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Nebraska Supreme Court Review

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The Nebraska Law Review is pleased to introduce in this issue a section devoted exclusively to recent decisions of the Nebraska Supreme Court. This section, to be published on an annual basis, will contain a critical discussion of recent decisions which the Nebraska Law Review believes are either cases of first impression in our court or rulings which substantially alter previous case law in Nebraska. The purpose of the Nebraska section is (1) to provide attorneys in Nebraska and elsewhere with a comprehensive study of the holdings of selected cases and an analysis of how these decisions relate to previous Nebraska decisions, and (2) to provide a forum in which members of the Nebraska Law Review can critically analyze the rationale of the cases in light of decisions in other jurisdictions.

The decisions composing this first annual Nebraska section were taken from decisions handed down during the calendar year 1968. A large number of those selected are in the criminal law area because of the many constitutional issues raised by the United States Supreme Court’s decisions applying constitutional amendments to the states.

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

I. Administrative Law

II. Attorneys
   A. State v. Richards, 183 Neb. 184, 159 N.W.2d 317 (1968).

III. Civil Procedure

IV. Criminal Law
   A. Constitutional Protection

B. Procedure

C. Juveniles

V. Damages

VI. Evidence

VII. Initiative Petition Procedure

VIII. Municipal Corporations

IX. State Constitutional Law

X. Tort-Governmental Immunity

XI. Torts-Gross Negligence
A. Brugh v. Peterson, 183 Neb. 190, 159 N.W.2d 321 (1968).

XII. Traffic Administration

XIII. Wills-Statutory Exemption in Lieu of Homestead
A. Estate of Grassman, 183 Neb. 147, 158 N.W.2d 673 (1968).

The Nebraska section does not include those cases which are or may become the subject of individual case notes. Thus this section
does not represent a discussion of all of the important Nebraska decisions. The Nebraska Law Review would welcome any suggestions from Nebraska attorneys or others interested in Nebraska law regarding both the method by which cases may be selected for future Nebraska Sections and the general form and content of this new venture.

James A. Beltzer '69
Student Articles Editor

I. ADMINISTRATIVE LAW

Poulson v. Hargleroad Van & Storage Co\(^1\) altered the law in Nebraska by redefining upon what grounds and to what extent the Nebraska Supreme Court will feel entitled to review decisions of the Nebraska Railway Commission.

Poulson involved an appeal by O. E. Poulson, Inc. from an order of the Nebraska State Railway Commission denying an application for a certificate of public convenience and necessity.\(^2\) Appellant, along with eight other carriers, had filed application requesting authority to transport anhydrous ammonia in Nebraska. Appellant's application was refused while the other eight were approved. One of the other applicants, prior to the Railway Commission hearing, had held authority to transport fertilizers and anhydrous ammonia between all points in Nebraska. The seven other successful applicants had authority to transport petroleum products, but such authority was limited to providing service within particular geographic areas within the state. Poulson did not have authority to transport either petroleum products or fertilizers. All applicants sought permission to transport anhydrous ammonia and each requested authority to transport the fertilizer throughout the state. At the conclusion of the hearing, all the applicants except Poulson were granted authority to transport anhydrous ammonia on a statewide basis. The Nebraska Supreme Court held that the denial of Poulson's certificate of public convenience and necessity by the Nebraska Railway Commission was arbitrary and unreasonable and, therefore, reversed the Commission's denial of the certificate. The court stated that the only question which it could decide on appeal from a decision of the Commission was whether the Commission acted within the scope of its authority and whether the order complained of was reasonably and not arbitrarily made.\(^3\)

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1. 183 Neb. 201, 159 N.W.2d 302 (1968).
2. Right to transport goods in Nebraska.
3. This is the only question that the Supreme Court of Nebraska can hear on appeal because the Nebraska Constitution has given the Commission plenary and absolute power over common carriers except
The governing Nebraska statute requires a certificate to be issued by the Commission, after notice and a formal hearing, if the applicant is fit, willing, and able to properly perform the proposed service and to conform to the provisions of certain other statutes which are consistent with the public interest. The court in deciding Poulson looked to prior case law in determining the issue of public necessity.

In cases where new or extended operating rights are sought, the controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need and whether this purpose can or will be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to public interest.\(^5\)

The court reasoned that Poulson was ready and willing to be a carrier of anhydrous ammonia, that there was sufficient demand for another carrier, and that allowing Poulson to be a carrier would not destroy the already existing legitimate competition. Therefore the Commission's denial of Poulson's certificate was held to be arbitrary and unreasonable.

This case is particularly important because the Nebraska Supreme Court, under the cloak of finding "arbitrariness," has in effect assumed, at least to some degree, the administrative functions which are vested solely with the Commission. The Court's function is not to judge evidence presented to the Commission; this task rests solely with the Commission. Rather the proper role of judicial review is to determine whether the Commission employed the required procedures in arriving at its decision—formal hearings, notice of hearings to all parties, presentment of all relevant evidence—in order to insure a non-arbitrary result. The findings of the Commission are to be viewed as the findings of a jury\(^6\) and unless those findings could not be based upon or related to the evidence presented, the court has no power "or should" have no power to reverse a decision of the Commission.

A review of the evidence in Poulson which was presented at the formal hearing clearly shows that the court surpassed its constitutional powers and has become involved in making the administrative determinations for which the Commission was established and

to the extent that the legislature has occupied the field or limited the power of the Commission by statute. The Nebraska Constitution does not give the courts this power. Neb. Const. art. IV, § 20.


\(^6\) In re Curtailment of Bus Service, 125 Neb. 825, 252 N.W. 407 (1934).
is uniquely qualified. Poulson is the only one of the nine applicants that had no Railway Commission authority to transport fertilizer, including anhydrous ammonia, and was the only applicant who had not transported these commodities in intrastate commerce. Poulson owned only one tractor and trailer suitable for the transportation of anhydrous ammonia while the other applicants had available over 200 units of equipment suitable for this type of operation. All of the witnesses at the hearing supported the other eight applications, but two of these witnesses, including one of the largest shippers of fertilizers in the state, did not support the Poulson application.

Herman Brothers protested the application of Poulson on the grounds that they had a large investment in expensive truck equipment which was not being fully utilized. By virtue of its existing certificate, this larger competitor could transport anhydrous ammonia between all points in Nebraska. There had been no time during the past fertilizer season or in the company's experience when Herman Brothers had an equipment utilization of greater than 250 hours in one month per unit. Normally, in an efficient truck operation each unit is utilized 400 hours per month. Thus Herman Brothers wanted their equipment more fully utilized before new competition was allowed to enter the field.

Comparing the evidence submitted at the hearing with prior Nebraska case law, it can readily be seen that the Commission acted well within its constitutional and statutory authority in denying Poulson a certificate of public necessity and convenience. In Application of West Nebraska Express,7 the Supreme Court of Nebraska held that when an order is made by the State Railway Commission, in the exercise of its administrative and legislative authority, and is presented to the Supreme Court for review, the function of the court is to determine if there is proof to support the order. The evidence given at the Poulson hearing was obviously sufficient to support the Commission's decision. The decision in Application of Hagen Truck Lines,8 established that an applicant for contract carrier authority had the burden to show to the Commission that the proposed service was specialized and fitted the need of the proposed contracting shippers. Under this test, Poulson certainly did not appear to be sufficiently specialized or fitted to the particular need to carry that material. Furthermore, Hagen held that if the prior

contract carriers showed that they were fit, willing, and able to meet the special need, then the applicant for contract carrier authority, even if he was specialized for the task, must show that he is better equipped and qualified to meet the special needs than are the carriers already performing the service. Poulson was not only not specialized for the task, but his equipment was markedly inferior. Finally, Hagen stated that where evidence is in conflict as between an applicant for a contract-carrier permit and objecting common carriers, it is the province of the Railway Commission to resolve the issue.

The Nebraska Supreme Court's decision in Poulson indicates that it has now assumed the position of a "super review board" both willing and able to exercise a wholly administrative discretion over the Railway Commission. If this is correct, the court has assumed power, not given it by either the state constitution or the state statutes, and for the exercise of which it lacks the necessary competence.9 The court has no investigating body, nor the "expertise to make . . . (administrative) decisions."10

II. ATTORNEYS

Two decisions directly affecting the duty of an attorney to his client were handed down by the Nebraska Supreme Court in 1968. The first, State v. Tunender,11 involved a post conviction proceeding motion alleging that counsel had rendered ineffective assistance. The Court reversed the defendant's conviction because it found a breach of the duty of loyalty owed by the attorney. This case is discussed in the Criminal Law section of this note, infra.

9 The dissenting opinion in Poulson points out that the majority cites no case from any court where the Railway Commission's or Utility Commission's certificate was reversed on similar grounds. There are many cases from other jurisdictions which hold that the determination or the right to a certificate is for the commission alone to determine and the court is bound by the commission's decision on the question. See Price v. Public Utilities Commission, 72 Colo. 65, 209 P. 640 (1922), which held that a denial of a certificate in the public interest is a purely administrative function from which an unsuccessful applicant cannot appeal. See also Modeste v. Public Utilities Commission, 97 Conn. 453, 117 A. 494 (1922); In re Samoset Co. 125 Me. 141, 131 A. 692 (1926); Sparata Foundry Co. v. Michigan Public Utilities Commission, 275 Mich. 562, 267 N.W. 736 (1936); Tri-State Transit Co. of La. v. Mobile & Ohio Transp. Co., 191 Miss. 364, 2 So. 2d 845 (1928).


In *State ex rel. Nebraska State Bar Ass'n v. Richards*, two Nebraska attorneys were suspended from practicing law for one year because of violation of Canon 38. The suspension resulted from a number of transactions in which the attorneys accepted payment of 50% of auctioneer's fees paid to two auctioneers whom the attorneys had hired or suggested for auctioning property for estates or other clients. Neither attorney disclosed the payment to either the court or their client though in at least three instances the trial court subsequently awarded attorney's fees.

Three defenses were raised: first, that the rebates had caused no harm to the clients; second, that the fees had been earned by the attorneys; and third, that the referee had failed to find the requisite wrongful intent. The court held that: (1) though the rebate may not have increased the cost to the clients, the "anticipation of a rebate from a company may tempt the lawyer to recommend that company to his client" and this temptation places the lawyer in a position of divided loyalty; (2) when seeking a fee from the court, the attorney is under a duty of complete disclosure and the attorney cannot conceal the benefits he gains from the work on an estate, have attorney's fees allowed on that basis, and later contend that the fees were earned; and (3) information withheld in violation of the duty of disclosure which raised a conflict between personal interest and professional duty is sufficient to show the requisite wrongful intent by circumstantial evidence.

The Supreme Court has now brought the generally accepted interpretations of Canon 38 and the attorney's duties thereunder to bear on the Nebraska Bar. Primarily this is a duty of disclosure, but included by implication is the duty of loyalty to the client. Full disclosure and consent by the client will not, however, in all cases leave an attorney free to accept payment from other than his client where such a payment is "too obviously capable of misconstruction." An attorney may never, for instance, accept a payment from the opposing party after the close of litigation.

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12 183 Neb. 184, 159 N.W.2d 317 (1968).
13 ABA CANONS ON PROFESSIONAL ETHICS No. 38 reads: A lawyer should accept no compensation, commission, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.
15 H. DRINKER, LEGAL ETHICS 97 (1953).
16 Id. at 97-98: "Even with the clients consent he [the lawyer] should not accept a gift from the opposite party in appreciation of 'kindness, gentleness and indulgence' after the close of litigation, this being too obviously capable of misconstruction."
17 Id. See ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION No.
When the matter of attorney's fees is before the court the attorney has a duty beyond disclosure to his client, he must fully inform the court in all matters pertaining to fees, including any benefits to be received after the close of the litigation. The court in Richardson cited Wise in Legal Ethics (1966) which states:

When a lawyer seeks a fee from the court in a matter in which the court has an interest...the attorney must make a complete disclosure of all circumstances. He must disclose the nature and content of agreements for fees, if any, whether or not he received or will receive compensation or other direct or indirect benefits of any kind from the clients or others, and any other fact which would have a bearing on the propriety of the compensation he seeks.\textsuperscript{18}

Three formal opinions have been handed down by the American Bar Association on this problem. These opinions illustrate that only after complete disclosure and consent by the client may an attorney accept compensation from another party; i.e., a commission from the sale of title insurance,\textsuperscript{19} one-fourth of a fee charged by the maker of an abstract,\textsuperscript{20} or repayment of an expense for a railroad fare not actually incurred because the attorney had a free pass from the railroad.\textsuperscript{21}

In Informal Opinion No. 680\textsuperscript{22} the American Bar Association Committee on Professional Ethics found it was a violation of Canon 38 for an attorney to "accept a referral fee for recommending the placement of his client's funds in a particular savings and loan association unless his client knows and approves of such an arrangement."

The American Bar Association Committee on Evaluation of Professional Ethics has proposed a rule specifically disallowing any

\textsuperscript{18} R. Wise, Legal Ethics 122 (1966). See H. Drinker, Legal Ethics 98 (1953): "He (the attorney) may not suggest to the client an extra fee in cases assigned to him by the court or in absence of such a suggestion, accept such fee except on order by the court."

\textsuperscript{19} ABA Comm. on Professional Ethics, Opinions, No. 304 (1962).

\textsuperscript{20} ABA Comm. on Professional Ethics, Opinions, No. 196 (1939).

\textsuperscript{21} ABA Comm. on Professional Ethics, Opinions, No. 38 (1931).

\textsuperscript{22} ABA Comm. on Professional Ethics, Informal Opinion No. 680. See id. at No. 556 (a lawyer may not engage in the sale of life insurance and accept a portion of a commission); id. at No. 526 (a lawyer may not accept a fee for investing his client's funds in a lay organization); id. at No. 278. See note 6 supra.
compensation from other than the client without disclosure and consent.\textsuperscript{23} In its discussion on this point the Committee stated:

Economic, political or social pressures by third persons are less likely to impinge upon the individual judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with the client. On the other hand, if a lawyer is compensated from a source other than his client he may feel a sense of responsibility to someone other than his client.\textsuperscript{24}

The Supreme Court has adopted this standard for the Nebraska Bar by its decision in the \textit{Richardson} case, and, more specifically, by refusing to accept the referee's failure to show actual harm as a defense. Further violations in this area will be treated as willful and with wrongful intent after this decision which not only gives notice that such actions are in violation of Canon 38, but finds the wrongful intent through circumstantial evidence.

\section*{III. CIVIL PROCEDURE}

Three recent decisions must be considered as having a significant impact upon civil procedure in Nebraska. The first, \textit{Beveridge v. State},\textsuperscript{25} considered the difficult question of an attorney's duty to object to proposed jury instructions in the trial court when the trial judge submits such proposed instructions to the attorneys a reasonable time before delivering them to the jury.

\textit{Berigan Bros. v. Growers Cattle Credit Corp.}\textsuperscript{26} was an action for declaratory judgment on a number of issues, some of which had been raised by a prior action but had not yet been litigated. The Supreme Court allowed the action for declaratory judgment to supersede the prior action.

Finally, \textit{Benes v. Matulka}\textsuperscript{27} involved the question of whether a motion to strike a counterclaim, sustained in the trial court, was a "final order" from which an appeal may be taken prior to a determination on the original complaint.

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\textsuperscript{23} ABA Special Committee on Evaluation of Ethical Standards, Code of Professional Responsibility 69 (1969): 6-108 Avoiding Influence by Other Than the Client (A) Except with the consent of his client after full disclosure a lawyer shall not:
(1) Accept compensation for legal services from other than his client.
(2) Accept from one other than his client anything of value relating to his representation of or his employment by his client.
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\textsuperscript{24} \textit{Id. at 65.}
\textsuperscript{25} 183 Neb. 406, 160 N.W.2d 229 (1968).
\textsuperscript{26} 182 Neb. 656, 156 N.W.2d 794 (1968).
\textsuperscript{27} 182 Neb. 744, 157 N.W.2d 832 (1968).
\end{flushright}
A. Beveridge v. State\textsuperscript{28}

An attorney who states specifically that he has no objections to jury instructions proposed by the trial judge, after he has had an adequate opportunity for examination of such instructions, cannot appeal an adverse decision by the jury on the basis of errors in such instructions.

In Beveridge v. State\textsuperscript{29} the judge submitted proposed instructions to counsel far enough in advance of delivery to the jury to give counsel a reasonable time to examine and inspect the instructions. In answer to the trial court judge’s question, the State’s attorney stated that he had no objections to the instructions. After a judgment against it, the State attempted to raise objections to the instructions before the Supreme Court which determined that, by answering the question and approving the instructions, counsel had elected to accept the instructions as given.

Justice Spencer, writing the majority opinion in the Beveridge decision found that the court alone had the responsibility to correctly instruct the jury,\textsuperscript{30} and counsel had absolutely no duty to approve or disapprove instructions proposed by the court. Under this formulation, only when the attorney actually does approve the instructions will he be precluded from contending on appeal that there were errors in those instructions.\textsuperscript{31}

In the concurring opinion,\textsuperscript{32} stating the position of four justices,\textsuperscript{33} the primary duty for correctly instructing the jury was also placed upon the trial court. However, in their view, the attorney has the duty to assist the trial judge, and cannot “avoid responsibility by declining comment.”\textsuperscript{34}

The concurring opinion stated the position held by a majority of the Nebraska Supreme Court. The exact implications of this opinion cannot be ascertained from the rather cursory discussion. The opinion would, however, require an answer to any question by the trial judge about the proposed instructions. Whether a failure to make specific objections would preclude later appeal would “depend upon the seriousness of the defects, the difficulty involved

\textsuperscript{28} 183 Neb. 406, 160 N.W.2d 229 (1968).
\textsuperscript{29} Id.
\textsuperscript{30} See Derr v. Grunnel, 127 Neb. 708, 256 N.W. 725 (1934).
\textsuperscript{33} White, C. J., Boslaugh, Smith, and McCown, JJ.
\textsuperscript{34} Beveridge v. State, 183 Neb. 406, 410, 160 N.W.2d 229, 231 (1968).
in discovering the defects, and other similar factors. An attorney could not, under this statement, refuse to object to a known error with an eye toward appeal in the case of an adverse decision.

The concurring opinion clearly represents a movement toward the federal procedure, which, under Federal Rule 51, requires an attorney to object prior to the retiring of the jury. Where counsel does not make specific objections to the instructions at that time, or has not submitted written requests for instructions, he waives his objections.

This requirement is for the protection of the judge as well as the parties. His attention must be called to any omissions or mistakes in his charge in order that he may have an opportunity to correct them before the jury finally retires. If these errors are not made clear by specific objections they cannot later furnish grounds for attacking the verdict. Thus the necessity of a retrial is avoided where by design or through sheer neglect the losing party fails to raise points during the progress of the case in the trial court.

General objections which do not set out specific errors in the instructions and thereby do not allow for correction by the trial judge are "wholly ineffective" and will not be sufficient to raise issues on the instructions on appeal. Furthermore, objections to instructions raised in the appeal cannot be different from that made in the trial court prior to the retiring of the jury.

The standard for objection set out in the concurring opinion is not as demanding as that required by the Federal Rules since failure to object in the Nebraska courts will not automatically preclude appeal on the basis of errors in the instructions. However, the obvious purpose of the opinion is to place a duty on counsel to inform the court of errors in its instructions and avoid appeals and retrials on points which could and should have been corrected in the original trial.

35 Id.
36 Fed. R. Civ. P. 51: "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of hearing of the jury."
38 Lowe v. Taylor Steel Products Co., 373 F.2d 65 (8th Cir. 1967); Bern v. Evans, 349 F.2d 282 (8th Cir. 1967).
The Nebraska Supreme Court has adopted a rule with reference to jury instructions requiring the use of Nebraska Jury Instructions where applicable. The rule states that:

The trial court may, and ordinarily should, hold a conference before or during the trial with reference to the preparation of proposed instructions. The trial court may direct counsel for either party to prepare designated instructions. Counsel may object at the conference on instructions to any instruction regardless of who prepared it. At the conference on instructions each counsel should aid the trial court by stating any specific objection that he has on any instruction proposed to be given.

The pattern jury instructions set out in the Nebraska Jury Instructions will avoid error in many cases. The requirement in the concurring opinion of the Beveridge case that the attorney respond, and the rule adopted by the Supreme Court, make it mandatory that an attorney be prepared to raise specific objections to instructions at the trial.

B. Berigan Bros. v. Growers Cattle Credit Corp.

Under what circumstances a petition for declaratory judgment can be filed, and the issues raised thereby determined, after an action involving the same transaction had been initiated in the trial court was the central issue in this case. The petition for a declaratory judgment was filed subsequent to an action initiated by Growers Cattle Corporation against three defendants, including Berigan Brothers, for conversion of cattle. In the earlier action all three defendants answered, and one defendant filed a cross petition. Berigan Brothers, by their answer, claimed no interest in the cattle other than a commission for their sale, and that the receipts from the sale had been paid to another of the defendants. The trial court, upon the plaintiff's motion, struck this portion of the answer and the cross-claim, limiting the issues to the ownership of the proceeds.

40 Nebraska Supreme Court Committee on Pattern Jury Instructions, Nebraska Jury Instructions, IX (1969), Rule Adopted by the Supreme Court with Reference to Nebraska Jury Instructions: "Whenever Nebraska Jury Instructions contains an instruction applicable in a Civil or Criminal Case, and the Court, giving due consideration to the facts and the prevailing law, determines that the jury should be instructed on the subject, the Nebraska Jury Instruction shall be used.

41 Id. (Emphasis added)

42 Id.

43 182 Neb. 656, 156 N.W.2d 794 (1968).
Berigan Brothers then filed a petition for declaratory judgment, praying for a determination of the rights of the parties with regard to the entire transaction, stating that such a determination would prevent a multiplicity of actions and eliminate possible intervention of the statute of limitations. The district court for Douglas County sustained a demurrer to the petition, but the Nebraska Supreme Court reversed, finding that the rights of all interested parties could not be adjudicated in the original action (which had been limited to a determination of the ownership of the proceeds) and that the purpose of the Uniform Declaratory Judgments Act was to dispose of cases such as this in which multiple suits would be necessary to determine the legal relations of the parties. That is, in the declaratory judgment action the court could determine not only who was entitled to the proceeds of the sale, but also who should ultimately be responsible for them.

As a general rule, an action for declaratory judgment cannot be used to supersede any pending action in which the rights of the parties can be determined. However, the Court distinguished the Berigan Brothers case in the following manner:

It is quite evident here that the rights of the parties are so interwoven that a suit awarding judgment against one defendant would have the effect of making him a potential plaintiff in a subsequent action. ... There are several claims in the instant case in which the evidence is in conflict. The claims are justiciable. They are intermingled. The petition for a declaratory judgment would avoid a multiplicity of suits that would be time consuming and costly. The law ... is that an order is final for the purposes of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect.

The application of declaratory judgment as a remedy has traditionally been limited by the Nebraska Supreme Court to situations

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in which a party has no other "equally servicable remedy."\textsuperscript{47} The Court has viewed the declaratory judgment action as a "statutory expansion of equity jurisdiction," and thus has insisted "that the equitable requirement of lack of another adequate remedy be maintained as a jurisdictional prerequisite for declaratory relief."\textsuperscript{48}

In reaching the decision in \textit{Berigan Brothers} the Supreme Court applied equitable principles established before the adoption of the declaratory judgment statute. In \textit{Finzer v. Peter}\textsuperscript{49} the court had, through its equitable powers, allowed the determination of all the parties' rights to avoid a circuity of actions. That action involved the liability of grantees and grantors of real property on a prior mortgage, though the original action had been brought at law on the note given with the mortgage.

In future decisions on whether to supersede prior actions by declaratory judgment actions the court will look to the factors set out in prior cases. Clearly an action for declaratory judgment will not be sustained where the transaction has previously been litigated to completion in the trial court,\textsuperscript{50} or where there is a specific statutory remedy provided by the legislature.\textsuperscript{51}

The \textit{Berigan Brothers} decision outlined a number of factors which will move the court to allow an action for declaratory judgment to supersede a prior action brought on the same transaction. The most important factor is the likelihood of a multiplicity of suits which would be readily apparent where virtually any possible decision in the initial action is likely to make further proceedings both necessary and probable. This situation arises where all claims cannot be adjudicated in the original action, and the claims are the result of a single commingled transaction. Declaratory judgments will be entertained where it will "afford (all the parties) relief from uncertainty and insecurity with respect to rights, status, and other legal relations."\textsuperscript{52} The court will, of course, not allow a declaratory judgment where all the parties are not before the court, and all rights and duties cannot be finally settled by the decision.\textsuperscript{53}

\textsuperscript{47} Murphy v. Holt County Com. of Reorgan. of School Dist., 181 Neb. 182, 147 N.W.2d 522 (1966); Strawn v. County of Sarpy, 146 Neb. 783, 21 N.W.2d 597 (1946).


\textsuperscript{49} 120 Neb. 389, 232 N.W. 762 (1930).

\textsuperscript{50} Phelps County v. City of Holdrege, 133 Neb. 139, 274 N.W. 483 (1937).

\textsuperscript{51} Scudder v. Buffalo County 170 Neb. 293, 102 N.W.2d 447 (1960).

\textsuperscript{52} Berigan Bros. v. Growers Cattle Credit Corp., 182 Neb. 655, 663, 156 N.W.2d 790, 796 (1968).

There are two general issues to which the court should look in determining whether an action for declaratory judgment will be allowed to supersede a prior, more traditional method of determining the rights of the parties.\textsuperscript{64} First, the court must determine the legal relationship between the parties, and, if this is in issue, whether the determination of a relationship in the initial action will alter the relationships between other parties. To what extent are the legal relations of the parties intermingled? Second, the court must decide whether the rights, status and relationships of the parties can be satisfactorily determined in the initial action, without unnecessary delay or waste of the court's time and client's money. Can the rights of the parties be fairly and adequately litigated in the original action?

The presumption is, of course, with the initial action and the party asking for a declaratory judgment will have to satisfy the court as to the necessity of superseding that action. Permitting an action for declaratory judgment to supersede a prior action is a procedural device which must be used sparingly, but should not be unduly limited where it would more adequately and efficiently resolve the rights of the parties.

C. \textit{Benes v. Matulka}\textsuperscript{55}

On appeal from an order of the trial court sustaining a motion to strike a counterclaim, the Nebraska Supreme Court found that the determination on such a motion in the trial court was not a final order and therefore it was not appealable while the original action was pending in the district court. The Court further determined that a counterclaim for malicious prosecution and slanderous statements could not be maintained in an action for conversion.

The statute of limitations on actions for slanderous statements and malicious prosecution is one year.\textsuperscript{66} The counterclaim in this case was filed within one year of the date of the alleged statements, but the year had passed when the trial court sustained the plaintiff's motion to strike the counterclaim. The defendant, therefore, attempted to have his counterclaim reinstated on appeal in order to avoid being precluded by the statute of limitations from bringing the action for slander and malicious prosecution.\textsuperscript{57}

\textsuperscript{55} 182 Neb. 744, 157 N.W.2d 832 (1968).
\textsuperscript{57} Brief for Appellant at 3, \textit{Benes v. Matulka}, 182 Neb. 744, 157 N.W.2d 832 (1968).
Under these conditions, the defendant contended that the ruling of the trial court was a "final order" from which an appeal may be taken under section 25-1902 of the Nebraska statutes. The defendant's theory rested on the proposition that a counterclaim is an independent cause of action, and that the decision in the trial court had effectively precluded any judgment on the cause of action.

The authority for defendant's assertion that the ruling in this case was a final order from which an appeal could be taken was *Atkins v. Chamberlain*, a case in which the plaintiff's petition stated three causes of action. The trial court sustained a demurrer to one of the three stated causes of action, and the Supreme Court determined that such a ruling was reviewable as a final order. The Supreme Court in that case noted that the ruling in the trial court had effectively prevented a judgment on that cause of action, but did not comment upon the fact that the ruling could just as well have been reviewed after all the issues had been determined by the trial court.

The *Atkins* decision, which was not cited by the Supreme Court in the *Benes* decision, would certainly seem applicable to this recent determination. In both cases a cause of action in favor of one of the parties was effectively precluded by a ruling in the trial court. Further, the appeal of the counterclaim in the *Benes* case precluded the entire action by the defendant, unlike the *Atkins* case in which only a part of the plaintiff's claim was prevented. The single possible distinguishing point is that the *Atkins* cause of action was specifically dismissed with prejudice, though in the *Benes* case the cause of action was just as effectively prevented.

Other cases in which the trial court decisions on motions have been found reviewable as final orders are instances in which the motion had effectively prevented the entire action with no other possible avenue of appeal available; such as an order overruling an application to set aside a default judgment, an order refusing to

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58 That statute provides: "An order affecting a substantial right in action, when such order determines the action and prevents a judgment... is a final order which may be vacated, modified or reversed as provided in this chapter." NEB. REV. STAT. § 25-1902 (Reissue 1964).

The Supreme Court reviews final orders under Section 25-1911, NEB. REV. STAT. (Reissue 1964), which provides: "A judgment entered or a final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors upon the record."

59 Dale v. Huneman, 12 Neb. 221, 10 N.W. 112 (1881).

60 164 Neb. 428, 82 N.W.2d 632 (1957) (The appeal was finally dismissed because the appeal had not been filed within the proper time).

permit the filing of a petition of intervention, an order of the county court refusing an application to file a claim against an estate, or an order refusing to allow notice of appeal to be filed out of time. In each of these cases the entire action was precluded; there was no action left pending from which an appeal might later be taken.

However, an order refusing summary judgment is not a final order since it does not determine the action or prevent a judgment, nor is the sustaining of a motion to make more definite and certain. In *Rehn v. Bingaman*, the court stated:

*The law... is that an order is final for the purposes of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect.*

The *Atkins* decision is distinctive in permitting appeal while an action is pending in the lower court. If the Supreme Court wishes to disapprove the decision, further confusion may be avoided by express disapproval or clarification of the scope of the *Benes* ruling.

The view adopted by the Supreme Court in *Benes v. Matulka* will, generally, maintain the speed and efficiency in litigation which would be lost if the litigation were held up while orders or motions were reviewed by the Supreme Court. Though in some few instances in which remand will be made necessary there will be a duplication of effort, precluding review until all questions are decided by the trial court will be generally advantageous to the Nebraska courts.

### IV. CRIMINAL LAW

#### A. CONSTITUTIONAL PROTECTION

(1) In *State v. Montgomery*, defendant and his companion were tried together and represented by the same attorney. The companion made a written confession inculpating the defendant, who

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64 Pep Sinton, Inc. v. Thomas, 174 Neb. 540, 118 N.W.2d 616 (1962). See *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1962), where the trial court decision not to allow an antenuptial agreement as a defense as a matter of law is a final order when the only other question in the case was the amount of widow's allowance.
66 Barry v. Wolf, 148 Neb. 27, 26 N.W.2d 303 (1947).
69 182 Neb. 737, 157 N.W.2d 196 (1968).
steadfastly denied its content. After the State had called five witnesses and nearly completed its case, the confession was introduced into evidence. Defendant’s appointed counsel had not been given a copy of the confession until immediately prior to the beginning of the trial, and as a result delayed moving for separate trials (severance). The lower court denied the motion and the Nebraska Supreme Court reversed, holding that the defendant was prejudiced by the introduction of the confession, and the resulting conflict was sufficient to deny him effective assistance of counsel.

Nebraska law provides that two or more defendants may be charged in the same indictment if it is alleged that they participated in the same act or transaction constituting the offense.70 A severance may be ordered by the court if “it appears that a defendant ... would be prejudiced by a joinder of . . . defendants in an indictment . . . for trial together . . . .”71 The majority opinion talks in constitutional terms (lack of effective counsel) but couches its holding in the language of the statute. In addition, the decision is something less than clear in regard to the definition of the statutory requirement of “prejudice.” Must there be actual proven “prejudice” to the defendant, or will the mere presence of “conflict of interest”72 be a sufficient basis for granting the motion to sever?

The court relies primarily upon a Fourth Circuit decision as authority for their holding.73 In Sawyer v. Brough two defendants were tried together and a confession of one was offered which expressly inculpated the other. This offer came as a complete surprise to the court-appointed counsel. The court held that introduction of the confession of one defendant coupled with continued denials of guilt from the other created an inherent divergence of interest, placing the defendants in adversary positions and that the possibility of harm was sufficient to impair the validity of the conviction.74 The court also referred to a Pennsylvania decision75 which held that

72 The United States Supreme Court has held that the right to counsel contemplates assistance of counsel free from impairment by an order requiring the simultaneous representation of conflicting interests and that such right does not require a finding of actual harm. Glasser v. United States, 315 U.S. 60 (1942). The issue may also be raised in light of this decision whether the Nebraska statute conforms to these constitutional guidelines established by the Supreme Court. Since the Nebraska statute requires actual prejudice, it could be argued that the statute is unconstitutional.
73 Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966).
74 Id. at 73.
mere conflicting interests invalidate the proceedings, regardless of whether actual harm results. These cases could certainly be authority for the proposition that Nebraska's "prejudice" requirement demands nothing more than a conflict of interest between two defendants as a condition precedent to a successful motion to sever. This proposition is further strengthened by the Nebraska court's reference to the recommendations of the American Bar Association's Advisory Committee on the Criminal Trial which does not mention a requirement of actual prejudice. Rather, the Committee suggests that the court elect (1) not to admit the statements; (2) to delete references to the defendant; or (3) to sever the trials.76

However, in a situation where the confession of one defendant specifically refers to another defendant, the better result requires actual prejudice to the non-confessing defendant before severance will be granted. Such a rule would serve to expedite justice while at the same time preserve constitutionally guaranteed rights. The underlying rationale is clear: by requiring a severance where prejudice exists the attorney is prohibited from placing himself in a position where he will be required to choose between conflicting duties owing to each client while still being permitted to represent each effectively where no possibility of prejudice exists.

Montgomery also raises a question relating to the attorney's responsibility to move for a severance. The State argued that since counsel had delayed making his motion for severance, he had waived the opportunity. In rejecting this argument, the court reasoned that since counsel had not received the statement until the day of the trial, he was not afforded "sufficient time to investigate the circumstances [and] absent . . . a reasonable opportunity to make such an investigation, [the State could not] say that the motion . . . was untimely made."77 This holding places the onus of raising an objection upon counsel for the defendants.

At least one jurisdiction has held that it is the responsibility of the trial judge to inquire of the attorney whether he has evaluated potential conflicts in a joint representation, and to make an affirmative determination as to the defendant's awareness of the possible dangers which are inherent in any joint representation.78 Thus the responsibility of the attorney is partially eliminated and the failure to move for severance does not constitute a waiver of that procedure.

(2) In *State v. Godfrey* defendant and his companion were stopped and questioned by the police in the vicinity of a recent burglary. They were taken to police headquarters and while undergoing interrogation were advised of their constitutional rights. They refused to make a statement, and at that point both were incarcerated. Five hours later they again underwent interrogation and were again advised of their rights. At this time defendants waived their rights and the officers obtained a confession which was later introduced into evidence.

Defendant was convicted and on appeal contended that the statements were obtained in violation of his constitutional rights. The now famous *Miranda* decision clearly establishes that a defendant in custody may at any time indicate his desire for an attorney and all interrogation must cease whenever such desire is manifested to the police. The right to have the attorney present continues during any subsequent questioning. Extrapolating from this holding, defendant argued that refusal to make a statement carries with it the same protection as a request for counsel, and implies that no future statements may be made without the presence of counsel; hence, the subsequent warnings and waiver were of no effect. The *Godfrey* decision, by rejecting this argument, simply requires a defendant to affirmatively manifest his desire for an attorney. The court seems to realize that mere formalistic compliance with minimum standards is not important. Rather, the inquiry must focus upon whether the accused has been meaningfully apprised of and has intelligently waived his rights. This principle is too readily obscured and must be kept in constant view to insure propriety in the operation of the criminal law system, and each case must be specifically examined to insure that any waiver was in fact both knowing and intelligent.

At trial, defendant moved to waive his right to trial by jury after the jury had been empanelled but before the actual trial had begun. This motion was denied. On appeal the defendant contended that the right to a jury trial was a personal right which may be waived at any time, and that the State has no authority to require a jury trial if there has been an intelligent waiver.

Three policy considerations support the right to waive a jury trial: flexibility, avoidance of emotional verdicts inherent in certain

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81 They do, however, recognize that the State may not continually harass the defendant by continuing pressures inherent in interrogation practices which are designed to break his will.
types of cases, and expedition of the business of the court and of the individual defendant's case. The Nebraska Supreme Court held, however, that it is not unreasonable to require that a motion to waive a jury trial be made or filed within a reasonable time prior to the trial. The apparent basis for this ruling was a general policy belief that the defendant should not be allowed to waive a jury once the State has gone to the expense of empanelling one.

As long as policy considerations alone are controlling, there is sound basis for the decision. The result may, however, involve a constitutional problem: does the right to trial by jury conversely imply the right not to have a jury? The United States Supreme Court has stressed the importance of this right and a waiver thereof: "Before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." Assuming that acceptance of a waiver is preceded by a conscious effort to insure the voluntary nature of a waiver of trial by jury, this language could buttress an argument that waiver of this right may not be denied. On the other hand, since the Supreme Court specifically requires the trial court's sanction, it could be argued that this sanction may be withheld on reasonable grounds, one of which might well be timeliness.

(3) State v. Reizenstein and State v. Oliva are cases concerned in part with the voluntariness of confessions introduced into evidence. Reizenstein was convicted of first degree murder for the shotgun slaying of his wife. He had made some statements immediately after the shooting which were recorded and compiled into a transcript. The actual statements were never introduced into evidence, but testimony was given by two officers present during the interrogation concerning their recollections of what was said. In Oliva, defendant was convicted of second degree murder in con-

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82 "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial,..." U.S. Const. amend. VI (emphasis added).
83 Hopefully such a requirement will serve to promote the efficient administration of justice. It seems quite reasonable to hold that the defendant must waive the jury trial before the process for selection has begun. On the other hand, the argument is strong that the right is personal and subject to waiver at any time in order to guarantee the right to a speedy trial.
85 183 Neb. 376, 160 N.W.2d 208 (1968).
86 183 Neb. 620, 163 N.W.2d 112 (1968).
87 The officers who testified "refreshed" their memories by referring to this 69 page document. No specific judicial determination of the voluntariness of these statements was made upon objection of counsel.
nection with the shooting death of her uncle. After the shooting occurred, defendant made some statements to a taxi driver and also to the police. These statements were introduced into evidence without objection. On appeal defendant alleged that the lower court committed reversible error by not determining the voluntariness of these statements, regardless of whether there had been any objection to their introduction.  

A central issue conjunctively raised by the two cases is whether, in Nebraska, the voluntariness of a confession must be determined by the court on its own initiative or whether the defendant must take some affirmative action to raise the issue such as objecting to the introduction of the confession into evidence. In Reizenstein there is language which seems to imply that the trial court is now required to make an independent determination of the voluntariness of a confession in light of Jackson v. Denno, regardless of whether the defendant fails to object to its introduction.

In Oliva, the defendant did not object to the introduction of the statements made to the taxi driver and to police. The court held that this omission precluded the defendant from complaining "of the failure of the court to hold [a hearing on the voluntary character of the statement]." In other words, if the defendant does not object to the introduction of a confession or statements, their voluntary character need not be determined, which seems to be in conflict with the result reached in Reizenstein.

Jackson v. Denno sets forth the defendant's basic obligation: "Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. ..." This statement implies that if no objection is made, the defendant may not later raise the issue on appeal, and it has

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88 Reizenstein involved a proceeding under the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 to -3004 (Supp. 1967), and Oliva was a direct appeal from the district court.
90 183 Neb. 376, 380, 160 N.W.2d 208, 211 (1968). This language is, however, merely dictum since there was an objection raised by the defendant's counsel at trial. Since some of these objections had been sustained concerning the introduction of the evidence, the court held that this was sufficient to be a judicial determination of their voluntary character. Id.
91 183 Neb. 620, 625, 163 N.W.2d 112, 115 (1968).
generally been so interpreted. But perhaps the better procedure would be to require that any confession or inculpating statement made by the defendant should first be submitted to the court for a determination of its voluntary character, and a failure to object to these statements should not preclude a court on appeal from determining the issue. That is, the great importance of such statements in the determination of guilt or innocence seems almost to necessitate that they be admitted only after having been found to be the product of the defendant's unimpinged free will.

In Reizenstein the court held that it was unnecessary to submit the question of the voluntariness of the statements to the jury since the determination by the trial judge was final on the issue. In his dissent, Justice McCown viewed the question as essentially one of fact which must be submitted to the jury. In light of Parker v. State, which stated that the voluntary character of a confession was a question of fact for the jury, it seems that the court has reached the wrong result. The language of Parker indicates that the determination of the trial judge is not final on the issue, and the question of voluntariness must be submitted to the triers of fact. By thus having an initial determination by the trial judge outside of the presence of the jury, followed by a final determination by the triers of fact, the defendant is assured the most complete determination that the statements were not in fact coerced.

(5) In State v. Simants, defendants were convicted in county court of contributing to the delinquency of a fourteen year old female minor. On removal to the district court the statute under which the defendants were charged was held to be unconstitutionally void for vagueness. The State appealed and the Nebraska Supreme Court reversed, holding that because of the vast number

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93 People v. Nash, 67 Cal. Rptr. 621 (1968); Blatch v. State, 216 So.2d 261 (Fla. 1968); People v. Fortman, 64 Cal. Rptr. 689 (1967); The rationale is, evidently, that such failure does not constitute fundamental error. Simpson v. State, 211 So.2d 852 (Fla. 1967). But see In re Cameron, 67 Cal. Rptr. 529, 439 P.2d 633 (1968), where the court held that the defendant is not precluded from challenging on appeal the admissibility of a confession that is involuntary as a matter of law, even though he did not object.
94 183 Neb. 376, 389-90, 160 N.W.2d 208, 216 (1968) (dissenting opinion).
95 164 Neb. 614, 83 N.W.2d 347 (1957). The court held that since the statements made by defendant could not be denied and were in fact self-serving in nature, they could not be objected to in a proceeding under the Post Conviction Act. This does not, however, answer the question of whether the voluntary nature of the statements is a jury question.
96 NEB. REV. STAT. § 28-477 (Reissue 1964).
of acts which could constitute the offense of "contributing to the delinquency of a minor," it was impossible to specify each prohibited act. Therefore, such a statute must, of necessity, be broadly drawn and could not be deemed unconstitutionally void for vagueness.

It is axiomatic that a criminal statute must be reasonably definite and clear. Defendants contended that since the act literally included unintentional as well as intentional acts, there was noncompliance with the constitutional minimum standard that a crime must be defined in such a manner as to inform one charged with its violation that the act is proscribed by statute. While a statute cannot be so vague as to make criminal an innocent act, it need not be so definite as to exclude the possibility of more than one construction. All that is needed to conform to constitutional standards is that the language convey a warning as to the proscribed conduct.

While the court was only confronted with the issue of the constitutionality of the statute, Justice McCown expressed fear that the majority has gone beyond the constitutional determination. The majority failed to note that nowhere in the record was it disclosed precisely what act was committed by the defendants. Since they were merely charged in the language of the statute, and the court does not concern itself with this question, Justice McCown's fear is that the information need not specify the acts committed. This in turn would not sufficiently inform the defendant of the nature of his offense, thereby failing to meet the minimal constitutional standards of notice and fair play. On remand it is assumed that the defendants will object to the information on the ground that it does not state a cause of action since it does not specify the particular acts sufficient to give the defendants notice of the violation. If that course of action is not followed, however, an information charging only that defendants "contributed to the delinquency of a minor" may well be sufficient to support a conviction.

Because it is impractical to prohibit each act that may reasonably be expected to cause, encourage, or contribute to the minor's delinquency, it necessarily follows that it is even more important to insure that any indictment specify and explicate the specific acts constituting the crime. Only where the statute sets forth the par-

102 Roth v. United States, 354 U.S. 476 (1957). Evidently the warning conveyed by the statute is that the proscribed conduct is anything which one might assume would tend to cause or contribute to the delinquency of a minor child, which is, arguably, no warning at all.
ticular elements of a crime in such a manner as to properly inform
the defendant of the nature of the prohibited offense, will it be
sufficient to charge in the language of the statute. Indeed, by citing
decisions which specifically require that the information specify
the acts committed, the majority seemingly recognizes this general
rule. It is unfortunate that they did not seize the opportunity to
clarify their position, since they could easily have held the statute
constitutional, but the information insufficient to constitute a cause
of action. If upon remand no amendment is made to the informa-
tion, the inference will certainly be raised that one charged simply
with "contributing to the delinquency of a minor" may be under an
indictment sufficient to lead to his incarceration.\footnote{103}

(6) \textit{State v. Forney}\footnote{104} arose after defendant was stopped by a
police officer in Gordon, Nebraska, in the early hours of the morning.
The officer had observed defendant for nearly forty minutes prior
to his detainment, and upon request the defendant voluntarily went
to the Gordon police station where he and his companion were
questioned. Mr. Forney was informed that there had been a break-in
at Merriman, Nebraska, east of Gordon,\footnote{105} and was asked if his car
could be searched. His consent was given and the search disclosed
a concealed weapon and a blue cloth bag containing some coins.
No search warrant was obtained.\footnote{106} Defendant was then placed
under arrest, informed of his constitutional rights, and charged
with carrying a concealed weapon and grand larceny.

The trial court sustained a motion to suppress the evidence taken
from the automobile, the State filed an application for summary
review, and the case was appealed. Justice Spencer, in a one-man

\footnote{103} As the Nebraska statute is set out, it is probably not necessary to
allege that the minor child has in fact become delinquent. Generally
such an allegation is not required under statutes similar to the one
in the instant case. The court does not, however, answer this ques-
tion. If it were determined to be necessary to make such an allega-
tion, then it would further be necessary to determine whether proof
of delinquency would be required where the accused was charged
with contributing to the minor's delinquency only, or, where he is
merely acting so as to tend to cause the minor child to become delin-
quent, if the burden of proof is less. These questions remain unan-
swered, but loom on the horizon for future determination. Some of
the cases are collected in Annot., 18 A.L.R.3d 824 (1968).

\footnote{104} 182 Neb. 802, 157 N.W.2d 403 (1968).

\footnote{105} When asked from where he came, defendant told the officer that
he had been in Rushville, which is located west of Gordon. The
officer had observed the defendant's car approach from the east.

\footnote{106} The officer testified that he had observed the defendant earlier in
the evening, but had not procured a warrant either to search or for
the defendant's arrest, although he had had ample opportunity to
procure either one.
opinion, reversed the district judge.\textsuperscript{107} Defendant was convicted and appealed, contending that the \textit{Miranda} warnings\textsuperscript{108} must be given before any consent to search may be obtained, and since the police had failed to give these warnings the subsequent search was rendered invalid. The Nebraska Supreme Court in affirming the conviction held that probable cause for the search existed, and that a person need not be warned that he does not have to submit to a search, and that anything discovered in the search could be used against him, before he may validly consent to a search.

The court's holding in \textit{Forney} is extremely confusing in light of the fact that they found probable cause existed for the warrantless search. Such a search does not contravene the fourth amendment's prohibition against unreasonable searches and seizures. It is unlikely that a warrantless search based upon sufficient probable cause requires, in addition, the consent of the defendant. The question of knowing consent to search is an important concept only where it operates as a waiver to an otherwise unreasonable arrest or search.

Kansas\textsuperscript{109} and Maryland\textsuperscript{110} decisions have held that a search is not illegal merely because of a failure to advise the defendant of his right not to consent.\textsuperscript{111} But these decisions found independent probable cause for the search and thus the issue was not whether the defendant must be given the \textit{Miranda} warnings prior to giving his consent to a search which is otherwise unreasonable under the fourth amendment in order that the consent may operate as a waiver of his rights under that amendment. Rather, the issue was whether, in addition to the existence of probable cause, a search

\textsuperscript{107} State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967).
\textsuperscript{108} Miranda v. Arizona, 384 U.S. 436 (1966). The warnings necessitated by this decision are that the defendant has a right to remain silent, that any statement he makes may be used against him, that he has a right to an attorney, and that if he cannot afford an attorney, he will be provided one at the State's expense. In the argument, defendant attempted to extrapolate these warnings to apply to the rights guaranteed by the fourth amendment, and that he should have been advised that he need not consent to the search, and that if he did, anything found could be used against him.
\textsuperscript{111} In Gorman v. United States, 360 F.2d 158 (1st Cir. 1967), the court held that it was unnecessary to warn the defendant specifically that he need not consent to the search and that anything found may be used against him. The reason was that this warning was inherent in the initial warnings given to the defendant at the outset of the interrogation. Thus \textit{Gorman} implies that there must be at least some warning, and is questionable authority for the court in the instant case. \textit{Id.} at 164.
must have consent preceded by those warnings. The decisions from other jurisdictions, which are interdependent for authority upon one another, justify the result on the concept that the fourth and fifth amendment protect different rights. Thus, the fifth amendment protection against incriminating statements is not applicable to the fourth amendment right against unreasonable searches and seizures.

The general rule is that a waiver of one's fourth amendment rights (consent to search) must be knowing and voluntary before the subsequent warrantless search, which is not based on probable cause, is deemed reasonable.\(^{112}\) Since the consent serves as a waiver of the right to be free from unreasonable searches and seizures, the courts must be assured that the waiver is voluntary. In United States v. Nikrasch,\(^{113}\) the court held that a warrantless search lacked probable cause and was not justified as being incidental to a lawful arrest because it was too remote in time from the arrest. Therefore, the consent of the defendant (waiver) was necessary if the search was not to be considered unreasonable and in violation of the fourth amendment. But, since the defendant had not been apprised of his rights under the fourth amendment, no true consent had been given, and the search was unreasonable.

In United States v. Blalock,\(^{114}\) the court recognized that a warrantless search is regarded as unreasonable and that to eliminate the taint of unreasonableness the defendant's consent must be obtained. This waiver of defendant's fourth amendment rights must meet the test of being an "intentional relinquishment or abandonment of a known right."\(^{115}\) Since the waiver must be voluntary, it must also be intelligent simply because one may not intelligently waive something which he does not know he has. Therefore, the fourth amendment requires no less a knowing waiver than do the fifth and sixth.\(^{116}\) The knowledge requirement serves the same purpose: to insure that the ignorant may not be forced to relinquish their rights more readily than the shrewd.\(^{117}\) In both cases, probable cause for a warrantless search did not exist, and therefore it was necessary to reach the issue of whether the fourth amendment protection against unreasonable searches and seizures had been waived by the defendant's consent.

\(^{113}\) 367 F.2d 740 (7th Cir. 1966).
\(^{117}\) Id.
In \textit{State v. Williams},\textsuperscript{118} the defendant was arrested on a vagrancy violation and was subsequently convicted for burglary. The court held that since the vagrancy violation was designed to preclude defendant from leaving the city until the suspicions of the police had been confirmed concerning the burglary, the initial arrest was illegal.\textsuperscript{119} And because the defendant was undergoing in-custody interrogation at the time, having become a focal suspect in the burglary, the warnings prior to waiver of his fourth amendment rights were necessary under the principles announced in \textit{Escobedo v. Illinois},\textsuperscript{120} since, in effect, the request to search is a request that the defendant be a witness against himself. The same prophylaxis against unreasonable and coercive police practices is a constitutional necessity regardless of whether the design is to establish guilt by obtaining a confession or disclosing evidence pointing to that guilt.\textsuperscript{121}

In an effort to refrain from "further shackling law enforcement,"\textsuperscript{122} the court has reached an incorrect result in its holding relating to the issue of whether consent to search without prior warnings is a knowing waiver. If probable cause existed for the warrantless search, then the issue of voluntary waiver need not have been raised. But if no probable cause for the warrantless search existed, then the search would have been unreasonable, absent a knowing waiver of the protection of the fourth amendment. The fact that the defendant was in custody (although not under arrest) and thereby under pressure from authority, is enough to make the consent involuntary, and the waiver invalid. Only upon being advised of his constitutional rights could the consent truly be deemed voluntary.

(7) In \textit{State v. Heiser}\textsuperscript{123} Lincoln police officers went to the defendant's home and attempted to gain entrance because they had information that a marijuana party was in progress.\textsuperscript{124} When they

\textsuperscript{118} 432 P.2d 679 (Ore. 1967).
\textsuperscript{119} The court did not say, however, that since the arrest was illegal, the search incidental to that arrest was likewise unlawful.
\textsuperscript{120} 378 U.S. 478 (1964).
\textsuperscript{121} The Oregon court specifically declined to decide the issue of whether the same prophylaxis against coercive police practices is necessary in a situation where there is probable cause justifying a basis for the issuance of a search warrant. 432 P.2d 679, 683 n.4 (Ore. 1967). At least this court has recognized the issue involved and some of its ramifications.
\textsuperscript{122} State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967).
\textsuperscript{123} 183 Neb. 665, 163 N.W.2d 582 (1968).
\textsuperscript{124} An employee of the Lincoln Municipal court had informed the officers approximately one hour earlier that the party was in progress, and
admitted that they did not possess a search warrant, entrance was refused.\textsuperscript{125} An officer at the back of the house then saw the defendant run to the kitchen, grab two containers, and throw them out of a window. The officers at the front door were finally admitted by a guest of the defendant\textsuperscript{126} and detected the odor of marijuana. At this point defendant was arrested and given the \textit{Miranda} warnings. The officers testified that defendant's permission was given to search the rest of the house; their search produced a container of marijuana which was introduced at trial. Defendant constantly denied giving his permission or consent to the search, and the only objection raised at trial was to the evidence obtained in this search. Defendant was convicted and he appealed.

The Nebraska Supreme Court held that the evidence objected to was obtained as the result of a legal search and seizure. Although warrantless, the search was incidental to a lawful arrest and therefore not unreasonable.\textsuperscript{127} If it is assumed that the arrest itself was based on sufficient probable cause there can be no dispute with the majority's decision. But if there was insufficient probable cause for the arrest, then it was invalid and the search made pursuant to that arrest must also fall as unreasonable.

The required standard for an arrest is “probable cause” which is normally defined as a belief derived from reliable facts and circumstances within the knowledge of the officer sufficient to warrant a man of reasonable caution in believing that an offense has been committed.\textsuperscript{128} At the time of the arrest, the officers had information (1) that a marijuana party was progressing, (2) at defendant’s house, (3) that he had refused them entrance when informed that the officers did not have a search warrant. They also knew that

\textsuperscript{125} There is nothing in the record to explain why a search warrant was not obtained since there was ample time to procure one, assuming that there was sufficient probable cause. This fact leads one to assume that there may not have been a belief on the part of the officers that probable cause did exist.

\textsuperscript{126} It is interesting to point out that the “guest” who admitted the officers was none other than the informing employee.

\textsuperscript{127} See United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Agnello v. United States, 269 U.S. 20 (1925); United States ex rel. Foose v. Rundle, 389 F.2d 54 (3rd Cir. 1968); Oelke v. United States, 389 F.2d 668 (9th Cir. 1967); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967).

(4) defendant ran from the door, (5) opened a window and, (6) threw something out on the lawn. It was later discovered that the containers on the lawn were filled with marijuana. At the time of the arrest the officers did not know what was in the containers.

There is language in the opinion which leads one to conclude that Justice Newton is partially justifying the probable cause for the arrest on the fact that the containers allegedly thrown out of the window did in fact contain marijuana. Since this fact was not known until after the arrest, it cannot be used to establish probable cause for the arrest and ensuing search. A search cannot be justified on the basis that facts giving rise to probable cause for arresting a person were discovered after the arrest. The argument is clearly bootstrapping, and perhaps in its rush to judgment, the Nebraska Court has relied to a certain extent on hindsight as a basis for holding that there was sufficient probable cause to justify an arrest and the search incidental thereto.

Assuming that there was insufficient probable cause to justify the arrest, thereby making the search unreasonable, the consent of the defendant to the search arguably removes the taint of unreasonableness. The obvious argument against such an assertion would be that the consent was obtained as a result of coercion. In Bumper v. North Carolina, the United States Supreme Court held that a search cannot be justified on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possessed a warrant. An analogous situation is presented where an individual is illegally arrested and subsequently consents to a search. It could be argued that the consent to the search was the result of undue coercion brought about by the arrest. Reasoning from Bumper, the State has the burden of showing that the consent was given voluntarily. Certainly that obligation cannot be satisfied by showing no more than mere acquiescence to the authority of the State.

Each individual case necessarily is controlled by its own particular facts in determining whether a search is justified. The law is necessarily too general in this area to function without a large element of discretion. But it is better to have that discretion wielded

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by judicial officers unprejudiced by the pressures of the situation rather than by the police. When viewed with the knowledge of the officers prior to the arrest, without the assistance of hindsight, it is questionable whether the warrantless search has met the constitutional standards for justification. The holding is clearly erroneous if the court has justified the arrest on the basis of hindsight. It is submitted that if the arrest was not based upon probable cause, the search is not made reasonable by defendant's consent, due to the coercion resulting from the arrest.

B. Procedure

(1) Defendant had brought an action under the Nebraska Post Conviction Act in State v. Tunender alleging that his counsel had rendered ineffective assistance. Tunender had been charged with motor vehicle homicide and leaving the scene of a personal injury accident. Initially, on the advice of his court-appointed counsel, he pleaded not guilty to both counts. However, following plea negotiations defendant changed his plea on the first charge to guilty and the second charge was withdrawn. Tunender testified that the attorney had promised him a sentence of probation if he would thus change his plea, and that the guilty plea was entered in reliance upon this promise.

The question in Tunender was whether counsel had breached his duty of loyalty and rendered ineffective assistance when he erroneously promised either a reduced sentence or the probability of a reduced sentence based upon plea negotiations with the county attorney. The four justice majority held that there had been such a breach. The majority opinion is devoid of any basic rationale to support its decision. However, since the general rule that post conviction relief will be granted only when the assistance of counsel was so grossly inept as to shock the conscience of the court was

135 The attorney testified that the county attorney had advised him that nothing would be accomplished by sending the defendant to jail and that there was a good chance for probation. After this was explained to the defendant, counsel advised him to plead guilty to the first count.
136 Counsel did admit to having given his opinion as to the probable outcome of the case, but did not tell the defendant that the "case [was] cut and dried." 182 Neb. 701, 704, 157 N.W.2d 165, 166 (1968). When defendant was sentenced to eighteen months the instant proceeding was instituted.
137 State v. Putnam, 182 Neb. 185, 153 N.W.2d 456 (1968); State v. Moss, 182 Neb. 502, 155 N.W.2d 435 (1968). In Busby v. Holman, 356 F.2d 75 (5th Cir. 1966), the court held that ineffective assistance of counsel
cited, the court appears to have concluded that the promises allegedly made in this case fell within this general rule.

Justice Carter's dissent approves of the rule expressed in the majority opinion, but asserts that counsel's actions in the instant case would not come within its scope. He points out that the processes of an attorney should not be scrutinized upon subsequent review as a matter of hindsight, but rather the attorney's actions should be judged from the perspective of the "facts and circumstances facing him at the time of the decision . . . ."\textsuperscript{138}

The majority fails to delineate any guidelines concerning what an attorney may or may not say or do. Certainly the decision seems to severely limit the utility of the plea bargain device since the court strongly implies that an attorney may neither render an opinion to his client regarding the probable outcome of negotiations with the prosecuting attorney nor attempt to persuade his client to enter a plea of guilty, without subjecting himself to a possible charge of ineffective counsel and possibly even disbarment.

The practice of plea bargaining has rarely been acknowledged, let alone scrutinized, by the appellate courts, and as a result few decisions have directly confronted the \textit{Tunender} problem. The Nebraska Supreme Court "recommends" that upon tender of a guilty plea in the future, the trial court should inquire about any discussions and any plea agreements between counsel. This benevolent recommendation is made to assure the defendant of the independence of the court from the office of the district attorney,\textsuperscript{139} and is clearly an affirmative step toward recognizing that plea bargaining exists. This recognition is obviously the vital prerequisite to any attempt to control the use of this procedure. Such a recommendation also precludes the defendant from later raising the argument that he relied upon the representations of counsel to his detriment.

\textsuperscript{138} State v. \textit{Tunender}, 182 Neb. 701, 709, 157 N.W.2d 165, 169 (1968) (dissenting opinion). Note, however, that the majority opinion focuses entirely on the representations made by counsel to his client as a result of the plea negotiations. Justice Carter emphasizes the specific facts involving the particular actions of the attorney. It is apparent that each views the ineffective assistance in an entirely different manner. The majority is unconcerned with whether the actual investigation made was thorough, and such an attack, although helpful, was unnecessary in \textit{Tunender}.

\textsuperscript{139} Id. at 704, 157 N.W.2d at 166-67.
Although the concept of "bargaining" is encouraged in civil litigation, compromise in the criminal system arguably is repugnant to the basic ideals of justice. The argument is that any compromise in the criminal area is immoral because the State does not possess the right to compromise. Justice and liberty are not proper subjects for bargaining and barter. From a pragmatic standpoint, however, elimination of plea bargaining would impose a procedural stranglehold on the trial court. Guilty pleas are said to be necessary to relieve the backlog on court dockets. By taking cognizance of the practice, the Nebraska Supreme Court has taken an affirmative step in attempting to compromise these conflicting policies by regulating the use of this device in order to promote the efficient administration of justice.

Nevertheless, the decision still leaves Nebraska attorneys in a perilous position. To avoid any possible repercussions the attorney should advise his client that in his professional opinion, the result will be a particular sentence. It must be made absolutely clear, however, that this "prediction" is merely an opinion, and is in no way a guarantee or promise. In essence, the burden has been shifted to the attorney to justify any advice which he may render to his client.

C. JUVENILES

(1) In DeBacker v. Brainard, Clarence DeBacker was arrested for passing a forged check and a petition was filed charging the seventeen year old offender with being a delinquent child.\(^{140}\) DeBacker objected to the jurisdiction of the court on the ground, \textit{inter alia}, that he had been denied the right to trial by jury. The objection was overruled, petitioner was adjudicated a delinquent child, and habeas corpus proceedings were instituted. Because of a provision in the Nebraska Constitution which provides that a legislative act may be held unconstitutional only on concurrence of five justices,\(^{141}\) the adjudication of the juvenile court was affirmed in DeBacker v. Brainard,\(^{142}\) although four justices believed the statute to be unconstitutional. These four justices argued that a juvenile charged with a violation of a state criminal law as the basis for an adjudication of delinquency is entitled to a trial by jury in juvenile court if the offense is one which would give rise to the right to a jury trial if tried in a criminal court.


\(^{141}\) "Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance;" \textit{Neb. Rev. Stat.} \textsection{} 43-201(4) (Reissue 1969).

\(^{142}\) \textit{Neb. Const.} art. V, \textsection{} 2.
The four justices seek to analyze the foundations upon which *In re Gault* is based. Concededly *Gault* does not require that juveniles be handled as adults, but it does require that due process standards be observed in an adjudication based upon criminal misconduct which could result in the placement of the juvenile in a state institution. Since the right to a jury trial has been deemed fundamental to due process under the fourteenth amendment in *Duncan v. Louisiana*, this right must be considered under *Gault* as one of the procedural safeguards to be afforded juveniles.

The three justice "majority" is concerned primarily with whether the rehabilitative objectives of a juvenile system may be less effective if burdened with such procedural "formalities" as trial by jury. They fail to give attention to the more basic question of whether fundamental fairness must be observed in any adjudication process which could result in the juvenile's commission to an institution.

*DeBacker* also raises the issue of the proper burden of proof in a juvenile case. Nebraska law provides that delinquency hearings "shall be conducted by the judge . . . applying the customary rules of evidence in use in civil trials without jury . . . ." After the evidence is introduced, the "court shall first consider only . . . whether the minor is a [delinquent child]." The dissenting justices in *DeBacker* argued that a finding of delinquency based upon conduct which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt, and therefore the preponderance of the evidence test espoused by the statute is unconstitutional.

(2) In *Guy v. Doeschot* the court was directly presented with the issue of whether the burden of proof in a juvenile proceeding should be the civil or criminal standard. However, the court declined to answer and instead specifically held that the evidence adduced was "insufficient to carry the burden of proof no matter which standard is applied. . . ." Although the holding is clear, Justice Carter asserts in his dissent that the majority opinion "relies upon a rule . . . of circumstantial evidence . . . applicable only to the jury" in a criminal case. Since this was not a "criminal" case and

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143 387 U.S. 1 (1967).
149 Id. at 559, 162 N.W.2d at 526.
150 Id. at 561, 162 N.W.2d at 528 (dissenting opinion).
there was no jury, the implication may be that the majority is defining a higher standard of proof in a juvenile proceeding than the preponderance of the evidence. Justice Carter believes without question that there was sufficient evidence to justify the determination made by the trier of fact when measured by the preponderance of the evidence standard. If the majority has adopted a rule applicable only to a jury in a criminal case, then this same four justice majority may have successfully accomplished an objective which could not be realized in DeBacker v. Brainard.

The basis for the petition to adjudge the defendant a delinquent child in Guy v. Doeschot was breaking and entering. A state's witness testified that she heard the sound of breaking glass at 2:45 A.M. and observed two boys enter a grocery store across the street from her home. After she had called the police, one of the boys ran from the store, and the police apprehended the defendant one-half block from the scene running at top speed.151 On these facts the court holds the evidence insufficient to support an adjudication based upon conduct which would have been criminal if charged against an adult. It is therefore arguable that the court has, for all practical purposes, adopted a rule that goes to the weight of circumstantial evidence applicable only in criminal trials. And although the court does not directly require the lower courts to observe this standard, both judges and attorneys must now recognize that an appellate finding that "the evidence is insufficient to carry the burden of proof, no matter which standard is applied in juvenile court,"152 is both relatively simple and distinctly possible.

V. DAMAGES

In Hughes Farms, Inc. v. Tri-State Generation and Transmission Ass’n153 condemnation proceedings were instituted against Hughes Farms to acquire a perpetual easement for the purpose of establishing a power line on plaintiff-condemnee’s land. The condemned appealed a damage determination by the county board appraiser, and a jury trial resulted in an award of $12,538.40.154 The easement

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151 This occurred only moments after the officers had received the call. Upon inquiry the defendant responded that he was merely “out for a walk.” The court held that his unexplained presence in the vicinity was insufficient to satisfy either standard of proof for the adjudication.


154 The appraiser had given a judgment for $9,500. There was a great deal of conflict as to the estimated damages, and plaintiff-condemnee asserted his damages to approximately $45,000, while the condemnor placed the damages between $2,500 and $3,000.
was partially over land upon which the condemnee had planted corn, but as a result of the construction of the power line, the land could not be irrigated at a critical time. Consequently, there was a loss of crops on land adjacent to the land which was condemned, as well as to the crops growing on the easement.

The court in *Wahlgren v. Loup River Pub. Power Dist.*¹⁵⁵ used language indicating that damages were to be computed on the basis of harm done to the land actually appropriated for use by the condemnor. Based on this holding the condemnor association argued that the measure of damages in a proceeding to acquire an easement for the purposes of establishing a power line was the diminution in value of the land upon which there was a restriction of the use. This test would obviously exclude consideration of crop damages on the adjacent land. However, *Wahlgren* had also stated that damages were recoverable for injury to the land actually taken, and for such injury to the residue of the land as is equivalent to the diminution in the value thereof.¹⁵⁶

Clearly, the court was correct in dismissing the condemnor association's reading of *Wahlgren* without extended discussion. The reason that *Wahlgren* allowed no more damages for injury than the land actually taken was simply because there was no evidence upon which a conclusion could have been based with respect to additional damages. In the instant case, however, the condemnee had gone to great lengths in attempting to establish the harm to crops on the adjacent land resulting from construction of the power line.

The *Hughes Farms* jury was instructed not to consider future injury to the land in determining the property damages to be awarded to the condemnee. To this instruction the defendant objected, contending that the landowner is required to recover all of his damages, including future crop damages, at the time of the condemnation. However, in the condemnation application the condemnor had proposed to obligate itself to reimburse the condemnee for all future crop damages incident to the construction of the power line and had reserved to the landowners or lessees the right to use the land under the line. That proposal, the condemnor argued, was not a binding agreement under the authority of *Little v. Loup River Pub. Power Dist.*¹⁵⁷ Hence, all of the damages must be computed at the initial condemnation proceeding. The general rule is that mere unaccepted promissory statements which are only

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¹⁵⁵ 139 Neb. 489, 297 N.W. 833 (1941).
¹⁵⁶ Id. at 496, 297 N.W. at 838.
¹⁵⁷ 150 Neb. 864, 36 N.W.2d 261 (1949).
declarations of future intentions by a condemnor cannot affect the rights acquired by the condemnee or the amount of damages which must be paid. The issue, therefore, was whether the application proposal was merely promissory or was in fact contractual.

Obviously, in order to have a binding contractual obligation, the condemnee must have accepted the proposal made by the condemnor. In Little, the court did not allow any statement to be made to the jury concerning future damages because there was no evidence that the proposal had been accepted by the condemnee. In the instant case, however, the condemnee accepted the proposal at the beginning of the trial, and made that acceptance part of the record.

Of major importance is that such a reservation with respect to future damages must be agreed to by both parties. The question of what constitutes an acceptance will generally arise prior to trial. But in the absence of an agreement, reasoning from the factual situation in Hughes, acceptance of the condemnor's proposal will be sufficient if it is stated for the record, out of the presence of the jury, that the condemnee accepts the offer with respect to the condemnor's promise to pay future damages to crops if they arise.

In an attempt to preserve this right the court recommended that any judgment should contain a provision subjecting the acquired easement to the obligation of the condemnor to pay such future damages, if and when they occur. Such preservation would provide the condemnee with an undisputable claim. It is unfortunate, however, that the condemnee did not object to the form of the judgment in the instant case, which failed to make such a provision. As a result, the condemnee may have to resort to a second lawsuit in any attempt to recover future damages if they do occur. This will no doubt raise practical problems of res judicata with respect to whether the condemnee may recover in any subsequent suit instituted in his behalf.

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168 Id. See also Pierce v. Platte Valley Public Power and Irrigation Dist. 143 Neb. 898, 11 N.W.2d 813 (1943). For an extensive collection of cases in this area see Annot., 7 A.L.R.2d 364 (1949).

159 This is seemingly the best method to assure the binding acceptance of such a proposal. In the instant case the acceptance was made out of the jury's presence. If there had been a failure to accept prior to trial, then that failure could be remedied at the time the trial commences.

160 On the other hand, the question would be whether the condemnee in this case would be able to carry over the judgment without the necessity of going into a second trial. In this case the condemnee would assert that the condemnor is collaterally estopped from asserting that there is no binding contract.
VI. EVIDENCE

Metropolitan Protection Serv. v. Tanner.161 Under the Uniform Business Records as Evidence Act,162 a business record prepared from prior records was held not admissible where it was prepared a number of months after the recorded events took place and only twelve days before trial. The circumstances within which the record was made, including the "complexity of the information in the record, training and skill of the recorder, and reasonableness of the elapsed time generally"163 will be considered in deciding whether a record is admissible under this uniform act.

In Metropolitan Protection Serv. v. Tanner164 suit was brought on the promise of defendant to pay for the services of the investigating agency. The plaintiff investigating agency introduced admitted reports of part-time investigators which disclosed their observations as well as hours worked and expenses. The disputed record was a compilation of these reports which had been made by the wife of the president of the agency at the conclusion of the investigation.

The decision that this record was outside the exception to the hearsay rule made by the Uniform Business Records as Evidence Act was based upon the fact that the entries were not made contemporaneously with the events. Thus, it lacked the probability of trustworthiness which is thought to be inherent in contemporaneous recording and is the basis for this exception to the hearsay rule.165

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162 NEB. REV. STAT. §§ 25-12,108 to -12,110 (Reissue 1964). Section 25-12,109 reads: "A record of an act, condition or event shall, insofar as relevant be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court the sources of information, method, and time of preparation were such to justify its admission."
164 Id.
165 The court cited 5 J. WIGMORE, EVIDENCE, § 1526 (3d ed. 1940) which states: "The entry should have been made at or near the time recorded, not merely because this is necessary to assure a fairly accurate recollection of the matter, but because any trustworthy habit of making business records will ordinarily involve the making of the record contemporaneously. The rule provides no precise time; each case must depend upon its own circumstances." (Italics were quoted by the court in Metropolitan, supra.) See also C. MCCORMICK, EVIDENCE § 284 (1954).
Though this decision restricts the use of summary compilations under the business records exception to the hearsay rule, other cases have provided a method for properly admitting compilations or tabulations of records into evidence at the discretion of the trial judge. Such a summary was allowed in \textit{Durand, Jackson \\& Associates, Inc. v. Nasr}, an action for recovery of architectural services.

In the \textit{Metropolitan} decision the court specifically limited itself to the arguments made by counsel based upon the Uniform Business Records as Evidence Act. The harsh consequences of this decision may be avoided under the discretion allowed the trial court by referring to \textit{Nasr} and offering the compilations as audits or tabulations rather than business records.

\section*{VII. INITIATIVE PETITION PROCEDURE}

In \textit{State ex rel. Morris v. Marsh} the Supreme Court of Nebraska clarified what is and is not procedurally acceptable in the evaluation of an initiative petition under the Nebraska Constitution and relevant statutes.

On July 3, 1968, petitions bearing the signatures of 57,521 electors were filed with the secretary of state. On July 5, 1968, additional petition forms were filed. The number of valid signatures needed was 48,640. On July 3, 1968, a verified statement as to persons or corporations contributing or receiving money or other things of value was filed with the petition forms. Supplemental itemized verified statements were filed on August 12 and August 28, 1968. On July 26, 1968, the secretary of state issued his certification that fewer than 48,640 of the signatures had been found acceptable or valid, and that the person or persons presenting such petitions had failed to file a satisfactory itemized verified statement of contributions and disbursements as required by statute. He then concluded that the initiative petition was insufficient and refused to certify the proposed amendment for placement on the ballot.

\begin{itemize}
\item \textsuperscript{166} \textit{Rose v. Kahler}, 151 Neb. 532, 535, 38 N.W.2d 391, 394 (1949): "The applicable rule is that audits or statements of account prepared for use at trial are not ordinarily admissible, but the trial court may, at its discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation which has been properly admitted."
\item \textsuperscript{167} 180 Neb. 409, 143 N.W.2d 122 (1966).
\item \textsuperscript{168} 183 Neb. 502, 162 N.W.2d 262 (1968).
\item \textsuperscript{169} Neb. Const. art. III, \S 2, which provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature...."
\item \textsuperscript{170} Neb. Rev. Stat. \S 32-704 (Reissue 1968).
\end{itemize}
The Nebraska Supreme Court held in Marsh that the Nebraska statute requiring a verified statement of every person, corporation or association sponsoring the petition, or contributing or pledging contributions of money need not be complete upon filing of the initiative petition. Instead, they ruled that it would be adequate if the itemized verified statement were filed in sufficient time to be available to the public "well prior to the general election date." This decision is particularly reasonable because it is usually not possible to have a complete list of financial backers at the time of filing an initiative petition. If such were the requirement, any time the complete list of contributors was not available at the time of the filing, the constitutional provision authorizing initiative petitions would be effectively thwarted. A statute should be used only to supplement the constitutional provision authorizing initiative petitions and not to limit or render useless its intended purpose of allowing the people themselves to participate in the legislative process.

The Nebraska court held that initiative petitions are presumed to be valid so long as they appear to have sufficient signatures and are in proper form. The presumption of validity is to continue until satisfactory proof is presented to rebut it. It is not rebutted by merely showing clerical errors. The policy of placing the burden on the state to prove the invalidity of a petition results from an uncomplicated rationale—since the right to initiative petitions is a constitutional right, it must be protected against overly technical objections. The following are examples of technical and clerical mistakes which the supreme court in Marsh held would not invalidate the signatures:

—Where either the circulator of an initiative page or a signatory sign as "Mrs." followed by the name of her husband, such signatures are valid;

—Where the venue of a verification shows an erroneous county and the remainder of the verification shows the actual county of notarization, such does not invalidate;

—Where there are incomplete signatures or dates on initiative petitions, they do not invalidate the remaining signatures;

\[171\] Id.  
\[174\] State ex rel. Ayres v. Amsberry, 104 Neb. 273, 177 N.W. 179 (1920).
—Where signatures utilize only initials and the last name, such signatures are valid;
—Where initiative petitions contain a sufficient address to identify the signers, they will be valid; and
—Where information is shown by ditto marks, it is valid.

It is quite apparent from Marsh that Nebraska courts will protect the right of initiative from any unnecessary obstructions. In essence, all that will be required in order to have a valid petition is a substantial compliance with the statutes.

VIII. MUNICIPAL CORPORATIONS

Lock v. City of Imperial

An airport authority formed under the authorization of the laws of the State of Nebraska is an independent public corporation, and the city which created such airport authority will not be held for damages caused by the negligence of the corporation. In reaching this decision in Lock v. City of Imperial the Nebraska Supreme Court, without comment, assumed that the duties involved in the operation of an airport for the benefit of a municipality were delegable to the independent corporation. Thus, they focused only upon the question of whether the airport authority was an agent of the city.

This issue arose in a suit against the City of Imperial and the airport manager for negligent failure to properly maintain an airport runway. The airport had been managed by the Airport Authority of the City of Imperial since 1960 when the city had created the public corporation. The airport authority had, since that date, maintained exclusive jurisdiction and authority over the operation and maintenance of the airport.

\[173\] 182 Neb. 526, 155 N.W.2d 924 (1968).

\[177\] Operation of an airport is a proprietary function of a city, and a city is therefore liable for negligent acts in operating and maintaining such. Braiser v. Cribbett, 166 Neb. 145, 88 N.W.2d 235 (1958).

\[178\] 182 Neb. 526, 155 N.W.2d 924 (1968).

\[180\] Appellee's brief at 10, Lock v. City of Imperial, 182 Neb. 526, 155 N.W.2d 924 (1968), quotes an affidavit from the chairman of the Airport Authority of the City of Imperial as follows: "That from April 11, 1960, to date, the City of Imperial, Nebraska, neither has had or maintained jurisdiction or authority over the airport nor the operation or maintenance of same...."
When a city undertakes to act for the benefit of the municipality in its corporate capacity, it must use ordinary care and diligence to avoid injuries to others in the performance of such acts. Furthermore, when a municipality undertakes such activities it owes certain duties to the public which cannot be delegated, and where a non-delegable public duty is found, no agency relationship or respondeat superior theory need be shown to impose liability upon the city. Duty to the public in this regard is limited to duties accruing to the general public such as maintenance of the streets and sidewalks in a safe condition or maintenance of the public water system.

The duties arising from the operation of an airport are not general public duties and are therefore delegable since such activity is not traditionally carried on by the city for the safety and welfare of the public. More important, the Nebraska Legislature has specifically delegated the entire maintenance and operation of an airport to the airport authority when such a corporation is formed by the city. The powers and duties allowed under such authorization are derived from the state rather than the city under which the corporation is formed. Therefore, if the city is to be held for the negligence of the airport authority, it must be by an agency or respondeat superior relationship.

Whether a public corporation created under the laws of the State of Nebraska is an agent of the governmental authority creating such corporation must be determined, where possible, by the intention of the legislature. Statutes authorizing the airport authorities provide that neither the city nor the state would be liable for the debts of the authority, and, more important, that the airport authority shall "have and retain full and exclusive jurisdiction and control over all facilities owned or thereafter acquired by such city for the purpose of aviation operation, navigation and air safety.

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181 Updike v. City of Omaha, 87 Neb. 228, 127 N.W. 234 (1910). The same is true where the legislature delegates the authority to so act to the city. Henry v. City of Lincoln, 93 Neb. 331, 140 N.W. 664 (1913).
182 Harms v. City of Beatrice, 142 Neb. 219, 5 N.W.2d 287 (1942).
183 City of Beatrice v. Reid, 41 Neb. 214, 59 N.W. 770 (1894).
184 Id.
185 Harms v. City of Beatrice, 142 Neb. 219, 5 N.W.2d 287 (1942).
186 Murray v. City of Omaha, 66 Neb. 279, 92 N.W. 299 (1902) (City was not held responsible for acts of independent board appointed under the charter of the city as authorized by the laws of the State of Nebraska).
The airport authority is specifically given the power to sue and be sued.\textsuperscript{189} The only powers retained by the city over the airport authority is to fill vacancies\textsuperscript{190} on the authority board and remove members thereof for "incompetence, neglect of duty, or malfeasance of office."\textsuperscript{191}

Such limited perogatives cannot be considered sufficient supervisory authority by the city as to subject the public corporation to the control of the city.\textsuperscript{192} The airport authority is therefore, a separate corporate entity for whose acts the city cannot be held liable.

IX. STATE CONSTITUTIONAL LAW

A. The Nebraska Supreme Court upheld in \textit{Tom and Jerry, Inc. v. Nebraska Liquor Control Comm'n}\textsuperscript{193} the validity of a Nebraska statute which in effect requires beer retailers to purchase for cash while permitting retailers of other alcoholic beverages to purchase on credit.\textsuperscript{194}

The issue decided in \textit{Tom and Jerry} was not whether the legislature had the power to pass a statute regulating credit sales in the liquor retail business, but whether the legislature had the authority to separate retailers of alcoholic beverages into two distinct classes and impose different restrictions upon each class. The plaintiffs contended that the statute was unconstitutional because it was an arbitrary classification not based upon any substantial difference in situation or circumstance which would naturally suggest the justice or expediency for the application of differing legislative standards to the classes thus established.\textsuperscript{195}

The general rule regarding classification for legislative purposes has often been repeated by the Nebraska Supreme Court:

\textsuperscript{191} Id.
\textsuperscript{192} In Brasier v. Cribbett, 166 Neb. 145, 88 N.W.2d 235 (1958), a city was held liable for the negligence of the operator of the airport since, under the contract between the operator and the city, the city retained supervisory authority and the manager was subject to the control and consent of the city in acting. The manager did not have exclusive right to possession or regulation of the airport.
\textsuperscript{193} 183 Neb. 410, 160 N.W.2d 232 (1968).
\textsuperscript{195} Safeway Stores, Inc. v. Nebraska Liquor Control Comm'n, 179 Neb. 817, 140 N.W.2d 668 (1966).
The rule established by the authorities is that while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects classified.\textsuperscript{196}

In \textit{United Community Serv. v. Omaha Nat'l Bank}\textsuperscript{197} the Nebraska Supreme Court held that the legislature may legislate in regard to a class of persons; but, it may not take what "may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered factions of the original unit as two classes and enact different rules for the governing of each."\textsuperscript{198}

In the area of alcoholic beverages, the long-standing policy has been that the legislature may regulate more broadly and without the same constitutional limitations confronting it as in the regulation of other areas of public interest.\textsuperscript{199} The United States Supreme Court held in \textit{Ziffrin v. Reeves}\textsuperscript{200} that state legislatures may, without at all infringing upon the due process clause, either terminate or severely regulate all liquor sales within their states. Under the states' inherent police power, the legislatures have the right to prohibit, regulate, or restrict the use, manufacture, distribution and sales of all alcoholic liquors, and to define alcoholic liquors of their character as property.\textsuperscript{201} A Nebraska statute\textsuperscript{202} provides that a liquor license shall not constitute property and the Nebraska Supreme Court in \textit{Leeman v. Vorcello}\textsuperscript{203} held that a liquor license was not a property right.

In \textit{Arrigo v. City of Lincoln}\textsuperscript{204} the court stated that classification must rest upon substantial differences in situations and circumstances separating the members of a natural class. In \textit{Tom and Jerry} the court held that there were real differences between the


\textsuperscript{197} 162 Neb. 786, 77 N.W.2d 576 (1958).

\textsuperscript{198} \textit{Id.}


\textsuperscript{200} 308 U.S. 132, 138 (1939).

\textsuperscript{201} \textit{Id. See also} \textit{In re Phillips}, 82 Neb. 45, 116 N.W. 950 (1903).

\textsuperscript{202} \textit{NEB. REV. STAT. § 53-149} (Reissue 1968).

\textsuperscript{203} 149 Neb. 702, 32 N.W.2d 274 (1948).

\textsuperscript{204} 154 Neb. 537, 48 N.W.2d 643 (1951).
The important factor to be observed in the Tom and Jerry decision is what constitutes real differences in situations and circumstances for the determination of whether more than a single class can be created. In the instant case, the court noted the following distinctions: (1) liquors other than beer can be stocked by a retailer in larger quantities than can beer; (2) liquor stock turnover is not as rapid as the beer turnover; and (3) liquor warehouses are usually more distant and deliveries less frequent than beer. The court also noted the fact that the retail sale of beer and the retail sale of other forms of alcoholic beverages were distinct. Precisely what the difference was the court did not bother to make clear. These real differences hardly seem "substantial" in the normal sense of the word. But in reference to a legislative act which can only be declared unconstitutional by a showing that it is arbitrary, the word "substantial" seems to have a different meaning. That is: if there are reasonable differences or likenesses then those differences or likenesses may be considered substantial. The presumption is, therefore, that a legislative act, as the one in question in Tom and Jerry, is constitutional unless it can be affirmatively shown that there are no substantial differences between the class which has restrictions imposed upon it and the class which is free of restrictions. If this burden cannot be met, no basis exists for a charge of legislative arbitrariness which would result in a declaration that the statute is unconstitutional.205

The Nebraska Supreme Court in upholding in Tom and Jerry the validity of the statute classifying beer retailers and liquor retailers other than beer into two distinct classes is in accord with almost all other jurisdictions.206

B. State ex rel. Norton v. Janing207 was a case of first impression in the Nebraska Supreme Court. Norton, a contractor, was charged with violation of a Nebraska penal statute208 for his failure to apply


206 182 Neb. 539, 156 N.W.2d 9 (1968).

207 Neb. Rev. Stat. § 52-119 (Reissue 1968): "It shall be unlawful for any person, firm or corporation who has taken a contract for the erection, improvement, repair or removal of any house, mill, manufactory or building of any kind for another, and has received pay-
money received from a contract with Kusek (for the erection of a garage), toward payment of a lien which had been filed against him by Larson Cement Stone Company and McCan Concrete.

Norton was bound over to the district court for trial and while being held by the sheriff for want of bail, commenced a habeas corpus proceeding asserting the unconstitutionality of the statute. Basically, he claimed that his detention in jail violated the state constitutional provision that "[n]o person shall be imprisoned for debt in any civil action on mesne of final process, unless in cases of fraud."209

The court held the statute authorizing imprisonment for the failure to pay debts to be unconstitutional because it permitted prosecution and possible imprisonment for failure to discharge contractual obligations without any proof of fraud. The state had contended that failure to prove fraud under the lien statute made no difference because the statute itself was a criminal statute and the constitutional provision prohibiting imprisonment for debt only applies to civil actions. This contention was not accepted by the court.

The decision examined and accepted the reasoning of People v. Holder.210 In that case the California District Court of Appeals had to deal with a similar statute and a constitutional provision which prohibited "imprisonment for debt in any civil action . . . unless in case of fraud."211 The California court determined that the prohibition against imprisonment for a debt cannot be evaded by simply making a legislative determination that nonpayment of a debt is a crime. The Nebraska court in accepting the California reasoning, stated that legislative bodies have often validly made

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209 NEB. CONST. art. I, § 20 (emphasis added).
211 Id. at 50, 199 P. at 835.
acts criminal which were once innocent. However, the legislative authority "to make acts criminal and punishable by imprisonment cannot be extended to an invasion of the rights guaranteed the citizens by the Constitution. . . . The exercise of them cannot be a crime."212 Although the California constitution only makes imprisonment for a debt in civil actions unconstitutional, and the statute in question in Norton concerned a criminal action, the Nebraska Supreme Court dismissed this distinction as being merely a technical rather than a substantive distinction. The court reasoned that form alone cannot change the actual substance of an enactment. In striking down a statute which permitted prosecution for a criminal offense for the failure to pay a contractual obligation without proof of fraud, our court has acted in accordance with the vast majority of jurisdictions.213

By declaring the debt statute unconstitutional, the Nebraska Supreme Court has also indicated that other statutes and court decrees might be subject to a similar fate. In Cain v. Miller,214 the court held that imprisonment for failing to pay alimony was not violative of the constitutional prohibition of imprisonment for debt. In deciding Cain, the court confronted the same constitutional provision that "no person shall be imprisoned for debt in any civil action on mesne or final process,"215 unless in case of fraud" and ruled:

A judgment, order or decree for payment of temporary alimony possesses different characteristics from an ordinary debt. Before it is made the court has decided that it is the duty of the defendant in the case to support his wife, and that he has the power to do so. It is designed to secure the performance of a legal duty in which the public has an interest. . . . We conclude, therefore, that the order to relator to pay temporary alimony is not a mere debt, and that the provision of the Constitution. . . . does not apply.216

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213 See Commercial Nat'l Bank of Sturgis v. Smith, 60 S.D. 376, 244 N.W. 521 (1932). Contra, State v. Williams, 133 Wash. 1212, 233 P. 285 (1925); Pauly v. Keebler 175 Wis. 428, 185 N.W. 554 (1921). These two courts held that a state had the police power to imprison for unpaid debts.
The Cain decision directly overruled two previous Nebraska cases which held that imprisonment for failure to pay alimony debt was unconstitutional. Is this to be distinguished from the Norton case where the legislature has by statute declared that a contractor must pay his debts? Just as the materialman's claim is a lien on a contractor for an obligation owed by that contractor to the materialman arising out of their contract, so alimony represents a lien on a spouse for an obligation owed to the other spouse arising from their marriage contract. If the analogy has validity, then the Norton case indicates a new position by the court. On the other hand, the Cain decision might be distinguished on the basis that in that case, unlike Norton, imprisonment did not occur until after an impartial judicial determination of the relevant facts, the entry of a judgment, and the violation of that judgment.

The Cain court expressly noted that before a decree for alimony is made, the lower court had decided that a duty of support existed and, therefore, it had the authority to enforce that decision and the decree requiring alimony payment through contempt proceedings. The policy argument in support of giving a court the power to enforce its decisions requiring payment of civil debts through contempt proceedings and jail sentences is that without such authority the court would have but very ineffective means to enforce its decrees. It must be remembered, however, that neither the court nor the legislature can controvert the express terms of the state constitution and in the area of civil debts, the state constitution is emphatic that imprisonment will not be tolerated.

X. TORT-GOVERNMENTAL IMMUNITY

In Brown v. City of Omaha the Nebraska Supreme Court held that cities and all other governmental subdivisions and local bodies of the state are not immune from tort liability arising out of the ownership, use, and operation of motor vehicles.

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217 The Nebraska Supreme Court has reaffirmed the Cain decision on many occasions. See Jensen v. Jensen, 119 Neb. 470, 229 N.W. 770 (1930); Umphenocer v. Hoosen, 121 Neb. 870, 236 N.W. 762 (1931); Maryott v. State, 124 Neb. 274, 246 N.W. 343 (1933); Thomas v. Thomas, 132 Neb. 827, 273 N.W. 483 (1937).


219 Coughlin v. Ehlert, 39 Mo. 285 (1866); Marsh v. Marsh, 162 Ind. 210, 70 N.E. 154 (1904).

The Brown decision has significantly changed the Nebraska law in the area of sovereign immunity. Justice McCown reasoned that the entire concept of governmental immunity from tort liability was antiquated and not relevant to modern society. Historically, the immunity rule had rested upon three grounds: (1) that the sovereign was inherently immune from suit; (2) that it is more expedient for injured individuals to suffer than for the public in general to be inconvenienced; and, (3) that governmental agents will perform their duties more effectively if not hampered by fear of tort liability.

In previous cases the Nebraska Supreme Court had drawn a distinction between proprietary functions and governmental functions in determining whether the governmental entity would be held liable. However, in Brown, McCown dismissed the governmental-proprietary test saying that it defied logical explanation.

Scope Of The Decision

The three justices speaking through Justice McCown limit the immediate impact of their decision by stating that in the entire area of sovereign immunity there should be a "gradual judicial transition which could be preferably accomplished by process of

221 Compare Greenwood v. City of Lincoln, 156 Neb. 142, 55 N.W.2d 343 (1952); Levin v. City of Omaha, 102 Neb. 328, 167 N.W.2d 214 (1918); Landmasser v. County of Cheyenne, 182 Neb. 345, 154 N.W.2d 706 (1968).

222 In Brown the court was split three ways: (1) McCown's opinion—three justices favored abolishing tort immunity; (2) Boslaugh's concurring opinion—joined the three favoring abolishment because he did not like the alternative as well; and (3) the dissenting opinion—three justices opposed the judicial abolishment of tort immunity for motor vehicles.

223 See Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 150 (1967). Here the court said the powers granted to municipal corporations can be divided into general classes and one class, which includes powers which are legislative, public, and governmental, and which import sovereignty; and a second class, which includes powers which are corporate, proprietary, quasi-private, and which are conferred for private advantage of municipal corporations. See also Lock v. City of Imperial, 182 Neb. 526, 155 N.W.2d 924 (1968). Operation of an airport is a proprietary function and subjects the city to tort liability if the city itself is operating it.

224 "The citizen who has been negligently injured by a vehicle of the city water department (which is a proprietary function) may recover, but the citizen who has been negligently injured by a vehicle of the city health department (which is a governmental function) of the same city cannot recover." Brown v. City of Omaha, 183 Neb. 430, 431, 160 N.W.2d 805, 806 (1968).
inclusion and exclusion, case by case, and stop by stop." Unfortunately, this statement is wholly incompatible with the court's fundamental premise that the basic doctrine is obsolete and unjust. If the entire concept of governmental tort immunity is obsolete and unjust, there is no logical support for a gradual transition through inclusion and exclusion. If this gradual transition is to occur on a case by case basis, then the possibility remains open that the evolution towards abolishing immunity from torts might be seriously slowed or completely stopped in a future judicial decision. The Wisconsin Supreme Court's decision in Holytz v. City of Milwaukee, which was cited in Brown, adopted a far more cohesive rationale for rejection of the immunity theory with their holding that there would be no future governmental immunity in the whole tort field.

In determining the tort liability of a municipality it is no longer necessary to divide its operations into those which are proprietary and those which are governmental. Our decision does not broaden the government's obligation so as to make it responsible for all harms to others; it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision.

It would also appear that Brown establishes no workable test for determining when the doctrine of immunity will or will not be applicable. Nevertheless, the court assumes the responsibility for making this very determination with their decision to include and exclude other areas of tortious conduct within the no-immunity rule on a case by case basis. To state that the doctrine is obsolete and unjust and then to specifically say that the court may or may not apply it in other cases is to give no guidance at all.

There appear to be two reasons for Justice McCown's caution: (1) the desire to avoid performing a legislative function; and/or, (2) the desire to begin dismantling the doctrine of immunity by stating a general policy while still reserving for future consideration a variety of uncertain problems in the area. His opinion specifically notes that because governmental immunity from tort liability encompasses such a large field, the legislative processes and procedures would be more effective in determining a comprehensive solution. And, "the court's processes and procedures are more effectively directed to a solution more narrowly limited to specific facts framed in litigated cases."
Although the decision in *Brown* is definitely limited, the holding expresses a clear intent to abolish governmental tort immunity protection in Nebraska. Certainly this is consistent with the movement to abolish the doctrine which is prevalent throughout the country.\(^{230}\) The *Brown* decision can be cited for the general proposition that immunity from tort liability is unjust, obsolete, and may no longer be a successful defense, and for the specific proposition that the doctrine of immunity no longer protects against tort liability arising out of the use and operation of motor vehicles.

### XI. Torts

*Brugh v. Peterson*\(^{231}\) has altered the meaning of "gross negligence" as used in Nebraska's motor vehicle guest statute.\(^{232}\) The court held in effect that each act or omission of the defendant driver must be *by itself* "grossly negligent." At approximately 10 p.m., an automobile driven by one Fischer was proceeding east on Pioneers Boulevard in Lincoln, Nebraska. After failing to stop at a "Stop" sign, this auto entered the intersection of Seventieth Street, at which point it was struck by the Peterson automobile which had been proceeding south on Seventieth Street.

Fischer's negligence consisted of (1) failure to notice and react to the reflectorized "Pavement Ends" sign 1,000 feet west of the intersection, (2) failure to notice and react to the reflectorized "Stop Ahead" sign 400 feet from the intersection, (3) failure to hear and/or react to a statement made by Campbell, a passenger, regarding the "Stop" sign, (4) failure to see the headlights of another vehicle approaching the intersection at approximately the same time, and (5) failure to see and/or react to the "Stop" sign itself. At no time during the entire 1,000 feet traveled from the "Pavement Ends" sign to the intersection did the defendant Fischer change or reduce his speed or apply his brakes.

A wrongful death action was brought by the estate of Dennis Brugh, a passenger in the Fischer automobile, against Fischer and against the driver of the other automobile involved in the intersection collision. The jury returned a verdict in the amount of $35,000.00 against each defendant. The defendant's motions for judgments not withstanding the verdict were overruled but their motions for a new trial were sustained. Plaintiff appealed this determination.

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\(^{230}\) See, e.g., Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962); Williams v. City of Detroit, 364 Mich. 231, 11 N.W.2d 1 (1961).

\(^{231}\) 153 Neb. 190, 159 N.W.2d 321 (1968).

\(^{232}\) NEB. REV. STAT. § 39-740 (Reissue 1968).
In order for a plaintiff to be successful in maintaining an action for wrongful death under the Nebraska motor vehicle guest statute, the plaintiff must prove gross negligence of the driver.\textsuperscript{233} Interpretations of the statute define gross negligence to include great and excessive negligence or negligence in a very high degree which indicates the absence of even slight care in performance of a duty.\textsuperscript{234} There is no fixed rule for ascertaining what is gross negligence within the meaning of the guest statute. Rather, the determination has been made dependant upon the facts and circumstances of each particular case.\textsuperscript{235} Prior to the \textit{Brugh} decision, the Nebraska Supreme Court had usually chosen to define gross negligence in negative terms. It is not momentary inattention,\textsuperscript{236} it does \textit{not necessarily} extend to wanton or wilful or intentional disregard for a guest’s safety,\textsuperscript{237} it may not always arise from an act but may arise from a series of acts or omissions.\textsuperscript{238}

Previous decisions of the Nebraska court had set certain broad guidelines on how the facts and circumstances of each particular case should be analyzed in order to determine whether there is sufficient evidence for a finding of gross negligence. In \textit{Smith v. Damato},\textsuperscript{239} the defendant’s decedent drove his automobile into a road grader head-on while moving at a high speed and after passing signs reading “Road Repairs Ahead” and “Men Working” which had red flags attached to them. The road grader was visible at all times from a distance of one-quarter mile or more. The Nebraska Supreme Court ruled that in these circumstances each act of the defendant should not be segregated and weighed separately to determine whether or not it alone constituted gross negligence under the guest statute. Instead, the acts should be viewed as a whole and as they relate to each other. In affirming the trial court’s finding that the defendant had been grossly negligent, the \textit{Smith} court applied the test which had been formulated in \textit{Komma v. Kreils}.\textsuperscript{240} In \textit{Komma}, the Nebraska Supreme Court had established that in a death action under the guest statute where no single act of the host could be separated from the whole, or from the

\textsuperscript{233} Id.
\textsuperscript{235} In \textit{re Bradner’s Estate}, 173 Neb. 692, 114 N.W.2d 730 (1962).
\textsuperscript{236} Callen v. Knopp, 180 Neb. 421, 143 N.W.2d 266 (1961).
\textsuperscript{238} Id.
\textsuperscript{240} 144 Neb. 745, 14 N.W.2d 591 (1944).
several acts of the host, as an independent cause of the fatal accident, the acts of the host were to be considered as a whole and could not be weighed separately to determine whether any of them constituted gross negligence.

It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of this accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence. A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach the degree of negligence that is considered gross. Here the jury were not bound to find that defendant's acts were negligence in a very high degree, but a jury question was in our opinion presented as to whether or not, under the circumstances here, the things which defendant did and failed to do amounted to negligence in a very high degree, i.e., gross negligence.241

The Supreme Court in both Smith and Komma thus held that the question of gross negligence is for the jury unless it is definitely apparent from the evidence that there was no possibility of gross negligence. From the facts in Brugh, the defendant Fischer might have been guilty of gross negligence, and, if the test laid down in Komma and followed in Smith were applied to the facts in Brugh, the question of gross negligence would have been a jury question not to be interfered with by either the trial judge or the appellate court except upon a finding that the jury's determination was not based upon the evidence.

The Komma test for the determination of gross negligence seems to be based on sound logic. Since gross negligence as opposed to ordinary negligence is a question of degree, it is apparent that such a question requires a factual distinction and, therefore, is essentially a jury question.

The Nebraska court has also held in Hess v. Holdsworth242 that a finding of gross negligence was justified if there was evidence of imminence of danger which was apparent to or known by the operator and if he was timely cautioned by the guest concerning the manner of operation, and if he still persisted in the negligent operation consisting not only of speed but of other conditions, known to the operator, which enhanced the peril. This rule

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241 Id. at 750-51, 14 N.W.2d at 595.
could be applicable to Brugh where a warning was given but was not heeded; the Supreme Court did not, however, consider Hess in the course of the Brugh opinion.

The Nebraska Supreme Court, in deciding Brugh, deviated considerably from its former decisions defining gross negligence. The majority divided the total factual picture into segments. They then analyzed each segment independently relying upon prior cases to hold the separate incidents insufficient to constitute gross negligence.\(^{243}\) The court said that the failure to stop at the “Stop” sign or see the Peterson automobile, alone, was insufficient to establish gross negligence.\(^ {244}\) It stated that the failure to observe warning signs was not gross negligence.\(^ {245}\) The court reasoned that the string of omissions (failure to observe the reflectorized “Pavement Ends” sign, the “Stop Ahead” sign, the verbal warning, the lights of the southbound automobile, and the reflectorized “Stop” sign) were merely momentary in nature. It is submitted that if such a series of omissions are merely momentary in nature and can be considered as segments, independent of each other, then the prior meaning of gross negligence, as used in the guest statute, has been drastically changed. It would now appear that gross negligence can only be established by proving one isolated act which is, by itself, \textit{per se} grossly negligent. The result of this decision is to make gross negligence under the guest statute extremely difficult to prove.

What constitutes gross negligence in states which have adopted a guest statute varies greatly.\(^ {246}\) Some states still demand ordinary care to be exercised by the host to his guests. Most states, however, define gross negligence in terms similar to Nebraska’s approach prior to the Brugh decision. Nebraska now has joined the minority of states in its interpretation of gross negligence under the guest statute.

\(^{243}\) Brugh v. Peterson, 183 Neb. 190, 197, 159 N.W.2d 321, 326 (1968) (dissenting opinion).

\(^{244}\) See Callen v. Knopp, 180 Neb. 421, 143 N.W.2d 266 (1966). The minority opinion distinguishes this case from present by noting the driver in Callen did not realize he was entering an intersection where there was a “Stop” sign on the arterial and was looking in the opposite direction from the approaching vehicle. Under such circumstances, his negligence was characterized as momentary in nature rather than persisting over a period of time.

\(^{245}\) Boismier v. Maragues, 176 Neb. 547, 126 N.W.2d 844 (1964). In Boismier the accident occurred at night, at a “T” intersection involving no other vehicles. The signs involved had no illumination qualities; the location of the only sign apparently not at the intersection itself was not shown; the driver put on his brakes as soon as he recognized the danger ahead.

\(^{246}\) See Annot., 3 A.L.R. 3d 180 §§ 42, 43, 44 for a summary of the various approaches courts take to determine this question.
XII. TRAFFIC ADMINISTRATION

In Ziemba v. Johns, defendant was arrested for operating a motor vehicle while under the influence of intoxicating liquor. Under Nebraska law it is provided that:

Any person who operates...a motor vehicle upon a public highway in [Nebraska] shall be deemed to have given his consent to submit to a chemical test of his blood, urine, or breath, for the purpose of determining the amount of alcoholic content in his body fluid. The test shall be administered...whenever the person has been arrested.

Defendant refused to take the test and a hearing was held to determine whether his refusal was reasonable.

At the hearing defendant asserted that his refusal was reasonable because he had entered a plea of guilty to the criminal charge of drunken driving. The Director of Motor Vehicles deemed this an unreasonable ground for refusal and defendant's license was revoked for a period of one year. On removal to the district court, defendant's license was reinstated and the Director appealed.

On appeal the Nebraska Supreme Court held that a plea of guilty to a criminal charge of drunken driving does not preclude the subsequent revocation of the defendant's license in an administrative proceeding.

247 183 Neb. 644, 163 N.W.2d 780 (1968).
248 Nebraska law provides that: "It shall be unlawful for any person to operate or be in actual physical control of any motor vehicle while under the influence of alcohol...." Neb. Rev. Stat. § 39-727 (Reissue 1968).
250 The procedure adopted was in conjunction with the following statutory provision: "If a person so arrested shall refuse to submit to the test...it shall not be given, and the arresting officer shall make a sworn statement to the Director of Motor Vehicles stating that he had reasonable grounds to believe that the person was operating...a motor vehicle...under the influence of alcoholic liquor...and that he refused to submit to the test." Neb. Rev. Stat. § 39-727.08 (Reissue 1968). It is further provided that "[u]pon receipt of the officer's report...the Director...shall notify such person of a date for hearing before him as to the reasonableness of the refusal to submit to the test....[I]f it is not shown...that such refusal...was reasonable, the Director shall summarily revoke the privilege of such person, for a period of one year from the date of such order." Neb. Rev. Stat. § 39-727.09 (Reissue 1968).
251 The criminal proceeding occurred prior to the administrative proceeding before the Director, and resulted in a conviction, fine, and a mandatory six month suspension of the defendant's driver's license.
proceeding under the implied consent law. The holding rejected defendant’s contention that the only purpose behind the implied consent law was to adduce evidence in order to obtain a criminal conviction of the licensee. A second purpose, it was held, is to protect the public from the irresponsible driver.

While it is clear that defendant’s argument, that refusal to submit to the test is subsequently made reasonable by a guilty plea to a charge of drunken driving, is a form of “bootstrapping,” it is just as clear that the plea of guilty eliminates the necessity for the chemical test required by law. The prescribed test is designed solely to determine the alcoholic content of the blood, and if the test results establish that a specific percentage of blood content is alcohol, the defendant will be convicted of the statutory offense and his license will be suspended as part of the mandatory sentence. In this manner the statute serves to protect the public from the irresponsible driver. It is not clear in such a situation, however, precisely how an administrative hearing to determine the reasonableness of a refusal to submit to a chemical test is intended to protect the public from the irresponsible driver. That hearing is only for one purpose: to determine whether the defendant’s refusal to submit to the test was reasonable. Therefore, it is immaterial whether the defendant actually was intoxicated. By holding, as the majority in Ziemba does, that the hearing is designed to protect the public by making a determination of reasonableness, the majority is, in effect, holding that the public is being protected from the driver who was unreasonable in his refusal to submit to the test.

The statute penalizes a failure to submit to the chemical test even though the reason for the test has been eliminated. Clearly,

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252 The court reasoned that the administrative proceeding was merely to determine whether a person’s privilege to drive shall be revoked. Therefore, any criminal prosecution for drunken driving has no bearing on this proceeding. See Marbut v. Motor Vehicles Department of Highway Commissions, 194 Kan. 620, 400 P.2d 982 (1965); Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961).

253 183 Neb. 644, 647, 163 N.W.2d 780, 782 (1968). A hearing to determine the reasonableness of a refusal to submit to a chemical test is not concerned with whether the chemical results which would have been obtained would have served a legitimate purpose in a criminal proceeding. An unreasonable refusal may not be subsequently transformed into a reasonable refusal simply because the person has been convicted.


255 The major reason for the statute is to adduce evidence in order to obtain a plea of guilty. This conviction results in an automatic suspension of the operator’s license, and in this manner the public is protected from the irresponsible driver.
the administrative proceeding is separate and distinct from the
criminal proceeding. But by virtue of the statutory scheme, the
hearing effectuates public policy by revoking one's license upon
refusal to submit only where the defendant has not pleaded guilty.
That proceeding carries with it the mandatory suspension of the
defendant's operator's license. This public policy would not neces-
sarily have been effectuated, however, had the defendant not
entered a plea of guilty.

Had the defendant submitted to the test and subsequently
pleaded guilty to the criminal charge of drunken driving, he would
have had his license revoked; in all likelihood, for a period of six
months. But since he refused to take the test, an additional sus-
pension of one year is imposed for no other reason than because he
was "unreasonable" in refusing to take the test. This has nothing
to do with protecting the public, unless it be argued that the
additional suspension is serving this function. But the result is
illogical, and perhaps the court has too readily dismissed the
rationale presented by the defendant.

XIII. WILLS—STATUTORY EXEMPTION
IN LIEU OF HOMESTEAD

The Nebraska Supreme Court held in In re Estate of Grassman257
that there was fraud in the inducement in the making of an ante-
uptual agreement sufficient to render it voidable because there was
not full disclosure of all material facts relating to the amount and
value of the wife's estate prior to the signing the document.258 It
also held that the surviving husband was entitled to an award of
$500.00 in lieu of homestead when the wife as head of the household
died without a homestead.

Wade and Katherine were married in the early afternoon of
August 17, 1960, in Alliance, Nebraska. Immediately prior to the
wedding, Wade was asked by Katherine's attorney to sign the
following document:

256 Note, however, that this is subject to the provisions of Neb. Rev. Stat.
§ 39-727.14 (Reissue 1968), which allows the Director to suspend a
license upon conviction of an offense of driving under the influence
of intoxicating liquor.
257 183 Neb. 147, 158 N.W.2d 673 (1968).
258 See In re Estate of Logan Enyart, 100 Neb. 337, 160 N.W. 120 (1916).
The court held that even if the intended spouse knows in a general
way that the intended husband is wealthy that is not enough to
satisfy the full disclosure requirement in making antenuptual con-
tracts.
The undersigned, Wade W. Grassman, who is contemplating marriage to Katherine Kent... hereby agrees and contracts that he shall receive no part of the estate of said Katherine Kent should he survive her. He hereby completely and without any reservation renounces and surrenders any and all rights he might acquire in her property by reason of being her husband should she precede him in death.

The signing by Wade was done hurriedly. In fact, both reading and signing the agreement required no more than three minutes. Katherine's attorney made no explanation to Wade of the nature or extent of Katherine's property and Wade knew nothing of the extensive property owned by his fiance. Katherine, prior to the wedding, had executed a will leaving all of her property to her two daughters from a previous marriage.

A year after the marriage, Wade became disabled and began receiving $350.00 per month as disability pay plus $100.00 per month from Katherine for his support. When Katherine died, Wade brought an action for his statutory share of Katherine's estate and for a statutory exemption in lieu of homestead.

In voiding the agreement, the court reasoned that antenuptial agreements will apply equally to either spouse so long as full prior disclosure of all the real and personal property is made. If the full disclosure requirement is not met, then the agreement will be subject to voidance.

The antenuptial agreement in Grassman could have also been voided for its failure to comply with the statute. The document was not signed by both the parties (Wade alone signed it) to the proposed marriage nor was it acknowledged in the manner required by law for the conveyance of real estate.

The Nebraska Supreme Court, allowing Wade a $500.00 statutory exemption in lieu of homestead, found that Katherine had been the head of the household. The exemption statute provides in part:

All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property, except wages...
Prior cases have held that support of a dependent husband ordinarily qualifies the wife as head of the family within the meaning of the exemption.\textsuperscript{264} However, the court inadequately answered the question of precisely what criteria must be met for the wife to become the head of the household when the husband is not a dependent. In Grassman Wade was receiving $350.00 monthly in disability pay which was supplemented by an additional $100.00 monthly from his wife. Thus, only two-ninths of his support was coming from Katherine. This varies little from the hypothetical where a husband retires and receives $700.00 monthly in retirement benefits and his wife supplements that with $200.00 monthly that she receives in wages. Is she to be considered the head of the family? What if the husband receives $350.00 monthly and the wife receives $100.00 monthly? From the holding in Grassman, the wife in these hypotheticals could be declared the head of the household for statutory exemption purposes.

The Illinois Supreme Court has held that where a husband is living and residing with his family, he is the householder and head of the family as contemplated by the statute.\textsuperscript{265} In South Carolina a husband, who had been separated from his wife for fourteen years, and who during such time did not support his wife, was nevertheless the head of the household, and therefore entitled to a homestead; the separation not having absolved him from the duty to support his wife.\textsuperscript{266}

The best method for determining the question of statutory exemption would be to define the purpose of the statute. It appears that the purpose of the statute was to provide a sum sufficient for a spouse to find housing upon the death of the other spouse. If this is what the statute was meant to accomplish, then the court's award to Wade of $500.00 in lieu of homestead was probably correct in light of the fact that Katherine's house was willed to her two daughters and thereby left Wade without a place to live. The Nebraska Supreme Court in Grassman implied this rationale but did not specifically state it. It would appear that the court preferred to become involved with the meaning of "head of the household" rather than with the more obvious inquiry into the purpose of the statute.

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Roger M. Beverage '70
Thomas R. Pansing, Jr. '69
John A. Rasmussen, Jr. '70
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\textsuperscript{264} State ex rel. Lucas v. Houch, 32 Neb. 525, 49 N.W. 462 (1891).
\textsuperscript{265} Taylor v. Taylor, 223 Ill. 423, 79 N.E. 139 (1906).
\textsuperscript{266} Appeal of Broakland Bank, 112 S.C. 400, 100 S.E. 156 (1919).