appointed counsel the defendant filed a written application for appointment of counsel. Some eight months after this first request, the trial court granted the application. Since the resident trial judge was unable to hear the case, it was heard by nonresident trial judges. Soon after his appointment, defense counsel moved for dismissal on the grounds that his client had been denied a speedy trial and due process. The motion was denied and trial was had forty-three days from the time of appointment of counsel.

In a per curiam decision, the Nebraska Supreme Court modified sentence but affirmed the conviction. The judges favoring affirmance found that Lee was tried within the statutory time, that he had not explicitly demanded a speedy trial, that he had not been prejudiced and had not been the subject of a purposeful failure by the court or prosecution to afford a speedy trial.

Although the court noted that the defendant had been tried within the statutory time, the provision is merely a maximum time for prosecution and should not be used to determine the question of denial of the right to a speedy trial within the time period. It is not clear exactly what weight was given to the fact

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104 See Klopfer v. North Carolina, 386 U.S. 213 (1967), applying the Sixth Amendment right to a speedy trial to the states. See also Neb. Const. art. 1, § 11 ("In all criminal prosecutions the accused shall have the right to . . . a speedy trial.").
105 See Neb. Rev. Stat. § 29-1202 (Reissue 1964) ("If any person indicted for any offense and committed to prison shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner.").
that the defendant was tried within the statutory maximum. However, there is some indication that the court was hesitant to consider the speedy trial issue when trial had taken place within the statutory period. In addition, the time period was found to vary from county to county. Thus, it is entirely possible that the right to a speedy trial may be determined by which county brings the litigation.

The Lee court also found that the defendant had not "demanded or requested a speedy trial or made any effort to obtain a speedier trial." Therefore, it seems the court followed what has been known as the "demand" doctrine. As far as the defendant is concerned, the consequence of the demand doctrine is that lack of an explicit request for a speedy trial will be construed as an indication that the defendant approves of the delay. The demand doctrine is premised on the concept that delays benefit defendants.

The rationale of the demand doctrine is of dubious quality. Specifically, with regard to the Lee case the doctrine had no utility since the defendant did not have legal counsel and was not free on bail. A delay could not have been to his benefit since there was no defense counsel to utilize the extra time in preparation for trial.

107 185 Neb. at 195, 174 N.W.2d at 350. At least those judges who found a denial of the right to a speedy trial found it necessary to stress that the statutory time was merely a "maximum."

108 Id. at 194, 174 N.W.2d at 349, where Justice McCown, joined by Justices Spencer and Smith noted the need for legislative attention to this matter. Apparently the legislature was listening when it passed L.B. 496, 81st Neb. Leg. Sess. (1971): "If any person indicted for any offense and committed to prison shall not be brought to trial within six months, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner. . . . If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial within six months, he shall be entitled to be discharged, so far as relates to such offense, unless the delay shall happen on his application, or be occasioned by the want of time to try such cause within six months." See also Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 863, 864 & n. 117 (1957); ABA Standards Relating to Speedy Trial § 2.2 (Tentative Draft 1967).

109 185 Neb. at 191, 174 N.W.2d at 348.


111 See United States ex rel. Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963) ("Such a rule is based on the almost universal experience that a delay in criminal cases is welcomed by defendants as it usually operates in their favor.") (Footnote omitted).

112 See Comment, Waiver of the Right to a Speedy Trial, 5 Calif. West. L. Rev. 76, 82 (1968). See also ABA Standards Relating to Speedy Trial § 2.2 (Tentative Draft 1967).
Nor could the defendant use the extra time for such things as earning money to pay for his defense, since he was incarcerated.

While the Nebraska Supreme Court appears to be following the weight of authority, the effect of the demand doctrine is to presume waiver of a constitutional right. Therefore, the continuing vitality of the doctrine is in doubt. With regard to the right to a speedy trial, the United States Supreme Court has stated:

The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution.

With regard to waiver of constitutional rights, the Court has argued:

There is a presumption against the waiver of constitutional rights and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege."

Whatever the utility of the demand doctrine, it appears that Lee did his best to "demand," that is, filing a written application for appointment of counsel after a prior oral application. Arguably, the youth did what most reasonable men would do when confronted with a lengthy period of incarceration prior to trial—he sought legal assistance. The Nebraska court gave a strong indication that the demand doctrine would be applied literally when it chose not to construe Lee's application for counsel as a request for a speedy trial.

The court also found that the defendant had not been prejudiced by his pre-trial confinement. However, two factors which would tend to indicate prejudice are suggested.

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113 See United States v. Maxwell, 383 F.2d 437, 441 (2d Cir. 1967), cert. denied, 389 U.S. 1057 (1968), where the court stated that the demand doctrine "has been consistently applied in a constantly lengthening line of cases."


116 185 Neb. at 191, 174 N.W.2d at 348 (1970): "We find a want of prejudice to the defendant since the trial court made it clear that the time spent in jail awaiting trial was given full consideration at the time sentence was passed." However Justices McCown, Spencer and Smith found no statutory authority for the trial judge to credit jail time on the sentence. And they also found that if defendant were to serve the one year sentence, minus credit for good time while serving it, he would be released in less time than he spent in jail prior to trial. Id. at 197, 174 N.W.2d at 351.
First, Lee was without counsel for 268 days. Although it was not argued, it may be assumed that the defense counsel had a difficult time reconstructing the events which led to the charge. The defendant may have been unable to remember relevant facts to aid counsel in preparation for trial.\textsuperscript{117} It is obvious that defense counsel could not argue and prove facts which the defendant had forgotten.

Second, there is little doubt that the defendant suffered anxiety. The fact that the defendant was young, never before in jail, and left virtually without counsel, legal or otherwise, would seem to increase dramatically the possibility and level of anxiety. The United States Supreme Court has specifically recognized that the right to a speedy trial exists, among other reasons, "to minimize anxiety."\textsuperscript{8} It is of interest that one judge in Lee saw the anxiety issue quite differently when he argued that "[u]ndue incarceration before trial and concern over public accusation would be very material to an innocent person wrongfully accused, but scarcely so to one who is guilty. . . ."\textsuperscript{119}

It would seem then that only those acquitted could claim prejudice because of anxiety due to lengthy pre-trial incarceration. Such a construction would prohibit the proof of prejudice because of anxiety. Only those convicted would have a forum, that is, appeal, to assert prejudice. Thus, one of the reasons for the speedy trial guarantee would be meaningless because acquitted defendants would have no reason to appeal.

In addition, an important aspect of the Lee decision is its failure to realize that prejudice may not be relevant to the speedy trial issue. As one commentator has suggested, the requirement that the defendant prove actual prejudice

defeats the goal of maintaining the reliability and integrity of the guilt-determination process by requiring an impossible task . . . , merges the right to a speedy trial into the broader right to due process and thus creates a danger of analytical confusion, and . . . eviscerates the effectiveness of the speedy-trial guarantee as a means of identifying and eliminating the causes of undue delay in the criminal process.\textsuperscript{120}

\textsuperscript{117} Cf. King v. United States, 369 F.2d 213, 215 (D.C. Cir. 1966) ("[P]roof that particular facts are forgotten is seldom possible.").
\textsuperscript{119} 185 Neb. at 200, 174 N.W.2d at 352 (Newton, J., concurring in finding of guilt and dissenting from reduction of sentence).
\textsuperscript{120} Note, The Right to a Speedy Trial, 20 STAN. L. REV. 476, 497 (1968). Cf. United States v. Lustman, 258 F.2d 475, 478 (2d Cir.), cert. denied, 358 U.S. 880 (1958) ("A showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment.").
There appear to have been two reasons for the delay. First, the trial court sustained the prosecution's objection to the appointment of counsel. Second, nonresident trial judges appeared in the district court due to the local judge's inability to hear the case. The test to be used, as the Nebraska court indicated, was whether the delay was arbitrary or oppressive.\textsuperscript{121}

First, defense counsel was not appointed for some 268 days because Lee's parents were capable of providing counsel for their son. No contention was made that Lee could afford counsel. It seems peculiar to determine that a youth who is without financial support is somehow able to provide counsel, thus alleviating the necessity of the state providing counsel. The better rule would be to inquire into the parents' financial ability and willingness to pay for counsel and then, if the parents refuse to pay for counsel, appoint counsel.\textsuperscript{122}

But more importantly the Lee court did not deem the denial of counsel a concrete reason for delay. It cannot be doubted that counsel, as opposed to the defendant, could have expedited a speedy trial. For example, if as the court suggested one must explicitly "demand" the right to a speedy trial, one can assume that only an attorney would be aware of such a legal anomaly. Arguably the denial of counsel was arbitrary; the defendant was in fact indigent. Therefore, if the denial of counsel contributed to the delay, it could be argued that the delay was arbitrary.

Secondly, it appears that the Nebraska Supreme Court placed significance on the fact that on ten occasions non-resident judges presided in the Lee matter.\textsuperscript{123} Apparently the court attributed some of the delay to that fact and held that portion to be reasonable. It should not be a matter of uncommon experience that trial judges will be unable to hear certain cases. If the state makes no reasonable attempt to insure that criminal matters will be brought to

\textsuperscript{121} 185 Neb. at 190, 174 N.W.2d at 348.
\textsuperscript{122} See Mattis, Financial Inability to Obtain an Adequate Defense, 49 Neb. L. Rev. 37, 54 (1969). See also Stifler, Determining the Financial Status of an Accused, 54 Ill. B. J. 868 (1966). ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 6.1 (1966): "Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel \ldots ." Cf. Gideon v. Wainwright, 372 U.S. 335 (1963).
\textsuperscript{123} The court considered the fact that on 10 occasions nonresident judges sat as "nothing more than an indication of the extent that the temporary disability of the local judge may have contributed to the delay of the trial in the instant case." 185 Neb. at 189, 174 N.W.2d at 347.
the attention of nonresident judges then perhaps the state should shoulder the responsibility. Since the government apparently concluded that it was simpler not to provide a system which would actively inform nonresident judges of the status of pending criminal matters, why should the government not be forced to prove the reasonableness of its priorities?²¹²⁴

In conclusion, the Lee decision strongly indicates that the right to a speedy trial in Nebraska is limited. Apparently a trial held within the statutory time period, without an explicit, if not literal demand for a speedier trial, without a conclusive showing of prejudice and without a blatantly arbitrary or oppressive attempt to slow the trial will be found to be a speedy trial. The vigor of the right to a speedy trial in Nebraska thus remains in doubt.

II. REAL PROPERTY


In State v. Bardsley²¹²⁵ the Nebraska Supreme Court held that upon termination of a lease of state school land, unauthorized permanent improvements became the property of the trustee State Board of Educational Lands and Funds. In the absence of statute or agreement providing otherwise, the lessee who made an unauthorized agreement was not entitled to remove the improvement or to compensation for its value. In 1966, the court had decided in Banks v. State²¹²⁶ that a lessee who had made unauthorized improvements on school lands retained "substantial" property rights in them and was entitled to compensation though they were attached to the land. Although Bardsley might be interpreted as overruling the Banks case,²¹²⁷ the decisions are distinguishable. When considered together, they may be interpreted to provide a comprehensive doctrine, based on statute, case law and common law, which controls ownership of improvements on state school lands.

Bardsley concerned the ownership of a $3,100 metal quonset building which the lessee erected on state school land in 1954

²¹²⁴ Cf. Hodges v. United States, 408 F.2d 543, 551 (6th Cir. 1969), where then Judge Blackmun suggested the need for coordination and stated: "All judges share responsibility for prompt disposition of criminal cases."


²¹²⁶ 181 Neb. 106, 147 N.W.2d 132 (1966) (4-3 decision with 3 justices concurring separately).

without the lessor's authorization. The lease was executed in 1943 for a twenty-five year term. It did not include provisions which would protect the lessee's interest in any improvements which might be made during the tenancy. Without such an agreement the lessee's rights depended on a statute which provided for appraisal of improvements and reimbursement for them at the termination of the lease. However, this statute was declared unconstitutional in 1955 because it failed to provide for notice of the appraisal to be given to the lessee. The situation had been further complicated by 1953 legislation which required the Board of Educational Lands and Funds to approve applications to construct improvements on leased school lands as a condition precedent to lessees' retention of property rights in those improvements.

The Nebraska Supreme Court determined the rights of the parties by the law at the time of execution of the lease. In Bardsley, since there was neither an agreement between the parties nor a constitutional statute controlling ownership of improvements, the court held that common law would govern. If the 1953 statute had been applicable, the lessee could not have claimed a reimbursable interest in the improvement because he had not obtained the lessor's approval of the construction of improvements as required.

The court cited an earlier school lands case which set out the common law rule that "improvements which became a part of the real estate may not be removed and do not become the property of the lessee. . . ." When permanent improvements were constructed without the owner's consent, the lessee forfeited his "common law privilege of removal or a right to compensation."

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130 Neb. Rev. Stat. § 72-240.07 (Reissue 1966): "Before any buildings, wells, irrigation improvements, dams, or drainage ditches are placed upon school lands by a lessee, written approval must be obtained from the Board of Educational Lands and Funds, except necessary improvements for the temporary handling and sheltering of livestock. Any such improvements placed upon school lands after September 14, 1953, where written approval for such improvements was not obtained from the board shall be considered improvements of the land and the lessee shall not be entitled to reimbursement therefor."
131 Id. This statute was enacted subsequent to the execution of the lease, but prior to the construction of the improvement.
133 170 Neb. at 747, 104 N.W.2d at 268.
At the termination of the lease improvements became part of the realty and vested in the owner of the fee.\(^{135}\)

In Banks,\(^{136}\) the lease had been executed on October 16, 1953. Later, the lessee had erected fences, a loading chute, corrals and a windbreak, and had leveled 150 acres of the leased land for irrigation, all without the board's approval. Upon expiration of the lease in 1965 the land was offered for sale\(^{137}\) and it therefore became necessary to determine ownership of the unauthorized improvements.

The district court rendered a declaratory judgment quieting title to the unauthorized improvements in the Board of Educational Lands and Funds. On appeal, the Nebraska Supreme Court held that the right to reimbursement for improvements was controlled by statutes which required appraisal and compensation for improvements regardless of authorization\(^{138}\) and other statutes which required authorization for retention of ownership rights.\(^{139}\) After a comparison of these statutes,\(^{140}\) the court held that the lessee retained a compensable interest in unauthorized improvements unless the improvement was within an enumerated category in the approval statute. The court also decided, on the strength of Mara v. Normann,\(^{141}\) that the lessee retained a compensable interest in other improvements made prior to 1953.

The Banks rationale was that where ownership was governed by statute, the lessee retained an interest in improvements which do not require prior authorization under section 240.07 of Chapter 72 of the Nebraska statutes. The category of improvements which do not require authorization may be determined by extending the court's comparison of the "appraisal" and "approval" statutes.\(^{142}\)

\(^{135}\) Frost v. Shinkel, 121 Neb. 784, 238 N.W. 659 (1931).
\(^{140}\) The court decided (1) that the loading chute, corrals and board windbreak were "fencing" within the meaning of the "appraisal" statute; (2) that "fencing" was specified for "appraisal" but not for "approval"; "fencing" was not unauthorized within the meaning of the statute; and the lessee retained a right to reimbursement for those improvements; and (3) that the land leveling was unauthorized and the lessee was not entitled to compensation for this improvement.
\(^{141}\) 182 Neb. 845, 77 N.W.2d 569 (1956).
\(^{142}\) This category includes fencing, windmills, pumps, tanks, assessments paid to any irrigation district, conservation terraces, trees, plowing for future crops, and alfalfa or other crops growing thereon.
The approval statute excludes “necessary improvements for the temporary handling and sheltering of livestock” from the authorization requirement.\footnote{\textit{NEB. REV. STAT.} § 72-240.07 (Reissue 1966).}

The \textit{Bardsley} and \textit{Banks} doctrines can be summarized in these rules: (1) The rights of the parties to a lease of school land are determined by the law in effect at the time of execution of the lease.\footnote{185 Neb. at 631, 177 N.W.2d at 601.} (2) In the absence of an agreement between the lessor and lessee, statutory law controls. In the absence of agreement or statute the common law controls.\footnote{Id. at 632, 177 N.W.2d at 601.} (3) The “approval” statute only controls the ownership of enumerated improvements in leases executed after September 14, 1953.\footnote{181 Neb. at 110, 147 N.W.2d at 134.} The lessee retains a compensable interest in authorized improvements, and in fencing, windmills, pumps, tanks, assessments paid to any irrigation district, conservation terraces, trees, plowing for future crops, and alfalfa or other crops growing thereon, and in necessary improvements for the temporary handling of livestock.\footnote{\textit{NEB. REV. STAT.} §§ 72-240.06, 72-240.07 (Reissue 1966). A different rule may govern leases executed subsequent to June 2, 1967, the day \textit{NEB. REV. STAT.} §§ 72-240.10 to -240.24 (Supp. 1969) became effective, but because \textit{NEB. REV. STAT.} §§ 72-257, 72-258 (Supp. 1969) provide for the sale of the school lands as leases expire, the problem is not extensive.} (4) The approval statute does not apply to leases executed before September 14, 1953. Instead, in the absence of agreement, ownership of improvements is controlled by the common law rule that “improvements which become a part of the real estate may not be removed and do not become the property of the lessee. . . .”\footnote{170 Neb. at 747, 104 N.W.2d at 268.}

This last doctrine enunciated in \textit{Bardsley} is subject to criticism. In determining the ownership of the metal quonset building, the court relied on the common law rule stated in \textit{Blomquist v. Board of Educational Lands and Funds}.\footnote{170 Neb. 741, 104 N.W.2d 264 (1960).} The rule that fixtures are the property of the lessor was extended to the \textit{Bardsley} case despite the well-recognized exception accorded to improvements made for trade or agricultural purposes.

In \textit{Blomquist}, the improvement was a twenty acre stand of trees planted for domestic and commercial purposes. Of course, the trees were improvements of a permanent nature, were attached to the land and could not be removed without damage to the premises. The \textit{Bardsley} improvement was of a different nature, but the
court extended the common law rule of fixtures without considering the equitable reasons to except fixtures placed on the land for trade or agricultural purposes from a harsh rule which discourages tenants from improving their leaseholds.

Justice Story, in *Van Ness v. Pacord*, explained that trade and agricultural fixtures were excepted from the general rule that fixtures are the property of the lessor in order to encourage enterprise and development. Nebraska has sought to encourage the construction of improvements on the state school lands to enhance their value for agricultural purposes. Furthermore, Nebraska has applied the liberal rule that lessees could remove fixtures they erected unless damage to the property might result or there was a contrary agreement.

In cases such as *Bardsley*, where the ownership of improvements on state school land is controlled by the common law, it is unfortunate that the Nebraska Supreme Court has not recognized the special rules which the common law reserved for trade and agricultural fixtures. The decision will have both immediate and long term consequences. In applicable cases at the termination of the lease, tenants will lose their financial interest in improvements which they have erected. In the absence of an agreement to protect their interests other lessees will be discouraged from improving school lands.


In *Dewey v. Montessori Educational Center, Inc.*, a case of first impression in Nebraska, the court was called upon to answer the question: is a nursery school a “school” within the contemplation of the Second Suburban Omaha zoning ordinance? The ordinance permits, among other things, “6. Schools, elementary and High. ***9. Hospitals and institutions of an educational, philanthropic or eleemosynary nature.”

Plaintiffs, who sought an injunction to restrain defendants’ operation of a nursery school in a suburban residential neighborhood, owned a $204,000 home next to the residence being used as

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150 27 U.S. (2 Pet.) 137 (1829).
154 Id. at 792, 178 N.W.2d at 793.
a nursery school. The court held that this nursery school did not violate the zoning ordinance.

After Dewey how may municipalities exclude nursery schools from residential neighborhoods? It is clear that in the future specific terms must be utilized in zoning ordinances to successfully exclude nursery schools from residential neighborhoods in Nebraska. Cases from other jurisdictions will aid in pointing the direction.

The defendant school had an enrollment of fifty children aged three to five years Monday through Friday, and fifteen two and one-half year olds on Saturday morning. There was instruction in reading, mathematics, geography, art, music and languages, with each child's progress reported periodically. The trial court held these activities constituted "[a] school program that is aimed primarily to introduce a child to a lifetime of creative learning."

The construction which the court placed on the zoning ordinance arguably would allow the use even in property zoned First Residential. A First Residential classification contains provision for "schools elementary and high" and also for "uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of any business."

The plaintiff argued that this was not an allowable school use, but should properly be excluded because the "school" was operated as a business. Furthermore the defendants' operation did not meet the definition of an educational institution as described in section nine of the ordinance. The court, however, dismissed both arguments and merely held that it was a school and not in violation of the Omaha ordinance.

Property owners and cities have been notably unsuccessful in excluding schools from residential districts. In discussing cases from other jurisdictions involving nursery schools and day care centers it is important to determine the degree of restrictiveness of the language of the particular zoning ordinance involved.

156 "We hold that the private school operated by the defendants is a school or educational institution, and the use of the defendants' property for such is not a violation of the zoning ordinances of the city of Omaha." 185 Neb. at 793, 178 N.W.2d at 794.
158 Id. at 793, 178 N.W.2d at 794.
160 Id. § 55-10.020 (9).
In *Livingston v. Davis*, an Iowa case in which the facts were essentially the same as those in *Dewey*, the court held a private nursery school was a school within the statutory ambit of a zoning ordinance that allowed "Public schools, Colleges, University Buildings and Uses, and Private Elementary Schools, taking only children up to and not exceeding the age of 14." It rejected the argument that nursery schools which failed to meet the statutory requirements for elementary and secondary schools were excluded from the definition of schools in the zoning ordinance.

A similar result was reached in *Chicago v. Sachs* although the Illinois court held that a nursery school could not by implication be included in the uses allowed by ordinance:

Nor does nursery school, or prekindergarten school, fall within the commonly understood meaning of the term "grade school." The accepted definition of a grade school is "A school divided into successive grades" (Webster's New International Dictionary, 2nd ed.) and defendant's school is not so divided.

However, the Sachs court held the classification was unreasonable since the ordinance allowed grade schools, high schools, boarding schools, vocational schools, colleges and universities in the district. The residential district in Sachs allowed many nonresidential uses, being one of the least restricted residential zones under the Chicago zoning ordinance. Therefore, even though the court held a nursery school was not a grade school, it struck down the classification in the ordinance and allowed the school.

New York allowed nursery schools in residential districts in *People v. Collins*, holding that:

The value of pre-schools to children can hardly be questioned by anyone whose children have attended a well-run school of this character. To limit the existence of such schools to the definition given in the Education Law would mean that such schooling would be available only to children of parents in the higher income brackets and live in a larger center of population.

The ordinance in Collins allowed "schools" in the district. In another case the New York Appellate Division affirmed an order of the Su-

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161 243 Iowa 21, 50 N.W.2d 592 (1951).
162 Id. at 25, 50 N.W.2d at 595.
163 1 Ill. 2d 342, 115 N.E.2d 762 (1953).
164 Id. at 344, 115 N.E.2d at 764.
165 191 Misc. 553, 83 N.Y.S.2d 124 (Westchester County Ct. 1948).
166 Id. at 555, 83 N.Y.S.2d at 126.
preme Court, Nassau County, directing the board to grant a permit to conduct a nursery school in a residential neighborhood.\textsuperscript{167}

In these New York cases the ordinances lacked any clear indication that nursery schools were to be covered, but the courts felt free to interpret the word schools to include private pre-schools and allow operation of such institutions in residential neighborhoods.

On the other side of the issue, individuals and cities have had success in barring such schools from residential districts when the ordinance in question has been restrictive in its definition of schools or where a special permit has been required to operate such a school in a residential district.

New York has allowed a city to refuse a permit to a nursery school when the applicable ordinance specifically provided that such schools would be permitted only as a special exception.\textsuperscript{168}

The Court of Appeal of Louisiana has held the operation of a nursery school, kindergarten or play school was not within the contemplation of an ordinance allowing the operation of “public schools, and educational institutions having a curriculum the same as that ordinarily given in public schools.”\textsuperscript{169} In addition to the allowable uses in the R-1 district above, the R-3, Multiple Family Residential District provided:

- Nursery Schools, pre-schools, and kindergartens, privately operated must provide a minimum play area of two hundred (200) square feet for each child and such play area must be enclosed to a height of not less than four (4) feet, not more than six (6) feet.\textsuperscript{170}

The court held that since a nursery school did not have the same curriculum as public schools it was limited to locating in the R-3 district.

\textsuperscript{168} “The pertinent provisions of the Building Zone Ordinance of the Town of Oyster Bay provide: ‘... In “D” Residence District, no building or premises shall be used and no building shall be hereafter erected or altered, unless otherwise provided for in this Ordinance, except for one or more of the following uses: ... 5. A regularly organized university, college, elementary or high school having a curriculum approved by the Board of Regents of the State of New York. 5a. A regularly organized Nursery School when permitted by the Town Board as a special exception, after a public hearing,” Rockefeller v. Pynchon, 41 Misc. 2d 1, 2, 244 N.Y.S.2d 978 (Sup. Ct. 1963).
\textsuperscript{170} Id.
In another Louisiana case, *Lakeside Day Care Center, Inc. v. Board of Adjustment*, the Court of Appeal of Louisiana held a day care center operating six days a week, eleven hours a day, twelve months a year was not a nursery, pre-kindergarten or kindergarten school allowed in the zoning ordinance:

The primary purpose of a day care center is not education but instead the all day care of children of working mothers. To qualify under the terms of the Baton Rouge Zoning Ordinance for "A-I" districts, the appellants would have to change their operation from one set up primarily to give all day care to children, to one set up primarily for the education of children.

*Lakeside* points out one distinction that was not considered in *Dewey*. If nursery schools are allowed uses, are day care centers also allowed? The significant difference is that little or no instruction is offered in day care centers. Their purpose is to watch over children rather than prepare them for further schooling in primary schools. Whether Nebraska will draw this distinction is an open question.

If one of the aims of a zoning ordinance is to classify and protect some areas, such as residential neighborhoods, restrictive language must be utilized to avoid problems such as the encroachment of nursery schools into residential areas. Nebraska has accepted the view that nursery schools are allowed uses in residential areas. Therefore it is time to reconsider the uses and descriptions used in enacting zoning laws. Although *Dewey* is a case of first impression in Nebraska, it seems possible to artfully draft zoning ordinances that will be effective in excluding nursery schools from residential neighborhoods. This can be accomplished either by requiring permits or providing explicit exclusion of such uses from residential neighborhoods.


In *Westbrook v. Masonic Manor*, the court was faced with some of the problems created by cooperative living organizations. The dispute involved a disagreement about the rights and obligations of the tenants and the organization.

The Manor was organized as an association of tenant owned apartments. However, it did not conform to either of the two types of organizations most often used for such ventures: condominiums

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171 121 So.2d 335 (La. App. 1960).
172 Id. at 339.
and cooperative stock corporations. Reference to case law involving these two types of organizations emphasizes why the Manor's organization was defective. In particular, other contract provisions on termination rights should prove instructive.

In *Masonic Manor*, plaintiff and defendant entered into a residency contract on July 3, 1964, which provided that for a 5,000 dollar entry fee the plaintiff was entitled to live in an assigned apartment for life, subject to payment of a pro rata share of monthly expenses. The contract further provided that "upon relinquishment . . . and written demand . . . ninety percent of any payment on entrance fees is refundable."  

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"APPLICATION"

hereby make(s) application for admission to the Masonic Manor at 52nd & Leavenworth Streets, Omaha, Nebraska.

In consideration of the acceptance of this application, the payment of an entrance fee will be made in the sum of $5,000.00 for a one-bedroom apartment.

It is further agreed that the payment of an entrance fee shall be inferior and subordinate to any mortgage which the Masonic Manor has or may place on the premises and whatever subordination agreement is needed will be executed upon request.

DATED this ______________________ day of ______________________, 196_

"ACCEPTANCE AND RECEIPT"

The above application is approved and accepted, and receipt is hereby acknowledged of $_____________________________ from

in payment of an entrance fee which, when applicant(s) is/are retired or 62 years of age or over, will entitle_____________________________ to live in an assigned apartment in the Masonic Manor for life, subject to a monthly payment of a proportionate share of expenses, maintenance and amortization of loan, and also subject to the rules and regulations which will be adopted to govern the Manor. This right to live in the Manor is not assignable.

It is agreed that, upon relinquishment of the apartment provided for herein and upon the written demand of applicant(s) or_____________________________heirs or assigns, ninety per cent of any payment on entrance fees is refundable as soon as the Masonic Manor secures another applicant for the apartment being released.

This payment entitles applicant(s) to the_____________________________ place for choice of exposure and floor for an apartment.

DATED this_____________________________ day of ______________________, 196_

MASONIC MANOR

By_____________________________"

175 Id.
After almost three years' occupancy, plaintiff gave notice on March 1, 1967, that he would vacate the apartment April 1, 1967. On March 19, 1967, defendant's board of directors passed a resolution providing that as of March 20, 1967, "owners of resident tenancy contracts would be responsible for the monthly prorata [sic] payment whether the apartment was occupied or not." The apartment was vacated on April 1, 1967, and "resold" on September 15, 1968. At that time defendant sent a check to plaintiff for $2,398.75. This amount was determined by crediting plaintiff with 5,400 dollars (ninety percent of the new entry fee of 6,000 dollars) less the monthly pro rata share for seventeen and one-half months or $3,001.25. Plaintiff brought suit to recover ninety percent of his 5,000 dollar entry fee. The trial court held for plaintiff and the supreme court affirmed with one dissent.

Both the condominium and the cooperative stock corporation provide for ownership rights in tenants. The condominium is recognized by statute in Nebraska; individual apartments may be owned in fee by the tenant. The cooperative stock company is organized as a corporation with shares of stock sold to tenants, which gives them the right to a proprietary lease. The lease and stock coupled with the bylaws of the association constitute the contract between the tenant and the association.

The Masonic Manor organization appears to be more like a cooperative stock corporation than a simple condominium. While there was no stock issued to the tenant the residency contract was similar to a proprietary lease; however, it granted only the right "to live in an assigned apartment in the Masonic Manor for life..." The entry fee assessed was similar to purchase of stock, and the required monthly payment of a share of the complex

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176 185 Neb. at 661, 178 N.W.2d at 281.
177 Id. at 662, 178 N.W.2d at 281.
179 Id. The entry fee had been raised on October 1, 1965.
182 Some courts have held that such cooperatives can be organized under cooperative stock corporation acts even if designed for farming cooperatives. See, e.g., State ex rel. Leavell v. Nelson, 387 P.2d 82, 63 Wash. 299 (1963). Nebraska has such an act: Neb. Rev. Stat. §§ 21-1301 to -1306 (Reissue 1970).
184 See note 174 supra.
expenses was identical to the maintenance charge of cooperative apartments.\textsuperscript{185}

In \textit{Susskind v. 1136 Tenants Corp.},\textsuperscript{186} the New York City Court distinguished between a condominium and a co-op:

It is noteworthy that a condominium conveys “units” by “recorded deeds” while an ordinary cooperative leases “apartments” to shareholder lessees by “proprietary leases.” Unlike a cooperative, management of a condominium does not have the sword of summary proceedings. A defaulting unit owner submits his unit to a lien in favor of his co-owners, which lien may be foreclosed in the same manner as a mortgage.....

A corporate cooperative thus indicates an entity holding title to all the premises and granting rights of occupancy to particular apartments. The condominium, on the other hand, refers specifically to schemes of individual ownership of individual apartments organized pursuant to statutory authority.....\textsuperscript{187}

It would appear that Masonic Manor was an attempt to combine the two types of organization: retaining title in the corporation and making the tenant liable for charges after surrender of his apartment. The Manor tried to accomplish this without any express covenant in the lease.

Since the term of the Masonic Manor lease was for the life of the tenant, if the position of the defendants had been sustained the Manor could require tenants to pay the monthly share for the rest of their natural lives. Since no mention of this aspect of the arrangement was made in either the majority or dissenting opinions, it is impossible to know if it was considered.

In the condominium and the cooperative stock company the owner or lessee of an apartment has something he can sell.\textsuperscript{188} The organizations cannot subject the individual owner or lessee to any liability by imposition of unreasonable restraints on his right to rid himself of an unwanted apartment.\textsuperscript{189} Arguably the organization must offer some kind of escape even if they wish to hold the owner or lessee to his contract.\textsuperscript{190} Often the organization is bound to meet the best offer a tenant has received for his property if they wish to block the sale to a particular offeror, or at least offer a

\textsuperscript{185} \textit{Id.}
\textsuperscript{186} 43 Misc. 2d 588, 251 N.Y.S.2d 321 (N.Y. City Ct. 1964).
\textsuperscript{187} \textit{Id.} at 592, 251 N.Y.S.2d at 327 (citations omitted).
\textsuperscript{188} The tenant may sell either the stock or the fee title, usually subject to a right of first refusal on the part of the organization. See Note, \textit{Right of First Refusal—Homogeneity in the Condominium}, 18 \textit{Vand. L. Rev.} 1810 (1965).
\textsuperscript{189} \textit{Id.} at 1811-16.
\textsuperscript{190} \textit{Id.}
reasonable price for the tenant's interests, whether or not they meet the best offer. This of course provides the owner or lessee an opportunity to get out of the arrangement if he wishes to move. While he may be required to take a loss, it is unlikely that a tenant would ever encounter the Masonic Manor delay of eighteen months during which time he must continue to pay rent.

It is also possible that the contract created a life estate in the tenant. Two cases from other jurisdictions have held that such leases created life estates. In Thompson v. Baxter, the lease provided:

"To have and to hold the above-rented premises unto the said party of the second part [the tenant], his heirs, executors, administrators, and assigns, for the full term of while he shall wish to live in Albert Lea, from and after the 1st day of December, 1904."

The court held that this lease contained all the essential elements of a life estate.

In Tinkham v. Wind the provisions read: "to hold for and during the term of the natural lives of the lessees and the survivor of them." The lessees' rental obligation was to maintain the property, pay a portion of the taxes and water charges, and insure the property for the benefit of the lessor. The Massachusetts court held that "[t]he lease created a life estate determinable upon the stated contingencies."

In Masonic Manor, the "lease" provided for the right to live in the apartment for life subject to payment of a monthly share of expenses. While the question is left open, it would be undesirable under today's conditions to hold that this type of arrangement constituted a life estate, in light of these cases setting out the legal relationship existing between the tenant and the organization in cooperative living units.

The majority in Masonic Manor appears to base its decision upon four grounds: first, that relinquishment of the apartment amounted to a surrender of the right to live in the apartment; second, that the defendant construed the contract not to require the monthly payment if the apartment was not occupied; third, that the action of the board on March 19 was a modification of the contract and not binding on the plaintiff; and fourth, that the interpretation

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191 107 Minn. 122, 119 N.W. 797 (1909).
192 Id. at 123, 119 N.W. at 797.
194 Id. at 159, 65 N.E.2d at 15.
195 Id.
of the contract by the parties was "one of the best indications of the true intent of the contract."\textsuperscript{196}

The dissent also relied heavily on contract interpretation, arguing that the contract was not ambiguous and therefore not open to construction by the court:

Surrender of the apartment did not terminate plaintiff's rights to that apartment under the terms of the contract; it merely meant that plaintiff would be entitled to a ninety percent refund of any payment on entrance fees, as soon as another applicant was secured for the released apartment.\textsuperscript{197}

The dissent contended that mutual interpretation by the parties was required before that interpretation could be given "great or controlling weight. . ."\textsuperscript{198} However, it also pointed out that the entire enterprise would be threatened if tenants could escape their responsibility to pay their share of expenses. While the dissent raises serious policy considerations, it also leaves important questions unanswered.

The defendant was a retirement home for Masons. The residency contract which granted the right to live in the manor for life certainly seemed to envision applicants remaining in the complex until death. The majority opinion implied that if the original contract had covered the question of expenses between the surrender of the premises and its resale those provisions would have been binding. Given this, future leases will undoubtedly be drawn to provide for the payment of expenses during this period. The tenant in Masonic Manor could have been liable for the payment of seventeen and one-half months' pro rata share of expenses; the next case could find a tenant obligated to pay expenses on an unoccupied apartment for life.

The question then becomes one of policy. Should persons be bound by leases that make them liable for payments for the remainder of their lives even though the property involved is no longer being used? What weight should be given to the need of the organization to have a continuous and predictable flow of money to meet its obligations?

A public policy opposed to such oppressive and perhaps unconscionable leases may be desirable. The court seems to have missed an opportunity to clearly delineate the legal status of the cooperative apartment in Nebraska. Alternatives to the court's view that

\textsuperscript{196} 185 Neb. at 663, 178 N.W.2d at 282.

\textsuperscript{197} Id. at 664, 178 N.W.2d at 282 (White, C. J., dissenting).

\textsuperscript{198} Id. at 667, 178 N.W.2d at 284 (White, C. J., dissenting).
express terms in a residency contract could not bind a tenant for life could include imposing limits on the time allowed the association to resell the apartment and hold the tenant liable for expenses or giving the tenant the right to transfer his interest to anyone without association approval after a stipulated period. While this may be a political rather than a judicial problem, the court might have encouraged legislative action by articulating the problems involved in such arrangements.

III. CIVIL PROCEDURE


In Abbott v. Abbott, the Nebraska Supreme Court held that a cause of action stated in an amended petition relates back to the date of the original complaint. Therefore, even though a new theory of recovery is introduced by the amendment, it is not barred by the statute of limitations when the petitioner is seeking recovery on the same general set of facts. This new interpretation of the relation back rule changes the supreme court's prior view that an amendment introducing a new theory of recovery was equivalent to the filing of a new action. The statute of limitations had been viewed as running continuously up to the date of the successful amendment.

The controversy in Abbott arose after the defendant refused to honor an oral agreement for the settlement of her husband's estate. Her son, the plaintiff, who agreed to appear as a subscribing witness to his father's will in county court and thus suffer a reduction in the beneficial devise made to him in the will filed his original petition on December 26, 1963. He alleged as grounds for the action the contested will, an oral family settlement, the defendant's oral promises to restore his share of the estate to equality with his brothers and sisters, his acceptance and performance of the offer, and defendant's nonperformance; he did not allege fraud or undue influence. On January 4, 1965, more than four years after distribution of the estate the plaintiff filed a second petition alleging promissory fraud and undue influence. The district court found that the cause of action alleged in the amended petition was barred by the statute of limitations and rendered summary judgment for the defendant.

185 Neb. 177, 174 N.W.2d 335 (1970).

The oral agreement was designed to allow the probate of the will without Mrs. Abbott testifying as one of the subscribing witnesses. Id. at 178-79, 174 N.W.2d at 337.

NEB. REV. STAT. § 30-208 (Reissue 1964).
On appeal, the first question presented was whether, for purposes of the statute of limitations, the amended pleadings related back to the date of filing of the original petition. The four member majority held with reference to the goal of adjudication on the merits that commencement of the action on Arthur Abbott's original petition stopped the running of the statute of limitations against the cause of action in the second amended petition. Thus the Nebraska rule was reformulated: "A cause of action pleaded by amendment ordinarily relates back to the original pleading provided that the claimant seeks recovery on the same general set of facts."

The decision was unmistakably influenced by the Federal Rules of Civil Procedure and introduced the equivalent of the federal rule of relation back of amendments to pleadings into Nebraska law. Although there is available precedent for such a rule in code pleading jurisdictions, the majority placed the decision on the policy basis of encouraging adjudication on the merits.

The dissent faulted the new rule for lack of precedent in code pleading jurisdictions and for vagueness in a procedural area where certainty and definiteness are required. Although the old rule may have fostered certainty through application of the mechanical "introduction of a new cause of action" test, this was achieved at the expense of adjudications on the merits. Under the old test, courts often used any one of a series of rules to distinguish new from amended causes of action. As may be expected the application of these rules to fact situations led to a variety of results.

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202 185 Neb. at 181, 174 N.W.2d at 338.
203 The court cited 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 448 (1960) and 3 J. MOORE, FEDERAL PRACTICE §§ 15.05, 15.15 (3d ed. 1968).
204 See FED. R. Civ. P. 15(c).
206 The dissent found authority lacking for the majority's conclusion that the Nebraska rule was objectionable "in the best modern view" and also criticized the new rule test of "general set of facts" as so "vague in nature" as to "furnish virtually no guideline at all." 185 Neb. at 183, 174 N.W.2d at 339 (White, C.J., dissenting).
207 Id. at 181, 174 N.W.2d at 338.
208 In Nebraska these rules included: (1) "An amended pleading which only amplifies or gives greater fullness of detail than is alleged in the original pleading does not state a new cause of action." Tennyson v. Werthman, 167 Neb. 208, 212, 92 N.W.2d 559, 562 (1958); (2) "A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause.
The Nebraska Supreme Court in *Zitnik v. Union Pacific Railroad* applied the rule that "an amended petition which only amplies, clarifies, or gives greater fullness of detail than is alleged in the original petition does not state a new cause of action." The original petition in that action alleged negligent operation of a locomotive which had run over plaintiff's husband. The amended pleading alleged negligence on the part of the railroad in failing to provide an employee to warn deceased of approaching locomotives. The court found the amended pleading did not state a different cause of action, but was only an amplification of the original petition.

In *Blair v. Klein* the Nebraska court decided that the amended pleading, although founded on the same injury described in the original petition, was a different cause of action because it was dependent entirely upon different reasons for holding the defendant liable. The original petition sought damages for breach of a contract to secure automobile insurance. The defendant insurance agent failed to secure the insurance and the vehicle involved was destroyed in an accident. After the statute of limitations had run, plaintiff amended his petition to add allegations of negligence in the failure to secure the insurance. The defendant's motion for a directed verdict was granted because the amended petition introduced a new and different cause of action which could not relate back to the original petition and therefore was barred by the statute of limitations.

In recent decisions the Nebraska court has applied "the preservation of the identity of the cause of action" test. In *Muenchau v. Swarts*, the plaintiff, a mechanical contractor, brought an action of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged." Johnson v. American Smelting & Refining Co., on rehearing, 80 Neb. 255, 261, 116 N.W. 517, 519 (1908) (cited in Blair v. Klein, 176 Neb. 245, 251, 125 N.W.2d 669, 672 (1964)); (3) If "[t]he identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case." Muenchau v. Swarts, 170 Neb. 209, 215, 102 N.W.2d 129, 133 (1960) (citing Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N.W.2d 545 (1943)). See also J. R. Watkins Co. v. Wiley, 182 Neb. 242, 153 N.W.2d 871 (1967); May Plumbing Co. v. Shaver, 182 Neb. 251, 153 N.W.2d 911 (1967); (4) Changes in the form of action or relief sought, where facts remain essentially the same, are amendments to original pleading, not changes in the cause of action. Finzer v. Peter, 120 Neb. 389, 232 N.W. 762 (1930).

209 95 Neb. 152, 155, 145 N.W. 344, 345 (1914).
210 176 Neb. 245, 125 N.W.2d 669 (1964).
211 170 Neb. 209, 102 N.W.2d 129 (1960).
against the owner of a new house to foreclose a mechanic's lien for services and material furnished in construction of the house. The original petition alleged a cause of action on an oral contract between the mechanical contractor and the owner. The petition was amended after the statute of limitations had run to allege a cause of action against the owner of the house on an agreement between the plaintiff and a general contractor. The court found that the identity of plaintiff's cause of action was preserved so that a new cause of action had not been introduced. The statute of limitations was thus not a bar to the plaintiff's suit.

There were several intermediate determinations necessary in these cases for resolving the issue of what constituted a "new cause of action." First, the nature of the actions alleged in the original petition and in the amended petition had to be classified, that is, ex contractu, ex delicto. Second, the actions had to be compared to determine if the amendment introduced a cause of action of a different genre than the original action. If the amended pleading alleged a cause of action based on a different theory, then the amendment introduced a new cause of action and was not allowed if the statute of limitations had run. Such a result resembled the now discredited "theory of the pleadings" doctrine and was inconsistent with the code plan of only pleading facts. 212

The basic problem running through all of the four rules which were used to determine if an amendment stated a new cause of action was the unarticulated yet underlying definition of a cause of action. In the Blair decision the court observed: "The cause of action in any case embraces, not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix the responsibility are parts of the cause of action." 213

In Abbott, the Nebraska Supreme Court has at least approached the problem of determining what constitutes a new cause of action in an amended pleading in terms that coincide with the modern Nebraska definition of cause of action: "A cause of action pleaded by amendment ordinarily relates back to the original pleading provided that the claimant seeks recovery on the same general set of facts." 214

212 C. CLARK, CODE PLEADING § 43 (2d ed. 1947).
213 176 Neb. at 252, 125 N.W.2d at 673 (quoting Johnson v. American Smelting and Refining Co., on rehearing, 80 Neb. 255, 258, 116 N.W. 517, 518 (1908)). Cf. C. CLARK, supra note 212, at 137: "The cause of action must . . . be such an aggregate of operative facts as will give rise to at least one right of action, but is not limited to a single right."
214 185 Neb. at 181, 174 N.W.2d at 338 (emphasis added).

*State ex rel. Sampson v. Kenny*\textsuperscript{215} was a mandamus action brought by property owners and taxpayers, as relators, to order the County Treasurer to carry out his duties under the tax refund statute.\textsuperscript{216} Nebraska courts are authorized to allow class actions when a common question or a large number of parties is involved.\textsuperscript{217} However, when the interests of the litigants or the courts are not well served, the class action is not allowed. *Sampson* prompts an examination of both the court's balancing of the competing considerations involved in the case and the further delineation of the kinds of actions which cannot be maintained as class actions.

The relators' petition alleged: (1) their ownership of property which had been annexed by Bellevue in 1965; (2) that a Sarpy County district court judgment had declared the annexation invalid and that the taxes levied under the invalid annexation were illegal and void; (3) a claim for refund of monies paid to the county treasurer and his refusal to act; and (4) the right to join all other taxpayers having the right to file a claim for such a refund. The county treasurer answered that his only interest in the litigation was the discharge of his duties in the collection and disbursement of taxes; therefore, he requested direction as to the proper discharge of those duties. The trial court, however, granted leave to the City of Bellevue to intervene. This intervenor moved to strike the paragraph seeking to join other taxpayers similarly situated.\textsuperscript{218} The trial court granted the motion and on the plaintiffs' failure to further plead, sustained the demurrer and dismissed the action.

Chief Justice White initially stated the issue in the case to be "whether the relators have the legal capacity to join all of the taxpayers similarly situated in a class action for mandamus against the county treasurer."\textsuperscript{219} However, the court did not decide this question, disposing of the case on a narrower issue.

The relators had petitioned the supreme court to make provision for payment of the refund claims to all persons situated in the areas illegally annexed. The court found that the petition and the relators' brief thus narrowed the issue to a determination of whether the relators might maintain this class action on behalf

\textsuperscript{216} NEB. REV. STAT. §§ 77-1734 et seq. (Reissue 1966).
\textsuperscript{217} NEB. REV. STAT. § 25-319 (Reissue 1964).
\textsuperscript{219} 185 Neb. at 231, 175 N.W.2d at 6.
of all other taxpayers for the recovery of the refunds due to each
one individually. This question had in fact been decided in Mont-
teith v. Alpha High School District, where the court held that
a taxpayer could not maintain a class action to recover void taxes.
By hinging the relators' cause of action on the second issue, the
question initially presented was avoided.

The court justified avoiding the initial question of relators' capa-
city to join all taxpayers similarly situated in a mandamus action
by noting that, "[w]hile in form the action purports to be directed
at the enforcement of the ministerial function by the county treas-
urer, the enforcement of a judgment in such a case would or might
involve judicial control, interference with, and usurpation of the
ministerial function of a statutory officer." This consideration
was complemented by the court's finding that the legislative intent
of the Nebraska tax refund statute was to require individual tax-
payer initiative to obtain a tax refund. Balancing the interests of
the state against the interests of the taxpayers, the court concluded
that even if the resolution of common questions would prevent a
multiplicity of suits, discretion would not allow this suit.

Although the question of the taxpayer's capacity to bring a class
action of mandamus was not decided, the court's resolution of the
narrower issue, the capacity of a taxpayer to bring a class action
for the recovery of funds due to each taxpayer individually, may
provide a useful indication of the kinds of class actions that may
be brought.

The court should avoid judicial involvement in administrative
decisions of the county treasurer. However, close analysis reveals
that much of the court's concern in this case may have been unwar-
anted. Although the refund statute subjects the legality and
validity of the tax refund to an administrative determination, the
prior district court decree declaring the annexation and tax levy
void and illegal precludes further substantive consideration of the
validity of the tax. The claim for a refund was clearly to recover
taxes paid under the void and illegal levy. In order to make the
refund, the Sarpy County Treasurer would have to determine the
amount involved, the area subject to the void levy, the number of
years for which a refund was due, and the identities of the tax-
payers entitled to a refund. The decree of the district court in the
annexation case, the public tax records, and the refund statute pro-

220 Id. at 231-32, 175 N.W.2d at 6.
221 125 Neb. 665, 251 N.W. 661 (1933).
222 185 Neb. at 233, 175 N.W.2d at 7.
224 185 Neb. at 233, 175 N.W.2d at 7.
vide the necessary information. The amount of the refund claimed was the amount of the void tax. The property involved was located in the area of the invalid annexation. Since the levy was void from its inception and the statute of limitations had not run, the refund was claimed for all illegal taxes paid. The tax refund statute provides that the person who paid the tax is entitled to the refund. A court decree ordering a county treasurer to make the refund could hardly involve judicial usurpation, control or interference in the ministerial duties of the county treasurer when the major questions had already been decided by legislative or other judicial bodies.

The *Sampson* decision is noteworthy because of the Nebraska Supreme Court's willingness to consider and weigh the hypothetical in balancing competing considerations. The court was concerned with "all of the procedural difficulties and confusion" which could possibly arise, for example, whether a person who had purchased real property subsequent to the payment of the illegal levy could recover a refund when he had never paid the tax. Other problems were not listed, but it is clear from the court's decision that hypothetical difficulties which might involve the judiciary in the county treasurer's ministerial functions weighed heavily against the use of a class action to resolve a common question and prevent a multiplicity of suits.

The decision in *Sampson* is more easily justified by the court's second consideration. Generally, a tax paid under mistake of law cannot be recovered unless special relief is provided. In Nebraska this relief is authorized by a tax refund statute requiring individual initiative on the part of each taxpayer to claim a refund. In the *Sampson* case, the individual taxpayer initiative requirement would not be strictly satisfied if the relief requested were granted. However, reliance on this single criterion is not convincing because the individual claim requirement is essentially procedural and does not reach the substantive right to a refund.

In addition, the court's necessarily vague balancing of real and hypothetical considerations departs from the former broad interpretation of the Nebraska class action statute.

225 "[T]he person claiming a refund, or the agent or authorized representative of such person, shall file a claim with the county treasurer for such refund ...." *Neb. Rev. Stat.* § 77-1736.04 (Supp. 1969).

226 In previous decisions the Nebraska Supreme Court has allowed class actions where (1) priority of appropriation on the Loup Rivers was involved and a junior appropriator brought an action on behalf of himself and all other appropriators similarly situated to determine the validity of a senior appropriation in proceedings before the department of water resources (*Hickman v. Loup River Pub. Power Dist.*, 173
Where the Sampson court chose not to decide the broader issue of the capacity of a taxpayer to join other taxpayers similarly situated in a class action of mandamus against a county treasurer, and disposed of the case on a narrower issue by means of a vague balancing of real and hypothetical issues, the current position on the extension of the class action to cases involving taxpayer protection was revealed.

The court's concern for the security of the public treasurer has safeguarded tax revenues, but this security has been purchased at the expense of taxpayers whose individual claims for refund are too small to justify litigation. In all probability, the interests of the local governmental subdivision and the adverse effect the class action would have had on the public treasury are controlling factors which should serve to distinguish this restrictive decision from prior judicial approval of extensions of the class action. Nonetheless, the court's willingness to look behind the petition to consider the possible consequences of the relief demanded, and the balancing of hypothetical issues instead of the issues actually involved provide a means by which all class actions could be avoided. That decision should ultimately rest with the legislature, not the courts.


In the case of Lydick v. Johns the question was: when may an appeal bond be so defective that it divests the court of jurisdiction? More specifically: does the failure to conform to all the requirements of the statute result in a lack of jurisdiction to hear the case?

Lydick was an appeal from the revocation of plaintiff's operator's license by the director of the Nebraska Department of Motor Vehicles under the implied consent rule. Plaintiff notified the department by letter of his intention to appeal pursuant to statute.

Neb. 428, 113 N.W.2d 617 (1962); (2) a school district reorganization was challenged by a taxpayer who brought a petition in error to reverse and set aside an order of the county superintendent fixing boundaries. The court upheld the action against the superintendent and the signers of the petitions requesting redistricting by allowing service of process on and defense by members of the class of petition signers (Keedy v. Reid, 165 Neb. 519, 86 N.W.2d 370 (1957)); (3) confirmation of the validity of a reclamation district was sought in special proceedings, the court holding it was not necessary to make all land owners in the district parties (Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950)).


228 NEB. REV. STAT. § 60-420 (Reissue 1968).
An appeal bond in the amount of $200 was enclosed in the letter. The bond contained blanks to be filled in by the auditor of public accounts since the auditor's approval is required by statute. The personnel in the office accepted and filed the bond, but neither the plaintiff nor the department of motor vehicles procured the approval of the auditor. Plaintiff's attorney called the department on the last day for appeal and inquired if the bond had been received, accepted and filed. He was told by an employee "that the bond had been filed and marked as filed on that day."

The department subsequently demurred to plaintiff's petition in the district court of Douglas County, challenging the jurisdiction of the court because of the plaintiff's failure to file a bond approved by the auditor of public accounts. The court overruled the demurrer, allowed plaintiff to amend the bond, and rendered judgment for the plaintiff when defendants elected to stand on their demurrer. The Nebraska Supreme Court reversed, holding that: "[T]he filing of an approved bond is a jurisdictional requirement. Its filing is a condition precedent to the initiation of the appellate process."

There are two lines of precedent in Nebraska bearing on this question. The first indicates that an appeal bond is jurisdictional and all requirements must be met to confer any jurisdiction, the second that an appeal bond is jurisdictional but amendment should be allowed where the defect is insubstantial.

The cases cited to support the view that all requirements must be met to confer jurisdiction fall into three categories: cases where the bond was given out of time; cases where the bond was approved by the wrong official; and cases where the action was commenced in the wrong county. In the cases filed out of time a variety of reasons appear to explain the defect. One case involved

229 "The applicant, licensee or appellant shall within twenty days from the date of the final order complained of, execute a bond for costs to the State of Nebraska in the sum of two hundred dollars with sufficient surety to be approved by the Auditor of Public Accounts." Id. at 721, 178 N.W.2d at 584.

231 Id. at 719, 178 N.W.2d at 582.


the recent amendment which changed the procedure to be followed from "timely filing of a notice of appeal" to "within 30 days." In three cases there was a miscalculation of when the time for appeal began to run. And in one case the bond was not tendered until eight months after final judgment had been rendered. In each of these cases the plaintiff had failed to start the process of appeal before the time for appeal had run.

In the second category the bond was filed or approved by the wrong official. In one case the appellant gave the bond to the clerk of the supreme court rather than the clerk of the district court; in the second case the bond was approved by the district court clerk rather than the county clerk.

In the third category the case was filed in the wrong county and dismissed for improper venue.

The cases in the first and second categories involved situations in which the possibility of failure of notice to the adverse party existed, while Peck v. Dunlevey involved the question of venue. All of these cases support the proposition that where appeal is granted by statute the requirements of the statute must be fulfilled to the letter before subject matter jurisdiction is conferred on the court. The general rule, however, is that such bonds must comply substantially with the statutory requirements. Any defect may be cured by amendment.

Nebraska allowed amendments to appeal bonds at a very early date. In Rube v. Cedar County the court said:

This undertaking, although informal, is not void. The proceedings, while irregular, were sufficient to give the district court jurisdiction. The plaintiff in error appears to have acted in good faith and should have been given an opportunity to file a new and sufficient bond.

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237 Cedar County v. McKinney Loan & Inv. Co., 1 Neb. (Unof.) 411, 95 N.W. 605 (1901).
239 Reiber v. Harris, 179 Neb. 582, 139 N.W.2d 353 (1966).
241 Id.
243 35 Neb. 896, 53 N.W. 1009 (1892).
244 Id. at 898, 53 N.W. at 1009.
There the taxpayer had failed to sign the appeal bond, but the court looked to substance rather than form and allowed amendment.

In the present case the missing signature was that of a state official whose function is ministerial and did not affect the value of the bond. Several recent cases in Nebraska have also allowed amendment to bonds that failed to precisely meet the statutory requirements. In *State ex rel. Miller v. Cavett* the court favorably cited the earlier *Rube* decision and held that an appeal bond given by the sheriff, although not double the amount of the judgment and costs as required by statute, was sufficient to lodge jurisdiction in the district court:

>The bond was approved and filed by the county judge. Such a bond is not void although it fails to comply with all the formalities of the law. In such cases the district court may permit or require the filing of a new bond, but it may not properly dismiss an appeal where it is possible to amend or replace the irregular bond.

In *In re Estate of Hoagland*, the court allowed the bond to be amended in order to add a second surety as required by statute. This rule was also followed in *State v. Kidder*. The court in *Kidder*, citing the amendment statute, said:

>The action of the trial court in permitting and approving the amendments to the appeal bond is approved as being not only within the spirit, but as required by the express wording, of the statute quoted.

In *Ballantyne Co. v. Omaha* the court approved the filing of an additional appeal bond “to pay all costs adjudged against the plaintiff” and in this manner avoided the amendment question.

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245 163 Neb. 584, 80 N.W.2d 692 (1947).
246 NEB. REV. STAT. § 24-544 (Reissue 1964).
247 163 Neb. at 586-87, 80 N.W.2d at 694.
249 169 Neb. 181, 98 N.W.2d 800 (1959).
250 “The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceedings to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment.”
251 NEB. REV. STAT. § 25-852 (Reissue 1964).
253 Id. at 231, 113 N.W.2d at 488.
Clearly the basic question in this area is when is a bond so defective that it cannot be amended? As the law now stands, one must file an approved bond before the time for appeal has run, but almost any other defect is subject to correction by amendment or the filing of an additional bond. There are good reasons for limiting the time in which an appeal may be taken, for requiring that bonds be filed, and for requiring that those bonds should be approved. However, where the failure to have the specific bond approved does not go to the sufficiency of the bond or the question of proper notice to the adverse party of the intention to appeal, it seems unnecessary to so strictly construe the statutes.

The statutes allowing amendment\textsuperscript{254} are remedial in effect and should be liberally construed. In any event, in \textit{Lydick} no question existed as to the sufficiency of the bond or the surety. Several states list approved surety companies but Nebraska's only requirements are that a surety "be a resident of this state and must have property, liable to execution, situate in the county in this state in which such undertaking . . . is to be given and filed."\textsuperscript{255} The implied consent law provides that the bond be filed in the office of the department of motor vehicles and that the action be brought in the county in which the plaintiff lives or in which the events leading to a revocation occurred. These requirements result in the anomalous situation that one must secure the bond and the approval of the auditor, send it to Lincoln to be filed, and bring the action in the local county.

Perhaps outstate lawyers should personally carry the bond to the capital to insure their clients have a chance to seek vindication of their rights. At best a lawyer may be faced with the prospect of losing on procedural matters when no real adverse interest is prejudiced by amendment. Implicit in the holding of \textit{Lydick} seems to be a wish to dispose of implied consent appeals on procedural grounds rather than on their merits. Even if this were a proper objective, the decision may also be applied to cases not involving the implied consent rule, thus unduly restricting considerations of the merits of their claims as well.

\textsuperscript{254} "The court in every stage of an action must disregard any error or defect in the pleading or proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." \textit{NEB. REV. STAT.} § 25-853 (Reissue 1964).

\textsuperscript{255} \textit{NEB. REV. STAT.} § 25-2223 (Reissue 1964).

In Schmer v. Gilleland the court considered some of the problems that arise under the Nebraska motor vehicle long arm statute. After an accident on February 19, 1962, the plaintiff filed a petition in the District Court of Madison County and a summons was served on the Nebraska Secretary of State on February 19, 1966. No affidavit of service was filed with the court, as is required by the statute. Subsequently two more summonses were procured by the plaintiff and served on the secretary of state but again no affidavit was filed.

In February 1968, plaintiff changed attorneys. His second attorney again had summonses issued and served and on March 25, 1968, filed the required affidavit. The defendant filed special appearances to each of the summonses. The trial court sustained special appearances as to the first three summonses but overruled as to the last one.

At this point defendant demurred for failure to state facts sufficient to constitute a cause of action on the grounds that the action was barred by the statute of limitations. The district court held that the demurrer searched the record for the date of commencement of the action, so the failure to file an affidavit of notice on the February 19, 1966, summons deprived the court of subject matter jurisdiction. The Nebraska Supreme Court affirmed the action of the district court, holding that "[a] demurrer on the ground of the statute of limitations opens the record pertaining to the time the action was commenced."

This was an affirmation of a recent change in Nebraska decisions. The relevant Nebraska statute says: "The defendant may demur to the petition only when it appears on its face (1) that the court has no jurisdiction of the person of the defendant or the subject of the action. . . ." A long line of cases have held that demurrers only question the face of the petition:

In the case of Peters v. Dunnells, 5 Neb. 460, the court, in the opinion, say [sic]: "The principle is well settled under our code, that where it appears on the face of the petition that the cause of action arose at such period that under the statute of limitation no action

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259 185 Neb. at 56, 173 N.W.2d at 393.
260 NEB. REV. STAT. § 25-806 (Reissue 1964) (emphasis added).
can be brought, the defendant may demur to the petition on the
ground that it does not state facts sufficient to constitute a cause of
action."\textsuperscript{261}

“It is well settled in this state that when it is not apparent from
the petition that the debt is barred, the statute of limitation must
be taken advantage of by answer.”\textsuperscript{262} Later in \textit{Reliance Trust Co. v. Atherton},\textsuperscript{263} the court said:

The principal question in this case, is whether the county court
erred in overruling the demurrer to the petition, and that question
depends on whether it appears on the face of the petition that the
cause of action was barred by the statute of limitations.\textsuperscript{264}

This language was repeated in several cases.\textsuperscript{265}

In \textit{Gorgen v. County of Nemaha}\textsuperscript{266} the court cited \textit{Reliance Trust}
as authority for the language: “Where the record shows that the
action was not commenced within the time required, the petition
is subject to demurrer.”\textsuperscript{267} However, in \textit{Reliance Trust} the court
also stated that the material question was whether the petition was
barred on its face by the statute of limitations. It now appears that
there are two lines of authority on the effect of a demurrer based
on the statute of limitations.

The statute and most of the cases interpreting it indicate that
the bar must appear on the face of the petition. \textit{Reliance Trust}
says that the return of the summons is part of the petition. \textit{Gorgen}
and \textit{Schmer} hold that the demurrer searches the record for the
date of commencement of the action. Thus, it appears that the court
has overruled sub silentio a long and well established precedent in
Nebraska.

Writers on this subject have considered the better rule to be
that a demurrer searches the record for the time of commencement
of the action.\textsuperscript{268} When the question arises on motion whether an
action has been brought within the statutory time, the trial judge

\begin{footnotesize}
\begin{enumerate}
\item Merriam v. Miller, 22 Neb. 218, 224, 34 N.W. 625, 627 (1887).
\item Hanna v. Emerson, 45 Neb. 708, 713, 64 N.W. 229, 231 (1895).
\item 67 Neb. 305, 93 N.W. 150, \textit{rehearing denied}, 67 Neb. 309, 96 N.W. 218
(1903).
\item Id. at 307, 93 N.W. at 151.
\item Tennyson v. Werthman, 167 Neb. 208, 92 N.W.2d 559 (1958); Vielehr
v. Malone, 158 Neb. 436, 63 N.W.2d 497 (1954); In re Estate of Mc-
Clenehan, 145 Neb. 707, 17 N.W.2d 923 (1945); Rohlf v. German Old
People’s Home, 143 Neb. 636, 10 N.W.2d 686 (1943).
\item 174 Neb. 588, 118 N.W.2d 758 (1962).
\item Id. at 589, 118 N.W.2d at 759.
\item See Atkinson, \textit{Pleading the Statute of Limitations}, 36 \textit{Yale L. J.} 914
\end{enumerate}
\end{footnotesize}
should be allowed to use the entire record to that point in time
necessary to answer the question. The old rule in Nebraska limits
the courts to the face of the petition. Although the Nebraska court
has not yet provided a sweeping analysis of the problem as pre-
sent by previous opinions, the better rule has now been adopted
by Nebraska.

The statute of limitations is normally an affirmative defense.
Plaintiffs are not required to anticipate affirmative defenses in their
petition so that if there are facts which bar application of the sta-
tute of limitations, sustaining a demurrer raising the defense might
preclude consideration of the facts avoiding the statute. However,
Nebraska allows amendments to a petition within ten days of the
filing of a demurrer as a matter of course. Thus, the plaintiff
cannot be prejudiced if the issue is raised by demurrer for he can,
through amendment, plead any facts avoiding the statute of limi-
tations.

What may ultimately be the more important question presented
by this case is whether failure to file the statutory affidavit that
notice of the service of summons on the Secretary of State has
been sent to the defendant serves to defeat jurisdiction of the court.
The court in Schmer could have held that the action was com-
cmenced when the Secretary of State was served pursuant to
statute.

The rule that a suit against an in-state defendant is commenced
by service of process on the defendant requires no citation. How-
ever, when an action is brought under a long arm statute, the
question arises: is the action commenced by service on the proper
state official or when service is had or notice is given the defendant?

The purpose of long arm statutes is to acquire personal juris-
diction over outstate defendants through service on the proper
state official. The question then arises whether there are good
reasons to defeat jurisdiction because of failure to file an affidavit
that notice has been sent to the defendant. Several jurisdictions
have considered this question. The majority have held that the
action commences at the time there is service upon the state official.

The plaintiff in Rielly v. Crook failed to file an affidavit that
notice had been sent to the defendant. The Georgia court said:

The question, then, is whether the failure to file a return receipt
and an affidavit of compliance were amendable defects. . . . The

evidence prescribed by statute to show service was incomplete but this was an amendable defect... Since the record prima facie shows jurisdiction of the defendant, and the motion to set aside the judgment does not affirmatively allege that defendant did not receive a copy of the petition from the Secretary of State,... the court did not err in sustaining the motion to dismiss the motion to set aside the judgment.272

California273 and Tennessee274 have held that service on the secretary of state prior to the running of the statute is effective even if notice is not received by the defendant until after the statute of limitations has run. The Court of Appeal of Louisiana has pointed out some relevant distinctions between service on the state official and notice to the defendant under long arm statutes:

There is a distinction between the service of legal process and the mere notice to be given the defendants of such service as provided for in this statute. In the first instance, the service is clothed with certain formalities which are not required in the second instance... It is clear that the act of service per se in such cases is completed when a proper officer has delivered to the secretary of state copies of the citation and petition. But, as a safeguard to the rights of nonresident defendants, and perhaps to make the act comply with the requirements pertaining to the question of due process of law, the act requires that, before any judgment can be rendered in the case against them, it must be shown that copies of the citation and petition have either been mailed to them or handed them in person...275

New York has considered a similar question. Notice was mailed to nonresident defendants prior to service of the summons and complaint on the secretary of state. Even though the notice failed to include a copy of the summons and complaint the court upheld jurisdiction by allowing amendment.276

Emery Transportation Co. v. Baker277 announced a more restrictive view. Plaintiffs had sent a registered letter to defendant containing notice of the suit. The defendant was not home when the letter was delivered, and did not pick it up at the post office. The Iowa court said:

Clearly, then, the act of timely mailing a notification, properly addressed, by restricted registered mail, does not end plaintiff's obligation. A receipt showing it has been delivered is required by [the

272 Id. at 336-37, 145 S.E.2d at 112 (citation omitted).
274 Noseworthy v. Robinson, 203 Tenn. 683, 315 S.W.2d 259 (1957).
long arm statute], and with the possible exception of refusal by addressee to accept offered delivery of same, plaintiff must show actual delivery of the notice, usually by return receipt.278

Originally the Delaware Supreme Court also strictly interpreted the notice requirement but it has recently retracted its position somewhat, saying:

We are of opinion that the proof of service is no part of the service itself. . . . The filing of the affidavit is analogous to a sheriff's return of personal service, which, if not filed on the time specified, may by court order be filed later. . . .279

In the present case it is interesting to note that the defendant, in objecting to the original summons and petition, never alleged that he failed to receive notice of the suit. His contention was that the plaintiff's failure to file the required affidavit was a jurisdictional defect, and that therefore, he was not brought within the jurisdiction of the court. In the absence of clarification by the supreme court the lower courts are free to so hold.

The long arm statute states no time in which the affidavit must be filed.280 The plaintiff finally on March 25, 1969, filed the required affidavit which was dated March 2, 1969.281 It is questionable whether at this late date an affidavit would comply with the statute. But at the first hearing in the case plaintiff could have been directed to comply with the statute and defendant allowed to rebut receipt of the notice. Had this procedure been followed it is doubtful that some three years would have been expended to decide that a demurrer searches the record.

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278 Id. at 750, 119 N.W.2d at 277.