REPORTS OF CASES

DETERMINED BY

THE SUPREME COURT

OF THE

STATE OF NEVADA

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Volume 82

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, on Behalf of Itself and Others Similarly Situated, Appellant, *v.* INSURANCE COMMISSIONER OF THE STATE OF NEVADA, Respondent.

No. 4926

January 3, 1966 409 P.2d 248

Appeal from judgment of the First Judicial District Court Ormsby County; Frank B. Gregory, Judge.

Declaratory judgment action by insurance company to determine the meaning of insurance premium tax statute. The lower court entered judgment dismissing the action and the insurance company appealed. The Supreme Court, Thompson, J., held that declaratory judgment action rather than petition to review order of insurance commissioner was proper way to resolve issue

between insurance company and insurance commissioner as to meaning of insurance premium tax statute.

Reversed and remanded.

Richard R. Hanna, of Carson City, for Appellant.

Harvey Dickerson, Attorney General, and *Daniel R. Walsh,* Deputy Attorney General, of Carson City, for Respondent.

1. Insurance.
   Role of statute allowing insurance companies a petition to review an order of insurance commissioner is to provide judicial review of discretionary orders and decisions of commissioner, on matters legislatively committed to him for resolution. NRS 680.230.
2. Insurance.
   Trial court, on petition to review order or decision of insurance commissioner, will look to information presented to commissioner and decide whether commissioner abused his discretion in entering order or decision in question. NRS 680.230.
3. Insurance.
   Where dispute between insurance companies and insurance commissioner concerned meaning of insurance premium tax statute, question of law was involved, not administrative discretion, and statute permitting review of administrative decisions did not apply. NRS 680.230, 686.010.
4. Statutes.
   Meaning of tax premium statute was not question which legislature had committed to insurance commissioner for decision. NRS 686.010.
5. Declaratory Judgment.
   If statute is unclear, a court, when asked to by declaratory judgment action, must seek out and proclaim its meaning. NRS 30.040.
6. Declaratory Judgment.
   Resort to declaratory procedure is appropriate way to resolve an issue that has not been committed for decision to administrative body or officer. NRS 30.040.
7. Declaratory Judgment.
   Declaratory judgment action rather than petition to review order of insurance commissioner was proper way to resolve issue between insurance company and insurance commissioner as to meaning of insurance premium tax statute. NRS 30.040, 680.230, 686.010.
8. States.
   Doctrine of sovereign immunity concerns immunity from suit to establish state liability or control state actions and

does not apply to suit between insurance company and insurance commissioner to ascertain meaning of a

state statute.

OPINION

By the Court, Thompson, J.:

The question presented on this appeal is whether an insurance company may seek a judicial declaration of the meaning of the insurance premium tax statute by an action for declaratory relief, or must it petition to "review" an order of the insurance commissioner in the manner provided by the Nevada Insurance Law? The proceeding below was for declaratory relief and was dismissed because that court believed that the remedy provided by the insurance code was exclusive. We do not agree and reverse.

Of course, the dismissal precluded inquiry into the merits of the controversy. The mutual life insurance companies and the insurance commissioner have different views about the meaning of the insurance premium tax statute, NRS 686.010. The companies contend that the statute imposes a tax only upon the stated and fixed premiums as reflected in the policies of insurance. On the other hand, the commissioner believes that the statute also allows a tax upon the companies' divisible surplus apportioned to the holders of life insurance policies and annuity contracts as dividends and applied to provide paid-up additions to such policies and contracts. Accordingly, he ordered an additional tax payment. In an effort to resolve their divergent views, Prudential, for itself and on behalf of 132 other life insurance companies similarly situated, commenced a class suit for declaratory relief to ascertain the meaning of the premium tax statute. The commissioner persuaded the lower court that Prudential had selected the wrong remedy; that only a petition to "review" the commissioner's order in accordance with NRS 680.230 of the insurance code is permissible.

[Headnotes 1, 2]

We think that the role of NRS 680.230 is to provide for the judicial review of *discretionary* orders and decisions of the commissioner, on matters legislatively committed to him for resolution. [1] In such cases, a petition to review the commissioner's findings may be filed by the aggrieved party with the district court of Ormsby County. The reviewing court will look to the information presented to the commissioner and decide whether he abused his discretion in entering the order or decision in question. National Life and Casualty Ins. Co. v. Hammel, 81 Nev. 125, 399 P.2d 446 (1965); see also Urban Renewal Agency v. Iacometti, 79 Nev. 113, 379 P.2d 466 (1963); McKenzie v. Shelly, 77 Nev. 237, 362 P.2d 268 (1961); Nevada Tax Commission v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957). Whether an administrative officer has properly exercised his discretion or abused it normally calls for an evaluation of the factual material presented to that officer and upon which he acted.

[Headnotes 3-7]

The present dispute between the mutual life insurance companies and the commissioner is

not within the "review" statute, as it involves a question of law and is not concerned with administrative discretion. The meaning of the premium tax statute is not a question

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[1] The statute reads: "1. Any order or decision made, issued or executed by the commissioner, except an order to make good an impairment of capital or surplus of a deficiency in the amount of admitted assets, whereby any company or person is aggrieved, shall be subject to review by the district court of Ormsby County.

"2. Any company or person aggrieved by an order or decision of the commissioner may, within 60 days after the order or decision has been mailed to or otherwise served upon the company or person entitled to receive the same, appeal from such order, or decision by filing a petition for a review of the findings of the commissioner in the district court of Ormsby County. If an appeal is not so taken it shall conclusively be deemed to have been waived.

"3. The commencement of proceedings under this section shall not operate as a stay of the commissioner's order, findings, ruling or decision, unless so ordered by the court."

that the legislature has committed to the insurance commissioner for decision. Of course, the commissioner may have his own notion about the meaning of that statute and announce it by administrative order, as he did here. However, his opinion on the subject is quite different from a discretionary power to decide the issue. The premium tax and its scope have been legislatively expressed. If the law is unclear or obscure, a court, when asked, must seek out and proclaim its meaning. Declaratory relief is tailored for that purpose. NRS 30.040 authorizes a declaratory action to "have determined any question of construction * * * arising under the statute * * *." Without question, Prudential chose the proper remedy. Iroquois Post No. 229 v. City of Louisville, 279 S.W.2d 13 (Ky., 1955); Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069 (1950); Baumgardt v. Isaacs, 29 Ill.2d 29, 193 N.E.2d 31 (1963). Resort to the declaratory procedure is the appropriate way to resolve an issue that has not been committed for decision to the administrative body or officer.

[Headnote 8]

As this case must be remanded, we must decide one further question. The lower court was persuaded that the doctrine of sovereign immunity also precluded declaratory relief. That doctrine concerns immunity from suit to establish state liability or control state action. Neither is involved here. The purpose of this suit is simply to ascertain the meaning of a state statute. This kind of litigation has never been subject to the immunity doctrine. Abelson's Inc. v. New Jersey State Bd. of Optom., 5 N.J. 412, 75 A.2d 867 (1950). [2]

Reversed and remanded.

Badt, J., and Zenoff, D. J., concur.

[2] We note that in 1965 the state waived its immunity from liability and action. Stats. Nev. 1965, ch. 505, p. 1413. The present dispute arose before the 1965 act.

BARTSAS REALTY, INC., Appellant, *v.* HERSHEL LEVERTON and FIRST NATIONAL BANK OF NEVADA, Executor of the Estate of LOUIS A. WOITISHEK, Also Known as L. A. WOITISHEK, Deceased, Respondents.

No. 4916

January 11, 1966 409 P.2d 627

Appeal from the Eighth Judicial District Court, Clark County; John Mowbray, Judge.

Proceeding involving competing claims of real estate brokers for commission resulting from sale of estate property. The lower court awarded commission to one broker and the other appealed. The Supreme Court, Badt, J., held that, in absence of finding as to which of competing brokers was the procuring cause of sale of estate property, it was impossible to decide which was entitled to recover commission from the estate and matter must be remanded.

Reversed and remanded.

Gregory & Gregory, of Las Vegas, for Appellant.

Jones, Wiener & Jones, of Las Vegas, for Respondent Hershel Leverton.

Samuel S. Lionel, of Las Vegas, for Respondent First National Bank of Nevada.

1. Executors and Administrators.
   Broker who claimed commission on sale of estate property had standing to protest so much of confirmation of sale as awarded commission to another broker. NRS 148.070.
2. Brokers.
   Faced with competing brokers each claiming commission, court must decide which was procuring or inducing cause of sale.
3. Brokers.
   Broker who is procuring or inducing cause of sale is entitled to commission irrespective of who makes actual sale or terms thereof.
4. Brokers.
   To constitute procuring cause of sale, thereby entitling broker to commission, conduct must be more than

merely trifling.

5. Brokers.

In nonexclusive situations, merely introducing eventual

purchaser is not necessarily enough to warrant broker's commission, inasmuch as first broker may still be shown to have abandoned efforts or have been helplessly ineffective.

6. Brokers.

Seller cannot in bad faith ignore or intervene so as to deprive broker of commission.

7. Brokers.

Broker must be given opportunity to consummate sale with ultimate purchaser where he initially introduced purchaser and has not abandoned negotiations, even though purchaser made separate, more attractive offer either directly to seller or through another broker.

8. Brokers.

Seller, in order to relieve himself of liability to broker who introduced prospective purchaser must notify procuring broker of later offer and give him reasonable time to protect his commission or seller must decline the sale.

9. Brokers.

Statute providing that executor or administrator may free himself of personal liability for brokerage commissions by contracting in writing with any bona fide agent to secure purchaser for any property of estate is immaterial in determining which of competing brokers was procuring cause of sale of estate property. NRS 148.110.

10. Brokers.

Executor's inclusion as part of sales agreement of a provision to pay commissions to one broker for sale of estate property was no more than personal promise by executor and it could not defeat the already vested right of any broker who was procuring cause of the sale.

11. Brokers.

Vested right of any broker who was procuring cause of sale of estate property was primary and broker looked directly to the estate for payment of commission.

12. Executors and Administrators.

It was incumbent upon court in approving payments of broker's commission for sale of estate property to ascertain who was the procuring cause of the sale.

13. Brokers.

Generally, real estate broker is agent for the seller.

14. Appeal and Error.

In absence of finding as to which of competing brokers was the procuring cause of sale of estate property, it was impossible to decide which was entitled to recover commission from the estate and matter must be remanded with direction to lower court to make necessary finding. NRS 148.060.

OPINION

By the Court, Badt, J.:

Two real estate brokers here compete for a commission resulting from a sale of estate property. The sale

was confirmed by the court (NRS 148.060), which heard both brokers and then awarded the commission to respondent Hershel Leverton on three grounds: (1) appellant Bartsas Realty, Inc., "did not participate in the negotiations leading to the escrow agreement"; (2) Bartsas' contention that it was entitled the commission because it "brought the parties together" was negated by application of NRS 148.110—Contracts to find purchaser: limitation on commission; and (3) Bartsas "at no time" was "agent" for the seller. We find all three grounds inapplicable and not supported by the evidence.

The facts are brief. Executor First National Bank of Nevada announced generally to local real estate brokers a desire to sell Las Vegas property of decedent Louis A. Woitishek. The bank asked $990,000 for a 73-acre parcel with "terms to be worked out." One of the brokers, Mrs. Mary Bartsas, submitted a written offer for $990,000 from United States Development Company by Louis Davidson, president. The bank took this offer under advisement. Four days later it received another offer from Davidson for the same property, this time through broker Leverton. The bank told Leverton of Davidson's earlier offer by Mrs. Bartsas and Leverton replied, "Well, he has changed brokers and he has come to me now." The bank then notified Mrs. Bartsas of the second broker's involvement "for whatever action she thought she should take." Mrs. Bartsas communicated with Leverton without satisfaction; she found Davidson unavailable and, after three weeks, resorted to the mails, writing Davidson that she still hoped to effect a sale. Davidson never replied. Instead he continued negotiations with the bank through Leverton and eventually consummated a purchase, the escrow agreement providing the bank would pay Leverton a five percent commission. This is the sale the court confirmed.

[Headnote 1]

1. A threshold point is whether Bartsas had standing to protest so much of the confirmation of sale as awarded the commission to Leverton. NRS 148.070 provides: "Any person interested in the estate may file written objections to the confirmation of the sale and

may be heard thereon * * *." Was Bartsas Realty, Inc., "interested in the estate"? The question might be disposed of by deciding Bartsas was not objecting to the confirmation of sale per se but only to an allocation of commission incident thereto, and therefor was not within the purview of NRS 148.070. Alternately, even applying NRS 148.070, it has been held by the California Supreme Court under an identical statute [1] that "the probate court has exclusive jurisdiction to adjust conflicting claims of two brokers." In re Hughes' Estate, 3 Cal.App.2d 551, 40 P.2d 295, 296, and cases cited therein.

[Headnotes 2, 3]

2. Faced with competing brokers, a court must decide which was the "procuring" or "inducing" cause of the sale. Flinders v. Gilbert, 141 Mont. 442, 378 P.2d 385; 12 C.J.S., Brokers § 92. That broker is entitled to a commission, irrespective of who makes the actual sale or terms thereof. Close v. Redelius, 67 Nev. 158, 215 P.2d 659; Ramezzano v. Avansino, 44 Nev. 72, 189 P. 681; Dalke v. Sivyer, 56 Wash. 462, 105 P. 1031, 27 L.R.A., N.S., 195. [2]

[Headnotes 4, 5]

It is impossible to measure in quantitative units the efforts necessary to constitute "procuring cause." Suffice that on the one hand it is "conduct that is more than merely trifling." Williams v. Walker, 95 N.H. 231, 61 A.2d 522. Thus in non-exclusive situations, merely introducing the eventual purchaser is not necessarily enough. Feeley v. Mullikin, 44 Wash.2d 680, 269 P.2d 828; Ingalls v. Streeter, 67 N.Y.S.2d 351. The first broker still may be shown to have abandoned efforts or been helplessly ineffective. Frink v. Gilbert, 53 Wash. 392, 101 P. 1088; Flinders v. Gilbert, supra.

[Headnotes 6-8]

On the other hand, a seller cannot in bad faith ignore or intervene so as to deprive a broker of commission.

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[1] Cal.Prob. Code § 756.

[2] We do not pass on the possible personal liability of a seller who, irrespective of "procuring cause," individually contracts to pay a second broker.

The broker must be given an *opportunity* to consummate a sale with the ultimate purchaser where he initially introduced that purchaser and has not abandoned negotiations. This is so even where the purchaser has made a separate, more attractive offer either directly to the seller or through another broker. Feeley v. Mullikin, supra. The seller, in order to relieve

himself of liability, must notify the procuring broker of the later offer and give him a reasonable time to protect his commission—or the seller must decline the sale. "Good faith and fair methods of trade require such a course of conduct." Grace Realty v. Peytavin Planting, 156 La. 93, 100 So. 62, 43 A.L.R. 1096.

Here, the lower court only found "Bartsas Realty, Inc., did not participate in the negotiations leading to the escrow agreement." This gives no indication whether Bartsas still might have been "procuring cause."

[Headnotes 9-12]

3. As to Bartsas' claim that it "brought the parties together," the court rejected this on the basis of NRS 148.110, which provides an executor or administrator may free himself of *personal* liability for brokerage commissions by contracting in writing "with any bona fide agent to secure a purchaser for any real or personal property of the estate." Clearly this is immaterial as to determining which of competing brokers was "procuring cause." Further, no such pre-sale writing ever was executed here. Instead, the executor-seller included as part of its sale agreement a provision to pay commission to Leverton. This was no more than a personal promise by the executor; it could not defeat the already vested right of a broker who was "procuring cause." Such a right was primary and looked directly to the estate. It therefore was incumbent upon the court in approving payment from the estate to ascertain who was the "procuring cause" of the sale. This now must be done.

[Headnote 13]

4. Finally, the lower court held that "at no time" was Bartsas Realty, Inc., acting as agent for the seller. This is directly contra to the general rule that a real

estate broker *is* agent for the seller. We consistently have insisted upon a seller's legal obligation to his broker, absent express agreements otherwise, even amidst unethical conduct by a purchaser. Close v. Redelius, supra; Ramezzano v. Avansino, supra. Then, too, this agency question is immaterial as to "procuring cause."

[Headnote 14]

For the reasons expressed, this case must be remanded with direction to the lower court to find specifically whether Bartsas Realty was the procuring cause of the sale. Absent such a finding, it is impossible to decide which of the competing brokers is entitled to recover a commission from the estate. At this time we express no view as to the rights of Leverton against the executor individually.

Reversed and remanded for a new trial in accordance with the views herein expressed.

Thompson, J., and Zenoff, D. J., concur.

McNamee, C. J., being incapacitated, the Governor assigned Honorable David Zenoff of the Eighth Judicial District Court to sit in his place.

LUCERNE MOTOR HOTEL CORPORATION, a Body Corporate, Appellant, *v.* AIRWAYS INTERNATIONAL RESERVATIONS CORPORATION, a Body Corporate, Respondent.

No. 4914

January 13, 1966 409 P.2d 622

Appeal from the Eighth Judicial District Court, Clark County; John Mowbray, Judge.

Action to recover rent for space on plaintiff's direct wire reservations board in air terminal. The lower court rendered judgment for the plaintiff, and the defendant appealed. The Supreme Court, Badt, J., held that in absence of evidence that motor hotel had been sold to defendant and that defendant had assumed vendor's

obligation for the rental of the space, the plaintiff could not recover from defendant on basis of a third-party beneficiary agreement.

Reversed.

Samuel S. Lionel and *Jerome F. Snyder,* of Las Vegas, for Appellant.

Jones, Wiener & Jones, of Las Vegas, for Respondent.

Contracts.

In absence of evidence that motor hotel had been sold to defendant and that defendant had assumed the vendor's obligation for rental of space on plaintiff's direct wire reservations board in air terminal, plaintiff could not recover from defendant on basis of a third-party beneficiary agreement.

OPINION

By the Court, Badt, J.:

Airways International Reservations Corp. (hereinafter called Reservations) filed a complaint against the Americana Motor Hotel Corp. (Americana) and Lucerne Motor Hotel Corp. (Lucerne) as joint defendants. The complaint alleged (1) that Americana had contracted with Reservations for space on a direct wire reservations board in the Las Vegas air terminal; (2) that subsequently Americana sold the motor hotel to Lucerne under an agreement whereby Lucerne agreed to assume the obligation for the rental; (3) that the defendants were jointly liable for these rents.

The defendants answered with a general denial.

The trial was before the court without a jury. Since no stenographic report of the evidence or proceedings at the trial was made, the parties proceeded under the provisions of NRCP 75(n) and the court settled and approved a statement of the evidence and proceedings. Such statement shows (1) that a photograph of the reservations board was admitted into evidence for the information of the judge to show the location of the sign and phone in question; (2) that a letter on the stationery of the Americana Motor Hotel stating "We will pay 75.00 per month until we are current. /s/ The Americana" was admitted; (3) that a letter from the

auditing department of Americana requesting Reservations for a record of all transactions was admitted; (4) that the original agreement for the rental of the space on the reservations board between Americana and Reservations was admitted in evidence; (5) that the president of Reservations testified that the facilities contracted for were, in fact, installed; and (6) that the credit manager of the telephone company testified that "the telephone company had an account with Americana Motor Hotel Corp. and Lucerne Motor Hotel Corp. in regard to the telephone line and testified that both companies paid for said service for the telephone line." Just that, and nothing more.

Although the plaintiff Reservations Corporation alleged the sale of the hotel corporation by Americana to Lucerne and the assumption by Lucerne of Americana's obligation to pay for the rental of the "direct telephone line service between the airport and the said motel" and although this was denied by Lucerne, no evidence was offered or received either of such sale (or any alleged date thereof) or of such assumption agreement. It is apparent that the agreed statement of evidence contains nothing tending to prove the sale and assumption. For such failure of proof the judgment must be reversed.

It is evident that appellant's contention is based upon a third-party-beneficiary agreement. In Fruitvale Canning Co. v. Cotton, 115 Cal.App.2d 622, 252 P.2d 953, 955, the court said:

"Before a third party who may derive a benefit of a promise is entitled to bring an action thereon there must be an intent clearly manifested by the promisor to secure the benefit claimed to the third person."

Judgment reversed and remanded with directions to enter judgment in favor of Lucerne Motor Hotel Corporation.

Thompson, J., and Zenoff, D. J., concur.

McNamee, C. J., being incapacitated, the Governor assigned Honorable David Zenoff of the Eighth Judicial District Court to sit in his place.

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82 Nev. 14, 14 (1966) Federal Ins. Co. v. Toiyabe Supply

FEDERAL INSURANCE COMPANY, Appellant, *v.* TOIYABE SUPPLY COMPANY and NEVADA BANK OF COMMERCE, Respondents.

No. 4925

January 14, 1966 409 P.2d 623

Appeal from the Second Judicial District Court, Washoe County; Thomas O. Craven, Judge.

Subrogation case. Summary judgment was granted in the trial court and an appeal was taken. The Supreme Court, Zenoff, D. J., held that under the circumstances surety had subrogation rights against bank which paid on forged indorsements on checks. The court further held that a question of fact existed which precluded summary judgment in favor of one defendant.

Reversed and remanded.

[Rehearing denied February 10, 1966]

Vargas, Dillon, Bartlett & Dixon, and *Alex. A. Garroway,* of Reno, for Appellant.

Gray, Horton and Hill, of Reno, for Respondents.

1. Banks and Banking.

   It is the absolute duty of a bank honoring a check to pay only to that payee, and no amount of care to avoid error will protect it from liability if it pays to the wrong person. NRS 92.030.

2. Banks and Banking.

   When a check is presented by a third person with the alleged indorsement of the payee, the payee bank must ascertain at its peril whether indorsement is forged, and genuineness of last indorsement on check

does not relieve such bank from duty of looking to genuineness of preceding indorsements. NRS 92.030.

3. Principal and Agent.

An employee authorized to make a restricted indorsement of checks for deposit is not authorized to make a general indorsement.

4. Corporations.

One taking a check made payable to a corporation must suffer the consequences if the agent indorsing it is without authority unless corporation is negligent or otherwise precluded by its conduct from setting up such lack of authority.

5. Bills and Notes.

One with authority to indorse checks, "For Deposit Only," who indorses generally, is without authority within

the meaning of statute providing that where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature. NRS 92.030.

6. Banks and Banking; Subrogation.

Where employee's duties were primarily connected with corporate employer's subsidiaries, he was authorized to make deposits "For Deposit Only," he had no separate or independent authority to withdraw from subsidiaries' bank accounts, he put unauthorized indorsements on checks payable to subsidiaries, eventually the checks were deposited with bank which had signature cards on file showing limitation on employee's authority to withdraw from subsidiaries' accounts, and bank guaranteed prior indorsements, the bank was liable to subsidiaries for their losses, and employer's compensated surety which had paid subsidiaries' losses, as subrogee, succeeded to all rights of employer and subsidiaries against bank.

7. Judgment.

A material issue of fact existed as to apparent authority of employee who procured payment of checks on forged indorsements, precluding summary judgment in favor of defendants to whom the checks were first passed.

OPINION

By the Court, Zenoff, D. J.:

Appellant appeals from an order granting summary judgment in favor of respondents.

Frank N. Kneeshaw was an employee of Basic, Inc., assigned principally to duties connected with the operation of Valley Power Company and Townsite Development Company (wholly owned subsidiaries of Basic), which were conducted in one office at Gabbs, Nevada, near the general office of Basic. Among other duties, Kneeshaw had charge of billings for power and the collection of all charges therefor and the collection of money payable to Townsite; he kept the books of both Valley Power and Townsite; he was authorized to make deposits to the respective accounts of those companies in Nevada Bank of

Commerce which he did by rubber stamp or handwritten indorsement, “For Deposit Only,” followed by the name of the company.

He had no separate or individual authority to withdraw from the bank account of Valley Power; he had no authority to withdraw from the Townsite account except with a joint signature of another person.

Toiyabe Supply Company operated a general store in Gabbs with a gambling casino.

Kneeshaw was employed by Basic from August 1956 to April 1, 1961 when he committed suicide. During the period of his employment, he frequently took to Toiyabe checks received by him payable to Valley Power or Townsite for obligations owing by third parties, and drawn on various banks. At times he wrote on the backs of some of those checks, in his own handwriting, the name of the payee and his own name, for example, “Valley Power Co. F. N. Kneeshaw.” Toiyabe gave Kneeshaw, in exchange for the indorsed checks either cash or a requested amount of cash and the balance by check of Toiyabe with either Valley Power or Townsite as payee. Kneeshaw deposited those checks from Toiyabe to the accounts of his employer.

Checks totalling $38,927.15 have been recovered which show that Kneeshaw negotiated them with Toiyabe by using the aforementioned indorsement. It is also stipulated that some checks given by Toiyabe to Kneeshaw, payable to Valley Power or Townsite, in exchange for checks and/or cash, were later properly deposited by Kneeshaw to the accounts of the respective payees in the total amount of $12,646.51. Thus, a total loss of $26,280.64 is claimed.

All the checks accepted by Toiyabe from Kneeshaw were indorsed by it and deposited in its account with Nevada Bank of Commerce, and that bank collected them from the drawee banks and gave credit therefor to the Toiyabe account.

Federal Insurance Company was surety on a bond to Basic “and any subsidiary corporation or corporations now existing or hereafter created, as their respective interests may appear” to pay and make good all losses of money, securities and other property through any fraudulent or dishonest act or acts, including embezzlement, forgery, misappropriation, wrongful abstraction or wilful misapplication, committed by any one of the

employees acting alone or in collusion with others. By reason thereof, Federal has paid to Valley Power $26,703.13 and Townsite $15,017.19, a total of $41,720.32.

It was further stipulated that no person in authority with Basic, Valley Power, or Townsite had any actual knowledge of those actions by Kneeshaw before he committed suicide.

1. In Valley Power Co. v. Toiyabe, 80 Nev. 458, 396 P.2d 137 (1964), this Court stated, "Having paid the assureds in full for their claimed losses, the insurer was subrogated, by operation of law, to the rights, if any, which the assureds may have had against the defendants before such payments were made."

This appeal seeks to determine the subrogation rights of appellant surety company against the respondents Bank and Toiyabe.

First, it must be determined whether Valley Power and Townsite had any rights against respondents. We will first consider rights against respondent Bank.

NRS 92.030 provides that "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

We find the transactions in the instant case to be within the purview of that statute. Here, an unauthorized indorsement was made and eventually the checks were deposited with respondent bank which had signature cards on file showing the limitation on the defalcating employee's authority to withdraw moneys from the corporate accounts.

[Headnotes 1, 2]

NRS 92.030 is identical to Sec. 23 of the Uniform Negotiable Instruments Law. Many cases have been decided under that section. It is well established that it is the absolute duty of a bank honoring a check to pay only to that payee and no amount of care to avoid error

will protect it from liability if it pays to the wrong person. Provident Trust Co. v. Interboro Bank & Trust Co., 133 A.2d 515 (Pa. 1957). Because of NIL § 23, the collecting bank never acquired title to the checks nor acquired a right to receive payment thereon from the drawee. And when a check is presented by a third person with the alleged indorsement of the payee, the paying bank must ascertain at its peril whether the indorsement is forged and the genuineness of the last indorsement on a check does not relieve such bank from the duty of looking to the genuineness of preceding indorsements. Home Indemnity Co. v. State Bank of Fort Dodge, 8 N.W.2d 757 (Iowa 1943).

[Headnotes 3-5]

An employee authorized to make a restricted indorsement of checks for deposit is not authorized to make a general indorsement. One taking a check made payable to a corporation must suffer the consequences if the agent indorsing it is without authority unless the corporation is negligent or otherwise precluded by its conduct from setting up such lack of authority. One with authority to indorse checks, "For Deposit Only," who indorses generally, is without authority within the meaning of the NIL. Standard Steam Specialty Co. v. Corn

Exchange Bank, 116 N.E. 386 (N.Y. 1917).

[Headnote 6]

Respondent bank stamped on the back of each check, "Prior endorsements guaranteed." "The guaranty of prior endorsements is required by clearing houses generally in the orderly conduct of banking business in order that the collecting bank may be held liable by the drawee bank for the validity of all prior endorsements. Such a guaranty is a business risk assumed by the collecting bank for the benefit of subsequent endorsers and especially for the benefit of the drawee bank, which ordinarily has no way of ascertaining whether the indorsements are genuine and which accordingly relies upon the guaranty in honoring checks presented to it. It is a risk undertaken by the collecting bank in the usual course of business with full knowledge of its potential liability and possible ensuing loss." Standard

82 Nev. 14, 19 (1966) Federal Ins. Co. v. Toiyabe Supply

Acc. Ins. Co. v. Pellecchia, 104 A.2d 288 (N.J. 1954). We believe, in this case, that that guaranty inured to the benefit of the payees, for their subrogee has chosen to bring this action rather than sue the drawee banks, and the payee has even fewer ways of ascertaining genuineness of indorsements—he never sees the cancelled checks.

The trial court in its pretrial order in the instant case made a finding of fact that Kneeshaw only had authority to indorse checks for deposit. There is no evidence in the record to indicate that Valley Power and Townsite conducted themselves in such a manner to lead the bank to believe Kneeshaw had authority to indorse generally, in fact, signature cards were on file negating any such authority. Therefore, we find that the indorsements in question here were without authority, that the respondent bank took the checks at its peril and guaranteed prior indorsements, and that it is liable to the payees (Valley Power and Townsite) for paying on the ineffective instrument.

2. We must now determine the rights of the appellate surety as subrogee to the rights of Valley Power and Townsite.

Respondents submit that a compensated surety, when maintaining an action against a collecting bank, stands in different stead than Valley Power and Townsite. The authority cited for this proposition is Meyers v. Bank of America, 77 P.2d 1084 (Cal. 1938), and U.S. Fidelity & Guaranty Co. v. First Nat. Bank in Dallas, Tex., 172 F.2d 258 (5th Cir. 1949), and similar cases applying the "weighing of the equities" doctrine.

This doctrine can be explained by the following quotation from the Meyers decision: "In equity it cannot be said that the satisfaction by the bonding company of its primary liability should entitle it to recover against the bank upon a totally different liability. The bank, not being a wrongdoer, but in the ordinary course of banking business, paid money upon these checks, the genuineness of which it had no reason to doubt, and from which it received no benefits. The primary cause of the loss was the forgeries committed by the employee, whose integrity was at least impliedly vouched for by his

employer to the bank. We cannot say that as between the bank and the paid indemnitor, the bank should stand the loss. * * * Our conclusion is that since the bonding company had no superior equities, it was not entitled to be subrogated to any claim plaintiff might have had against the bank." Id. at 1089.

Some significance is given to the fact that the surety has been paid to assume a risk and therefore has fewer equities than the assured.

Respondents thus contend that summary judgment was proper in the instant case since Federal had no superior equities and could not, therefore, prevail as subrogee of Valley Power and Townsite.

Appellant, on the other hand, argues that the surety should be given the benefit of the contractual obligation against the respondents by allowing subrogation and cites Standard Acc. Ins. Co. v. Pellecchia, supra. "It is objected that such a recovery by the surety constitutes a 'windfall' in that in the event of such recovery the surety suffers no loss on its surety bond although it has been paid premiums by the insured to reimburse it against just such a loss, as here. This argument loses sight of two fundamental facts: first, that even if the surety recovers against the third party on subrogation it still has been put to the expense of paying agent's commissions on the writing of its bond, to the necessity of investigating the insured's claim and of settling or litigating it, and, second, that the amounts of recoveries by subrogation are taken into consideration in arriving at the amount of premiums to be charged for surety bonds." Id. at 302.

Admittedly, there is a split of authority concerning the rights of a compensated surety as subrogee. We disapprove of the "weighing of the equities" doctrine and find no significance in the fact that a surety is compensated. We hold, therefore, that the surety subrogee succeeds to all rights of its assured and is subject only to those defenses the bank may have raised against the assureds. See 35 Va.L.Rev. 647, 23 Ins. Counsel J. 104, 22 Ins. Counsel J. 453.

The exigencies of the free flow of commerce require,

in our view, that a bank be held to the strict requirements of the authority given to it by customers who should not be concerned that its depositing agency act in any manner in the handling of customer accounts but in the way it is directed by the customer. To hold otherwise would shake the confidence of the commercial public in its banking institutions and restrict the accepted use of checks and drafts as instruments of money.

"The general rule is that a person or corporation called upon to act upon the faith of a

written instrument, including an endorsement of commercial paper, must ascertain its genuineness at its peril. The principle rests in public policy and has been universally necessary for the security of commercial transaction." Hamlin's Wizard Oil Co. v. United States Express Co., 106 N.E. 623 (Ill. 1914).

Therefore, while we are of the opinion that the trial court was correct in finding no material issue of fact as between the appellant and respondent bank, we think the wrong law was applied. Therefore, we reverse the summary judgment in favor of the bank and direct the entry of summary judgment in favor of Federal pursuant to appellant's cross-motion for summary judgment below.

[Headnote 7]

3. The trial court had also entered summary judgment for Toiyabe but the reasons for the ruling are not supported by the record. The issue of apparent or ostensible authority that may have been created by the employer companies toward Toiyabe is one of fact. From the record, we cannot say, as a matter of law, that no apparent authority existed. Thus, there being an issue of material fact, summary judgment is not proper. The summary judgment in favor of Toiyabe Supply Company is reversed and that matter remanded for further proceedings.

We express no opinion as to liability, if any, between the respondents. That question was not presented by this appeal.

In view of these rulings, the appeal on the cost bill is

dismissed and appellant allowed its taxable costs below and here.

Thompson and Badt, JJ., concur.

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82 Nev. 22, 22 (1966) Schramm v. El-Khatib

RAYMOND M. SCHRAMM, DIANE SCHRAMM and JO ANN CLARK, Administratrix of the Estate of C. M. SCHRAMM, Deceased, Appellants, *v.* SHUKRI 'M' EL-KHATIB, STANLEY OAKES, GARTH CAMERON, B. A. TODKILL, MIDTOWN MOTORS, INC., a Nevada Corporation, and TODKILL LINCOLN MERCURY, INC., a Nevada Corporation, Respondents.

No. 4920

January 19, 1966 409 P.2d 888

Appeal from the Eighth Judicial District Court, Clark County; John F. Sexton, Judge.

Wrongful death and personal injury action. The trial court entered order dismissing action for failure to prosecute within two years after action was filed. The plaintiffs appealed. The Supreme Court, Badt, J., held that trial court did not abuse its discretion when it dismissed action for failure to prosecute, where three and one-half years passed between time action was filed and motion was granted and where rights of litigants might be finally resolved in similar action in sister state.

Affirmed as modified.

John Peter Lee, of Las Vegas, for Appellants.

Robert E. Jones, of Las Vegas, for Respondent Garth Cameron.

Christensen, Bell & Morris, of Las Vegas, for Respondents Stanley Oakes and Midtown Motors, Inc.

Morse & Graves, of Las Vegas, for Respondents B. A. Todkill and Todkill Lincoln Mercury, Inc., a Nevada Corporation.

82 Nev. 22, 23 (1966) Schramm v. El-Khatib

1. Dismissal and Nonsuit.
   Trial court, in wrongful death and personal injury action, did not abuse its discretion when, on defendant's motion, it dismissed action for failure to prosecute, where three and one-half years had passed between time action was filed and time motion was granted and where rights of litigants might be finally resolved in similar action in sister state. NRCP 41(e).
2. Dismissal and Nonsuit.
   Where trial court dismissed plaintiff's wrongful death and personal injury action under rule which concerned dismissal for failure to prosecute and which made such dismissal a bar to another action upon same claim for relief against same defendant, words "with prejudice" in court's order were surplusage and were stricken. NRCP 41(e).

OPINION

By the Court, Badt, J.:

This is an appeal from the order of the court below granting respondents' motion to dismiss pursuant to NRCP 41 (e) for failure to bring the action to trial within two years from and after said action was filed. [1]

The suit (for damages for personal injury and wrongful death) was filed August 28, 1961, naming Shukri 'M' El-Khatib, Stanley Oakes, Garth Cameron, B. A. Todkill, Midtown

Motors, Inc., and Todkill Lincoln Mercury, Inc., as defendants. Apparently, this action was instituted a little over a year and a half after the New Mexico Federal District Court granted motions of defendants to quash service but prior to the New Mexico jury verdict in favor of appellants and against Shukri 'M' El-Khatib on February 9, 1962.

Answers to the Nevada complaint were filed by respondents—Garth Cameron (September 28, 1961); Stanley Oakes and Midtown Motors, Inc. (October 2, 1961); B. A. Todkill and Todkill Lincoln Mercury, Inc. (November 6, 1961). Shukri 'M' El-Khatib was not personally served and he did not answer or appear. Appellants took no other action after filing the complaint until

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[1] NRCP 41(e) Want of Prosecution. The court may in its discretion dismiss any action for want of prosecution * * * whenever plaintiff has failed for two years after action is filed to bring such action to trial. * * * A dismissal under this subdivision (e) is a bar to another action upon the same claim for relief against the same defendants unless the court otherwise provides."

a motion to dismiss for failure to prosecute, pursuant to Rule 41(e) was filed on April 24, 1964. Stanley Oakes and Midtown Motors, Inc., filed the same motion on May 5, 1964. Both motions were denied. Another motion was filed by Garth Cameron on February 15, 1965, and B. A. Todkill and Todkill Lincoln Mercury, Inc., filed their motion on March 1, 1965. The court, without objection considered Stanley Oakes' and Midtown Motors, Inc.'s motion which had been previously filed as being renewed for the purpose of the hearing.

On March 10 and 11, 1965, the Nevada District Court ordered the action dismissed with prejudice as to Cameron, Todkill, Todkill Lincoln Mercury, Inc., Oakes and Midtown Motors, Inc.

It will be seen that the dismissals were ordered approximately three and one-half years after the action had been filed--no attempt having been made to bring it to trial within that time.

An appeal from said orders was duly taken by all the appellants herein.

As a preliminary matter, it should first be noted that heretofore these appellants moved in the Federal District Court of New Mexico to dismiss with prejudice their causes of action against defendants Murdock-Salyer Chevrolet Company, Garth Cameron and B. A. Todkill individually. Murdock-Salyer Chevrolet Company is not named as a defendant herein and is not a respondent. Garth Cameron and B. A. Todkill are named as respondents despite the granting of appellants' own motion in the New Mexico Federal District Court to dismiss their cause of action with prejudice as to these defendants. This would seem to eliminate them as parties to the Nevada action and to the present appeal by application of the doctrine of

estoppel. The judgment against Shukri 'M' El-Khatib in New Mexico would likewise seem to eliminate him as respondent herein as being res judicata. This would appear to leave only Stanley Oakes, Midtown Motors, Inc., and Todkill Lincoln Mercury, Inc., as respondents herein.

Rule 41(e) was amended in this jurisdiction, effective March 16, 1964, by adding a concluding sentence as follows: "A dismissal under this subdivision (e) is a bar

to another action upon the same claim for relief against the same defendants unless the court otherwise provides." Instead of using the words of NRCP 41 (e) as amended, the court below simply dismissed the action against them "with prejudice." This dismissal was made under the discretionary powers of the court after the expiration of some three and one-half years without bringing the case to trial. Appellants do not contest the fact that it was subject to dismissal under the provisions of the section but contend that the dismissal and particularly the dismissal "with prejudice" was an abuse of the lower court's discretion, because the continued and complex proceedings before the New Mexico District Court and the Tenth Circuit Court of Appeals (which appellants outline in greater detail than recited herein) provided a reasonable excuse for not bringing the Nevada action to trial. The sole question for our consideration, then, is whether there was such abuse of discretion.

There are no ironclad rules governing the situation. In Harris v. Harris, 65 Nev. 342, 196 P.2d 402 (1948), this court said:

"The only limitation upon the discretionary power of the court to dismiss a cause for delay in its prosecution is that it must not be abused. (Citation.)

"Each particular case presents its own peculiar features, and no ironclad rule can justly be devised applicable alike to all. (Citations.)

"The discretion to be exercised, under the circumstances of the particular case, is a legal discretion, to be exercised in conformity with the spirit of the law and in such a manner as to subserve and not to impede or defeat the ends of substantial justice. (Citations.)

In Northern Illinois Corp. v. Miller, 78 Nev. 213, 370 P.2d 955 (1962), quoting Harris v. Harris, supra, this court said: "'[U]nless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal.'"

We turn then to the proceedings in the New Mexico courts. As briefly as may be stated, they were as follows:

Suit was initially filed in the Second Judicial District Court of New Mexico on September 5, 1958, by the appellants and, upon petition, was removed to the U.S. District Court for New Mexico on September 24, 1958. Several defendants in that action moved to quash service on the basis that they were nonresidents of the State of New Mexico. The Federal District Court granted the motion of Murdock-Salyer Chevrolet Company, Stanley Oakes, Midtown Motors, Inc., Garth Cameron, B. A. Todkill, Todkill Lincoln Mercury, Inc., and Cooper Oldsmobile, Inc.

An interlocutory appeal was attempted by the appellants but the Tenth Circuit Court of Appeals refused to hear it. Consequently, the case went to trial with only Red Gilmore and Shukri 'M' El-Khatib as defendants. A verdict was returned in favor of appellants as against those two defendants. Thereafter, appellants sought reversal of the previous order granting the motion to quash service of process on the other defendants. The Tenth Circuit sustained a motion to dismiss the appeal on December 19, 1962, because no final judgment had been entered. (See Schramm v. Murdock-Salyer Chevrolet Company, 312 F.2d 249 (10th Cir. 1962)).

After a final decree was entered by the U.S. District Court for New Mexico, appellants moved to dismiss with prejudice their causes of action against defendants Murdock-Salyer Chevrolet Company, Garth Cameron, and B. A. Todkill for reasons other than an alleged defect of service of process. An appeal was once again taken to the Tenth Circuit Court of Appeals questioning the quashing of service on the remaining defendants. On September 16, 1965, the Tenth Circuit reversed and remanded stating that, "The evidence is as yet inconclusive as to who was the owner of the automobile at the time of the collision." Schramm v. Oakes, No. 8011, Domenici, Admr. v. Oakes, No. 8012, 352 F.2d 143 (10th Cir. 1965). Apparently, the court felt that "this [was] the type of case where appellants should have the opportunity of proving jurisdiction during the trial on the merits and [should] not be cut off at a preliminary hearing." The action is presently pending before the U.S. District Court in New Mexico.

All these proceedings in the New Mexico courts were

set forth in detail to the court below through affidavits in opposition to the motion to dismiss. Appellants assert that the court below was guilty of a gross abuse of discretion in its failure "to give due and accurate assessment" to the New Mexico litigation. The district court's order of March 11, 1965, indicates that the motion was first argued on March 4, 1965, and was continued at appellants' request to March 11, at which time the court considered the arguments and the affidavits submitted (which included the affidavit of New Mexico counsel reciting the New Mexico proceedings), whereupon the court made its order of dismissal. The record shows that the New Mexico litigation had continued for three years before the Nevada

suit was filed, and has since been pending in Nevada for an additional three and one-half years, without any attempt to bring it to trial.

[Headnote 1]

Further, it is apparent that if the New Mexico District Court ultimately finds that it has jurisdiction over Stanley Oakes, Midtown Motors, Inc., and Todkill Lincoln Mercury, Inc., then the appellants' rights will be adjudicated in the New Mexico case. On the other hand, if that court finds that it does not have jurisdiction over them, such finding will also determine that they cannot be held liable to the appellants, and would be res judicata in the present Nevada case. As the rights of the litigants may be finally resolved in the New Mexico case, we cannot find that the lower court here abused its discretion in granting a 41(e) dismissal. We wish to make it clear, however, that the dismissal in this case shall not be a bar to the New Mexico proceeding, and therefore modify the order of dismissal below by adding these words: "This dismissal is not a bar to the New Mexico action upon the same claim for relief and against the same defendants."

[Headnote 2]

As noted above, under the 1964 amendment to NRCP 41(e), "a dismissal under the subdivision (e) is a bar to another action upon the same claim for relief against the same defendants unless the court otherwise provides." If such bar or prejudice was all that the court desired or intended, the dismissal "with prejudice" was

unnecessary and surplusage. However, in order that it may not be construed as in any manner interfering with proceedings in New Mexico, and may not be pleaded as res judicata in the New Mexico case, the words "with prejudice" are hereby stricken from the court's orders of March 10 and 11, 1965.

We find no gross abuse of the court's discretion in dismissing the action under NRCP 41(e).

Modified as above, the orders are affirmed.

Thompson, J., and Zenoff, D. J., concur.

McNamee, C. J., being incapacitated, the Governor assigned Honorable David Zenoff of the Eighth Judicial District Court to sit in his place.

LOUISE LANIGIR, ANN CHAIX, MARGE ARDEN, THEODORE ARDEN, a Minor, LYDIA RUSS, IVY LANIGIR and THOMAS ARDEN, Appellants, *v.* JOHN ARDEN, BETTY ARDEN aka NONEY M. ARDEN, Respondents.

No. 4924

January 19, 1966 409 P.2d 891

Appeal from judgment of the Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Action to quiet title. The lower court entered decree for the defendants, and the plaintiffs appealed. The Supreme Court, Thompson, J., held that deed, which was signed by decedent owner's surviving children as grantors with intent to effectuate sale to specified grantees, but which was never physically delivered to named grantees, and for which no consideration was received by children, was ineffectual as conveyance to such grantees, and thus subsequent purported deed from such grantees to one such surviving child was equally infirm and could not defeat title claims of other children.

Reversed and remanded.

Vargas, Dillon, Bartlett & Dixon, and *Robert W. Marshall,* of Reno, for Appellants.

Belford & Anglim, of Reno, for Respondent Betty Arden.

Leslie B. Gray, of Reno, for Respondent John Arden.

1. Deeds.
   Deed executed, acknowledged and recorded is presumed to have been delivered, and party questioning fact of delivery must overcome presumption by clear and convincing evidence.
2. Appeal and Error.
   Appellate court may not weigh conflicting evidence and, in doing so, substitute its view for that of trial court.
3. Deeds.
   Evidence which was not diminished in value, impeached, contradicted or questioned qualified, as matter of law, as clear and convincing evidence sufficient to overcome presumption of delivery of deed executed, acknowledged and recorded.
4. Deeds.
   Deed, which was signed by decedent owner's surviving children as grantors with intent to effectuate sale to specified grantees, but which was never physically delivered to named grantees, and for which no consideration was received by children, was ineffectual as conveyance to such grantees, and thus subsequent purported deed from such grantees to one such surviving child was equally infirm and could not defeat title claims of other children.
5. Vendor and Purchaser.

Fact that wife of one of 11 surviving children of deceased property owner was notified by at least one of other children that interest was claimed in such property was notice of facts sufficient to cause further inquiry by wife, thereby destroying her claim as bona fide purchaser under deed to such property from her husband as result of divorce proceedings.

6. Adverse Possession.

One requisite of adverse possession is hostility. NRS 11.070, 11.120, 11.140, 40.090.

7. Tenancy in Common.

Even as between cotenants who are not related, tenant out of possession may assume that permissive possession of his cotenant is amicable until notified that it has become hostile, and evidence needed to show hostility or notice must be stronger than that required in case between strangers.

8. Tenancy in Common.

Where cotenants are also brothers and sisters, relationship is not unlike that of trust and demands that tenant in possession, in order to make out case of adverse possession, openly disavow claims of his brothers and sisters and unequivocally make his claim of sole ownership known to them.

9. Tenancy in Common.

Cotenants who are brothers and sisters bear fiduciary relationship to one another, and each is entitled to trust

other and not question conduct unless its purpose is clearly made known.

10. Tenancy in Common.

Record established that possession of real estate by one of 11 cotenant's brothers and sisters was with permission of his brothers and sisters, rather than adverse or hostile.

11. Equity.

Especially strong circumstances must exist to sustain defense of laches when statute of limitations has not run.

12. Equity.

Each case must be examined with care in determining whether to sustain defense of laches where statute of limitations has not run.

13. Quieting Title.

Children of deceased property owner seeking to quiet title to property as cotenants were not barred by laches from obtaining requested relief, where statute of limitations has not run and there was no showing of prejudice to defendants occasioned by delay. NRS 11.070, 11.080, 11.190.

14. Estoppel.

Doctrine of estoppel by deed estops grantor from asserting that he acquired title after and not before conveyance and forbids grantor from denying his misrepresentation as to title contained in deed.

15. Estoppel.

Doctrine of estoppel by deed was not applicable in case involving purported deeds signed by deceased property owner's 11 children, where grantors named in deed had title to property at time deed was signed and there was no misrepresentation as to title.

16. Quieting Title.

Fact that some of heirs of deceased property owners, who were plaintiffs in action to quiet title, withdrew from litigation at conclusion of plaintiffs' case in chief and did not appeal from adverse decision did not effectuate transfer of their undivided interest in property, and their title remained the same as those who did not withdraw as parties plaintiff.

OPINION

By the Court, Thompson, J.:

This case concerns title to approximately 10 acres of land near Reno, Nevada. The former owner, Philip Arden, died intestate in 1929, and title to the property vested equally in eleven surviving children as tenants in common, subject to estate administration. Philip's estate was closed on February 8, 1937, and a final decree of distribution was entered and recorded, showing devolution of a one-eleventh interest to each of the surviving

children. The action below was to quiet title. The plaintiffs are nine of the surviving children, and the widow and son of the tenth who died before this suit was started. [1] The defendant John Arden is the remaining surviving child of Philip, and the co-defendant Betty Arden is John's former wife.

The plaintiffs' claim to the property rests upon the February 8, 1937, decree of distribution and their assertion that, since that time no one has conveyed away his one-eleventh undivided interest as a tenant in common. The defendant Betty Arden asserts a valid record title to the property as a bona fide purchaser from her former husband and co-defendant John Arden. On July 29, 1960, John deeded the property to Betty, as required by the terms of a settlement agreement, incident to divorce. Betty, therefore, counterclaimed to quiet title. The defendant John Arden also asserts a valid record title to the property (until he conveyed it to Betty on July 29, 1960) by reason of two deeds: the first, dated February 6, 1937, signed and acknowledged by each of the surviving children (Philip, William, Theodore, John, Tom, Ann, Louise, Ivy, Lydia, Josephine and Mary) as grantors to Arthur P. Herrmann and Lena Herrmann, his wife, as grantees, and recorded at the request of John Arden on April 5, 1941, at 11:10 a.m.; the second, dated April 5, 1941, signed and acknowledged by the Herrmanns as grantors, to John Arden as grantee, and recorded at the request of John Arden on April 5, 1941, at 11:11 a.m. Furthermore, John and his co-defendant Betty each pleaded adverse possession, the statute of limitations, laches and estoppel by deed as affirmative defenses to the plaintiffs' assertion of title.

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[1] The eleven surviving children were: Philip Arden, William Arden, Theodore Arden, John Arden, Tom Arden, Ann Chaix, Louise Lanigir, Ivy Lanigir, Lydia Russ, Josephine Gerbig and Mary Dittman. All were plaintiffs below, except John who was a defendant and Theodore who had died. Theodore's widow Marge and son Theodore were also plaintiffs. At the conclusion of plaintiffs' case in chief, Philip, Josephine and Mary withdrew, not wishing to assert any interest in the property. Thus eight of the original eleven plaintiffs remained. They lost below. All but William have appealed. For reasons mentioned later, the withdrawal of Philip, Josephine and Mary and the decision of William not to appeal, do not affect their interests in the property.

The lower court ruled in favor of the defendant Betty Arden and gave her a decree quieting title to the property. It believed that her record title was valid. Though not required to do so, the court also concluded that Betty had acquired title by adverse possession; that the plaintiffs were barred by limitations and laches; and that they were estopped to deny the validity of their deed dated February 6, 1937. This appeal followed. We hold that the lower court was wrong on every point, and reverse. We shall recite the relevant evidence as each issue is discussed.

1. Whether Betty Arden's record title is valid depends upon the effectiveness of the deed dated February 6, 1937, from the eleven surviving children as grantors to Arthur P. Herrmann and Lena Herrmann, grantees. Before the father's estate was closed, Mr. Herrmann advised the administrator that he, Herrmann, might wish to purchase the property. In anticipation of sale, the administrator caused the deed to be prepared and signatures obtained. As the eleven children were scattered, it took from February 6, 1937, to March 9, 1937, to secure all signatures. Meanwhile, Herrmann advised the administrator that he would not purchase. That advice was given the administrator before the estate was closed and before the acknowledged signatures of all grantors had been obtained. The estate was closed February 8, 1937. Some time later (exact date unknown, but apparently after March 9, 1937, when the last signature to the deed was acknowledged) the deed was left with the attorney who had been handling the estate. The document was never physically delivered to the Herrmanns. A consideration for that deed never passed from the Herrmanns to the administrator of the estate or to any of the named grantors. The Herrmanns do not recall ever having seen the deed, did not buy the property, and have never claimed any interest therein.

More than four years later, on April 5, 1941, the Herrmanns for some reason not disclosed by the record, were persuaded to execute a deed of this land to John Arden. John Arden procured the deed of February 6, 1937, from the attorney with whom it had been left and recorded

that deed on April 5, 1941, at 11:10 a.m. One minute later, the Herrmann-John Arden deed was recorded.

The tale just related is not disputed. Five of the eleven grantors named in the February 6, 1937, deed testified. Four were plaintiffs and the other, John Arden, a defendant. Mr. Herrmann also testified. All agree that the 1937 deed was prepared and signed, intending to effectuate a sale to the Herrmanns, and for no other purpose. [2] The grantors never intended for the deed to operate as a conveyance unless the Herrmanns purchased the property. Cf. McCord v. Robinson, 225 Ark. 177, 280 S.W.2d 222 (1955); Battle v. Anders, 100 Ark. 427, 140 S.W. 593 (1911). A sale did not occur. The grantors received no consideration for their

deed. There is no showing that the attorney with whom the deed was deposited was authorized to deliver it to John Arden four years later, nor is there evidence of authority from those grantors to John Arden to record that deed.

[Headnotes 1-4]

A deed executed, acknowledged and recorded is presumed to have been delivered. Whoever questions the fact of delivery must overcome the presumption by clear and convincing evidence. Campbell v. Campbell, 368 Ill. 202, 13 N.E.2d 265 (1938); Klein v. Klein, 239 Iowa 40, 29 N.W.2d 163 (1947). John and Betty Arden contend that the lower court was justified in ruling that the presumption of delivery was not overcome here. We cannot agree. Though aware that an appellate court may not weigh conflicting evidence and, in doing so, substitute its view for that of the trial court, that doctrine does not govern this case. There is no conflict in the evidence received at trial on the material points we have mentioned. The lower court was compelled to accept the facts as we have related them. As such evidence was not diminished in value, impeached, contradicted or questioned, it must, as a matter of law, qualify as "clear and

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[2] John Arden intimates that, sometime later (date unknown), his brothers and sisters agreed to give him the property. The trial court ignored that intimation. In any event, real property is not conveyed orally, nor may a court sensibly construe the 1937 deed to the Hermanns to be a deed of gift to John Arden.

convincing" evidence sufficient to overcome the presumption of delivery. Cf. Dalton v. Dalton, 14 Nev. 419 (1879). Accordingly, we hold the 1937 deed ineffectual as a conveyance from the grantors therein named to Arthur P. Herrmann and wife. It follows that the deed from the Herrmanns to John Arden is equally infirm and may not defeat the plaintiffs' claim to title.

[Headnote 5]

As stated before, John Arden conveyed the property in controversy to Betty Arden on July 29, 1960. The lower court found that Betty was a bona fide purchaser without notice. We think that finding clearly erroneous. John deeded the property to Betty as required by their divorce settlement. However, before doing so he asked her to contact the other Arden children for their permission. Betty did contact some of them, and was notified by at least one of them that an interest was claimed. This, without more, was notice of facts sufficient to cause further inquiry by Betty, thereby destroying her present claim as a bona fide purchaser. Moore v. De Bernardi, 47 Nev. 46, 220 P. 544 (1923); Bailey v. Butner, 64 Nev. 1, 176 P.2d 226 (1947); Federal Savings & Loan Ins. Corp. v. Urschel, 159 Kan. 674, 157 P.2d 805

(1945); Blondell v. Turover, 195 Md. 251, 72 A.2d 697 (1950).

2. As we do not agree with the lower court on the validity of Betty Arden's record title, we must turn to examine the affirmative defenses. If one of them is established, the judgment below must be affirmed.

[Headnotes 6-10]

(A) Adverse possession. From 1939 until the divorce in 1960 John Arden paid the taxes on the property. Since the divorce, Betty has paid them. After World War II, John and Betty lived on the property. In 1946 they built a garage and used it as their home. Later they built a home, barn, corrals and fences at a total cost of about $33,000. Most of the time they ran livestock, raised, cut and baled hay. From March 29, 1957, through February 29, 1960, they conveyed away five parcels. In a title controversy between strangers, a court

could find all requisites needed to establish the acquisition of title by adverse possession whether claiming under NRS 11.120, NRS 11.140 and NRS 11.070, or NRS 40.090; O'Banion v. Simpson, 44 Nev. 188, 191 P. 1083 (1920); Zubieta v. Tarner, 76 Nev. 243, 351 P.2d 982 (1960); Su Lee v. Peck, 49 Nev. 124, 240 P. 435 (1925). Rodgers v. Carpenter, 44 Nev. 4, 189 P. 67 (1920). Here, however, the title dispute is not between strangers. It is between co-tenants who are brothers and sisters. One requisite of adverse possession is hostility. Even as between co-tenants who are not related, the tenant out of possession may assume that the permissive possession of his co-tenant is amicable until notified that it has become hostile; and the evidence needed to show hostility or notice must be stronger than that required in a case between strangers. Wilkerson v. Thomas, 121 Cal. App.2d 479, 263 P.2d 678 (1953); Elder v. McClaskey, 70 F. 529 (6th Cir. 1895). Where, as here, the co-tenants also are brothers and sisters, the relationship is not unlike that of trust and, we think, demands that the tenant in possession openly disavow the claims of his brothers and sisters, and unequivocally make his claim of sole ownership known to them. Levy v. Ryland, 32 Nev. 460, 109 P. 905 (1910). John Arden never told his brothers and sisters that he claimed to be the sole owner. He so testified. Indeed, he acknowledged the interest of brother Bill by making provision for him in the divorce settlement with Betty. At that time, he also was aware that all brothers and sisters might assert an interest for he asked Betty to check with them. Clearly, John's state of mind was such that he did not believe that his possession of the property and the improvements placed thereon was a hostile possession in the thoughts of his brothers and sisters. Nor does the record intimate that any of the brothers and sisters believed John's possession to be hostile or adverse to their interests. Co-tenants who are brothers and sisters bear a fiduciary relationship to one another. Each is entitled to trust the other, and not question conduct unless its purpose is clearly made known. We adopt the rule

of Levy v. Ryland, supra, as equally applicable to co-tenants who are brothers and

sisters. Accordingly, on this record, we must view John's possession as having been with the permission of his brothers and sisters, rather than adverse or hostile. Nor does the fact that John conveyed away small parcels change our view, for the first of such conveyances was on March 29, 1957, less than 5 years before this action was commenced. NRS 11.070; NRS 11.080. As the limitation period had not run, we need not decide whether conveyances of parts of the property by a co-tenant in possession, standing alone, would sustain a finding of hostility against a co-tenant brother or sister. [3] Cf. Witherspoon v. Brummett, 50 N.M. 303, 176 P.2d 187 (1946) where the co-tenant in possession conveyed away the entire tract to a stranger who took actual, open and exclusive possession; also O'Banion v. Simpson, 44 Nev. 188, 191 P. 1083 (1920).

[Headnotes 11-13]

(B) Laches. Especially strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run. Miller v. Walser, 42 Nev. 497, 181 P. 437 (1919). Each case must be examined with care. Cooney v. Pedroli, 49 Nev. 55, 235 P. 637 (1925). Perhaps the most important inquiry is whether the party urging laches has been prejudiced by his opponent's delay in asserting rights. We perceive no prejudice here and no good reason to prefer the equitable doctrine of laches to the applicable statute of limitation and, by doing so, deny a remedy to the co-tenants out of possession. Witnesses were available to each side. The history of the Arden family property was traced from the time of its acquisition to the time of trial. Prejudice may not be claimed for lack of evidence occasioned by the delay. It seems best to resolve this case on its merits, for we can ascertain the merits from the witnesses who related the family story. The merits are not hidden from us.

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[3] The lower court ruled that the plaintiffs were barred by the limitations of NRS 11.190 which concerns actions "other than those for the recovery of real property." In Kerr v. Church, 74 Nev. 264, 329 P.2d 277 (1958), clear dictum advises that the applicable statute of limitation to a quiet title action is NRS 11.080. That statute specifies a 5-year limitation period. See also NRS 11.070.

As the record tells the story, there is no reason to avoid coming to grips with the case simply because time short of the legal limitation period has passed.

[Headnotes 14, 15]

(C) Estoppel by deed. The lower court concluded that the plaintiffs, by reason "of the execution and delivery of the deed dated February 6, 1937, are estopped to deny its validity." By definition the doctrine of estoppel by deed does not touch this case. That doctrine, sometimes referred to as the doctrine of after acquired title, estops a grantor from asserting that he acquired title after and not before the conveyance. It forbids the grantor from denying his misrepresentation as to title contained in the deed. Tiffany, Real Property, 3d ed., ch. 29, § 1230. Here all agree that the grantors named in the deed of February 6, 1937, had title to the property. No one contends that they were without title on that date and later acquired it. No one contends that there was a misrepresentation as to title. Clearly the doctrine of estoppel by deed is not involved.

[Headnote 16]

For the reasons expressed we conclude that the heirs of the estate of Philip Arden each own an undivided one-eleventh interest as tenants in common in the real property described in the judgment entered below, except Theodore Arden, deceased, whose one-eleventh interest descended to his heirs, and John Arden whose one-eleventh interest was conveyed to Betty Arden by deed dated July 29, 1960. John and Betty Arden are accountable to the plaintiffs below for all sums received from those who purchased parcels of the inherited real property, and are also entitled to credit for the improvements of and payments made upon the property described in the judgment below. As mentioned in footnote 1 of this opinion, some of the heirs of Philip Arden, who were plaintiffs below, withdrew from the litigation. The withdrawal did not effectuate a transfer of their undivided interests in the property. Accordingly, their title is the same as those who did not withdraw as parties plaintiff. We therefore reverse the judgment below, and remand

this cause for further proceedings in accordance with the views expressed herein.

Badt, J., and Zenoff, D. J., concur.

STATE GAMING CONTROL BOARD, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, and HONORABLE JOHN F. SEXTON, District Judge, Respondents.

No. 5035

January 24, 1966 409 P.2d 974

Original proceeding in certiorari.

Proceeding to review stay order of the District Court, Clark County, preventing State Gaming Control Board from proceeding further in administrative action by board against gaming licensee. The Supreme Court, Thompson, J., held that district court lacked jurisdiction to stay administrative proceeding initiated by State Gaming Control Board to revoke gaming license of licensee convicted of felony.

Stay order nullified and set aside.

[Rehearing denied February 9, 1966]

Harvey Dickerson, Attorney General, and *Don W. Winne,* Deputy Attorney General, of Carson City, for Petitioner.

Edward G. Marshall, District Attorney, Clark County, Las Vegas, for Respondent.

Foley Brothers by *Thomas A. Foley,* for Mr. Ruby Kolod.

1. Constitutional Law.
   District court lacked jurisdiction to stay administrative proceeding initiated by State Gaming Control Board to revoke gaming license of licensee convicted of felony. NRS 463.010 et seq.; Const. art. 6, § 6.

2. Constitutional Law.
   Constitution does not authorize court intrusion into administration, licensing, control, supervision and discipline of gaming. Const. art. 6, § 6.
3. Constitutional Law.
   Court is powerless to prevent occurrence of administrative hearing before state gaming commission. Const. art. 6, § 6; NRS 463.315, subds. 1, 13.
4. Constitutional Law.
   Courts owe fidelity to legislative purpose relative to Gaming Control Act and must not block gaming control board in its efforts to discharge assigned duty. NRS 463.010 et seq.
5. Certiorari.
   If one statutory essential of writ of certiorari is missing, writ should not be granted. NRS 34.020, subd. 2.
6. Certiorari.

Certiorari was only remedy available to State Gaming control board seeking review of stay order of district court preventing board from proceeding further in administrative action to revoke gaming license. NRS 463.010 et seq., 463.315, subd. 13; NRCP 62(c), 65, 72(b)(2), 81(a).

OPINION

By the Court, Thompson, J.:

This is an original proceeding in certiorari to review a stay order of the district court preventing the State Gaming Control Board from proceeding further in an administrative action by the board against Ruby Kolod, the D. I. Operating Company, and Karat, Inc., who are licensees authorized to engage in gaming in Nevada. The administrative action was commenced under the authority of the Gaming Control Act, NRS, ch. 463, to revoke the gaming license of Ruby Kolod and to eliminate his interests in the D. I. Operating Company and Karat, Inc. It was precipitated by the felony conviction of Ruby Kolod in April 1965, following a jury trial in the United States District Court for the District of Colorado adjudging him guilty of a conspiracy to transmit in interstate commerce communications containing threats to injure and murder one Robert Sunshine. The board charged that Kolod is unsuitable to hold a gaming license because of the felony conviction and also because of his association with Felix Antonio Alderisio who is

alleged to be a leader in organized crime. Kolod has appealed the felony conviction and the appeal has not been decided. The district court stopped the administrative action. It ordered that "the status quo be maintained until there is a final disposition of the case under appeal," referring to the Colorado federal court conviction and pending appeal. It is this order that is challenged by the instant proceeding.

[Headnotes 1-4]

The district court was without jurisdiction to stay the administrative proceeding initiated by the board. The State Constitution, art. 6, § 6, does not authorize court intrusion into the administration, licensing, control, supervision and discipline of gaming, and the Gaming Control Act expressly forbids court intervention by writ or "other equitable proceedings." NRS 463.315(13). [1] Only court review of a final order or decision of the Nevada Gaming Commission is permissible. NRS 463.315(1). [2] It is emphatically clear that a court is powerless to prevent the occurrence of an administrative hearing before the Nevada Gaming Commission. Any effort to obstruct the orderly administrative process provided by the Gaming Control Act casts serious doubt upon the ability of Nevada to control the privileged enterprise of gaming. Control does not exist if regulatory procedures are not allowed to operate. Courts owe fidelity to the legislative purpose and must not block the Gaming Control Board in its effort to discharge assigned duties. The stay order was, and is, void and of no effect.

[1] NRS 463.315(13) provides, "The judicial review by the district and supreme courts afforded in this chapter shall be the exclusive method of review of commission actions, decisions and orders, and shall preclude the use of any of the extraordinary common law writs or other equitable proceedings."

[2] NRS 463.315(1) reads, "Any person aggrieved by a final decision or order of the commission made after hearing or rehearing by the commission pursuant to NRS 463.312, and whether or not a petition for rehearing was filed, may obtain a judicial review thereof in the district court of the county in which the petitioner resides or has his or its principal place of business."

[Headnotes 5, 6]

The respondent challenges the propriety of certiorari. The writ shall issue when an inferior tribunal has exceeded its jurisdiction, there is no appeal, nor any plain, speedy and adequate remedy. NRS 34.020(2). If one of the essentials is missing, the writ should not be granted. Schumacher v. District Court, 77 Nev. 408, 365 P.2d 646 (1961). Here the respondent's challenge is bottomed on the proposition that the stay order is appealable. We are referred to the rules of civil procedure concerning injunctions and appeal, NRCP 62(c), 65, 72(b)(2). The rules of civil procedure do not apply to special statutory proceedings if inconsistent or in conflict. NRCP 81(a). [3] The conflict between the civil procedure rules and the special statutory proceeding provided for by the Gaming Control Act is apparent. The civil rules allow injunctions and stay orders. The Gaming Control Act forbids them. NRS 463.315(13). As a stay order is not allowed, a fortiori, an appeal is likewise precluded. No remedy other than certiorari was available to the petitioner here. The stay order entered by the district court is nullified and set aside.

This matter was decided from the bench on January 12, 1966. This opinion is in explanation of that decision.

Badt, J., and Wines, D. J., concur.

[3] NRCP 81(a) provides in part, "These rules do not govern procedure and practice, otherwise than on appeal, in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute."

ROBERT BORDEN WILSON, Appellant, *v.* HARRY FRANKLIN PERKINS and GRACE PERKINS, His Wife, Respondents.

No. 4933

January 26, 1966 409 P.2d 976

Appeal from verdict in favor of plaintiff in automobile negligence action. Second Judicial District Court, Washoe County; Thomas O. Craven, Judge.

Action by husband and wife arising out of intersectional automobile collision in which they were both injured. The trial court rendered judgment on verdict for plaintiffs, and defendant appealed. The Supreme Court, Zenoff, D. J., held that evidence permitted jury to find that westbound plaintiff motorist traveling on four-lane thoroughfare was not contributorily negligent as to speed or lookout with respect to intersectional collision with defendants' northbound vehicle which had proceeded into intersection from road controlled by stop sign and that the case was required to be remanded to permit distribution of damages between the spouses as required by statute.

Affirmed as modified.

Alex. A. Garroway, of Reno, for Appellant.

Springer & Newton, of Reno, for Respondents.

1. Automobiles.
   Evidence permitted jury to find that westbound motorist traveling on four-lane thoroughfare was not contributorily negligent as to speed or lookout with respect to intersectional collision with northbound vehicle which had proceeded into intersection from road controlled by stop sign.
2. Evidence.
   Court properly refused to permit eyewitness to answer questions whether collision would have occurred if one vehicle had been traveling at given speed and as to whether driver of such vehicle could have operated it so that it would have passed behind another vehicle after that vehicle had crossed over part of the highway, as facts could have been so fully and sufficiently described that jury could form as intelligent opinion as witness.
3. Trial.
   Juror's affidavit was not admissible to impeach verdict and to show that jurors had reached quotient verdict.

4. Damages.
   Nothing in record showed that $62,000 damages award to one who sustained painful and permanent

injuries was result of passion or prejudice and judicial conscience was not shocked by award.

5. Appeal and Error.

Though matter was not raised on appeal, reviewing court was required to remand case upon affirming judgment awarding damages to husband and wife where damages had not been distributed in accordance with statute requiring apportionment between spouses when wife sustained injuries giving rise to action brought jointly by them. NRS 41.170.

OPINION

By the Court, Zenoff, D. J.:

On July 29, 1963, shortly before 7:00 p.m., the parties to this action were involved in a collision between their respective automobiles at the intersection of B Street and Stanford Way, the centerline of which is an eastern border of the City of Sparks.

Appellant Wilson was driving his station wagon northwardly on Stanford Way, a two lane road which is controlled by a stop sign at the intersection of B Street. Respondent Perkins was driving his blue Ford in an easterly direction on B Street, a four lane thoroughfare. His wife was a passenger in the car.

Both Mr. and Mrs. Perkins were injured in the accident and taken to the hospital by ambulance from the scene. Mr. Perkins was treated and released; Mrs. Perkins, injured more seriously and requiring surgery, remained in the hospital more than two weeks.

The Perkins' complaint alleged negligence of the defendant Wilson in not stopping at the stop sign and yielding the right of way to plaintiffs. Wilson's answer denied negligence and alleged contributory negligence on the part of Perkins as an affirmative defense, and his proof sought to establish excessive speed and failure of lookout.

The jury in the court below returned a verdict in favor of Mr. Perkins for $506.19 and for Mrs. Perkins for $62,000. Special findings were made by the jury as follows:

1. Was the plaintiff, Harry Perkins, negligent?

Answer: Yes.

2. If your answer is “Yes,” did that negligence proximately contribute in causing the injury?

Answer: No.

It is from that judgment that appellant seeks relief here.

1. As one ground of error he assigns the refusal of the trial court to grant motions for a directed verdict, judgment notwithstanding the verdict, and for a new trial. These motions were based on his contention that no evidence was established to justify the jury making any finding but for the defendant, and that the trial judge should have so ruled as a matter of law.

[Headnote 1]

The record, however, does not support his contention. As compelling an argument as appellant makes otherwise, it remained the function of the jury to resolve the disputes in the

testimony of the several witnesses despite appellant's utter disagreement with those findings. Smith v. I.O.O.F.B.A., 46 Nev. 48, 205 P. 796 (1922); Musser v. L.A. & S.L.R. Co., 53 Nev. 304, 299 P. 1020 (1931). The trial judge reviewed the testimony and evidence and refused to grant these motions. We agree with the trial court that no cause appears in the record for removing the case from the jury.

Since we uphold the jury's determination that there was no contributory negligence that proximately led to the accident, we need not decide appellant's second specification of error concerning imputation of negligence to the wife as an owner of the vehicle under NRS 41.440.

[Headnote 2]

2. The trial court refused to allow an eyewitness to answer the following questions:

"* * * if the blue car had been travelling at 25 miles per hour would there have been a collision?

"* * * would it have been possible for the driver of the blue car to operate his automobile so that it would pass behind the station wagon after the station wagon had crossed over part of the highway?"

↓ 82 Nev. 42, 45 (1966) Wilson v. Perkins ↓

The court properly refused to allow the witness to answer the questions. In Mikulich v. Carner, 69 Nev. 50, 240 P.2d 873 (1952), this court stated, "The ultimate issue, that of negligence, must be determine by the jury from the testimony detailing facts and circumstances connected with the accident, and not from the opinion or conclusion of the declarant."

There is little distinction between nonexpert testimony as to the cause of an accident, as in Mikulich, and the same testimony as to how the accident might have been avoided. In both, the facts could have been so fully and sufficiently described that the jury could form an intelligent opinion as well as the witness.

3. The assignment of error that the jury disregarded the instructions of the court is not so reflected by the record.

[Headnote 3]

4. Appellant also contends that the jurors reached a quotient damage verdict and that the trial court improperly struck the affidavit of one juror alleging misconduct.

The trial court was correct in holding the affidavit of the juror inadmissible to impeach the jury's verdict. Kaltenborn v. Bakerink, 80 Nev. 16, 388 P.2d 572 (1964).

[Headnote 4]

5. Finally, it is urged that the award to Mrs. Perkins of $62,000 is excessive.

The recent case of Miller v. Schnitzer, 78 Nev. 301, 371 P.2d 824 (1962), states the law of Nevada regarding this Court's function in reviewing damages awarded by a jury.

We conclude, then, that there is no evidence in the record to show that the damages in the instant case were the result of passion or prejudice and our judicial conscience is not shocked at the award. Viewing the record in the light most favorable to the plaintiff, we find substantial evidence tending to prove actual, painful, and permanent injuries. The damages were not excessive.

[Headnote 5]

6. We affirm the judgment below as to liability and the total damage award but remand with direction that

the award of damages be redistributed in accordance with NRS 41.170. [1]

Under that statute, a sum awarded for hospital and medical expenses of a wife are to be awarded to the husband when both husband and wife are plaintiffs in the action. While this issue was not raised on appeal, we feel that we must enforce compliance with NRS 41.170. Meagher v. Garvin, 80 Nev. 211, 391 P.2d 507 (1964).

Plaintiffs' Exhibit HH in the record reveals that defendant admitted the sum of $1,714.54 to be reasonable and proper hospital and medical expenses of plaintiff Grace Perkins. Therefore, we order redistribution as follows: to the plaintiff Grace Perkins the total sum of $60,285.46 general damages and to the plaintiff Harry Franklin Perkins the total sum of $2,220.73, which includes $1,714.54 for his wife's medical and hospital expenses.

Affirmed as modified.

Thompson and Badt, JJ., concur.

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[1] "In cases where a wife sustains personal injuries by reason of the negligence of another, suit may be brought by the husband and wife jointly or separately at their option. When brought jointly, damages shall be segregated and those damages assessed by reason of personal injuries and pain and suffering shall be awarded to and belong to the wife, and damages assessed for loss of services and for hospital and medical expenses and other care shall be awarded to the husband. In cases where the wife sues separately, all damages sustained by the wife shall be awarded to and belong to the wife." NRS 41.170.

JAMES E. BOND, dba SUNRISE SHEET METAL, and INDUSTRIAL SHEET METAL

WORKS, a California Corporation, Appellants, *v.* STARDUST, INC., Respondent.

No. 4911

January 27, 1966 410 P.2d 472

Appeal from judgment of the Eighth Judicial District Court, Clark County; John Mowbray, Judge.

Action by owner to challenge correctness of claim of subcontractor. The lower court entered summary judgment for the owner, and subcontractor appealed. The Supreme Court, Thompson, J., held that extension agreement under which lienholders, including subcontractor released liens and received from owner in return a 25 percent payment on claims plus unsecured installment notes for balances claimed due subject to right of owner to challenge correctness of lienholders' claims by suit precluded fixed price contracts with the lienholders and clearly demonstrated that all the lienholders expected to be paid for reasonable value of labor performed and material furnished, and that subcontractor's conclusory affidavit which was to effect that labor had been performed and materials furnished for stipulated price pursuant to agreement with owner and which did not state essential terms of the agreement was insufficient to create issue of material fact as to whether subcontractor had overcharged owner as found by special master whose report concerned quantum meruit, for summary judgment purposes.

Affirmed.

Jones, Wiener & Jones, of Las Vegas, for Appellants.

Samuel S. Lionel, of Las Vegas, for Respondent.

1. Judgment.

   Subcontractor's conclusory affidavit which was to effect that labor had been performed and materials furnished for stipulated price pursuant to agreement with owner suing to challenge correctness of subcontractor's claim and which did not state essential terms of the agreement was insufficient to create issue of material fact as to whether subcontractor

had overcharged owner as found by special master whose report concerned quantum meruit, for summary judgment purposes. NRCP 56(e).

2. Contracts.

   Extension agreement under which lienholders, including subcontractor, released liens and received from owner in return a 25 percent payment on claims plus unsecured installment notes for balances claimed due subject to right of owner to challenge correctness of lienholders' claims by suit precluded fixed price contracts with the lienholders and clearly demonstrated that all the lienholders expected to be paid for

reasonable value of labor performed and material furnished.

3. Judgment.

Failure to consider owner's claim for relief based on collusion between general contractor and subcontractor in violation of statute did not preclude summary judgment for owner which had apparently abandoned that claim, choosing to rest case upon master's report indicating that owner had been overcharged by subcontractor. NRS 613.190.

OPINION

By the Court, Thompson, J.:

This appeal is from a summary judgment for Stardust, Inc., the plaintiff below. The appellant Bond suggests that genuine issues of material fact remain and asks that we reverse and remand for trial. We think that summary judgment was properly entered and affirm.

This case is one of many resulting from the construction of the Stardust Hotel at Las Vegas, Nevada. Stardust ran out of money before the job was completed. Consequently, many subcontractors filed liens. Bond, a sheet metal subcontractor, filed a lien for labor and materials in the sum of $99,602.20. In lieu of foreclosure proceedings, the lienholders, including Bond, entered into an extension agreement with Stardust under which the lienholders released their liens and received in return a 25 percent payment on their claims plus unsecured installment notes for the balances claimed to be due. This arrangement enabled Stardust to secure additional financing and complete the job. Pursuant to the agreement, Stardust paid Bond 25 percent of the amount for which a lien had been filed and executed an installment note to Bond for the balance. The agreement also

reserved to Stardust the right to challenge the correctness of the subcontractor's claims by suit in the district court, as the claims had not been fixed or audited. The suit below was to challenge the correctness of Bond's claim of $99,602.20. [1]

Stardust alleged that Bond had been guilty of overcharging for the labor and materials furnished. In a separate count, Stardust asserted that Bond had offered gratuities to the general contractor in violation of NRS 613.190. Stardust asked the court to determine the amount due Bond, if any. Bond's answer admitted all material averments of the complaint except that he denied overcharging and denied any statutory violation. As the litigation posed mainly an accounting problem, Stardust moved for the appointment of a special master as authorized by NRCP 53. The court granted the motion and, in accordance with 53(c), directed the master to report on three issues: first, to find each item and charge for labor performed and materials furnished; second, to find the reasonable value thereof; and, third, to conclude whether Stardust had been overcharged. The master did as directed. He examined all billings in detail, conducted hearings at which testimony was received and, when finished, filed his findings and report with the court. He had found each item and charge, determined reasonable

value, and concluded that Bond had overcharged Stardust by $72,992.75 and had been overpaid in that amount. Bond's objections to the master's report were made, a hearing held, and the objections overruled. The court adopted the report. Relying on that report, Stardust then moved for summary judgment. Bond resisted and, in opposition, submitted his conclusory affidavit to the effect that the labor was performed and materials furnished for a stipulated price pursuant to an agreement with Stardust. The essential terms of the agreement were not stated. Therefore, he argued that, as the master's report concerned quantum meruit and had nothing to do with work being done for a fixed contract price, a genuine issue of material fact remained to be tried and summary judgment was, therefore,

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[1] Stardust had paid Bond more than $200,000. The lien claim was for an additional $99,602.20.

improper. Furthermore, he urged that the second claim for relief of Stardust, Bond's alleged violation of NRS 613.190, was not considered at all, and should be submitted and resolved only after a full trial. The lower court was not persuaded by Bond's contentions and entered summary judgment for Stardust. This appeal followed.

[Headnotes 1, 2]

Bond asks that we set aside the summary judgment for the same reasons he urged in the lower court when opposing Stardust's motion. We have no doubt about the propriety of the summary judgment. If there were an agreement between Bond and Stardust pursuant to which Bond was to do the sheet metal work for a fixed price, the pleadings made no mention of it. Nor was an effort made to amend the pleadings to show such an agreement. The agreement was not offered to the court in any acceptable manner. The conclusory statement of Bond contained in his affidavit in opposition to the motion for summary judgment does not create an issue of material fact. NRCP 56(e); Dredge Corp. v. Husite Co., 78 Nev. 69, 369 P.2d 676 (1962). The billings for services and materials, which the master examined with care, contain no indication that they were submitted pursuant to an underlying agreement between Bond and Stardust. The only agreement before the trial court was the extension agreement between Stardust and all lien holders to which we initially referred. That agreement necessarily precluded fixed price contracts with subcontractors, for it explicitly reserved to Stardust the right to challenge the correctness of the amounts claimed to be due by appropriate court action. Clearly all subcontractors concerned expected to be paid for the reasonable value of labor performed and material furnished. The master found reasonable value, the lower court adopted that finding, and its correctness is not challenged on this appeal. Cf. Stardust v. Desert York Company, 78 Nev. 91, 369 P.2d 444 (1962), involving the same extension agreement.

[Headnote 3]

The second contention advanced as to why summary judgment was improper was that Stardust's second claim for relief based on collusion between the general contractor and Bond—the violation of NRS 613.190—was not considered at all. There was no need for the court to consider that alternative claim, as Stardust apparently abandoned it, choosing to rest its case upon the master's report. A defendant cannot compel litigation of a claim which the plaintiff no longer wishes to assert.

For the reasons expressed, the summary judgment entered below is affirmed.

Badt, J., and Zenoff, D. J., concur.

MARVIN JAMES SCHIFF, Appellant, *v.* MECHAM CONSTRUCTION CO., INC., RALPH HALEY dba WHITEY'S PLUMBING, W. R. HUSBAND dba HUSBAND TILE CO., and GIFFORD ELECTRIC, INC., a Nevada Corporation, Respondents.

No. 4949

February 3, 1966 410 P.2d 758

Appeal from judgment of the Eighth Judicial District Court, Clark County; William P. Compton, Judge.

Consolidated actions for $2,733 which defendant allegedly borrowed from plaintiff construction company, and for $3,917 for work, labor and materials furnished by plaintiffs to defendant at his request, incident to subsequently mutually abandoned joint-venture contract concerning houses. The lower court made findings and entered judgment against defendant in each case, and the defendant appealed. The Supreme Court held that the findings were supported by substantial evidence.

Affirmed.

Calvin C. Magleby, of Las Vegas, for Appellant.

Paul L. Larsen, of Las Vegas, for Respondents.

1. Joint Adventures.

   In consolidated actions for $2,733 which defendant allegedly borrowed from plaintiff construction company, and for $3,917 for work, labor and materials furnished by plaintiffs to defendant at his request, incident to subsequently mutually abandoned joint-venture contract concerning houses, evidence warranted findings and judgment against defendant in each case.

2. Joint Adventures.

   Evidence warranted finding that joint-venture contract had been mutually abandoned, in consolidated actions for $2,733 which defendant allegedly borrowed from plaintiff construction company, and for $3,917 for work, labor and materials furnished by plaintiffs to defendant at his request.

OPINION

Per Curiam:

In the lower court two actions were consolidated for trial, Case No. 118632 entitled "Mecham Construction Company, Inc., Plaintiff, versus Marvin James Schiff, et al, Defendants," and Case Number 118881 entitled "Mecham Construction Company, Inc., Ralph Haley dba Whitey's Plumbing, W. R. Husband dba Husband Tile Company, and Gifford Electric, Inc., Plaintiffs, versus Marvin James Schiff, Defendant."

Case No. 118632 was to recover the sum of $2,733.50 which the defendant allegedly borrowed from the plaintiff.

Case No. 118881 was to recover the sum of $3,917.40 for work, labor and materials furnished by the plaintiffs to the defendant at his request.

The issues presented in the lower court were factual and, after trial of the consolidated actions, the court found against the defendant in each case. The defendant Schiff has appealed.

[Headnotes 1, 2]

(1) The appeal does not present questions of law for resolution, [1] and a full opinion by this court would have

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[1] The record shows that Schiff and Mecham made a joint-venture contract concerning the houses, and Schiff insisted below, and here, that all rights must rest on that contract. The trial court, however, found as a matter of fact that the joint-venture contract had been mutually abandoned. This finding is supported by substantial evidence. Cf. Holland v. Crummer Corp., 78 Nev. 1, 368 P.2d 63.

no value as precedent. The record shows that the findings of the lower court are supported by substantial evidence. Friendly v. Larsen, 62 Nev. 135, 144 P.2d 747. Accordingly, the judgment as to total sums is affirmed, though as to the $3,102.11 provided as a single amount for "extras" due all four parties plaintiff, we feel that the record, and the plaintiffs, require an explicit division allotting $1,092 to Gifford Electric, Inc.; $319.25 to Husband Tile Company; $250 to Whitey's Plumbing; and the remainder, $1,440.86, to Mecham Construction Co., Inc.

GRANT SAWYER, Governor of the State of Nevada, Petitioner, *v.* THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Ormsby, and THE HONORABLE FRANK B. GREGORY, Judge Thereof, Respondents.

No. 5021

February 4, 1966 410 P.2d 748

Original petition for writ of prohibition.

The Supreme Court held that where Governor was outside state only for a few hours on a Sunday evening, Lieutenant Governor was not empowered to request the impanelment of a state grand jury, contrary to previously expressed wishes of Governor, on ground that he was the acting Governor under constitutional provisions allowing Lieutenant Governor to serve as an acting Governor in case of Governor's absence from the state.

Writ issued.

Harvey Dickerson, Attorney General of Nevada, for Petitioner.

Theodore H. Stokes, District Attorney of Ormsby County, *Robert F. List,* Deputy District Attorney of Ormsby County, and *Laxalt, Ross and Laxalt,* of Carson City, for Respondents.

1. States.
   Term "absence" is used in constitutional provision allowing Lieutenant Governor to serve as acting Governor in case of Governor's absence from state means effective absence, and that is an absence which is measured by the state's need at any given moment for a particular act by the official then physically not present. Const. art. 5, § 18.
2. States.
   Where Governor was outside state only for a few hours on a Sunday evening, Lieutenant Governor was

not empowered to request the impanelment of a state grand jury, contrary to previously expressed wishes of Governor, on ground that he was the acting Governor under constitutional provisions allowing Lieutenant Governor to serve as an acting Governor in case of Governor's absence from the state. NRS 6.135, 223.070; Const. art. 5, § 18.

3. States.

   Assuming a valid request by Lieutenant Governor, as acting Governor, for impanelment of state grand jury while Governor was absent from state for a few hours, the revocation of such request by Governor immediately upon his return and before any action could be initiated on the request was effective. NRS 6.110-6.135, 223.070; Const. art. 5, § 18.

4. Constitutional Law.

   Since the judge to whom a request is made by the Governor for convening of a state grand jury acts ministerially rather than judicially in entering order for impanelment of such grand jury, a valid request may be revoked regardless of doctrine of separation of powers. NRS 6.135.

OPINION

Per Curiam:

Petitioner, the governor of Nevada, seeks a writ of Prohibition to bar the First Judicial District Court from impaneling a state grand jury pursuant to NRS 6.135. Said statute initially was invoked by the lieutenant governor.

The facts are not in dispute. Prior to November 28, 1965, a controversy erupted as to conduct of the Nevada State Department of Highways. In public statements, the lieutenant governor suggested that a state grand jury be impaneled to investigate the highway department. Authority to call such a grand jury is derived from NRS 6.135, which confines that authority to the governor and the legislature. The governor disagreed with the lieutenant governor as to the need for a state grand jury. In reply, the lieutenant governor announced that *he* would demand the state grand jury—should he

ever serve as acting governor and come within the authority of NRS 6.135.

On Sunday, November 28, the governor left Nevada to make a previously scheduled, publicly announced dinner speech at Sacramento, California. The governor departed Carson City at 5:20 p.m., attended the dinner, and returned to Carson City at 10:10 p.m. In his absence, the lieutenant governor went to the home of a district judge at Carson City and requested that a state grand jury be impaneled pursuant to NRS 6.135. On returning, the governor revoked the lieutenant governor's request.

Nevertheless, the next morning, Monday, November 29, the district judge issued an order for impaneling of a state grand jury. It is to the directive of that order that the instant writ of prohibition is requested.

In seeking this writ of prohibition, petitioner presents three arguments, in this order: (1)

that the lieutenant governor under the instant facts did not have power to request a state grand jury under NRS 6.135; (2) that the request properly was revoked by the governor; and (3) that the provision within the statute for payments is invalid. Under the instant facts, that last point is specious. As to petitioner's other arguments, they are inconsistent. If the request for a state grand jury could not have been made, nothing ever existed to have been revoked. Therefore we focus first on the request itself.

1. NRS 6.135, which provides for the calling of a state grand jury, as opposed to regular, county grand juries, [1] is confined to a "request of the governor, or of the legislature by concurrent resolution." [2] Clearly, no

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[1] Cf. NRS 6.110, 6.120, and 6.130.

[2] "1. Upon request of the governor, or of the legislature by a concurrent resolution, the district judge of any county shall cause a grand jury to be impaneled in the same manner as other grand juries are impaneled, except that the sole duty of a grand jury impaneled under the provisions of this section shall limit its investigations to state affairs, and to the conduct of state officers and employees. The report of such grand jury shall be transmitted to the governor and the legislature.

"2. The expenses of a grand jury impaneled under the provisions of this section shall be a charge against the general fund of the state, to be certified by the district judge and paid on claims."

provision is made for a lieutenant governor. However, Art. V, Sec. 18 of the Constitution of the State of Nevada allows the lieutenant governor to serve as *acting* governor "[i]n case of the impeachment of the governor, or his removal from office, death, inability to discharge the duties of said office, resignation or absence from the state * * *." [3] In the matter before us, the lieutenant governor submits that he was acting governor on November 28 when he invoked the powers of NRS 6.135 because at that moment the governor was "absent from the state."

All agree that the governor was not physically present in Nevada at the moment in question. The dispute is whether "absence from the state" as contained within Sec. 18 was intended by the framers of our state Constitution to mean simply physical non-presence, however brief, or whether it was written into our Constitution to indicate some other condition. The overwhelming majority of states which have examined identical or nearly identical provisions have found that "absence" as contained within rules for orderly succession in government means "effective absence"—i.e., an absence which is measured by the state's *need* at a given moment for a particular act by the official then physically not present.

[Headnote 1]

We find no reason to contradict this century-long compilation of decisions. Rather, we

consider their logic proper and reasonable and conclude that it most nearly satisfies the role of any government. With this in mind, let us trace and examine the entire problem at bar.

Respondents open with the premise that "absence" is an ordinary and simple word, unambiguous and not requiring interpretation. We disagree. "Absence" *is* ambiguous. "Many words of common use in our language have two or more meanings. It is not infrequent that a word having one meaning in its ordinary employment has a materially different or modified meaning in its legal use. This word 'absence' is a fair example. It

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[3] Substantially identical provisions are contained within NRS 223.070.

has been held that one may be absent, though actually present, as where a judge, though on the bench, does not sit in the cause. He is there taken as absent in contemplation of law. Bingham v. Cabbot, 3 Dall. 19, 1 L.Ed. 491; Byrne v. Arnold, 24 New Br. 161. It has also been held to mean 'not present.' Paine v. Drew, 44 N.H. 306. It has been held, too, as not meaning 'out of the state only.' James v. Townsend, 104 Mass. 367." Watkins v. Mooney, 114 Ky. 646, 71 S.W. 622.

The word "absence" as used in our Constitution does need interpretation. We find no clue in our constitutional debates [4] and therefore look elsewhere. As before indicated, overwhelming case authority supports the petitioner's contention that "absence" means "effective absence."

As far back as 1872, the Nebraska Supreme Court in People ex rel. Tennant v. Parker, 3 Neb. 409, 19 Am. Rpts. 634, cautioned that to accept "strict" absence forced one to "reflect upon the possible consequences of such a construction of the Constitution, upon the disgraceful tricks, strifes and exhibitions, which might be entailed upon the people of the State * * *." That court felt it was necessary to adopt "a more salutary rule, one which, while it will insure the efficient administration of the affairs of State during a brief temporary absence of the executive, will at the same time protect this department of the government against unnecessary and ill-advised intrusion."

The conflict, then, is between the citizens' right to have, at every moment, an official ready, willing and able to fulfill all duties and powers entrusted that *office* by the electorate—along with a disdain for government by absentee officials; and at the same time the citizens' equal right to realize the unintruded policies of the *individual* they placed in that office. Thus in event of a specified official's physical non-presence, the crux of a provision for succession in the event of "absence" is the state's immediate need for a specific act or function. Certainly, where the act or function performed by the successor is obviously contrary to policies of the absentee official,

[4] Nevada Constitutional Debates & Proceedings, p. 160.

a closer scrutiny is warranted to determine if the "absence," was "effective."

In the instant matter, the governor was outside the state for only a few hours, and these on a Sunday evening. Not only was there no immediate need for an NRS 6.135 request during that brief period, but, as events proved, no action could even be initiated on such a request until courts opened Monday morning, at which time the governor had returned.

Accord: State ex rel. Warmoth v. Graham, 26 La. Ann. 568, 21 Am.Rpts. 551; State ex rel. Crittenden v. Walker, 78 Mo. 139; Mayor of Detroit v. Moran, 46 Mich. 213, 9 N.W. 252; [5] Watkins v. Mooney, 114 Ky. 646, 71 S.W. 622; [6] State ex rel. Olson v. Lahiff, 146 Wis. 490, 131 N.W. 824; Cytacki v. Buscko, 226 Mich. 524, 197 N.W. 1021; Gelinas v. Fugere, 55 R.I. 225, 180 A. 346; and In re An Act Concerning Alcoholic Beverages, 130 N.J.L. 123, 31 A.2d 837.

Allegedly contra are Application of Crump, 10 Okla. Crim.Rep. 133, 135 P. 428, 47 L.R.A. (N.S.) 1036; Montgomery v. Cleveland, 134 Miss. 132, 98 So. 111, 543; 32 A.L.R. 1151; and Walls v. Hall, 202 Ark. 999, 154 S.W.2d 573, 136 A.L.R. 1047. We have studied these cases and disagree with their reasoning. [7]

[Headnotes 2-4]

3. We have decided that the lieutenant governor was not empowered to request the impanelment of a state grand jury in the circumstances here involved. Though unnecessary, we choose briefly to discuss the second question, i.e., assuming a valid request by the lieutenant governor, was that request revoked? In our view the revocation was effective. The "separation of powers"

[5] Respondents argue that "mayoral" cases interpreting "absence" vis-a-vis city charters or state statutes are inapplicable in considering the instant constitutional provision. We disagree. In fact, both "mayoral" and "gubernatorial" cases generally interchange citations and authorities, the principles involved in both being, for all practical purposes, identical.

[6] Cf. Commonwealth v. Ginn & Co., 120 Ky. 83, 85 S.W. 688.

[7] See the well-presented dissent in Montgomery v. Cleveland, supra.

concept is not involved, for under NRS 6.135 the judge to whom the request for a state grand jury is presented acts ministerially rather than judicially in entering the order requested. Here, the revocation occurred before the court could act at all.

Writ granted.

W. E. "BILL" RUSH, Appellant, *v.*
MARGO G. RUSH, Respondent.

No. 4943

February 7, 1966 410 P.2d 757

Appeal from judgment of the Eighth Judicial District Court, Clark County; John F. Sexton, Judge.

Proceeding on motion of divorced wife to modify divorce decree approving written agreement providing for husband's future support. The lower court granted requested relief, and the divorced husband appealed. The Supreme Court, Thompson, J., held that where divorce decree approving written agreement providing for husband's future support, as well as agreement itself, expressly directed that agreement survive divorce, wife was precluded from thereafter seeking to modify divorce decree, and purported reservation of jurisdiction as to alimony was ineffectual.

Reversed.

Robert L. Gifford, Tad Porter, and *William R. Devlin,* of Las Vegas, for Appellant.

Calvin C. Magleby, of Las Vegas, for Respondent.

1. Divorce.

Where divorce decree approving written agreement providing for husband's future support, as well as agreement itself, expressly directed that agreement survive divorce, wife was precluded from thereafter seeking to modify divorce decree, and purported reservation of jurisdiction as to alimony was ineffectual.

2. Divorce.

Jurisdiction cannot be reserved to deal with subject over which divorce court has divested itself of jurisdiction by directing survival.

OPINION

By the Court, Thompson, J.:

By motion, a former wife sought to modify a divorce decree which approved a written agreement providing for the husband's future support. [1] As in Ballin v. Ballin, 78 Nev. 224, 371 P.2d 32 (1962), the agreement and the decree each expressly directed that the agreement survive divorce. Here, the court also reserved jurisdiction as to alimony. In Ballin, jurisdiction was not reserved. That difference is fastened upon to justify the modification proceeding below. The lower court assumed jurisdiction and granted relief to the former wife. This, we believe, was error.

[Headnotes 1, 2]

In Ballin, supra, we sought to make it clear that, where the agreement and decree each direct survival, later controversy regarding support must rest upon the agreement, for the rights of the parties flow from the agreement rather than from the decree approving it. Thus, a motion to modify the decree (as distinguished from an action on the agreement) was there held to be precluded. The same rationale applies here. A purported reservation of jurisdiction as to alimony is ineffectual in these circumstances. Jurisdiction cannot be reserved to deal with a subject over which the divorce court has divested itself of jurisdiction by directing survival. Accordingly, the order modifying the decree is reversed. Cf. Day v. Day, 80 Nev. 386, 395 P.2d 321.

Badt, J., concurs.

[Counsel stipulated to submit this appeal to two Justices.]

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[1] An interesting question, briefed and argued, was the validity of a provision in a settlement agreement requiring the wife to pay alimony to the husband. Our disposition of the appeal does not require discussion of that question.

DANIEL C. STURGILL and JEANNÉ STURGILL, Appellants, *v.* INDUSTRIAL PAINTING CORPORATION OF NEVADA, a Nevada Corporation, Respondent.

No. 4937

February 8, 1966 410 P.2d 759

Appeal from order denying third party claim to real property. Eighth Judicial District Court, Clark County; Richard L. Waters, Jr., Judge.

Proceeding on appeal from an order of the trial court denying third-party claim to real property. The Supreme Court, Zenoff, D. J., held that where escrow sale agreement had been opened, deed executed, and deed placed in escrow before attachment by judgment creditor of vendors, all conditions relating to sale were performed before attachment and escrow agent could have been compelled by either party to deliver deed and purchase money even though date of close of escrow had not arrived, and thus ownership had transferred to purchaser before attachment was levied and vendors no longer had interest in property subject to levy of attachment.

Reversed.

Boyd and Leavitt, of Las Vegas, for Appellants.

Elmer M. Gunderson, of Las Vegas, for Respondent.

1. Vendor and Purchaser.
   As long as conditions of escrow sale agreement relating to real property remain unperformed, vendor's interest is subject to rights of attaching creditors.
2. Vendor and Purchaser.
   If title has passed to purchaser, attaching creditor of vendor can gain no rights in property conveyed.
3. Vendor and Purchaser.
   Title to real property passes when all conditions of sale are performed.
4. Escrows.
   Where requirement of recordation was printed on back of escrow sale agreement and merely stated that close of escrow should be day on which instruments were recorded, such printed instructions were not conditions of sale but rather definitions and conditions for protection of escrow

agent and were thus merely procedural and did not impose any affirmative action on part of parties to agreement that could be construed as condition to passing of title.

5. Fraudulent Conveyances.
   Attaching creditor or judgment creditor is not within class designated by recording statute for protection

against unrecorded conveyance. NRS 111.320, 111.325.

6. Escrows.

Where escrow sale agreement had been opened, deed executed, and deed placed in escrow before attachment by judgment creditor of vendors, all conditions relating to sale were performed before attachment and escrow agent could have been compelled by either party to deliver deed and purchase money even though date of close of escrow had not arrived, and thus ownership had transferred to purchaser before attachment was levied and vendors no longer had interest in property subject to levy of attachment.

OPINION

By the Court, Zenoff, D. J.:

Owen and Thelma Rust, owners of certain real property in Clark County, entered into an escrow sale agreement wherein they agreed to sell Lot No. 6 to the Sturgills for a stated price pursuant to agreed terms.

On January 15, 1964 an escrow was opened, and on March 2, 1964 the deed to the property was deposited in the escrow. On March 12, 1964 the respondent, a judgment creditor of the sellers, levied an attachment on the property which was the subject of the sale.

Appellants asserted their third party interest as purchasers and owners of the subject property. The attaching creditor defended, claiming that since the escrow was not closed, title to the property had not transferred from the sellers to the buyers at the time of the attachment. They based their argument on the fact that the escrow agreement contained the provisions, "close of escrow shall be on or before March 17, 1964," and "the close of escrow shall be the day on which the instruments are recorded." The escrow, in fact, did not close until April 3rd. No reason for the delay was given.

Counsel stipulated on oral argument that the down payment had been paid into escrow before the date of the attachment. It was further stipulated in the trial

court that conditions one through five of the escrow agreement (including approval of the buyers to assume an existing encumbrance, transfer of a reserve account, and adjustments for taxes and insurance) were met prior to the attachment. We find that these were the only conditions relating directly to the sale and the passing of title to the property.

The trial court sustained respondent's contention. We do not agree with the ruling.

[Headnotes 1, 2]

So long as the conditions of an escrow remain unperformed, the grantor's interest is subject to rights of attaching creditors. Olander v. Tighe, 61 N.W. 633 (Neb. 1895); Wolcott v. Johns, 44 P. 675 (Colo. 1896); May v. Emerson, 96 P. 454 (Ore. 1908). See also 87 A.L.R. 1505. However, if title has passed to the grantee, an attaching creditor of the grantor can gain

no rights in the conveyed property. Kinnison v. Guaranty Liquidating Corp., 115 P.2d 450 (Cal. 1941).

Therefore, the determinative factor in the instant case is whether at the time of attachment the legal title was in the sellor or in the buyer.

The escrow had been opened, the deed executed, and the deed placed in the escrow before the attachment. All of the conditions relating to the sale were performed before the attachment, but the deed was recorded and the escrow closed subsequent to the attachment.

There is some authority for the proposition that title cannot pass until the deed is recorded when recordation is a condition in the instructions. Lieb v. Webster, 190 P.2d 701 (Wash. 1948). In that case, the condition read: "He [the escrow agent] was to procure and record conveyance to the appellants." This condition was included among the conditions concerning other financing, policies of title insurance, and assumption of prior encumbrances.

In the instant case, the requirement of recordation was printed on the back of the agreement and merely stated that, "close of escrow shall be the day on which the instruments are recorded." Those printed instructions are not conditions of sale but rather definitions and conditions for the protection of the escrow agent.

↓ 82 Nev. 61, 64 (1966) Sturgill v. Industrial Painting Corp. ↓

[Headnotes 3, 4]

Title passes when all conditions of sale are performed, Holman v. Toten, 128 P.2d 808 (Cal. 1942), so the closing date becomes immaterial. It seems clear to us that the phrases relating to recordation and close of escrow were merely procedural and did not impose any affirmative action on the part of the parties that could be construed as a condition to the passing of title.

[Headnote 5]

Appellant correctly argues that an attaching creditor or a judgment creditor is not within the class designated by the recording statute for protection against an unrecorded conveyance. NRS 111.320 and 111.325 protect subsequent *purchasers* and *mortgagees* and make no reference to creditors. See Sharon v. Minnock, 6 Nev. 377 (1871); Wilson v. Wilson, 23 Nev. 267, 45 P. 1009 (1896); Adams v. Baker, 24 Nev. 162, 51 P. 252 (1897); In re Wilson's Estate, 56 Nev. 500, 56 P.2d 1207 (1936).

[Headnote 6]

When the conditions of the sale had been met the escrow agent could have been compelled by either or both of the parties to the sale to deliver the deed and the purchase money regardless that the date of the close of escrow had not yet arrived, for nothing more remained to be done to effectuate the sale itself. Thus, ownership had transferred to the buyer before the attachment was levied and the seller no longer had an interest in the property that was subject to a levy of attachment.

Reversed. Judgment shall enter granting the third party claim in accordance with its prayer

for relief.

Thompson and Badt, JJ., concur.

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82 Nev. 65, 65 (1966) Lawry v. Devine

JACK D. LAWRY, dba JACK D. LAWRY & ASSOCIATES,
Appellant, *v.* W. E. DEVINE, Respondent.

No. 4973

February 8, 1966 410 P.2d 761

Appeal from the Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Suit by real estate broker against owner of real property for commission. The trial court rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Zenoff, D. J., held that a letter stating the selling price, the terms of sale, and information as to taxes and insurance, given the broker by the owner whom the broker had contacted for the information, did not constitute a listing agreement, and did not bind the owner for the broker's commission in relation to a nonconsummated sale to a prospective purchaser procured by the broker.

Affirmed.

Carl F. Martillaro, of Carson City, for Appellant.

Paul A. Richards and *Chauncey G. Griswold,* of Reno, for Respondent.

1. Appeal and Error.
   Factual findings of trial court will be sustained at appellate level if there is any substantial evidence in record supporting them.
2. Appeal and Error.
   Supreme Court is compelled by record to accept trial court's determination as to what transpired in negotiations for sale of property, in action involving broker's entitlement to commission.
3. Brokers.
   Fact that broker approaches owner of real estate and requests terms at which he is willing to sell his property is not sufficient in and of itself to show contract of employment by owner of property so as to bind him legally to pay commission to broker when he produces prospective buyer.
4. Brokers.
   Naked act of owner of real property giving broker, upon request, letter containing some of terms upon which he will sell his property does not constitute employment of broker thereby entitling him to recover commission for securing buyer.

5. Brokers.
   Each case must stand on its own facts, in determining whether broker is entitled to commission for procuring prospective purchaser of real property.
6. Brokers.
   Letter stating selling price, terms of sale, and information as to taxes and insurance, given broker by owner whom he had contacted for information, did not constitute listing agreement, and did not bind owner for broker's commission in relation to nonconsummated sale to prospective purchaser procured by broker.

OPINION

By the Court, Zenoff, D. J.:

This suit was instituted by Lawry, a real estate broker, to recover a commission from Devine, the owner of certain real property in Ormsby County.

On January 17, 1963, Lawry contacted Devine for the purpose of securing information concerning the property as he had a prospective buyer. Devine had his wife type on his office stationery the following:

"TO WHOM IT MAY CONCERN

As follows is the selling price, and other information as to the property located on Highway 395 S. of Carson City, Nevada.

$42,000 Selling Price: This selling price is over and above real estate commissions, or any other selling charges.

$10,000 down payment: 6% Interest on unpaid balance annual:

The taxes on the property run approximately $114.07 per year.

The insurance for coverage amounting to $10,000.00 is $298.70 per year."

Devine's name was typewritten under this. Printed in ink at the end of the memorandum was the phrase, "$200.00 month."

Lawry related this information to his prospective buyer, Bunkowski, who signed an offer and acceptance form and gave Lawry a check for $1,000.00 as a deposit.

Devine did not see or sign the offer and acceptance

agreement nor did either of the parties sign the escrow agreement which Lawry had prepared reciting a down payment of $1,000.00 and a first trust deed for $36,000.

Instead, a meeting was called to negotiate the sale of Devine's property. Apparently, Devine had forgotten the balance on an existing encumbrance and informed Lawry of the

amount at this meeting. The record reflects disagreement as to whether Bunkowski was or was not willing to proceed with the sale when he learned of the $21,000 first deed of trust. Devine testified that Lawry informed him that Bunkowski would not assume this encumbrance. Devine and Bunkowski never met prior to trial. No agreement was reached and the property was subsequently leased by Devine to a third party with an option to buy.

Lawry contends that, as agent for Devine, he produced a buyer ready, willing, and able to buy on the terms set out by Devine and thus is entitled to his broker's commission.

The trial court, as trier of the facts, resolved the conflict in testimony in favor of Devine finding that there was no meeting of the minds of the parties concerning the sale of the property as the terms were incomplete. Therefore, the court held that Lawry was not entitled to a commission.

[Headnotes 1, 2]

1. We reach the same result but on different grounds. It is well established that the factual findings of the trial court will be sustained at the appellate level if there is any substantial evidence in the record supporting them. Friendly v. Larsen, 62 Nev. 135, 144 P.2d 747 (1944); Close v. Redelius, 67 Nev. 158, 215 P.2d 659 (1950). We are compelled by the record to accept the trial court's determination as to what transpired in the negotiations for the sale of this property.

[Headnote 3]

2. However, we fail to find that a listing agreement was ever established between the seller, Devine, and the broker, Lawry. The fact that a broker approaches an owner of real estate and requests the terms at which he is willing to sell his property is not sufficient in and

of itself to show a contract of employment by the owner of the property so as to bind him legally to pay a commission to the broker when he produces a prospective buyer. Smith v. Lewis, 291 P.2d 804 (Wyo. 1955); M. L. Bass v. American Railway Express Co., 126 S.E. 112 (N.C. 1925); Forney v. La Susa, 132 N.E.2d 55 (Ill. 1956); 43 A.L.R. 839.

[Headnotes 4, 5]

The naked act of an owner of real property giving a broker, upon request, a letter containing some of the terms upon which he will sell his property, does not constitute an employment of the broker thereby entitling him to recover a commission for securing a buyer. Herring v. Fisher, 242 P.2d 963 (Cal. 1952). Each case must stand on its own facts. An open request to find buyers as in Bartsas Realty, Inc. v. Leverton, 82 Nev. 6, 409 P.2d 627 (1966), is distinguishable from the mere expression of a willingness to place property for sale at the request of the broker. For instance, if the transaction here had been consummated within the

terms of the memorandum such would have been evidentiary of the owner's intent that the memorandum be construed as a listing with the agent. See Stein v. James, 329 F.2d 459 (Okla. 1964).

[Headnote 6]

The owner, by the act of relating to the broker the terms for the sale of his property, is not thereby irrevocably bound, having entered an employment agreement. To hold otherwise would place the owner of real property in a position of tight-lipped restraint. He would run a severe risk in just discussing the disposition of his property with a broker. It is clear from the facts of this case that the letter stating terms for the sale of Devine's property was not a listing agreement and, therefore, did not bind Devine for the broker's commission sought by appellant.

Therefore, we affirm the holding of the lower court.

Thompson and Badt, JJ., concur.

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82 Nev. 69, 69 (1966) Dredge Corp. v. Wells Cargo, Inc.

DREDGE CORPORATION, a Nevada Corporation,
Appellant, *v.* WELLS CARGO, INC., Respondent.

No. 4931

February 10, 1966 410 P.2d 751

Appeal from judgment of the Eighth Judicial District Court, Clark County; Taylor H. Wines, Judge.

Action by gravel company against owner of unpatented mining claims for specific performance of latter's contractual promise to convey an undivided one-half interest in patented claims and for a partition. Owner counterclaimed for value of gravel removed, for damages for breach of contract, and to quiet title in itself to all of the claims. The lower court found for gravel company, and appeal was taken. The Supreme Court, Thompson, J., held that remedy of specific performance was available to gravel company with respect to patented claims, even where gravel company failed to perform contractual obligation on other unpatented claims, where contract was divisible as to each claim, and where federal government administrative proceeding was designed to determine validity of mining locations and did not preclude prospecting or exploration work, nor did it affect right to occupy claims for those purposes, gravel company that had agreed with owner of mining claims to work unpatented claims could work them notwithstanding government contest, so that performance by gravel company was not excused, and gravel company's action for specific performance of

owner's promise to convey an undivided one-half interest in patented claims should be remanded where trial court made no finding as to gravel company's performance as to unpatented claims.

Affirmed in part and reversed in part, with directions.

See also 80 Nev. 99, 389 P.2d 394.

Deaner, Butler & Adamson, of Las Vegas; *Marcus & Kahn,* of Beverly Hills, California, for Appellant.

Guild, Guild & Cunningham, and *David W. Hagen,* of Reno, for Respondent.

➧ 82 Nev. 69, 70 (1966) Dredge Corp. v. Wells Cargo, Inc. ➧

1. Contracts.

   A contract is "divisible" where, by its terms, performance of each party is divided into two or more parts, number of parts due from each party is the same, and performance of each part is agreed exchange for a corresponding part by other party.

2. Mines and Minerals.

   Language in contract between owner of mining claims and gravel company, which stated that when patents had been issued on any of said claims owner would convey to gravel company an undivided one-half interest therein, together with fact that the parties desired to secure patents for unpatented claims, and that when contract was made they had good reason to believe that they might obtain patents from some claims and not others, showed that contract was intended to be divisible.

3. Mines and Minerals.

   Cancellation clause of contract between owner of mining claims and gravel company, which provided that if gravel company failed to perform any condition, covenant, term or agreement at time and in manner set forth, such agreement was automatically cancelled, did not destroy divisibility of contract since such language, by itself, was compatible with either divisible contracts or an entire contract.

4. Specific Performance.

   Remedy of specific performance of contract whereby owner of mining claims was to convey to gravel company an undivided one-half interest in patented claim, was available to gravel company with respect to patented claims, even where gravel company failed to perform contractual obligation on other unpatented claims, where contract was divisible as to each claim.

5. Appeal and Error; Mines and Minerals.

   Where federal government administrative proceeding was designed to determine validity of mining locations and did not preclude prospecting or exploration work, nor did it affect right to occupy claims for those purposes, gravel company that had agreed with owner of mining claims to work unpatented claims could work them notwithstanding government contest, so that performance by gravel company was not excused, and gravel company's action for specific performance of owner's promise to convey an undivided one-half interest in patented claims should be remanded where trial court made no finding as to gravel company's performance as to unpatented claims.

6. Mines and Minerals.

   Contract between gravel company and owner of unpattented mining claims which provided that when patents had been issued on any of the claims owner was to convey an undivided one-half interest in and to said land, provided on any part of said land wherein gravel company had constructed buildings, pits, etc.,

that part shall be conveyed to gravel company, supported finding that, as to claims on which gravel company had constructed gravel pit, gravel company had fee simple title.

7. Evidence.

Recital of fact in contract between owner of mining claims and gravel company, that gravel company was desirous of entering into an agreement with owner for removal of gravel from said claims, was conclusively presumed to be true. NRS 52.060, subd. 2.

8. Mines and Minerals.

Where contract between gravel company and owner of mining claims provided that gravel company had the right before patent to remove gravel from any claims without limit and without royalty, and that after patent gravel company was to become owner of that part of patented claim occupied by its gravel pit, court correctly denied owner's counterclaim for an accounting of profits earned by gravel company for gravel removed from patented claims after patents were issued, since on that date gravel company became equitable owner of gravel pit area.

OPINION

By the Court, Thompson, J.:

The inception of this controversy was an agreement entered into on May 12, 1954, between Dredge Corporation and Wells Cargo, Inc., concerning mining claims in Clark County, Nevada. The parties have different notions about the meaning of that agreement and their rights thereunder. Dredge acquired the mining claims and wished to patent them under the United States mining laws. Wells, a gravel business operator, wanted to obtain a free gravel supply. To accommodate the desire of each the agreement was made. In short, the agreement obligated Wells to excavate at least 500 cubic yards of gravel from each claim and spend at least $500 in the improvement of each claim. A time limit was specified. Also, Wells was to do the required annual assessment work until patents were issued. When a patent was issued on any claim, Dredge was to convey to Wells an undivided one-half interest therein. The May 12, 1954, agreement concerned 13 unpatented mining claims (Dredge Nos. 25, 26, 27, 52, 53, 54, 55, 56, 57, 58, 59, 61 and 62). On May 23, 1955, 11 more were added (Dredge Nos. 13, 14, 15, 16, 36, 37, 40, 41, 44, 45, 60), and on June 8, 1955, 5 more (Alpha, Beta, Gamma, Delta, Epsilon).

As to the original group of 13 claims the parties

agreed that performance by Wells on Claims 25, 26 and 27 was excused; that Wells fully performed on Claims 54, 55, 58, 59, 61 and 62. They do not agree whether Wells performed

its contractual obligations on Claims 52, 53, 56 and 57. As to the 11 additional claims added to the agreement on May 23, 1955, it is conceded that Wells fully performed on Claim No. 60. Performance is disputed on the remaining 10, and an issue is raised as to whether performance by Wells was excused by reason of contest proceedings commenced by the Bureau of Land Management. The same is true with regard to the 5 claims added to the agreement on June 8, 1955. Wells did the annual assessment work on all claims to the time of trial. It is clear from the record that Wells ceased all other work on any of the claims in 1956, except Claims Nos. 54, 55, 58, 59, 60, 61 and 62.

On August 4, 1960, the United States issued patents to Dredge on Claims Nos. 58, 59, 61, 62 and the south one-half of 60. On November 15, 1962, Dredge gave Wells notice that Wells had failed to perform its contractual obligations on all claims on which patents had not been issued, and soon thereafter litigation started. On November 30, 1962, Dredge commenced an action for declaratory relief and for an accounting by Wells of profits from its gravel pit operations. In that case the lower court granted summary judgment to Wells, which was reversed on appeal. Dredge Corp. v. Wells Cargo, 80 Nev. 99, 389 P.2d 394 (1964). Meanwhile, on May 3, 1963, Wells sued Dredge for specific performance of its promise to convey an undivided one-half interest in the patented claims and for a partition. Dredge counterclaimed for the value of the gravel removed, for damages for breach of contract, and to quiet title in itself to all of the claims. As all issues raised by the first case were involved in the second, the parties agreed to dismiss the first action without prejudice and go to trial on the second. This was done. The lower court found in favor of Wells and against Dredge and this appeal followed. Reference to specific findings which are challenged, will be made as particular assignments of error are discussed.

The five main questions presented to us by the appellant Dredge are: First, is the contract of May 12, 1954, divisible as to each claim, thereby enabling Wells to acquire an interest in the patented claims on which it fully performed, even though it failed to perform on many of the unpatented claims? The lower court ruled that the contract was divisible and granted relief to Wells on the patented claims. Second, was the failure of Wells to perform on many of the unpatented claims excused because of the contest proceedings started by the Bureau of Land Management? The lower court found that performance by Wells was excused as it had performed "to a point that was practical," in view of the government contest. Third, assuming divisibility of the contract, what is the extent of Wells' interest in the patented claims? The lower court construed relevant contract provisions. Fourth, is Dredge entitled to an accounting of profits earned by Wells for gravel removed from the patented claims after the date that patents were issued? The lower court denied an accounting. Fifth, may Dredge recover damages from Wells for breach of contract? By reason of its rulings on the first and second issues above mentioned, the trial court, a fortiori, denied contract damages to Dredge. Dredge challenges each ruling.

[Headnote 1]

(1) The district court found the contract divisible as to each claim and reasoned that Wells was entitled to specific performance from Dredge as to the claims on which patents were issued. A contract is divisible where, by its terms, performance of each party is divided into two or more parts; the number of parts due from each party is the same; and the performance of each part is the agreed exchange for a corresponding part by the other party. Restatement, Contracts § 266. Of course, the words used and the subject matter involved show the intention of the parties. State v. Jones, 21 Nev. 510, 34 P. 450 (1893); Hutchens v. Sutherland, 22 Nev. 363, 40 P. 409 (1895); Linebarger v. Devine, 47 Nev. 67, 214 P. 532 (1923); Fuller v. United Electric Co., 70 Nev. 448, 273 P.2d 136 (1954). In Jones, Linebarger,

and Fuller, the contracts were declared to be entire, while in Hutchens the language of the contract pointed to divisibility and the court so ruled. The intent of the parties and the object sought to be accomplished controls. Sterling v. Gregory, 149 Cal. 117, 85 P. 305 (1906).

[Headnote 2]

Here we agree with the lower court that the words used show that Dredge and Wells intended to treat each mining claim separately. The contract states that "when patents have been issued on any of said claims" Dredge shall convey to Wells an undivided one-half interest therein. The word "any" suggests divisibility. Wells was not obliged to work all claims simultaneously. The contract provided otherwise. Finally, and perhaps of overriding significance, is the subject matter involved. The parties desired to secure patents for unpatented claims. When the contract was made they had good reason to believe that they might obtain patents on some claims and not on others. Success depended in part upon the view of the United States as to whether a patent on any particular claim should be granted. Patents were separately applied for, proof submitted as to each claim, and separately treated. The parties undoubtedly had this in mind when they imposed the obligation on Dredge to convey when a patent was issued on "any" claim.

[Headnote 3]

Dredge argues that the cancellation clause of the contract destroys divisibility. That clause provides that, if Wells fails to perform "any condition, covenant, term or agreement herein, at the time and in the manner herein set forth after 5 days written notice of such failure, then this agreement is automatically cancelled * * *." That language is not germane to the issue of whether the contract is divisible. By itself, that clause is compatible with either divisible contracts or an entire contract. As indicated, we think that other language of the contract and the subject matter involved shows the parties' intention to treat each claim separately. A fortiori, the cancellation clause is applicable to each claim separately.

[Headnote 4]

Notwithstanding the lower court's view about divisibility, with which we are in accord, Dredge insists that the remedy of specific performance is not available to Wells with respect to the patented claims, because of its failure to perform contractual obligations on the unpatented claims. [1] The position is not valid. Having determined that the contract is divisible as to each claim, it follows that a right to specific performance exists as to each claim upon which Wells has fully performed and a patent has been issued. Bower v. Bagley, 9 Wash. 642, 38 P. 164 (1894).

[Headnote 5]

(2) The next question to be considered is the contention that the district court erroneously found that Wells' obligation to perform on the unpatented claims (except Claims Nos. 52, 53, 56, 57) [2] was excused because of contest proceedings commenced by the Bureau of Land Management. In so ruling the court expressly declined to decide whether Wells had fully performed on those claims, though much evidence was received bearing on that issue. Wells contended throughout that it had given full performance on each claim, and offered evidence. Only subordinately did Wells assert the contest proceedings as an excuse for non-performance. Of course, it would be inappropriate for this court to make an initial finding as to performance by Wells. That is a trial court function and, as we agree with Dredge that performance by Wells was not excused, a remand is necessary as to this aspect of the litigation.

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[1] The main authority cited is Byers v. Fuller, 58 F.Supp. 570 (D.C.E.D. Ky. 1945), where the court found the agreement to be divisible and at the same time refused specific performance for the part performed because the plaintiff had defaulted as to other separable parts. We do not agree with the Byers holding and state only that we think that court erred in concluding that the agreement was divisible rather than entire.

[2] Claims Nos. 52, 53, 56 and 57 were not contested by the Bureau of Land Management. Yet the lower court failed to decide whether Wells had fully performed on those claims, nor does the judgment deal with them. They are in limbo. The rights of the parties with respect to those claims should be resolved in this litigation.

The lower court ruled that performance by Wells was excused because of contest proceedings commenced by the Bureau of Land Management. The thought advanced is that the federal administrative proceeding effectively prevented further work by Wells on the

claims being contested and excused further performance. When those claims were added to the agreement of May 12, 1954, the parties knew of the government contest and exchanged promises notwithstanding such knowledge. In such circumstances, impossibility of performance because of governmental action, did not occur. McCulloch v. Liguori, 88 Cal.App.2d 366, 199 P.2d 25 (1948). Furthermore, the filing of a contest by the government is not a "judicial executive or administrative order" preventing or prohibiting further work on the claims by Wells.[3] That administrative proceeding is designed to determine the validity of the mining locations and does not preclude prospecting or exploration work, nor does it affect the right to occupy the claims for those purposes. Davis v. Nelson, 329 F.2d 840 (9th Cir., 1964). Wells could work the claims notwithstanding the government contest. Accordingly, performance by Wells was not excused.

Our ruling on this question eliminates any need to consider the fifth question offered by this appeal—may Dredge recover damages from Wells for breach of contract? That question may become an issue in the event the lower court on remand decides that Wells has not fully performed its contractual obligations with respect to the unpatented claims we have been discussing.

(3) We now turn to consider the extent of Wells' interest in the patented Claims 58, 59, 61, 62 and the south one-half of 60. Paragraph 7 of the contract provides: "When patents have been issued on any of said

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[3] Restatement, Contracts § 458 provides: "A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States."

claims, said Dredge Corporation agrees to convey an undivided one-half interest in and to said land provided on any part of said land wherein said Wells Cargo, Inc. has constructed buildings, pits, etc., that part shall be conveyed to said Wells Cargo, Inc." The Wells gravel pit occupied a part of patented Claims 61 and 62. The record shows that Wells had removed about 1,989,000 cubic yards of gravel from that pit area during the 10 year period, 1954 (when the agreement was entered into) to 1964 (when the parties presented their differences to the court).

[Headnote 6]

Dredge contended below, and contends here, that the quoted proviso of the contract entitles Wells to an undivided one-half interest in the patented claims, and no more. Wells agrees, except as to the gravel pit area of 61 and 62 to which it claims fee simple title. The lower court ruled for Wells on this point, relying on that portion of the quoted paragraph, "provided on any part of said land wherein said Wells Cargo, Inc. has constructed buildings, pits, etc. that part shall be conveyed to said Wells Cargo, Inc." We agree with that ruling. Though the word arrangement throughout the contract is not grammatical, we think that the intention is fairly expressed. Evidence aliunde is not needed.

[Headnotes 7, 8]

Wells is a gravel business operator and wanted a free gravel supply. For this reason Wells contracted with Dredge. A recital of their agreement points this out—"Whereas, said Wells Cargo, Inc. is desirous of entering into an agreement with said Dredge Corporation for the removal of gravel from said claims * * *." That recital of fact is conclusively presumed to be true. NRS 52.060(2); Thomsen v. Glenn, 81 Nev. 56, 398 P.2d 710 (1965). Consonant with that purpose, Wells was granted the right before patent to "remove gravel from any of said claims without limit and without royalty" (paragraph 8 of the agreement); and after patent Wells was to become the owner of that part of the patented claim occupied by its gravel pit (paragraph 7 of the agreement already quoted). We think that the holding of the lower

court as to Wells' interest in the patented claims honored the plain meaning of the agreement and is in harmony with the underlying purpose which moved Wells to contract with Dredge. [4] This being so, it follows that the ruling below denying Dredge's counterclaim for an accounting of the profits earned by Wells for gravel removed from the patented claims after the date that patents were issued is also correct, for on that date Wells became the equitable owner of the gravel pit area. We thus dispose of the third and fourth questions presented by this appeal. [5]

Accordingly, the judgment below is affirmed with respect to the patented claims known as Dredge Claims 58, 59, 61, 62 and the south one-half of 60. It will be necessary for the district court to specify a time within which the judgment as to these claims must be complied with, as the time originally designated has passed because of this appeal.

For reasons expressed in this opinion, this case must be remanded to the district court for additional findings with respect to the unpatented claims concerning which the judgment was silent. As to those claims we remand and direct the lower court to find from the record as it now exists whether Wells performed its contractual obligations: (1) with respect to the

unpatented claims known as Dredge Claims 52, 53, 56 and 57, which were not contested by the Bureau of Land Management; and (2) with respect to the unpatented claims known as Dredge Claims 13, 14, 15, 16, 36, 37, 40, 41, 44, 45, Alpha, Beta, Gamma, Delta and Epsilon, which were contested by the Bureau of Land Management; and to make such further orders as may become necessary by reason of its finding on the issue of performance.

Finally, as the parties have conceded that Wells fully performed with respect to the unpatented claims known

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[4] The purpose of Dredge in entering into the agreement is equally clear. The agreement required Wells to bear the extensive costs to be incurred in developing the claims for patent. Dredge was not financially obligated.

[5] An assignment of error about a ruling on evidence need not be considered as it does not affect our resolution of this appeal.

as Dredge Claims 54 and 55, which claims are not contested by the Bureau of Land Management, the judgment must be enlarged to provide that Wells shall have the right to continue to remove gravel from those claims without limit and without royalty. Should patents later issue, Wells' interest therein shall be as herein provided with respect to the claims on which patents have already issued.

Each party shall bear its own costs on appeal.

Badt, J., and Bowen, D. J., concur.

THE STATE OF NEVADA, Ex Rel. LESTER E. MORFORD, III, Appellant, *v.* JACK FOGLIANI, Warden, Nevada State Penitentiary, Carson City, Ormsby County, Nevada, Respondent.

No. 4956

February 21, 1966 411 P.2d 122

Appeal from order of the First Judicial District Court, Ormsby County, Richard L. Waters, Jr., Judge, denying habeas corpus.

The Supreme Court, Thompson, J., held that the Fifth Amendment to the Federal Constitution, U.S.C.A. Const. Amend. 5, requiring that prosecution for a capital offense be by grand jury indictment is not applicable to state prosecution for murder and that fact that prosecution in state court for murder was based on an information instead of an indictment did not render conviction and death sentence for first-degree murder unconstitutional and void.

Affirmed.

[Rehearing denied March 21, 1966]

John Squire Drendel, and *Stanley H. Brown,* of Reno, for Appellant.

Harvey Dickerson, Attorney General, of Carson City, and *William J. Raggio,* District Attorney, Washoe County, of Reno, for Respondent.

1. Habeas Corpus.
   Contention that open charge of murder contained in information to which plea of guilty was entered did not authorize a finding of first-degree murder could not be raised by petition for writ of habeas corpus. NRS 200.030.
2. Habeas Corpus.
   Writ of habeas corpus does not perform function of demurrer, motion to quash or appeal.
3. Habeas Corpus.
   Constitutional validity of conviction may be tested by habeas corpus.
4. Indictment and Information.
   Fifth Amendment to Federal Constitution requiring that prosecution for capital offense must be by grand jury indictment is not applicable to state prosecution for murder. U.S.C.A.Const. Amend. 5.
5. Indictment and Information.
   Federal Constitution does not preclude dispensing entirely with grand jury in state prosecutions. U.S.C.A.Const. Amend. 5.
6. Indictment and Information.
   That prosecution for murder was based on information instead of grand jury indictment did not render conviction and death sentence for first-degree murder unconstitutional and void. U.S.C.A.Const. Amend. 5.

OPINION

By the Court, Thompson, J.:

[Headnotes 1-3]

This is an appeal from an order denying habeas corpus. Morford entered a plea of guilty to an open charge of murder. A three-judge court was appointed to hear evidence, determine degree, and impose sentence. NRS 200.030. Morford was adjudged guilty of first degree murder and sentenced to death. That judgment was affirmed on appeal. Morford v. State, 80 Nev. 438, 395 P.2d 861 (1964). Some of the questions raised by the instant proceeding were resolved by that appeal and we are not persuaded that they should be reconsidered. Nor shall we consider the petitioner's claim that the open charge of murder contained in the information does not authorize a finding of first degree murder. That claim comes too late, for it is not the function of post-conviction habeas corpus to perform the office of demurrer,

82 Nev. 79, 81 (1966) Morford v. Fogliani

motion to quash, or appeal. Ex parte Boley, 76 Nev. 138, 350 P.2d 638 (1960). We shall only consider his contention that the judgment and sentence is unconstitutional and void in that he was charged by information rather than by indictment, for the constitutional validity of a conviction may be tested by habeas corpus. Dean v. Fogliani, 81 Nev. 541, 407 P.2d 580 (1965); Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965).

[Headnotes 4-6]

The petitioner claims that the Fifth Amendment to the federal constitution requires prosecution for a capital offense to be by grand jury indictment, and that we should consider that part of the Fifth Amendment applicable to state murder prosecutions. The Supreme Court of the United States has ruled otherwise. Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232 (1884); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1961). There is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. Beck v. Washington, supra. Though petitioner suggests otherwise, we find nothing in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), or Murphy v. New York Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 678 (1964), to intimate that the High Court is about to overturn Hurtado and Beck. The Malloy and Murphy opinions concern only a part of the Fifth Amendment—the privilege against self incrimination. Nor is Smith v. United States, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959), apposite, for it was a federal prosecution.

Affirmed.

Badt, J., and Zenoff, D. J., concur.

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82 Nev. 82, 82 (1966) Dep't of Hwys. v. Wells Cargo, Inc.

THE STATE OF NEVADA, on Relation of Its Department of Highways, Appellant, *v.* WELLS CARGO, INC., a Nevada Corporation, Respondent.

No. 4936

February 24, 1966 411 P.2d 120

Appeal from the Eighth Judicial District Court, Clark County; David Zenoff, Judge.

Eminent domain proceedings. From parts of judgment of the lower court awarding compensation for property taken for construction of highway interchange, the state highway department appealed. The Supreme Court, Badt, J., held, inter alia, that where grant deed of land for highway construction was accepted by county board subject to encroachment of existing fence and weighing installations upon surveyed right-of-way, grantor had an express easement in land conveyed for which grantor was entitled to compensation upon the taking of such easements by eminent domain for construction of highway interchange.

Affirmed.

Harvey Dickerson, Attorney General, and *Eli Grubic,* Special Deputy Attorney General, for Appellant.

Guild, Guild & Cunningham, of Reno, for Respondent.

1. Deeds.
   Law will not force grantee to take title to realty against his will, where grantee accepts only part of conveyance or accepts it subject to conditions.
2. Eminent Domain.
   Where grant deed of land for highway construction was accepted by county board subject to encroachment of existing fence and weighing installations upon surveyed right-of-way, grantor, continuing to use such improvements in connection with adjoining land still owned by grantor, had express easement in land conveyed to county for which grantor was entitled to compensation upon the taking of such easement by eminent domain for construction of highway interchange. NRS 37.020, subd. 2, 408.010 et seq.
3. Eminent Domain.
   Value of interests, such as easements, in land taken by eminent domain for highway interchange and severance

damages as a result of such taking to adjoining land owned by owner of interests taken were questions of fact. NRS 37.020, subd. 2, 408.010 et seq.
4. Eminent Domain.
   Determinations by trial judge as fact-finder as to value of interests in land taken by eminent domain for

highway interchange and severance damages as a result of such taking to adjoining land still owned by owner of interests taken were supported by substantial evidence and hence should not be disturbed on appeal. NRS 37.020, subd. 2, 408.010 et seq.

5. Evidence.

Chief executive officer who had purchased for corporation property being taken by eminent domain and was individual owner of adjacent lands was qualified to testify as to value of property taken. NRS 37.020, subd. 2.

OPINION

By the Court, Badt, J.:

This is an appeal by the Highway Department of the State of Nevada from parts of an eminent domain judgment which, in total, awarded respondent Wells Cargo, Inc., $442,536 for various takings pursuant to construction of a Las Vegas highway interchange. NRS ch. 408. Appellant does not protest the bulk of the award, but argues that the court below erred in finding Wells had any property interests in two parcels of land for which Wells was awarded $20,590, and therefore Wells had no right to severance damages for a third, adjacent parcel, for which Wells received $5,369. Further, appellant protests that $181,070 was an unreasonably high evaluation of Wells' severance damages in other parcels, and valuation testimony of the corporation's president, Joseph W. Wells, should not have been admitted.

We reject all of appellant's contentions.

1. There is no dispute as to the facts surrounding appellant's protest that Wells had no property interests worthy of compensation in parcels "A" and "B." On June 12, 1956, Wells Cargo, Inc., through J. W. Wells, executed and acknowledged a "Grant Deed" to Clark County, Nevada, purporting to convey parcels "A" and

"B." [1] Three weeks later, on July 6, 1956, the Board of County Commissioners of Clark County regularly met and, according to their minutes, accepted the Wells property "with the following conditions: permit the present fence and weighing installations to encroach upon the east edge of the surveyed right-of-way until such time as the property adjoining changes ownership or until the encroachment is no longer necessary to the business conducted thereon. Thereafter, Wells continued to make use of its improvements on parcels "A" and "B" without incident until the instant eminent domain proceedings, which, as noted, awarded Wells $20,590 for its "interests" in the lands.

It is the gist of appellant's argument that the June 12, 1956, deed from Wells to the county conveyed a fee simple absolute, leaving Wells no interests whatsoever in the properties and therefore no right to any subsequent eminent domain damages. Wells replies that the deed *and* the July 6 board minutes must be read together for the complete import of the intended transaction between Wells and Clark County; and that Wells therefore retained a compensatory interest in the parcels.

[Headnotes 1, 2]

We need not delve further into the parties' theories. No matter what the June 12 deed, taken alone, purported to convey, the clear fact is that the grantee county only accepted part of that conveyance. This is evidenced by the minutes of the board. Harmon v. Tanner Motor Tours, 79 Nev. 4, 377 P.2d 622. In such transactions, the law will not force a grantee to take title to real

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[1] "WHEREAS, the County of Clark, State of Nevada, Grantee, desires to construct a highway HIGHLAND ROAD, and

"WHEREAS, the proposed route of said road has been surveyed and staked, and construction work has been commenced, and

"WHEREAS, WELLS CARGO, INCORPORATED by J. W. Wells, as Grantor, desires to grant and convey to the said Clark County, Nevada, the below described land for purpose of constructing said highway.

"NOW, THEREFORE, in consideration of the premises and of the construction of said highway by Clark County, Nevada, the undersigned Grantor does hereby GRANT, BARGAIN, SELL and CONVEY to Clark County, Nevada, for street and road purposes, all of the following described land * * *."

property against his will. Reina v. Erassarret, 90 Cal.App.2d 418, 203 P.2d 72; Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502. In the matter at bar, the board allowed Wells to retain certain uses of parts of the land subject to conditions outside the county's control. Wells thus held an express easement in the lands and was entitled to compensation upon a taking of this easement by eminent domain. NRS 37.020(2).

[Headnotes 3, 4]

2. The value of the interests taken in parcels "A" and "B," as well as all severance damages, was a question of fact and there is ample testimony indicating substantial evidence in support of the judge below as fact-finder. In such instances, we should not disturb his decisions. Dept. of Highways v. Pinson, 66 Nev. 227, 207 P.2d 1105; Dep't of Highways v. Campbell, 80 Nev. 23, 388 P.2d 733. "Evaluations and determinations reach *de novo* at the appellate level, amounting, in effect, to complete redeterminations of basic issues, are usually best avoided." Conklin v. State, 22 A.D.2d 481, 256 N.Y.S.2d 477.

[Headnote 5]

3. Finally, appellant argues that it was error to permit J. W. Wells to testify as to the value of the taken properties because J. W. Wells was shown only to be "an officer of the corporation" and not shown to be especially qualified to comment on land values in the area of the taking. In Weber v. West Seattle Land & Improvement Co., 188 Wash. 512, 63 P.2d 418, it was held that where a particular individual is controlling and managing officer of a corporation, that should suffice to qualify his statements on that corporation's property values.

Cf. Puget Sound Power & L. Co. v. Public Utility Dist. No. 1, 123 F.2d 286 (9th Cir.), where the "Washington Rule," so-called, is discussed in the dissent. We need not enter that dispute. Here, it was shown J. W. Wells was "chief executive officer" of Wells Cargo, Inc., that he purchased the property now being taken, and was, in fact, an individual owner of adjacent lands. This was

sufficient to qualify him. Dep't of Highways v. Campbell, supra; State v. Olsen, 76 Nev. 176, 351 P.2d 186.

Affirmed.

Thompson, J., and Compton, D. J., concur.

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82 Nev. 86, 86 (1966) Heppner v. McCombs

VERNON C. HEPPNER, Administrator of the Estate of ROBERT PATTON McCOMBS, Deceased, Appellant, *v.* SALLY McCOMBS, as Parent and Guardian of BRUCE McCOMBS and LAUREN McCOMBS, Minors, Respondent.

No. 4957

February 24, 1966 411 P.2d 123

Appeal allowing judgment of child support from California as a claim against estate of deceased father. Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Action on claim against the estate of a decedent. From a judgment of the trial court allowing claim for support of decedent's minor children from date of father's death until each child would reach majority, the administrator of decedent's estate appealed. The Supreme Court, Zenoff, D. J., held that under separation agreement, providing for support of minor children, which expressed intent to bind father's estate and was incorporated in California divorce decree, and decree which was entitled to full faith and credit in Nevada, obligation to support minor children survived death of father as a charge against his estate and was not satisfied by social security survivorship benefits received by children, though they exceeded in amount the monthly support payments provided for in separation agreement.

Affirmed.

Guild, Guild & Cunningham, and *Drennan A. Clark,* of Reno, for Appellant.

William N. Dunseath, of Reno, for Respondent.

1. Executors and Administrators.
   Under separation agreement, providing for support of minor children, which expressed intent to bind father's estate and was incorporated in California divorce decree, and decree which was entitled to full faith and credit in Nevada, obligation to support minor children until they reached majority survived death of father, though then a resident and domiciliary of Nevada, as a charge against his estate.
2. Executors and Administrators.
   Obligation of deceased father's estate to support minor children after his death as fixed by California divorce decree incorporating separation agreement was not satisfied by social security survivorship benefits received by children, though in excess of amount provided in separation agreement for their support, in absence of any expressed intent by deceased father's will or otherwise that such benefits were to replace obligation of estate for support under separation agreement and divorce decree.

OPINION

By the Court, Zenoff, D. J.:

Robert McCombs and Sally McCombs entered into a separation agreement dated May 15, 1957, containing provisions pertinent to financial and property matters customarily made pending a divorce. Relevant to the issues before this court are two paragraphs; one required Robert McCombs to pay $100 per month for the support and maintenance of two minor children until they reached majority; and the other provided that the agreement was binding upon the heirs, administrators, executors and assigns of the parties.

An Interlocutory Judgment of Divorce was entered on June 25, 1957, by the Superior Court of California and a final decree on July 10, 1958.

Decedent, Robert McCombs, became a resident and domiciliary of Nevada and was a partner in a Reno certified public accounting firm. On August 31, 1958 he married Jane McCombs, now his surviving widow, and on May 24, 1964, he died. He had left a holographic will whereby, he gave all of his possessions to Jane.

When the will was admitted to probate, a claim on behalf of the two children was filed against decedent's estate. The claim, in the amount of $12,900, represented $50 per month for each child from the date of death of

the decedent to the respective dates each child reaches majority. The remaining $300 was admitted to be owed in the separation agreement and never paid.

The claim was rejected by the administrator and a complaint was filed pursuant to NRS 147.130. The trial court allowed the claim on the ground that the separation agreement evinced an intention by the deceased to bind his estate for the child support and that the California final judgment of divorce which incorporated the agreement was binding on the estate.

[Headnote 1]

On this appeal the parties concede that full faith and credit must be given the California judgment. In California the obligation of a father to support his minor child which is fixed by divorce decree or property settlement agreement does not cease upon the father's death, but survives as a charge against his estate. Taylor v. George, 212 P.2d 505 (Cal. 1949), and cases cited therein. See also In re Goulart's Estate, 32 Cal.Rptr. 229 (1963), and Kress v. Kress, 33 Cal.Rptr. 77 (1963). The administrator argues, however, that the children are now receiving survivorship benefits under Social Security in an amount that exceeds the specified support payments and that the judgment for support is thus satisfied.

1. The will in the instant case made no declaration of intent nor any other provision for either the disposition of any Social Security or the distribution of any property to decedent's children. This, then, is a different situation from Taylor v. George, supra, wherein the deceased expressed that certain life insurance "is and will be sufficient for his (surviving son's) needs so far as any contribution from me is concerned."

[Headnote 2]

The specific reference in that will was construed to mean that deceased intended the insurance proceeds to be in lieu of any other support and the court allowed the support obligation to be satisfied by the insurance. We can find nothing in the record here to permit a construction that Social Security was intended to supplant the child support provision of the separation agreement.

↓ 82 Nev. 86, 89 (1966) Heppner v. McCombs ↓

Without any expressed intent no substitution of satisfaction for the obligation could be made. Gainsburg v. Garbarsky, 289 P. 1000 (Wash. 1930). [1]

Our case turns on the full faith and credit to be given to a judgment of a sister state and whether or not it has been paid. [2]

We find that the Social Security benefits were not intended to replace the obligation of the estate for support under the agreement and decree of divorce.

The judgment of the trial court is affirmed.

Thompson and Badt, JJ., concur.

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[1] We make no determination, however, whether Social Security benefits are a fund which the testator, by expressed intent, could substitute for an existing obligation for child support. Therefore, the applicability of the principle of Taylor v. George and Gainsburg v. Garbarsky to a situation where a substitution of survivorship benefits was expressed in the will, is not decided here.

[2] Nevada has not yet been faced with the problem of the obligation of child support after the death of the father and we decline to rule on that point until it is squarely presented.

NEVADA CREDIT RATING BUREAU, INC., Appellant, *v.* WILLIAM LLOYD ZARKER, LIDA ZARKER, CHARLES R. ZARKER and HELEN ZARKER, Respondents.

No. 4962

February 28, 1966 411 P.2d 478

Appeal from judgment in a suit upon another judgment of a sister state. Second Judicial District Court, Washoe County; Grant L. Bowen, Judge.

Action on judgment of a sister state. The lower court rendered judgment for defendants and plaintiff appealed. The Supreme Court, Zenoff, D. J., held that collateral review of jurisdiction of a foreign judgment, by permitting defendant to testify that he was not personally served with process in action in sister state, is proper.

Affirmed.

Stewart & Horton, of Reno, for Appellant.

William L. Hammersmith, of Reno, for Respondents.

1. Constitutional Law.

   Due process requires protection against the inequity of claims made against persons without their knowledge.

2. Judgment.

   Collateral review of jurisdiction of a foreign judgment, by permitting defendant to testify that he was not personally served with process in action in sister state, is proper; overruling Barber v. Barber, 47 Nev. 377, 222 P. 284, 39 A.L.R. 706.

OPINION

By the Court, Zenoff, D. J.:

Judgment by default had been entered against respondents in a court of record of California. The certificate of return related that respondent William Zarker was personally served with process at Concord, California.

The judgment was assigned to appellant and action brought against Zarker in Nevada. At a pretrial conference it was stipulated that if permitted to testify, Zarker would state that he was never personally served with process of any kind or nature in California.

The sole question raised on this appeal is whether or not, upon an action in this state upon a judgment rendered in a court of record in a sister state, the defendant can be permitted to testify that he was not personally served with process in the original action, thus showing want of jurisdiction of that court. The lower court ruled that the defendant could testify and entered judgment in his favor.

1. In Barber v. Barber, 47 Nev. 377, 222 P. 284 (1924), involving a collateral attack upon a sister state divorce decree, this court held that the authority of an attorney to appear for the person he represents is conclusively presumed and refused review of the attorney's authority. Whatever the distinctions may be between a record that reflects the appearance of an attorney for his client, or one, as here, that contains an affidavit of service

of process on the defendant named, they are of no significance in the determination of the right of a court of the forum to examine the validity of that authority or service in order to determine whether jurisdiction over the party existed in the original action.

[Headnote 1]

Barber was decided long before Williams v. North Carolina, 325 U.S. 226 (1945), and it must be now conceded that the greater weight of authority allows an examination into jurisdiction. Greenzweig v. Strelinger, 37 P. 398 (Cal. 1894); Hammell v. Britton, 119 P.2d 333 (Cal. 1941); Commercial Factors Corp. v. Kurtzman Bros., 280 P.2d 146 (Cal. 1955). Cf. Lampson Lumber Co. v. Hoer, 93 A.2d 143 (Conn. 1952); State Tax Comm'n of Utah v. Cord, 81 Nev. 403, 404 P.2d 422 (1965). See Restatement, Judgments § 12(c) (1942); 3 Freeman on Judgments § 1366 (1925). Due process requires the protection against the inequity of claims made against persons without their knowledge. Griffin v. Griffin, 327 U.S. 220 (1946). While the danger of spurious denials of service of process, authority of attorneys or lack of knowledge by other methods is a consequence, yet the right of cross-examination, proof by deposition and appraisal of credibility by the trial judge are safeguards against abuse.

[Headnote 2]

Barber v. Barber, supra, insofar as it is inconsistent with these principles is therefore expressly overruled and we hold that collateral review of the jurisdiction of a foreign judgment is proper.

Affirmed.

Thompson, J., concurs.

Justice Badt being ill, counsel for the parties stipulated that the hearing and determination of this appeal be before the other members of the court.

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82 Nev. 92, 92 (1966) Byers v. Graton

GEORGE BYERS, Sheriff of Douglas County, Nevada; and HARTFORD ACCIDENT & INDEMNITY COMPANY, a Connecticut Corporation, Appellants, *v.* HENRY C. GRATON, Respondent.

No. 4965

February 28, 1966 411 P.2d 480

Appeal from the First Judicial District Court, Ormsby County; Richard L. Waters, Jr., Judge.

Action for personal injuries. The lower court refused to change the place for trial, and defendants appealed. The Supreme Court, Thompson, J., held that right to request change of venue was not waived by filing answer before moving for change.

Reversed.

Eugene J. Wait, Jr., and *Allan Shamberger,* of Reno, for Appellants.

Carl F. Martillaro, of Carson City, for Respondent.

1. Venue.

   Right to request change of venue was not waived by filing answer before moving for change. NRS 13.020, 13.040, 13.050, 248.020, subd. 2.

2. Venue.

   A defendant is not entitled to have action removed to county of his residence unless none of the other defendants are residents of county where action is brought. NRS 13.040.

3. Corporations; Venue.

   Where codefendant is a foreign corporation, mere fact that it is doing business in the state does not fix its residence in any particular county for purposes of venue, and hence does not defeat right of other defendant

to move place of trial to county of his residence. NRS 13.040.

OPINION

By the Court, Thompson, J.:

This appeal is from an order refusing to change the place for trial of a personal injury action from Ormsby County to Douglas County. We think that the motion

to change venue should have been granted and, therefore, reverse.

[Headnote 1]

Graton commenced suit in the Ormsby County District Court to recover damages for an assault and battery by Byers, the sheriff of Douglas County. It is claimed that the incident happened in Douglas County while Byers was "in the performance of his official duties." Named as defendants were Byers and the Hartford Accident & Indemnity Company who wrote a surety bond for Byers. [1] Within 20 days after being served with process, Byers filed an answer and also a demand and motion to change venue. (Cf. Nevada Transit Co. v. Harris, 80 Nev. 465, 396 P.2d 133 (1964), where the defendant failed to file a written demand to change venue before filing his motion.) The motion was made on two grounds. First, that as a resident of Douglas County he had a right to have the case tried there, NRS 13.040 [2] ; second, as the tort occurred while Byers was acting as a public officer, in Douglas County, NRS 13.020 [3] requires the matter to be tried in that county. The plaintiff Graton agrees that Douglas County is a proper county for trial. However, he does contend that by filing an answer before demanding and moving for a change of venue, Byers waived his right to request a change. This contention

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[1] NRS 248.020(2) provides: "Before entering upon the discharge of his duties, each sheriff shall: (2) Give a bond to his county in the penal sum of not less than $10,000 nor more than $50,000, with two or more sureties, residing in his county, or by any qualified surety company, to be approved by the board of county commissioners, conditioned for the faithful performance of the duties of his office. The bond shall be filed and recorded in the office of the county clerk of his county."

[2] NRS 13.040 provides in pertinent part: "In all other cases, the action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action * * *."

[3] NRS 13.020 provides in pertinent part: "Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial: * * * (2)

Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer."

persuaded the lower court to deny Byers' motion. We disagree.

Since 1867 it has been the law of Nevada that the filing of an answer to the merits does not interfere with a defendant's right to demand a change of venue. Sheckles v. Sheckles, 3 Nev. 404. See also Ruchverg v. Russell, 71 N.D. 658, 3 N.W.2d 459 (1942). Our statute requires that the demand be made "before the time for answering expires." NRS 13.050. That language refers to time and may not be read to imply that, by filing an answer, one somehow waives his right to demand that the case be tried in the proper county. Indeed, NRCP 12(a) requires a defendant to serve his answer within 20 days after the service of summons and complaint upon him. Absent a written stipulation extending time, or court order, the time for answering is not altered unless a Rule 12(b) motion is interposed. A demand and motion to change venue is not embraced by Rule 12(b). Thus, it is apparent that a defendant who is not a resident of the county where the action is brought, who does not file a Rule 12(b) motion, and who wishes to demand a change of venue, must file his answer and demand a change of venue within the 20-day limitation period. Compliance with the rules for answering should never constitute a waiver of one's statutory right to demand a change of venue. Furthermore, as Rule 12(b) explicitly states that no objection is waived by being joined with another defense (except as otherwise specified), it follows that the objection of improper venue is not waived by an answer to the merits.

[Headnotes 2, 3]

We also believe it appropriate to mention another issue disclosed by the record, though not considered below. The co-defendant Hartford is a foreign corporation qualified to do business in Nevada. It neither joined in, nor opposed, Byers' demand to change venue. The pertinent words of NRS 13.040 state that "the action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action." That language means that a defendant is not entitled to have the action removed to the county of his

residence unless it appears that none of the other defendants are residents of the county where the action is brought. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730 (1912); Independent Iron Works v. American President Lines, 35 Cal.2d 858, 221 P.2d 939 (1950); Monogram

Co. of California v. Kingsley, 38 Cal.2d 28, 237 P.2d 265 (1951). However, where the co-defendant is a foreign corporation, the mere fact that it is doing business in this state does not fix its residence in any particular county for the purposes of venue, so as to defeat the right of the other defendant to move the place of trial to the county of his residence. Warren v. Ritter, 61 Cal.App.2d 403, 142 P.2d 948 (1943); Rowland v. Bruton, 125 Cal.App. 697, 14 P.2d 116 (1932); San Jose Hospital v. Etherton, 84 Cal.App. 516, 258 P. 611 (1927). [4]

Reversed.

Zenoff, D. J., concurs.

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[4] Counsel stipulated to submit this appeal to two justices for decision.

↓ 82 Nev. 95, 95 (1966) Jowers v. Compton ↓

LULA ROBINSON JOWERS, Petitioner, *v.* THE HONORABLE WILLIAM COMPTON, Judge of the Eighth Judicial District Court of the State of Nevada, Respondent.

No. 5051

March 1, 1966 411 P.2d 479

Petition for writ of mandamus to compel the trial court to proceed to trial of a will contest.

The Supreme Court, Zenoff, D. J., held that District Court's granting of contestant's motion for continuance in will contest pending outcome of California proceeding concerning prior will executed in California by same decedent, wherein contestants were proponents of will, was within trial court's discretion and not reviewable by mandamus.

Writ denied.

↓ 82 Nev. 95, 96 (1966) Jowers v. Compton ↓

Johnson & Steffen, of Las Vegas, for Petitioner.

Robert L. Reid, of Las Vegas, for Respondent.

1. Mandamus; Wills.

District Court's granting of contestant's motion for continuance in will contest pending outcome of

California proceeding concerning prior will executed in California by same decedent, wherein contestants were proponents of will, was within trial court's discretion and not reviewable by mandamus.

2. Mandamus.

Mandamus will not lie to review discretionary acts of trial court.

OPINION

By the Court, Zenoff, D. J.:

Petitioner seeks a writ of mandate to compel the Eighth Judicial District Court to proceed to hearing and final determination in a will contest. The court stayed the matter pending outcome of California proceedings concerning a prior will executed in Los Angeles by the same decedent. Proponents of that will are contestants in the Nevada action. However petitioner, proponent of the subsequent "Nevada" will, has refused to enter the California adjudication and here protests that the Nevada court's stay order either was without or in abuse of discretion. We disagree.

[Headnote 1]

1. The court below simply granted contestants' motion for a continuance. Such an action clearly was within the court's discretion. Benson v. Benson, 66 Nev. 94, 204 P.2d 316; Neven v. Neven, 38 Nev. 541, 148, P. 354, 154 P. 78.

[Headnote 2]

2. "It has long been the law in this state that mandamus will not lie to review discretionary acts of the trial court." Wilmurth v. District Court, 80 Nev. 337, 393 P.2d 302, and cases cited therein.

Writ denied.

Thompson, J., concurs.

82 Nev. 95, 97 (1966) Jowers v. Compton

Justice Badt being unable to preside because of illness, the parties stipulated to the hearing and determination before the other members of the court.

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82 Nev. 97, 97 (1966) Soady v. First National Bank

ERNEST E. SOADY and DORIS L. SOADY, Appellants, *v.* THE FIRST NATIONAL BANK OF NEVADA, HERB LERCH, E. H. LERCH, MARTHA GILLESPIE, RICHARD LERCH and BARBARA TRIMARK, Respondents.

No. 4954

March 2, 1966 411 P.2d 482

Appeal from the Eighth Judicial District Court, Clark County; John Mowbray, Judge.

Proceeding to construe will which provided that inventory of assets, instructions to legatee, and list of organizations to be given bequests were to be found in a safe deposit box. The safe deposit box did not contain such material. The lower court rendered judgment that will was invalid and that estate passed to heirs at law under intestacy. The legatee appealed. The Supreme Court, Zenoff, D. J., held that decedent's will expressed clear unequivocal gift to legatee and was sufficient to establish decedent's intent, that absolute gift was not limited by later language referring to inventory, instructions, and list where that language was so vague and uncertain as to be incapable of making any reasonable disposition of property, and that no trust was created by language in will referring to instructions to legatee and to a list of organizations to which bequests were to be distributed by legatee.

Reversed.

Singleton, DeLanoy & Jemison, of Las Vegas, and *S. V. O. Prichard,* of Sunland, California, for Appellants.

George E. Franklin, Jr., of Las Vegas, for Respondent-Executor.

Michael L. Hines, of Las Vegas, for Respondents-Heirs-at-Law.

1. Wills.
   The primary presumption when interpreting or construing a will is that against total or partial intestacy.
2. Wills.
   Presumption that the blood of the testator is preferred over strangers does not apply where in order to prefer those of the blood of the testator, it is necessary to ignore the presumption against intestacy.
3. Wills.
   The guideline for the interpretation or construction of a will is the intention of the testatrix, determined by the meaning of the words used by her.
4. Wills.
   Statement in decedent's will that, “I hereby give, devise and Bequeath” net estate was sufficient to establish decedent's intent to make gift notwithstanding language in will referring to instructions to legatee and list of organizations to which bequests were to be distributed by legatee.
5. Wills.
   When an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention to do so as was shown by the words creating

the estate.

6. Wills.
   Rule that an absolute estate conveyed in one clause of will will not be limited by subsequent words controls the rule that an intent stated in one clause of a will may be qualified or limited by subsequent clauses.
7. Wills.
   Absolute gift to legatee was not limited by later language in will referring to inventory, instructions, and list contained in safe deposit box where items were not found in safe deposit box and language was so vague and uncertain as to be incapable of making any reasonable disposition of the property.
8. Wills.
   A testator may incorporate an extrinsic document into will only if such document is in existence at the time the will is made and the reference clearly identifies it.
9. Wills.
   When a will contains a reference to an extraneous document purporting to dispose of certain property, the fact that the reference is ineffective does not affect testamentary dispositions of property made according to law.
10. Trusts.
    It is essential to validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject matter thereof be certain, and that the beneficiaries be certain.

82 Nev. 97, 99 (1966) Soady v. First National Bank

11. Wills.
    No trust was created where absolute gift to legatee in will was made notwithstanding later language in will referring to instructions to legatee and to a list of organizations to which bequests were to be distributed by legatee.

OPINION

By the Court, Zenoff, D. J.:
The decedent, Betty M. Foster, left a will providing, inter alia:

> "THIRD, I hereby give, devise and Bequeath to Reverend Ernest E. Soady, and/or Doris L. Soady, his wife * * * my net estate consisting of Real and Personal Property, Insurance Policies, Stocks in Corporations in the United States and Canada, also Cash in Savings and Checking Account at the Bank and in Financial Institutions. These will be named with the instructions to Reverend Ernest E. Soady in my Safety Deposit Box Number 3068 at First National Bank of Nevada * * *.
>
> "FOURTH, Reverend Ernest E. Soady shall also be furnished in said Safety Deposit Box names of the various Religious Organizations which shall receive Bequests from said Estate. My Executor hereinafter named shall issue checks directly to the various Religious Organizations according to my instructions and forward said checks to Reverend Ernest E. Soady for distribution. In the event of the demise of both Reverend

> Ersest [sic] E. Soady and Doris L. Soady, his wife, prior to my death; My Executor hereinafter named shall issue and forward checks directly to the said various Religious Organizations."

After the death of Betty M. Foster, it was found that the safety deposit box named in her will contained neither an inventory of the assets of the decedent nor any instructions to Reverend Soady, nor the names of any religious organizations to whom bequests were to be made.

A Petition to Construe the Will was filed with the

district court. The district court declared the will too ambiguous to be capable of ascertainment of testatrix's intent, and therefore held it invalid, with the estate passing to the heirs-at-law through intestacy. It is from that order that appellants appeal.

Consideration of established principles in the construction of wills compels us to reverse the order of the trial court.

[Headnotes 1, 2]

The primary presumption when interpreting or construing a will is that against total or partial intestacy. Tsirikis v. Hatton, 61 Nev. 78, 116 P.2d 189 (1941); In re Farrelly's Estate, 4 P.2d 948 (Cal. 1931). And while there is another presumption that the blood of the testator is preferred over strangers, this presumption does not apply where in order to prefer those of the blood of the testator, it is necessary to ignore the presumption against intestacy. In re Plumer's Estate, 324 P.2d 346 (Cal. 1958).

[Headnote 3]

The guideline for the interpretation or construction of a will is the intention of the testatrix, In re Hartung's Estate, 39 Nev. 200, 155 P. 353 (1916); In re Hartung, 40 Nev. 262, 160 P. 782, rehearing denied, 161 P. 715 (1916), determined by the meaning of the words used by her. Jones v. First Nat'l Bank, 72 Nev. 121, 296 P.2d 295 (1956). See Sharp v. First Nat'l Bank, 75 Nev. 355, 343 P.2d 572 (1959).

[Headnote 4]

Turning to the language of the will, we find that the first sentence of paragraph THIRD is expressed as a clear, unequivocal gift to the Soadys of the net estate. Had the will contained this sentence alone, there could be no doubt as to the intent of the testatrix.

[Headnotes 5, 6]

When an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest

an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. This rule of construction controls the rule that an intent given in one clause of a will may be qualified or limited by a subsequent clause. In re Mallon's Estate, 93 P.2d 245 (Cal. 1939); In re Kearn's Estate, 225 P.2d 218 (Cal. 1950). See In re Marti's Estate, 61 P. 964 (Cal. 1900), and In re Cummin's Estate, 229 P.2d 136 (Cal. 1951).

[Headnote 7]

The absolute gift to the Soadys in paragraph THIRD, we hold, is not limited by later language since that later language is so vague and uncertain as to be incapable of making any reasonable disposition of property. The failure to specify the sum or the recipient of any bequest in paragraph FOURTH makes it impossible to say that as clear an intention was shown by the words of paragraph FOURTH as was demonstrated by the absolute gift of paragraph THIRD.

Therefore, we find that paragraph FOURTH is ineffectual and that the clear intent of the testatrix in paragraph THIRD is not limited or affected by the provisions of paragraph FOURTH. [1]

[Headnotes 8, 9]

A testator, in addition, may incorporate an extrinsic document into a will only if such document is in existence at the time the will is made and the reference clearly identifies it. An attempt to incorporate a future document in a will is ineffectual, for the testator cannot be permitted to create for himself the power to dispose of his property without complying with formalities required in making a will. Simon v. Grayson, 102 P.2d 1081 (Cal. 1910); Keeler v. Merchant's Loan & Trust Co., 97 N.E. 1061 (Ill. 1912); Ragland v. Wagener, 180 S.W.2d 435 (Tex. 1944). And when a will contains a reference to an extraneous document purporting to dispose of certain property, the fact that the reference is ineffective does

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[1] Paragraph six of the will leaves $1.00 to such persons who attempt to oppose or set aside the probate of the will. This paragraph aided in the determination of testatrix's intent.

not affect testamentary dispositions of property made according to law. In re Greenman's Estate, 52 N.W.2d 363 (Mich. 1952). See 18 A.L.R.2d 684.

[Headnotes 10, 11]

Respondents attempt on appeal to spell out the creation of a trust in favor of religious organizations. It is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject matter thereof be certain, and that the beneficiaries be certain. In re Ralston's Estate, 37 P.2d 76 (Cal. 1934). See In re Kearn's Estate, supra; Newhall v. McGill, 212 P.2d 764 (Ariz. 1949). No creation of a trust is so expressed here.

Accordingly, the order below nullifying the dispositive provisions of paragraph THIRD of the last will of Betty M. Foster is reversed, and distribution of the estate of Betty M. Foster shall be as directed by that paragraph.

Reversed.

Thompson and *Badt, JJ., concur.

*Because of illness, Justice Badt did not sit at the oral hearing. However, pursuant to Rule 9(3), Supreme Court Rules, he did participate in the decision and opinion of the court upon the written briefs and discussion of the members of the court.

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82 Nev. 103, 103 (1966) United Ass'n Journeymen v. Dist. Ct.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 525, Las Vegas, Nevada, Petitioner, *v.* EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, Respondent.

No. 5036

March 21, 1966 412 P.2d 352

Original proceeding in certiorari.

Proceeding to review order of District Court vacating an arbitration award in a labor dispute. The Supreme Court, Thompson, J., held that where collective bargaining agreement provided for a tripartite arbitration board, court could not order labor dispute to be submitted to a new arbitration tribunal composed of five unbiased, neutral members.

Vacating order nullified and arbitration award reinstated.

Morton Galane, of Las Vegas, for Petitioner.

John Peter Lee, of Las Vegas, for Respondent.

1. Certiorari.
   The extraordinary remedy of certiorari is appropriate when an inferior tribunal has exceeded its jurisdiction, there is no appeal, nor any plain, speedy and adequate remedy; if one of the essentials is missing, the writ should not be granted. NRS 34.020, subd. 2.
2. Labor Relations.
   An arbitration tribunal composed of two members designated by contractors' association and two members designated by union and a neutral member who serves as chairman, as provided in collective bargaining agreement, is a "tripartite arbitration board"; the labor and management members are expected to be partisans and to act as advocates for their respective sides; this is one of the significant features which often distinguishes industrial arbitration from commercial arbitration.
3. Labor Relations.
   Neutral member-chairman of tripartite arbitration board did not have to resolve labor dispute, where the two labor members of board advocated union's interpretation of collective bargaining agreement giving rise to grievance and their views were shared by one of the two management members of the board.

82 Nev. 103, 104 (1966) United Ass'n Journeymen v. Dist. Ct.

4. Labor Relations.
   Arbitration board did not have to be composed of five neutral members, where collective bargaining agreement provided for a tripartite arbitration board composed of two members designated by contractors' association and two members designated by union and a neutral member who would serve as chairman.
5. Labor Relations.
   If parties to a collective bargaining agreement provide for a tripartite arbitration board, the court is powerless to substitute a tribunal of different character.
6. Arbitration and Award; Labor Relations.
   Statutory arbitration under the Uniform Arbitration Act may be invoked to resolve any controversy existing at the time of the agreement to submit but does not touch the arbitration of future disputes under a collective agreement. NRS 38.010 et seq., 38.030, 38.040.
7. Labor Relations.
   Order setting aside award of tripartite arbitration board composed of two members designated by contractors' association and two members designated by union and a neutral member who served as chairman, as provided in collective bargaining agreement, and directing labor dispute to be submitted to arbitration board composed of five neutral members was not "final order" determining rights of parties and no appeal could be taken therefrom. NRS 38.010 et seq.; NRCP 72 and (b) (1).
8. Appeal and Error.
   A court order vacating, modifying or affirming an arbitration award may properly qualify as a "final judgment" from which an appeal may be taken, if that is all that is accomplished by the order. NRCP 72 and (b) (1).

OPINION

By the Court, Thompson, J.:

This is an original proceeding in certiorari to review an order of the district court vacating an arbitration award in a labor dispute. We rule that the vacating order must be nullified and the award reinstated.

The union and the Associated Plumbing and Air Conditioning Contractors of Nevada, Inc., entered into a collective bargaining agreement for the period July 1, 1963, to June 30, 1966. Among other matters, the agreement specified a procedure for settling grievances. A dispute arose between the union and two plumbing contractors because the "temporary license" which had been issued to the contractors by the State Contractors Board

was revoked by the board with the proviso that the licensees could complete the jobs they had in progress. The union believed that the action of the state board gave cause for suspension of the labor agreement because of the contract clause quoted below. [1] The contractors had a different notion. The agreed upon grievance procedure was pursued and eventually the dispute was submitted to a five-man tripartite arbitration board. It found for the union. The neutral member of the board, who served as chairman, did not vote as three of the four remaining members agreed that the union's interpretation of Art. IX(a) (1) was correct. The contractors then moved to vacate the award. Their motion rested mainly on the proposition that the arbitration board was not composed of five neutral members. The court accepted their view, set aside the award, and directed the dispute to be submitted to "a Board of Arbitration selected in accordance with the agreement and the law in the premises, who are not parties to the case and who are chosen with the procedure set forth in the contract." We understand that order to mean that the arbitration board must be composed of five neutral members in order to comply with the applicable provisions of the collective bargaining agreement. For the reasons hereafter stated, we think that the court's action was in excess of its jurisdiction and void.

[Headnote 1]

The extraordinary remedy of certiorari is appropriate when an inferior tribunal has exceeded its jurisdiction, there is no appeal, nor any plain, speedy and adequate remedy. NRS 34.020(2). If one of the essentials is missing, the writ should not be granted. Gaming Control Board v. District Court, 82 Nev. 38, 409 P.2d 974 (1966); Schumacher v. District Court, 77 Nev. 408,

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[1] Art. IX(a) (1) of the contract reads: "Employees agree to work for employers who are members or non-member signatories to this Agreement only if and so long as they comply with all of the following conditions: (1) The Employer shall at all times have in effect a duly issued State Plumbing Contractor's License and a Master Plumber's License, or a State Piping Contractor's License, or a Refrigeration and Air-Conditioning Contractor's License, at his shop or in the locality where the job is to be performed."

365 P.2d 646 (1961). We turn first to consider whether the court exceeded its jurisdiction.

[Headnotes 2-4]

The collective agreement provided that the board "shall consist of two members designated in writing by the Association and two members designated in writing by the Union." A neutral person was to act as umpire. An arbitration tribunal composed in this fashion is a tripartite arbitration board—that is, one which is made up of one or more members selected by management, an equal number selected by labor, and a neutral member who serves as chairman. Elkouri, How Arbitration Works, 60 (1960). The labor and management members are expected to be partisans and to act as advocates for their respective sides. Indeed, this is one of the significant features which often distinguishes industrial arbitration from commercial arbitration. [2] Phillips, The Function of Arbitration in the Settlement of Industrial Disputes, 33 Colum.L.Rev. 1366, 1372 (1933); 58 Northwestern U.L.Rev. 494 (1963); West Towns Bus Co. v. Division 241, 26 Ill.App.2d 398, 168 N.E.2d 473 (1960). In the instant matter, the labor members of the board did advocate for the union's interpretation of the contract provision giving rise to the grievance, and their views were shared by one of the two management members of the board. Therefore, it was not necessary for the neutral umpire to resolve the dispute. The composition of the tripartite arbitration board was precisely as provided for by the collective agreement. A fortiori, the award is not subject to question upon the ground that the board was not composed of five neutral members.

[Headnote 5]

The misconception of the lower court about the make up and function of the members of a tripartite arbitration board caused it to order, in effect, that the grievance

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[2] Apparently the lower court was not aware of the proper function of the members of a tripartite arbitration board, for its written decision rests upon two commercial arbitration cases which are wholly inapposite. See: In re Miller, 23 N.Y.S.2d 120 (1940); Astoria Medical Group v. Health Ins. Plan of Gr. N.Y., 11 N.Y.2d 128, 182 N.E.2d 85 (1962).

be submitted to a new arbitration tribunal composed of five unbiased, neutral members. This

order, we think, exceeded the court's jurisdiction. If the parties to a collective agreement provide for a tripartite arbitration board, a court is powerless to substitute a tribunal of different character.

[Headnotes 6-8]

Though the respondent suggests otherwise, we fail to find provision for an appeal from the order here in question. It is hinted that the appeal provision of the Uniform Arbitration Act, NRS, Ch. 38, applies. None of the provisions of that act apply to a collective bargaining agreement which itself provides a grievance procedure for the settlement of future disputes which may arise during the term of the contract. Statutory arbitration under the uniform act may be invoked to resolve any controversy existing at the time of the agreement to submit (NRS 38.030; NRS 38.040), but does not touch the arbitration of future disputes under a collective agreement. United Assn. Journeymen v. Stine, 76 Nev. 189, 351 P.2d 965 (1960). Nor does NRCP 72 allow an appeal from the order in question, as it is not a "final judgment" determining the rights of the parties. The opposite is true. The order unsettled the rights of the parties, and directed them to start over and submit their controversy to an arbitration tribunal of different kind and composition. Just as an order denying summary judgment is not a final judgment from which an appeal lies (Smith v. Hamilton, 70 Nev. 212, 265 P.2d 214 (1954), by a parity of reasoning the order here in question is not final. In neither instance have the rights of the parties been determined. We do not mean to imply that a court order vacating, modifying or affirming an arbitration award may not be appealable. If that is all that is accomplished by the order, it may properly qualify as a final judgment within the intendment of NRCP 72(b)(1). The present order did much more. It directed resubmission of the dispute to another board, thereby making clear the court's view that the controversy was not finally resolved. We think "finality" was destroyed by that direction. Thus, neither statute nor

82 Nev. 103, 108 (1966) United Ass'n Journeymen v. Dist. Ct.

rule authorizes an appeal here. No remedy other than certiorari was available to petitioner. We find no merit in the other points presented. The order below vacating the award and directing resubmission to another arbitration board is annulled, and the arbitration award is reinstated.

Zenoff, D. J., concurs.

(Counsel stipulated to submit this proceeding to a two-judge court.)

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82 Nev. 108, 108 (1966) Gianoli v. Gabaccia

ALBERT C. GIANOLI, Administrator With Will Annexed of the Estate of JOHN DATA, Appellant, *v.* FRANCESCA GABACCIA, CONSTANTINO MASSA, MARIA PUGNO, GIUSEPPE DATA, et al., Respondents.

No. 4979

March 24, 1966 412 P.2d 439

The administrator of the estate of John Data appeals an order of distribution pursuant to his request for declaratory judgment to ascertain heirship and proper distribution. Seventh Judicial District Court, White Pine County; Jon R. Collins, Judge.

Will construction case, in which appeal was taken from an adverse decision of the lower court. The Supreme Court, Zenoff, D. J., held that anti-lapse statute should apply to bequests which are void, as well as to lapsed bequests or devises, so that testator's gift to each of his brothers and sisters should be given effect as to brothers and sisters who were deceased before execution of testator's will, as well as to those who died before testator but subsequent to execution of his will.

Reversed.

E. R. Miller, Jr., of Ely, for Appellant.

A. D. Demetras, of Ely, for Respondents.

82 Nev. 108, 109 (1966) Gianoli v. Gabaccia

1. Wills.
   An "ambiguous provision in a will" means simply that there are two constructions or interpretations which may be given to a provision of a will and that it may be understood in more senses than one.
2. Wills.
   Provisions of testator's will, which bequeathed $5,000 to each of his brothers and sisters and left residue to his nieces and nephews, were not ambiguous, nor did they contain any latent ambiguity, so that court was restricted to writing alone in determining testator's intention.
3. Wills.
   Brothers and sisters of testator, who died before testator but after execution of his will in which they were devisees, would come within protection of anti-lapse statute in absence of a provision in the will to the contrary. NRS 133.200.
4. Wills.
   Anti-lapse statute applies to class gifts. NRS 133.200.
5. Wills.
   To render anti-lapse statute inoperative, a contrary intent on part of testator must be plainly indicated. NRS 133.200.

6. Wills.

Anti-lapse statute would save gifts to testator's deceased brothers and sisters who died subsequent to execution of testator's will where the will did not indicate that it was testator's contention that such statute not apply. NRS 133.200.

7. Wills.

Anti-lapse statute was motivated by a purpose to protect kindred of testator and by a belief that a more fair and equitable result would be assured if a defeated legacy were disposed of by law to lineal decedents of legatees or devisees selected by testator. NRS 133.200.

8. Wills.

Anti-lapse statute should apply to bequests which are void, as well as to lapsed bequests or devises, so that testator's gift to each of his brothers and sisters should be given effect as to brothers and sisters who were deceased before execution of testator's will, as well as to those who died before testator but subsequent to execution of his will. NRS 133.200.

OPINION

By the Court, Zenoff, D. J.:

This is a case of will interpretation in which the sole matter at issue is the pertinence and application of Nevada's "anti-lapse statute," NRS 133.200. The lower

court ruled the statute inapplicable and ordered testate distribution accordingly. We reverse.

The testator, John Data, executed a valid will on December 2, 1946, the material paragraphs of which follow:

"SECOND: I give and bequeath to each of my brothers and sisters, the sum of five thousand dollars ($5,000.00).

"THIRD: All the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situate, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, or to which my estate shall thereafter become entitled, I give, devise and bequeath to my nephews and nieces, share and share alike."

Data, a bachelor, originally was from a family of seven. At the time of his will's execution, however, a brother, Giuseppe, and a sister, Caterina Massa, already had died. Subsequent to execution, but prior to Data's own death on February 22, 1965, two other brothers and a second sister died. Thus only one sister, Francesca Gabaccia, survived Data.

In petitioning the court for distribution of Data's estate, the Administrator, applying the anti-lapse statute, allowed, under the will's second paragraph, $5,000 each to the two brothers and two sisters who survived the execution of Data's will, though only one sister survived Data. The residue, as per the third paragraph of the will, then was divided equally among Data's nieces and nephews.

The attorney for absent heirs protested, alleging only the surviving sister should take a $5,000 share. The lower court agreed, finding the will was ambiguous and that NRS 133.200

did not apply. We disagree.

[Headnotes 1, 2]

1. "An ambiguous provision * * * means simply that there are two constructions or interpretations which may be given to a provision of a will and that it may be understood in more senses than one." In re Tonneson's Estate, 136 N.W.2d 823 (N.D. 1965). There is nothing in either the second or third paragraph of Data's will

which creates such an ambiguity. In the second paragraph he bequeathed $5,000 to each of his brothers and sisters; in the third, he left the residue to his nieces and nephews. Nor is there any "latent" ambiguity. Cf. Estate of Shields, 84 Ariz. 330, 327 P.2d 1009 (1958). We therefore are restricted to the writing alone.

2. In the second paragraph, as noted, Data bequeathed $5,000 each to his brothers and sisters, five of whom predeceased him—two of the five predeceasing the execution of the will.

[Headnote 3]

We first consider the two brothers and sister of Data who were alive at the time of the will's execution but predeceased Data. At common law, their bequests would be said to "lapse," and thereby fail. Presuming this result contrary to a testator's intent, Nevada, as almost all other states, enacted an "anti-lapse statute," NRS 133.200, expressly protecting devises and bequests to "any child or other relation of the testator." [1] Data's brothers and sisters come within this protection [2] "in the absence of a provision in the will to the contrary." NRS 133.200.

[Headnote 4]

3. It is argued that the second paragraph refers to the brothers and sisters as a "class" and our anti-lapse statute should not apply to "class" gifts. We agree with the overwhelming weight of authority that an anti-lapse statute *does* apply to class gifts. Hoverstad v. First Natl. Bank & T. Co., 76 S.D. 119, 74 N.W.2d 48, 56 A.L.R.2d 938 (1956); In re Steidl's Estate, 89 Cal.App.2d 488, 201 P.2d 58 (1948); Page on Wills, Lifetime Ed., § 1062; Restatement, Property, Parts 3 & 4, p. 1623, comment a, § 298.

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[1] NRS 133.200. Death of devisee. When any estate shall be devised or bequeathed to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving lineal descendants, such descendants, in the absence of a provision in the will to the contrary, shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator.

[2] "The testator is presumed to know the law * * *." In re Steidl's Estate, 89 Cal.App.2d 488, 201 P.2d 58 (1948).

[Headnotes 5, 6]

4. Next, it is argued that Data intended for the antilapse statute not to apply. Such intent, of course, would control, "but to render the statute inoperative a contrary intent on the part of the testator must be plainly indicated." In re Steidl's Estate, supra. Nowhere is such a "plain intent" expressed within Data's will; nor did he even state, "I give * * * to each of my *surviving* brothers and sisters * * *." The fact that in the third paragraph he bequeathed his residue to his nieces and nephews, "share and share alike," does not influence who takes "through an entirely separate channel, * * * and entirely different right" under the second paragraph. Everhard v. Brown, 75 Ohio App. 451, 62 N.E.2d 901, 911 (1945).

[Headnotes 7, 8]

5. Finally, we consider the status of the brother and sister who predeceased the execution of Data's will. At common law, their bequests would fail as "void." Our anti-lapse statute only speaks of a testamentary beneficiary who "shall die before the testator;" there is no specification as to how *long* "before," nor is there any express reference within the statute to "lapse" or "void" bequests or their distinction. [3] However "[i]t seems obvious that the [anti-lapse statute] was motivated by a purpose to protect the kindred of the testator and by a belief that a more fair and equitable result would be assured if a defeated legacy were disposed of by law to the lineal descendants of the legatees or devisees selected by the testator." Hoverstad v. First Natl. Bank, supra, 74 N.W.2d at 55. Accepting this rationale, as have the majority of courts, we see little reason to not equally apply it to void as well as lapsed bequests or devises. Kehl v. Taylor, 275 Ill. 346, 114 N.E. 125, 127 (1916).

We therefore hold NRS 133.200 is applicable to the instant will, and that its provisions extend to void as well as lapsed bequests.

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[3] Cf. Cal.Prob. Code § 92, which expressly includes "void" bequests and devises.

Reversed. Distribution shall be made in accordance with the foregoing.

Thompson, J., concurs.

Justice Badt was unavailable because of illness. The parties stipulated that the matter be determined by the remaining members of the court.

HARVEY DICKERSON, Attorney General of the State of Nevada, Petitioner, *v.* THE GRAND JURY OF WASHOE COUNTY, Respondent.

No. 5072

March 28, 1966 412 P.2d 441

Original proceeding in prohibition.

Proceeding to stop further inquiry by county grand jury into operations of state hospital. The Supreme Court, Thompson, J., held that statute authorizing grand jury to inquire into any and all matters affecting morals, health and general welfare of inhabitants of county permitted proposed inquiry of county grand jury into security arrangements at state hospital in county and constitutional provision for separation of powers was not thereby offended.

Prohibition denied and proceeding dismissed.

Harvey Dickerson, Attorney General, and *Daniel R. Walsh,* Chief Deputy Attorney General, both of Carson City, for Petitioner.

William J. Raggio, Washoe County District Attorney, of Reno, for Respondent.

1. Grand Jury.
   Statute authorizing grand jury to inquire into any and all matters affecting morals, health and general welfare of inhabitants of county permitted proposed inquiry of county grand jury into security arrangements at state hospital in county. NRS 172.300, subd. 2.

2. Grand Jury.
   County grand jury has jurisdiction to inquire into affairs of state office located within the county. NRS 34.320, 172.300, subd. 2.
3. Grand Jury.
   State grand jury statute did not preclude county grand jury from inquiring into security arrangements at state hospital in county. NRS 6.135, subd. 1.

4. Grand Jury.

State grand jury statute does not limit powers of grand jury impaneled pursuant to other statutes. NRS 6.110, 6.120, 6.130, 6.135, subd. 1, 6.140, 172.220, 178.250, 232.300-232.320, 433.100-433.120.

5. Constitutional Law.

Constitutional provision for separation of powers was not offended by authorizing county grand jury to investigate state hospital and report its findings to court. NRS 172.300, subd. 2; Const. art. 3, § 1.

OPINION

By the Court, Thompson J.:

This is an original proceeding for a writ of prohibition to stop further inquiry by the Washoe County Grand Jury into the operations of the Nevada State Hospital. The petitioner suggests that the permissive inquisitorial powers expressed by NRS 172.300(2) do not allow a county grand jury to inquire into the affairs of a state agency. [1] His argument is bottomed on two propositions: first, that NRS 6.135(1) (sometimes referred to as the state grand jury statute) reveals a legislative intention that state affairs be investigated by a grand jury impaneled under that statute, and not otherwise; [2] second, that Nev.Const.Art. 3, § 1, concerning the separation of powers of the three departments

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[1] NRS 172.300(2) provides: "The grand jury may inquire into any and all matters affecting the morals, health and general welfare of the inhabitants of the county, or of any administrative division thereof, or of any township, incorporated city, irrigation district or town therein."

[2] NRS 6.135(1) reads: "Upon request of the governor, or of the legislature by concurrent resolution, the district judge of any county shall cause a grand jury to be impaneled in the same manner as other grand juries are impaneled, except that the sole duty of a grand jury impaneled under the provisions of this section shall limit its investigations to state affairs, and to the conduct of state officers and employees. The report of such grand jury shall be transmitted to the governor and the legislature."

of state government—legislative, executive, judicial—precludes a grand jury from investigating a state executive function. Neither contention has merit. Therefore, we deny prohibition.

[Headnote 1]

The district attorney of Washoe County presented to the grand jury certain information which his office had received concerning the Nevada State Hospital near Sparks, Washoe County, Nevada. That information concerned the possible commission of public offenses at

the hospital and security arrangements regarding patients who have been convicted of criminal offenses, patients against whom criminal charges are pending, and patients who are dangerous to others. The grand jury caused subpoenas to issue demanding the appearance of the Nevada Director of Health and Welfare, a former superintendent of the Nevada State Hospital, and its present superintendent. The latter was also requested to produce "records of commitments or admissions of patients transferred from the Nevada State Prison or any prison or jail within the state, or whose admission is accompanied by a police hold." The purpose and scope of the proposed inquiry was thus made clear. In this opinion we do not attempt to describe limitations upon the inquisitorial powers of the grand jury. We merely hold that NRS 172.220 requires that body to "inquire into all public offenses committed and triable within the jurisdiction of the court," and that NRS 172.300(2) permits the proposed inquiry into the security arrangements at the state hospital.

[Headnotes 2-4]

The basic inquiry on prohibition is jurisdiction. NRS 34.320. Although In re Ormsby County Grand Jury, 74 Nev. 80, 322 P.2d 1099 (1958), does not explicitly state that a county grand jury has jurisdiction to inquire into the affairs of a state office located within the county, the decision must be read to stand for that proposition as the court was aware of the problem and approved the grand jury inquiry of state officers subject to the limitations expressed. Indeed, the petitioner concedes such power with respect to all "public offenses" committed and triable within the county. NRS 172.220. He only

challenges the power to inquire into the security arrangements. In our view the security arrangements at the state hospital affect the health and general welfare of the inhabitants of Washoe County and fall within the permissive authorization of NRS 172.300(2). We do not find in NRS 6.135(1)—the so-called state grand jury statute—any expression of a contrary legislative purpose. That statute simply allows the governor, or the legislature by concurrent resolution, to request a district judge to impanel a grand jury. It does not purport in any way to limit the powers of a grand jury impaneled pursuant to NRS 6.110, NRS 6.120, NRS 6.130 or NRS 6.140. It is, of course, true that had a grand jury been impaneled upon request of the governor or legislature to inquire into the affairs of the state hospital, its sole duty would be to investigate and report. That limitation is imposed by the express language of NRS 6.135(1). The powers of a grand jury otherwise impaneled are not so limited. It may subpoena witnesses (NRS 178.250), present public offenses to the court by presentment or indictment (NRS 172.220), and inquire into the matters specified in NRS 172.300.

[Headnote 5]

The petitioner's other ground for prohibition is that Nev.Const.Art. 3, § 1 [3] forbids the proposed inquiry. We do not think that the separation of powers doctrine is involved. The

power of the executive branch of the state government to administer the affairs of the state hospital is specified by statute. NRS 232.300-232.320; NRS 433.100-433.120. That power is not impaired or weakened by the proposed grand jury inquiry. Indeed, the grand jury may not administer the affairs of the hospital. However, it may appropriately report and recommend upon matters within the scope of the inquiry as proposed. The constitutional provision for separation of powers is not offended by authorizing a county grand

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[3] Nev.Const.Art. 3, § 1, reads: "The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted."

jury to investigate a state agency and report its findings to the court. Cf. Nev. Comm'n Equal Rights v. Smith, 80 Nev. 469, 396 P.2d 677 (1964).

For the reasons expressed the application for prohibition is denied and this proceeding is dismissed.

Zenoff, D. J., concurs.

Justice Badt was unavailable because of illness. The parties stipulated that the matter be determined by the remaining members of the court.

JAMES B. McMILLAN, Appellant, *v.* UNITED MORTGAGE CO., a Nevada Corporation, Respondent.

No. 4944

March 29, 1966 412 P.2d 604

Appeal from judgment of the Eighth Judicial District Court, Clark County; David Zenoff, Judge.

Payee and holder of 27 notes, and the beneficiary of 27 second trust deeds given as security, brought action against maker on the notes and attached certain of his assets. The lower court denied defendant's motion to discharge the attachment, and defendant appealed. The Supreme Court, Thompson, J., held that holder of notes was required to first exhaust the security before an action on the note and ancillary attachment was permissible.

Judgment reversed.

Barrett, D. J., dissented.

Robert L. Reid, of Las Vegas, for Appellant.

Deaner, Butler & Adamson, of Las Vegas, for Respondent.

1. Mortgages.
   A trust deed is within the intendment of statute providing that there shall be but one action for the recovery of any debt, or for the enforcement of any right secured by

mortgage or lien upon real estate, or personal property. NRS 40.430.
2. Mortgages.
   Opinion of beneficiary of a trust deed concerning its value may not be substituted for the mode of determining that fact, and the mode is first to exhaust the security by sale pursuant to the trust deed.
3. Mortgages.
   Under statute, holder of notes secured by trust deeds is required to first exhaust the security before an action on the note and ancillary attachment is permissible; disapproving Vande Veegaete v. Vande Veegaete, 75 Mont. 52, 243 P. 1082, and Edminster v. Van Eaton, 57 Idaho 115, 63 P. 2d 154, 108 A.L.R. 393. NRS 31.010, 40.030.

OPINION

By the Court, Thompson, J.:

This appeal concerns the remedy open on default to the holder of promissory notes secured by second deeds of trust. Involved is the interplay of two statutes: the "one-action rule" announced in NRS 40.430 pertaining to the enforcement of a right secured by mortgage on real estate, and NRS 31.010 which allows ancillary attachment in an action upon a note when the security has become valueless, or of insufficient value.

United Mortgage, the payee and holder of 27 promissory notes made by McMillan, and the beneficiary of 27 second trust deeds given as security therefor, commenced a district court action against McMillan, and attached certain of his assets. Each note was for $1,950 (total, $52,650). The 27 second trust deeds were junior to a first deed of trust which had been given by McMillan, as trustor, to Nevada Savings & Loan Association, beneficiary, to secure a

$906,000 debt. Inter alia, the complaint alleged, on information and belief, that McMillan had defaulted on his obligation for which the first deed of trust was security, and that "foreclosure proceedings" had been commenced thereon. [1] The affidavit of attachment asserted that the payment of the debt of $52,650 was secured by a mortgage, lien or

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[1] For convenience, we, too, will use the mortgage term "foreclosure," though perhaps not precisely accurate as applied to a trustee's sale under a trust deed.

pledge, "but that said mortgage, lien or pledge has become valueless." Pursuant to NRS 31.200(1a) McMillan moved to discharge the attachment. His motion was denied and this appeal followed.

Here it is not suggested that the notes or the trust deeds grant a right to sue before exhausting the security. Nor did United Mortgage, before starting this suit, expressly or impliedly waive its security. The early case of Hyman v. Kelly, 1 Nev. 179 (1865), hints that one may abandon the security and sue for the collection of the debt. Instead, United Mortgage wishes to pursue alternative courses simultaneously, and we must decide whether this is permissible.

1. In the absence of a preclusive statute, two remedies are open on default to the holder of a secured promissory note. The debt may be enforced by a suit on the note, or by a sale of the land. At common law the creditor could pursue either remedy, or both at once. Bank of Italy v. Bentley, 217 Cal. 644, 20 P.2d 940 (1933). McMillan here contends that NRS 40.430 [2] is such a preclusive statute and forces the creditor to first exhaust the security or show that it is valueless. Therefore, he suggests that this action upon the promissory

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[2] NRS 40.430 reads: "There shall be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage or lien upon real estate, or personal property, which action shall be in accordance with the provisions of this section, and NRS 40.440 and 40.450. In such action, the judgment shall be rendered for the amount found due the plaintiff, and the court shall have power, by its decree or judgment, to direct a sale of the encumbered property, or such part thereof as shall be necessary, and apply the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff. If the land mortgaged consists of a single parcel, or two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such counties by the sheriff, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county. If it shall

appear from the sheriff's return that there is a deficiency of such proceeds and balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debts, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the clerk of the court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor."

notes was premature as the security had not been exhausted when suit was commenced, and until that is done a court cannot know whether the security is valueless, or of insufficient value to secure the debt. On the other hand, United Mortgage suggests that the "one-action rule" does not preclude suit on the note when the security for the debt has become valueless, or of insufficient value; to rule otherwise would effectively nullify the intendment of NRS 31.010 allowing ancillary attachment in these circumstances. [3] We turn to resolve these divergent views.

[Headnote 1]

2. We must first decide whether a trust deed falls within NRS 40.430. The statute uses the term "mortgage." A trust deed is not mentioned. Also, it refers to an "action" for the recovery of a debt, and a "judgment" in that action. Thus, it is argued, that as a trust deed is technically not a mortgage, and is "foreclosed" by sale at public auction (NRS ch. 107) rather than by court action, the statute cannot apply. [4] The argument is not without persuasion. Yet California, from whom our statute was borrowed, holds squarely that a trust deed is within the statutory "one-action rule" relating to mortgages. In the leading case, Bank of Italy v. Bentley, supra, the court wrote: "Fundamentally, it cannot be doubted that in both situations the security for an

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[3] NRS 31.010, in pertinent part, reads: "The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as hereinafter provided, in the following cases: (1) In an action upon a judgment or upon a contract, express or implied, for the direct payment of money, which is not secured by mortgage, lien or pledge upon real or personal property situated or being in this state; or if originally so secured, when such security has, without any act of the plaintiff or the person to whom the security was given, become valueless or insufficient in value to secure the sum due the plaintiff, in which case the attachment shall issue only for the unsecured portion of the amount due the plaintiff, or excess of the amount due the plaintiff above the value of the security as the same has become so insufficient."

[4] The differences between a trust deed and a mortgage are explored in depth by Professor A. M. Kidd at 3 Cal.L.Rev. 381 (1915).

indebtedness is the important and essential thing in the whole transaction. The economic function of the two instruments would seem to be identical. Where there is one and the same object to be accomplished, important rights and duties of the parties should not be made to depend on the more or less accidental form of the security." That court went on to state that in either event (whether a mortgage or a trust deed) there is an implied understanding between the parties that the land shall constitute the primary fund to secure the debt. As a practical matter there is no substantial dissimilarity between a mortgage with a power of sale and a deed of trust, except for the statutory right of redemption. Sims v. Grubb, 75 Nev. 173, 336 P.2d 759 (1959). We therefore agree with California, and hold that a trust deed is within the intendment of NRS 40.430.

[Headnote 2]

3. Having determined that a trust deed falls within the intendment of the "one-action rule," we must next consider the province of NRS 31.010(1) allowing an ancillary attachment when the security has become valueless or of insufficient value. California tells us that part of the attachment statute "refers to a case where the security has changed in the value it had when originally taken, and has so depreciated as to become of no value." Barbieri v. Ramelli, 84 Cal. 154, 23 P. 1086 (1890). There is no suggestion in this case that there has been a change in the value of the security between the date it was given and the default of McMillan. We think the creditor's conclusory affidavit to be simply an expression of fear that a sale will not bring enough to satisfy McMillan's obligations. In any event, the creditor's opinion of value may not be substituted for the mode of determining that fact. Security First National Bank of Los Angeles v. Chapman, 31 Cal.App.2d 182, 87 P.2d 724 (1939). That mode is first to exhaust the security by sale pursuant to the trust deed. Barbieri v. Ramelli, supra; Hill v. Grigsby, 32 Cal. 55 (1867), where on appeal the court affirmed an order discharging an attachment; Page v. Latham, 63 Cal. 75 (1883), where the appellate could reversed an order refusing

to discharge an attachment; Giandeini v. Ramirez, 11 Cal.App.2d 469, 54 P.2d 91 (1936), reversing an order refusing to discharge an attachment; Mason v. Jansen, 45 Idaho 354, 263 P. 484 (1927). Dictum of the early Nevada case of Weil v. Howard, 4 Nev. 384 (1868) is in accord. Once the security has been sold and the debt not satisfied, an action on the note with ancillary attachment is permissible. Sims v. Grubb, supra. (Action on the debt, no discussion re attachment.) We reject any expressions in Vande Veegaete v. Vande Veegaete, 75 Mont. 52, 243 P. 1082 (1925), and Edminster v. Van Eaton, 57 Idaho 115, 63 P.2d 154 (1936), which are inconsistent with our views.

[Headnote 3]

In ruling that the holder of a note, secured by a trust deed, must first exhaust the security before an action on the note and ancillary attachment is permissible, we are aware that exceptions exist. Sale of the security is the primary remedy. However, the attachment statute may be utilized if the security, without fault of the mortgagee or beneficiary, has become valueless, as where the security has been destroyed by fire and other similar situations. See Note, 25 Cal.L.Rev. 469 (1937); Annot., 108 A.L.R. 397.

For the reasons expressed, the order below refusing to discharge the attachment is reversed.

Badt, J., concurs.

Barrett, D. J., dissenting:

I dissent.

The appellant has described the problem here involved in his statement of the nature of the action, "This is an appeal from an order denying motion to discharge a writ of attachment." It is the position of this writer that the decision of this court should be limited to that issue alone, and should not in anywise be based upon a possible ground for a motion to dismiss the entire action, which, it seems to me, is the basis of the majority opinion. If a ground for dismissal exists, then the appellant should have pursued that course under Rule 12, NRCP. At line 4, page 5, of appellant's opening brief,

he states: "The respondent's complaint and affidavit in support of attachment *fails to state a cause of action* upon which a writ of attachment can properly be granted." (Emphasis added.)

Granted that rules of pleading should be liberally construed in the trial court, certainly some precision should be expected and required on any application to an appellate court. The function of an appellate court is to consider the specific question presented to it in the light of the rules governing appellate practice and procedure, and not to attempt to find some way to provide relief regardless of the inadequacy of the appellant's presentation. Ordinarily this means that the lower court should be affirmed unless it clearly appears that the appellant has established a right to the specific relief requested.

The California Supreme Court recognized the difference between a motion to dismiss and a motion to discharge an attachment in two opinions rendered in 1890, one being Barbieri v. Ramelli, 84 Cal. 154, 23 P. 1086 (1890), and the other being Barbieri v. Ramelli, 84 Cal. 174, 24 P. 113 (1890). The first case, which is cited in the majority opinion, reversed the judgment rendered in the trial court because of the "one-action rule" and ordered dismissal. Justice McFarland concurred only because the decision was consistent with earlier decisions, and

stated, “If the question were an open one, I would come to a different conclusion.” The second Barbieri v. Ramelli opinion was on an appeal in the same case from an order of the trial court denying a motion to discharge and dissolve an attachment. The defendants filed an affidavit in support of their motion to discharge the attachment in which facts were specifically set forth showing that the security had not depreciated in value, but rather had increased in value. Justice McFarland wrote the unanimous opinion of the Court and stated at page 114 of 24 P.: “. . . It is true that the affidavit of plaintiff states the general conclusion that the mortgage has become valueless, which was sufficient, no doubt, to justify the clerk in issuing the writ; but the affidavit of defendant contained a statement of specific facts which, if true, shows that the mortgage had not become valueless. Plaintiff had the opportunity, under section 557 of

the Code, to contradict these specific statements of fact made by defendant, or to state any other facts; and, not having done so, we think that defendant's affidavit must be taken as establishing the truth of what it contains. And, if the security had not become valueless, then defendants were entitled to have the attachment dissolved. Of course, if there had been any substantial conflict in the evidence as to the facts involved, we would not disturb the ruling of the court below.” The lower court was reversed, but only because the plaintiff did not meet the defendants' evidence regarding value.

Before going further, I wish to state that I agree that a trust deed clearly falls within the intendment of NRS 40.430. It should likewise be clear, and it is to me, that the “one-action statute” does not preclude suit on the note when the security for the debt has become valueless, or of insufficient value, and that attachment may issue in the action so filed. In providing as it did in § 1 of NRS 31.010, the legislature could have had no other intention than to allow such a suit and attachment.

In my opinion, the only question here involved is whether the writ of attachment was improperly issued.

NRS 31.200 provides three grounds for discharge of attachment, the first of which, “(a) That the writ was improperly issued,” being the only possible ground available in this case.

NRS 31.210 provides that when a motion to discharge attachment is made on affidavits, the plaintiff may oppose by affidavits.

NRS 31.220 provides as follows: “If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged; *but such attachment shall not be discharged if at or before the hearing of such application the writ of attachment or the affidavit or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.”* (Emphasis supplied.)

The italicized language can only be interpreted to mean that “improperly or irregularly issued” refers solely to defects contained in the writ of attachment or the affidavit or the

undertaking. Clearly, the propriety

of the bringing of the action has nothing to do with possible defects in the writ, the affidavit or the undertaking. The language of the second Barbieri v. Ramelli case supports this position. And, although not directly in point, Kuehn v. Patroni, 20 Nev. 203 (1888), is definitely helpful. There this court stated, in substance, that a motion to discharge attachment pursuant to NRS 31.200 should be denied where the affidavit in support of the motion consists of denials of general facts constituting the cause of action set forth in the complaint—that matters involving the merits of the case will not be considered on such a motion.

Also, see 6 Am.Jur.2d, Attachment and Garnishment § 429 at page 862: "As a general rule, the merits of the action aided by attachment cannot be inquired into or adjudicated in a motion to dissolve the attachment; otherwise an applicant for the dissolution could force a trial of the merits of the case on his motion. . . . However, in some instances, inquiry into the merits of the main action have been allowed, usually as an exception to, or relaxation of, the general rule; . . ."

Also see Witkin, California Procedure, Provisional Remedies § 93, page 926: "(1) Cause Not Within C.C.P. 537. If the cause of action stated in the complaint is not within the class of cases in which attachment will issue, the attachment may be dissolved. (Citations.) (2) No Cause of Action. Suppose the complaint sets forth a type of action within the terms of C.C.P. 537 but, tested by the rules of pleading, it fails to state a cause of action. It might well be argued that the attachment should be dissolved. However, two rules usually operate to preclude this result: First, the merits of the main case cannot be determined on a motion to discharge an attachment. (Citations) Second, the motion cannot be made to operate as a demurrer, i.e., it cannot raise defects of pleading which are capable of cure by amendment. (Citations.)."

Also see Section 2, Rule 35, District Court Rules: "No attachment shall be dissolved by reason of any defect in the attachment papers that can be amended without affecting the substantial rights of the parties."

The only possible ground the appellant can have for

discharging the attachment is the sufficiency of the affidavit, and it very definitely appears that this ground was never raised in the court below. The appellant seeks to show that this

point was raised in the lower court by stating in his reply brief at line 3, page 2, "The sufficiency of the affidavit in support of attachment is automatically put in issue where the holder of a deed of trust secured by an interest in real property attempts to bring direct action on the debt." This is a feeble effort, wholly without supporting authority, and even if true, would be of no avail since the point was never mentioned in the lower court. If the integrity of decisions of trial courts is to be recognized and preserved, no one should be allowed to play fast and loose with the courts' efforts and functions, and irresponsibility on the part of counsel should not be countenanced.

Had the sufficiency of the affidavit been raised in the lower court, I would consider that the rule stated in Barbieri v. Ramelli, supra, would supply ample authority for holding that the appellant, having furnished no evidence regarding value, would not be entitled to have the attachment discharged, regardless of the sufficiency of the affidavit, which, incidentally, in this case leaves something to be desired.

For the reasons stated, the order of the lower court denying the motion to discharge attachment should be affirmed.

↓ 82 Nev. 127, 127 (1966) Tucker v. State ↓

HORACE GOUCHER TUCKER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 4893

April 11, 1966 412 P.2d 970

Appeal from judgment of the Eighth Judicial District Court, Clark County; John C. Mowbray, Judge.

Defendant was convicted before the trial court of second-degree murder, and he appealed. The Supreme Court, Thompson, J., held that permitting jury to hear and consider evidence of prior homicide occurring at defendant's home was prejudicial error, in absence of showing that defendant committed prior homicide.

Reversed and remanded.

Harry E. Claiborne, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, of Carson City, and *Edward G. Marshall,* District Attorney of Clark County, and *Earl Gripentrog,* Deputy District Attorney, both of Las Vegas, for Respondent.

1. Homicide.

Permitting jury to hear and consider evidence of prior homicide occurring at defendant's home was

prejudicial error, in absence of showing that defendant committed prior homicide.

2. Criminal Law.
   Any evidence which shows that defendant committed other offenses should be excluded, unless relevant to prove commission of crime charged.
3. Criminal Law.
   When other offense sought to be introduced falls within exception to rule of exclusion, trial court should be convinced that probative value of such evidence outweighs its prejudicial effect.
4. Criminal Law.
   Reception of evidence of other offenses is justified by necessity and, if other evidence has substantially established elements of crime involved, probative value of showing another offense is diminished, and trial court should rule it inadmissible even though relevant and within exception to rule of exclusion.
5. Criminal Law.
   Anonymous crimes can have no relevance in deciding whether defendant committed crime with which he is charged.

6. Criminal Law.
   Before evidence of collateral offense is admissible for any purpose, prosecution must first establish by plain, clear and convincing evidence, that defendant committed that offense.
7. Criminal Law.
   Statement, made by defendant to police officer, after police arrived and found body in defendant's home, that "You ..... find ..... gun this time" was understandable and admissible in homicide prosecution.

OPINION

By the Court, Thompson, J.:

On May 7, 1957, Horace Tucker telephoned the police station and asked a detective to come to the Tucker home in North Las Vegas. Upon arrival the detective observed that Tucker had been drinking, was unshaven, and looked tired. Tucker led the detective to the dining room where one, Earl Kaylor, was dead on the floor. Kaylor had been shot several times. When asked what had happened, Tucker said that he (Tucker) had been sleeping in the bedroom, awakened, and walked to the dining room where he noticed Kaylor lying on the floor. Upon ascertaining that Kaylor was dead, Tucker telephoned the police station. He denied having killed Kaylor. A grand jury conducted an extensive investigation. Fifty-three witnesses were examined. However, an indictment was not returned as the grand jury deemed the evidence inconclusive. No one, including Tucker, has ever been charged with that killing.

On October 8, 1963, Horace Tucker telephoned the police and asked a sergeant to come to the Tucker home in North Las Vegas; that there was an old man dead there. Upon arrival the sergeant noticed that Tucker had been drinking. The body of Omar Evans was dead on the couch in the living room. Evans had been shot. Tucker stated that he (Tucker) had been asleep, awakened, and found Evans dead on the couch. Subsequently Tucker was charged with the murder of Evans. A jury convicted him of second degree murder and the court pronounced judgment and the statutory sentence of

imprisonment for a term of "not less than 10 years, which term may be extended to life."

[Headnote 1]

At trial, over vehement objection, the court allowed the state to introduce evidence of the Kaylor homicide. The court reasoned that the circumstances of the deaths of Kaylor and Evans were sufficiently parallel to render admissible evidence of the Kaylor homicide to prove that Tucker intended to kill Evans, that the killing of Evans was part of a common scheme or plan in Tucker's mind, and also to negate any defense of accidental death. These limited purposes, for which the evidence was received and could be considered by the jury, were specified by court instruction as required by case law. See Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965); State v. Monahan, 50 Nev. 27, 249 P. 566 (1926); State v. McFarlin, 41 Nev. 486, 172 P. 371 (1918). We rule that evidence of the Kaylor homicide was not admissible for any purpose and that prejudicial error occurred when the court permitted the jury to hear and consider it.

[Headnote 2]

Nevada follows the rule of exclusion concerning evidence of other offenses. We exclude any evidence which shows that the defendant committed other offenses (Garner v. State, 78 Nev. 366, 374 P.2d 525 (1962)), unless relevant to prove the commission of the crime charged. The "unless" portion of the rule is stated in the form of exceptions. Thus we have held that evidence of an offense, other than that for which the accused is on trial, may be allowed as an exception if relevant to prove: motive (State v. Cerfoglio, 46 Nev. 332, 213 P. 102 (1923)); intent (State v. Vertrees, 33 Nev. 509, 112 P. 42 (1910); State v. McMahon, 17 Nev. 365, 30 P. 1000 (1883); State v. Elges, 69 Nev. 330, 251 P.2d 590 (1952); Wallace v. State, 77 Nev. 123, 359 P.2d 749 (1961); Wyatt v. State, 77 Nev. 490, 367 P.2d 104 (1961); Fernandez v. State, 81 Nev. 276, 402 P.2d 38 (1965)); identity (State v. Roberts, 28 Nev. 350, 82 P. 100 (1905); Nester v. State, 75 Nev. 41, 334 P.2d 524 (1959)); the absence of mistake or accident (State v.

McMahon, supra; Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965)); or a common scheme or plan.

[Headnotes 3, 4]

Whenever the problem of evidence of other offenses confronts a trial court, grave considerations attend. The danger of prejudice to the defendant is ever present, for the jury may convict now because he has escaped punishment in the past. Nor has the defendant been advised that he must be prepared to meet extraneous charges. Indeed, as our system of justice is accusatorial rather than inquisitorial, there is much to be said for the notion that the prosecution must prove the defendant guilty of the specific crime charged without resort to past conduct. Thus when the other offense sought to be introduced falls within an exception to the rule of exclusion, the trial court should be convinced that the probative value of such evidence outweighs its prejudicial effect. Brown v. State, supra; Nester v. State, supra; State v. Nystedt, 79 Nev. 24, 377 P.2d 929 (1963). The reception of such evidence is justified by necessity and, if other evidence has substantially established the element of the crime involved (motive, intent, identity, absence of mistake, etc.), the probative value of showing another offense is diminished, and the trial court should rule it inadmissible even though relevant and within an exception to the rule of exclusion.

[Headnote 5]

In the case at hand we need not consider whether evidence of the Kaylor homicide comes within one of the exceptions to the rule of exclusion, because the first requisite for admissibility is wholly absent—namely, that the defendant on trial committed the independent offense sought to be introduced. There is nothing in this record to establish that Tucker killed Kaylor. Anonymous crimes can have no relevance in deciding whether the defendant committed the crime with which he is charged. Kaylor's assailant remains unknown. A fortiori, evidence of that crime cannot be received in the trial for the murder of Evans.

[Headnote 6]

We have not before had occasion to discuss the quantum of proof needed to establish that the defendant

on trial committed the separate offense sought to be introduced. Here there was only conjecture and suspicion, aroused by the fact that Kaylor was found dead in Tucker's home. We now adopt the rule that, before evidence of a collateral offense is admissible for any purpose, the prosecution must first establish by plain, clear and convincing evidence, that the defendant committed that offense. Labiosa v. Gov't of the Canal Zone, 198 F.2d 282 (Cir. 5, 1952); Gart v. United States, 294 F. 66 (Cir. 8, 1923); Paris v. United States, 260 F. 529 (Cir. 8, 1919); cases collected annot., 3 A.L.R. 784. Fundamental fairness demands this standard in order to preclude verdicts which might otherwise rest on false assumptions.

[Headnote 7]

There is one other ground of error which we should consider. A police officer was allowed

to testify to a statement made to him by Tucker shortly after the police arrived and found Evans' body. The statement is, “You ..... find ..... gun this time.” Appellant cites Buster v. State, 23 Nev. 346, 47 P. 194 (1896), and contends the statement was unintelligible and thus inadmissible as a matter of law. We think that the statement is understandable and therefore admissible.

Reversed and remanded for new trial.

Collins, D. J. and Wines, D. J., concur.

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82 Nev. 132, 132 (1966) Lehtola v. Brown Nevada Corp.

GLADYS E. LEHTOLA and EDWARD E. LEHTOLA, Appellants, *v.* BROWN NEVADA CORPORATION, a Corporation, and W. G. BROWN, Respondents.

No. 4981

April 11, 1966 412 P.2d 972

Appeal from judgment of the Second Judicial District Court, Washoe County; Taylor H. Wines, Judge.

Action by motel patron and her husband for damages as result of injury to patron who tripped and fell on motel premises. The trial court entered a judgment n. o. v. for the motel owner and the patron and her husband appealed. The Supreme Court, Thompson, J., held that the disputed factual evidence relating to motel owner's negligence was one for jury resolution, and that where defendant moved for involuntary dismissal at close of plaintiff's case in chief and judge reserved ruling and defendant presented his case but judge did not thereafter rule on motion nor did defendant move for directed verdict at close of case, lower court could not treat the trial motion for involuntary dismissal as a motion for directed verdict at close of case thereby supplying necessary foundation for later motion for judgment n. o. v.

The judgment n. o. v. for the defendant is reversed; the jury verdicts for plaintiffs are reinstated with direction.

Wilke, Fleury & Sapunor, of Sacramento, California; and *Loyal Robert Hibbs,* of Reno, for Appellants.

Vargas, Dillon, Bartlett & Dixon and *Robert W. Marshall,* of Reno, for Respondents.

1. Innkeepers.

Disputed evidence about the construction, placement and color of parking bumper strip, lighting in area and other matters made issue of motel owner's negligence one for jury resolution in action by patron and her husband for injuries to patron who tripped and fell over concrete curb or bumper strip in front of

automobiles parked in front of motel units.

2. Judgment; Trial.

Where defendant moved for involuntary dismissal at close of plaintiff's case in chief and judge reserved ruling

and defendant presented his case but judge did not thereafter rule on motion nor did defendant move for directed verdict at close of case, lower court could not treat the trial motion for involuntary dismissal as a motion for directed verdict at close of case thereby supplying necessary foundation for later motion for judgment n. o. v. NRCP 41(b), 50.

3. Judgment; Trial.

Motion for involuntary dismissal made at close of plaintiff's case in chief and a motion for directed verdict at close of plaintiff's case in chief are functionally indistinguishable, but a motion for directed verdict must be made at close of all the evidence if movant later wishes to make a post-verdict motion for a judgment n. o. v. NRCP 41(b), 50.

OPINION

By the Court, Thompson, J.:

Mr. and Mrs. Lehtola received jury verdicts for $13,500, and $5,000, respectively, which were set aside by the trial court and a judgment notwithstanding the verdicts was entered for the defendant Brown Nevada Corp. This appeal by the Lehtolas followed.

[Headnote 1]

They were guests of the Nevada Inn, a motel in Reno. Upon returning to their motel room late at night, Mrs. Lehtola tripped and fell over a concrete curb or bumper strip in front of the cars parked in front of the motel units, fracturing her hip. Hospitalization, surgery and prolonged care ensued. Her damage award was to compensate for her personal injury and incidental expense, while his was for loss of consortium and other damages. In setting aside the jury verdicts and entering judgment for the defendant, the trial court ruled that the defendant was not negligent as a matter of law. We have reviewed the record with care and cannot agree. Disputed fact evidence about the construction, placement and color of the parking bumper strip, the lighting in the area, and other matters made the issue of the defendant's negligence one for jury resolution. Accordingly, the judgment notwithstanding the jury verdicts must be set aside and the verdicts reinstated for this reason alone. However, as a full opinion discussing conflicts in the evidence would have no value

as precedent, we choose to consider a subordinate procedural ground advanced by the appellants which, we think, is equally valid.

[Headnote 2]

At the close of the plaintiffs' case in chief, the defendant moved for involuntary dismissal pursuant to NRCP 41(b). The judge reserved ruling and the defendant presented his case. Thereafter, the judge did not rule on the 41(b) mid-trial motion, nor did the defendant move for a directed verdict at the close of the case. Cf. Sobrio v. Cafferata, 72 Nev. 145, 297 P.2d 828 (1956). The defendant now argues that it was permissible for the lower court to treat the mid-trial motion as a motion for a directed verdict at the close of the case, thereby supplying the necessary foundation for the later motion for judgment n.o.v. We cannot agree. [1]

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[1] NRCP 41(b) reads as follows: "For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for lack of an indispensable party, operates as an adjudication upon the merits."

NRCP 50 reads as follows: "(a) Motion for Directed Verdict: When Made; Effect. A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of the case. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If the evidence is sufficient to sustain a verdict for the opponent, the motion shall not be granted.

"(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the

[Headnote 3]

It is, of course, true that a 41(b) motion for involuntary dismissal made at the close of the

plaintiffs' case in chief, and a 50(a) motion for a directed verdict made at the close of the plaintiffs' case in chief, are functionally indistinguishable. 2B Barron & Holtzoff, § 919; 5 Moore's Federal Practice 1043; Cranston Print Works

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motion. Not later than 10 days after service of written notice of entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

"(c) Same: Conditional Rulings on Grant of Motion. (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

"(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after service of written notice of entry of the judgment notwithstanding the verdict.

"(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

Co. v. Pub. Serv. Co. of N.C., 291 F.2d 638 (4th Cir. 1961); Manger v. Kree Institute of Electrolysis, 233 F.2d 5 (2d Cir. 1956). [2] However, it does not follow that a 41(b) motion at the close of the plaintiffs' case may serve as a motion for a directed verdict as contemplated by Rule 50 to establish a basis for a subsequent motion for a judgment n.o.v. A 50(a) motion must be made at the close of all the evidence if the movant wishes later to make a post-verdict motion under that rule. Such, we think, is the fair intendment of Rule 50, the necessary implication of Sobrio v. Cafferata, supra, and the holding of many cases collected in 69 A.L.R.2d 449 at 478 and 97 L.Ed. 90. A 41(b) mid-trial motion necessarily tests the evidence as it then exists. Here the court reserved ruling on that motion. Thereafter, the complexion of the case changed as the defendant offered evidence. The record does not show that at the close of the case the defendant requested a ruling on the mid-trial motion, 6551

Collins Avenue Corp. v. Millen, 104 So.2d 337 (Fla. 1958), and no motion was made for a directed verdict. Nothing occurred. The lower court, therefore, was not authorized to entertain a postverdict motion under 50(b).

The judgment n.o.v. for the defendant is reversed; the jury verdicts for plaintiffs are reinstated with direction to enter judgment thereon. Appellants are allowed costs on appeal.

Zenoff, D. J., and Marshall, D. J., concur.

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[2] The Federal Rules of Civil Procedure, as amended 1963, make 41(b) applicable only to non-jury cases. Nevada has not adopted the amendment.

KENNETH RONALD GRAVES, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 4951

April 19, 1966 413 P.2d 503

Appeal from judgment of the Second Judicial District Court, Washoe County; John W. Barrett, Judge.

Defendant was convicted in the trial court of attempted first-degree murder, and he appealed. The Supreme Court, Thompson, J., held that giving of instruction which commented on defendant's testimony was prejudicial error.

Reversed and remanded.

[Rehearing denied May 17, 1966]

Harry E. Claiborne, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, of Carson City, and *William J. Raggio,* Washoe County District Attorney, of Reno, for Respondent.

1. Criminal Law.
   Giving of instruction, in prosecution for attempted first-degree murder, which commented on defendant's testimony was prejudicial error.
2. Constitutional Law.
   Power to decide whether it is prejudicial error to give a special instruction relating exclusively to

defendant's testimony in a criminal case is lodged with the judicial rather than with the legislative branch of the state government. Const. art. 3, § 1.

3. Criminal Law.
   Statute providing that no special instructions shall be given relating exclusively to testimony of defendant and that giving of such instructions shall constitute reversible error is precatory in character. NRS 175.170.
4. Criminal Law.
   Rule of harmless error may not be invoked to overcome a violation of statute providing that no special instruction shall be given relating exclusively to the testimony of the defendant and that the giving of such instructions shall constitute reversible error; overruling State v. Williams, 47 Nev. 279, 220 P.2d 555; State v. Fitch, 65 Nev. 668, 200 P.2d 991. NRS 169.110, 175.170.
5. Criminal Law.
   Thrust of constitutional mandate providing that judges shall not charge juries in respect to matters of fact, but

may state testimony and declare the law, is to preclude comment on the evidence by the judge, and includes within its scope the matter of the credibility of the witnesses. Const. art. 6, § 12.

6. Criminal Law.
   Matters of fact, including credibility of witnesses, are for jury resolution. Const. art. 6, § 12.
7. Criminal Law.
   It is permissible to instruct generally that jury is the sole judge of the credibility of all witnesses, but impermissible to single out the testimony of one and comment upon its quality and character. Const. art. 6, § 12.
8. Criminal Law.
   Failure of defense counsel to object to prejudicial instruction was immaterial. NRS 175.515.
9. Homicide.
   Instruction on general intent, in prosecution for attempted first-degree murder, should not have been given, since intent to kill must be proved by evidence and inferences reasonably deducible therefrom, and may not be based upon a presumption. NRS 200.030, subd. 1, 208.070.
10. Homicide.
    General intent instruction is permissible in a murder prosecution where malice and intent are presumed from the unlawful killing, and when offense charged does not require proof of specific intent. NRS 200.030, subd. 1, 208.070.

OPINION

By the Court, Thompson, J.:

[Headnotes 1-4]

A jury convicted Graves of attempted first degree murder. He was the sole witness in

defense. His request for reversal and another trial rests mainly upon the jury instruction quoted below, [1] commenting upon his testimony. The state acknowledges error and concedes

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[1] Instruction No. 6 reads as follows: "The defendant has offered himself as a witness on his own behalf in this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducement and temptations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled; if convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."

that the instruction offends the prohibition of NRS 175.170 reading: "In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given his testimony being left solely to the jury, under the instructions of the court; provided: 1. That no special instruction shall be given relating exclusively to the testimony of the defendant; and 2. That the giving of such instruction shall constitute reversible error." We agree with the legislature that the giving of a special instruction relating exclusively to the testimony of a defendant in a criminal case is, per se, prejudicial error. However, our conclusion is reached entirely apart from the legislative expression that the giving of such an instruction "shall constitute reversible error." The power to decide that question is lodged with the judicial rather than with the legislative branch of our state government. Nev. Const. art. 3, § 1 [2] ; cf. State ex rel. Watson v. Merialdo, 70 Nev. 322, 268 P.2d 922 (1954); McCarthy v. Mobile Cranes, Inc., 18 Cal.Rptr. 750, 199 Cal.App.2d 500 (1962); Kostas v. Johnson, 224 Ind. 540, 69 N.E.2d 592 (1946). Accordingly, we consider the legislative language to be precatory in character. Cf. Ratliff v. Sadlier, 53 Nev. 292, 299 P. 674 (1931). We do not criticize the 1949 legislature for having so expressed itself, as its enactment was apparently invited by the decisions of this court in State v. Williams, 47 Nev. 279, 220 P. 555 (1923) and State v. Fitch, 65 Nev. 668, 200 P.2d 991 (1948). In each case an instruction similar to the one here challenged (though not as prejudicially strong) was denounced as error, but labeled harmless. In Williams, supra, the court concluded its discussion of the statute as it then existed by stating:

"Must we not conclude that, if the legislature intended

[2] Nev. Const. art. 3, § 1 reads: "The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted."

such a result (reversible error), it would have expressly provided for the reversal of a judgment where such an instruction is given?" Of course, when Williams (1923) and Fitch (1948) were written the statute did not direct reversal. The rule of harmless error was invoked to save the convictions. In 1949 the legislature responded to the question asked in the Williams opinion by amending the statute to provide for reversal. Since that amendment, this court has mentioned the statute only once. In Scott v. State, 72 Nev. 89, 295 P.2d 391 (1956), it was held not to be error to refuse a somewhat similar instruction because of the statutory prohibition. The implication of State v. Williams, supra, and State v. Fitch, supra, that the legislature is empowered to decree what shall constitute reversible error in a criminal case is now expressly repudiated. As before noted, the legislative expression in that regard is constitutionally impermissible. Further, we expressly overrule those cases insofar as they invoke the rule of harmless error (NRS 169.110) [3] to overcome a violation of NRS 175.170 as we believe that prejudice is built into the prohibited instruction.

[Headnotes 5-7]

The legislative prohibition found in NRS 175.170 rests, we think, upon the constitutional command that judges shall not charge juries "in respect to matters of fact but may state the testimony and declare the law." Nev. Const. art. 6, § 12. The thrust of the constitutional mandate is to preclude comment on the evidence by the judge and includes within its scope the matter of the credibility of witnesses. People v. Boren, 139 Cal. 210, 72 P. 899 (1903). Matters of fact, including the credibility of witnesses, are for jury resolution. For this reason, it is permissible to instruct generally that the

[3] NRS 169.110 reads: "No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually

prejudiced the defendant, in respect to a substantial right."

jury is the sole judge of the credibility of all witnesses, but impermissible to single out the testimony of one and comment upon its quality and character.

[Headnote 8]

The challenged instruction we are here considering offends not only our Constitution, art. 6, § 12, and statute NRS 175.170, but our sense of justice as well. No one would suggest that a judge should be allowed to instruct the jury that a defendant in a criminal case, who has testified on his own behalf, is a liar and not to be believed. It seems to us that an instruction carrying similar disparaging implications is almost as offensive. Here the jury was charged, inter alia, to "consider his relation and situation under which he gives his testimony, the consequence to him relating from the result of this trial, and all the inducement and temptations which would ordinarily influence a person in his situation," in deciding the credit to be given the defendant's version of the incident in question. Such language comes close to an admonition that the defendant is not worthy of belief. It is, of course, permissible for the jury to reach that conclusion by itself. It is not permissible for the court to encourage that result by instruction. In this case, the prosecutor emphasized the instruction in his summation to the jury[4] thereby adding to the damage already accomplished. For the reasons

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[4] "That is true of every witness, and there is a particular Instruction in here that the Court has instructed you that the defendant himself having taken the stand in this case, that you are entitled to notice his manner on the stand; and I think you saw the defendant's manner on this stand. I think you saw it in comparison to the other witnesses in this case. You should consider his relation and the situation under which he gave his testimony and the consequences to the defendant relating from the result of this trial.

"Did any of these things prompt what the defendant said from this witness stand? Is there any reason why the defendant's testimony in this case is the only one that is different from every other witness who took the stand on practically everything that was said as the cause of his relation and situation in this case? Is it because of the consequences resulting from the result of this case and all the inducements and temptations which would ordinarily influence a person in his situation? Is his testimony the truth or is it the result of the situation in which he has placed himself?"

expressed, we must reverse and remand for a new trial. The failure of defense counsel to object to the instruction is immaterial. NRS 175.515; Harvey v. State, 78 Nev. 417, 375 P.2d

225 (1962).

[Headnotes 9, 10]

Another assigned error has merit. We turn to discuss it in order to preclude recurrence when this case is tried anew. The defendant was charged with having committed the crime of attempted first degree murder, which requires proof of a specific intent to kill. [5] People v. Snyder, 15 Cal.2d 706, 104 P.2d 639 (1940). The jury was instructed on general intent and specific intent. [6] The general intent instruction should not have been given. The intent to kill must be proved by evidence and the inferences reasonably deducible therefrom and it may not be based upon a presumption. People v. Snyder, supra; People v. Miller, 2 Cal.2d 527, 42 P.2d 308 (1935); People v. Mize, 80 Cal. 41, 22 P. 80 (1889). A general intent instruction is permissible in a murder prosecution where malice and intent are presumed from the unlawful killing. The burden is shifted then to the defendant to establish mitigating circumstances or justification. That instruction is also appropriate when the offense

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[5] NRS 208.070 reads in part: "An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime * * *."

NRS 200.030(1) provides: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, or which shall be committed by a convict in the state prison serving a sentence of life imprisonment, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree."

[6] The general intent instruction stated: "Upon the question of intent, the law presumes a person to intend the reasonable and natural consequences of any act intentionally done; and this presumption of law will always prevail, unless, from a consideration of all the evidence bearing upon the point, the jury entertain a reasonable doubt whether such intention did exist." [Instr. 19]

The specific intent instruction was: "When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the Jury as a matter of fact before the Jury can find a verdict of guilty." [Instr. 20]

charged does not require proof of specific intent. However, it may not be given when the defendant is charged with attempted murder. A homicide was not accomplished and a foundation does not, therefore, exist upon which to presume that the accused intended the "natural and probable consequences of his act." People v. Snyder, supra.

We have considered the remaining assignments of error and find them to be without merit.

Reversed and remanded for a new trial.

Zenoff, D. J., and Sundean, D. J., concur.

The Governor designated Honorable Clarence Sundean to sit for Mr. Justice Badt.

ROBERT ORMAND, a Minor, by and Through his Guardian ad Litem, CARL REED, Appellant, *v.* GORDON D. BREHM, Respondent.

No. 4975

April 19, 1966 413 P.2d 493

Appeal from the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Action to recover for injuries suffered in an automobile accident. From a judgment entered upon a verdict in the trial court for the defendant, the plaintiff appealed. The Supreme Court, Zenoff, D. J., held that instruction pertaining to host's intoxication as driving while intoxicated rather than as wilful misconduct and instruction pertaining to guest's intoxication as wilful misconduct were prejudicially erroneous.

Reversed and remanded.

[Rehearing denied May 27, 1966]

Foley Brothers, and *Morse & Graves,* of Las Vegas, for Appellant.

Singleton, DeLanoy & Jemison, of Las Vegas, for Respondent.

1. Appeal and Error; Automobiles.
   Instruction, in suit to recover for injuries suffered in an automobile accident, pertaining to host's intoxication as constituting driving while intoxicated rather than as wilful misconduct was prejudicially erroneous.
2. Automobiles.
   Trial court or jury, in a civil action brought by a guest, might possibly find without inconsistency that injuries to guest resulted from intoxication and wilful misconduct of driver.
3. Appeal and Error; Automobiles.
   Instruction, in action to recover for injuries suffered in an automobile accident, pertaining to guest's intoxication as wilful misconduct was prejudicially erroneous.

OPINION

By the Court, Zenoff, D. J.:

Plaintiff brought this action to recover for injuries suffered in an automobile accident. Plaintiff who April 20, 1961 was 18 years of age, defendant, who was then 21, and two companions set off in the defendant's panel truck for an evening round trip from Las Vegas, Nevada, to Lathrop Wells, Nevada. Before starting, and after getting a contribution from each member of the party, defendant purchased approximately five dollars worth of beer for drinking during the drive. The trip to Lathrop Wells was uneventful. During this ride the four consumed most of the beer. After a brief stop at Lathrop Wells, the party drove to Ash Meadows. There, they stopped long enough for one drink and one of the companions decided to remain.

The defendant was driving when they turned homeward. Their route was to Death Valley Junction in California, a distance of approximately seven miles, and thence southeast on Highway 95 to Las Vegas. Although there was beer at hand, no one drank after leaving Ash Meadows. On the way to Death Valley Junction the defendant lost his way and was briefly mired in sand. After getting the vehicle out of the sand and headed in the right direction, the plaintiff and the other companion suggested that someone else drive, but the defendant refused to give up the wheel. Before reaching

Death Valley Junction, the defendant asked which direction he should turn at the Junction. Twice he was warned about excessive speed on a dirt road and responded by slowing down for the time being. As the automobile approached the Junction, a well marked intersection with directional signs, plaintiff and the other guest were asleep or dozing. The defendant at an excessive speed attempted a turn at the intersection and lost control. The vehicle overturned, seriously injuring plaintiff who is now a quadriplegic.

The jury awarded judgment for defendant. Plaintiff now appeals that at least two instructions given over objection were prejudicially erroneous. We agree and reverse.

1. The protested instructions were numbered “30” and “31” among a total of 43:

“INSTRUCTION NO. 30: An automobile guest who knowingly and intentionally participated in drunken conduct leading up to motorist's intoxicated condition is guilty of ‘wilful misconduct.'

“INSTRUCTION NO. 31: You are hereby instructed that if you find that the defendant driver was intoxicated at the time of the accident, then, even though his conduct might have constituted wilful misconduct if he had not been intoxicated, if you find that such conduct was the result of intoxication, then you should consider such conduct as constituting driving while intoxicated rather than wilful misconduct.”

Plaintiff-appellant contends these instructions were substantial distortions of applicable

California law. [1] We agree and find error in failure to make crucial distinctions under the California "guest statute" [2] between a

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[1] The parties agreed to proceed under California law, lex loci.

[2] Cal.Veh. Code § 17158: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the guest during such ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or wilful misconduct of said driver." Cf. NRS 41.180(3).

host's liability for "intoxication" and his liability for "wilful misconduct."

[Headnotes 1, 2]

2. Assuming plaintiff was a "guest," he could recover only if the proximate cause of his injuries was his "host"-driver's "intoxication or wilful misconduct." The fatal flaw of Instruction 31 was that it kept jurors from possibly finding *both* intoxication and wilful misconduct were proximate causes of the accident. Instead, if the jurors found intoxication they could look no further. Instruction 31 said that all the driver's acts should then be deemed "the result of intoxication." Thus jurors finding intoxication could not also find "wilful misconduct"; but they should have been allowed to do so under California law. "We are of the view that a trial court or jury, in a civil action brought by a guest, might properly find without inconsistency that the injuries to the guest resulted from both the intoxication and the wilful misconduct of the driver. And as the jury might have sustained either or both charges in the present case and as the defenses to said charges differ to some extent, we are of the opinion that the trial court committed prejudicial error in withdrawing the issue of wilful misconduct from the consideration of the jury." Pennix v. Winton, 61 Cal.App.2d 761, 143 P.2d 940, 942 (1943).

3. To the extent that Schneider v. Brecht, 6 Cal.App.2d 379, 44 P.2d 662 (1935) may be *contra,* we consider it superseded by the later decision of a co-ordinate court [3] in Pennix. See Kelley v. Kelley, 43 Del. 408, 48 A.2d 381 (1946). We also note approval of Pennix in Jones v. Harris, 104 Cal.App.2d 347, 231 P.2d 561 (1951); [4] and Pennix' own insistence that it is explanatory, not contradictory, of Schneider. 143 P.2d at 942.

4. The difference in available defenses between "intoxication" and "wilful misconduct" is crucial. Where

[3] Schneider was a ruling by California's Third District Court of Appeal; Pennix was by the First District. Apparently the California Supreme Court has not passed on the question.

[4] Jones was a ruling by California's Fourth District Court of Appeal.

only "intoxication" is shown, plaintiff could be barred from recovery if he assumed the risks of accompanying a driver so incapacitated.[5] Against "wilful misconduct," however, that same plaintiff could still prevail unless shown his conduct was equally culpable. "Intoxication," then, is but an *element* of "wilful misconduct." Fuller v. Chambers, 169 Cal.App.2d 602, 337 P.2d 848 (1949); Taylor v. Rosiak, 236 Cal.App.2d 68, 45 Cal.Rptr. 767 (1965).

[Headnote 3]

5. The fault of Instruction 30 was that it glossed over these differences in defenses by ordering jurors that plaintiff's participation in intoxication, if so found, constituted "wilful misconduct." Thus plaintiff would be precluded from any recovery merely by participation in intoxication, regardless of whether defendant's actions went beyond intoxication[6] into "wilful misconduct."

Reversed and remanded.

Thompson, J., and Wines, D. J., concur.

Badt, J., being ill, the Governor designated Honorable Taylor H. Wines, of the Fourth Judicial District Court, to sit in his place.

[5] The California courts also speak in terms of "contributory negligence" as a defense to intoxication. Taylor v. Rosiak, 236 Cal.App.2d 68, 45 Cal.Rptr. 767 (1965).

[6] Just what constitutes such "other acts or omissions" beyond intoxication is perhaps the most difficult problem in this entire area, since almost all conduct concurrent with intoxication may reasonably be regarded as incident thereto. However, the matter need not be discoursed here; in the instant case it was a question for the jury.

ROYAL INDEMNITY COMPANY, INC., a New York Corporation, Appellant, *v.* SPECIAL SERVICE SUPPLY CO., INC., a Corporation, Respondent.

No. 4982

April 19, 1966 413 P.2d 500

Appeal from the Eighth Judicial District Court, Clark County; William P. Compton, Judge.

Suit by materialman to recover from surety on bond posted by contractor in compliance with licensing statute. The lower court rendered summary judgment for materialman and surety appealed. The Supreme Court, Zenoff, D. J., held that surety was liable on bond where, by expressly denying liability for prior materials, surety accepted by implication liability for materials procured after date of bonding agreement.

Affirmed.

[Rehearing denied May 16, 1966]

Singleton, DeLanoy, and *Jemison,* of Las Vegas, for Appellant.

Deaner, Butler & Adamson, of Las Vegas, for Respondent.

1. Bonds.

   A contractor's bond may be conditioned more broadly than is required by statute. NRS 624.010 et seq., 624.270.

2. Contracts.

   In construing contracts, every word must be given effect if at all possible.

3. Principal and Surety.

   Contractor's bond which expressly denied liability for prior materials by implication accepted liability for materials procured after date of bonding agreement and surety was liable for materials furnished after bond was given even if statute does not extend to materialman's contracts. NRS 624.010 et seq., 624.270.

4. Principal and Surety.

   In construing a contractor's bonding agreement, the Supreme Court could not disregard as surplusage a plainly worded provision that contractor's surety would not be liable for labor and material bills incurred prior to date of bonding agreement. NRS 624.010 et seq., 624.270.

5. Licenses.

   Where bond posted by contractor as required by licensing statute was not entirely drawn in exact wording of

the statute and spoke of defaults and material bills, the only reasonable inference was that it was intended to go beyond the statutory language. NRS 624.010 et seq., 624.270.

OPINION

By the Court, Zenoff, D. J.:

We are called upon to construe a bonding agreement between a professional surety and a contractor to determine whether a materialman, due and owed monies from the contractor, may recover against the bond.

The surety, Royal Indemnity Company, Inc., contracted a $3,000 bond with Darby Air Conditioning which provided:

"NOW, THEREFORE, if the Principal herein (Darby) shall for the period beginning with the date hereof and ending with the expiration of One Year from said date, faithfully comply with all of the provisions of Chapter 624 of the Revised Statutes of Nevada, as amended, then this obligation shall be null and void, otherwise to remain in full force and effect.

"THE LIABILITY OF THE SURETY herein shall be confined to unlawful acts, omissions, or defaults of the Principal occurring subsequent to the date hereof, and prior to the expiration of One Year from said date; provided, however, that the Surety shall in no event be liable for labor and material bills incurred by the principal prior to the date hereof."

Appellant Royal Indemnity argues this agreement was not a "materialmen's bond" but only ran to the statutory requirements of NRS 624.270 which, appellant insists, do not extend to simple breaches of contract to materialmen. [1]

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[1] "NRS 624.270. Bond or cash deposit of new licensee; rights of employees, claimants against bond or deposit.

"1. No new license, as distinguished from the renewal of an existing license, shall be issued hereafter by the board unless the applicant for a new license shall:

(a) File, or have on file, with the board a bond issued by a qualified surety insurer in a sum to be fixed by the board based upon the magnitude of the operations of the applicant, but which sum shall not be less than $500 nor more than $5,000, running to

The lower court allowed recovery in a summary judgment. We affirm.

[Headnote 1]

1. It is unnecessary to decide the exact limitations of NRS 624.270. Even if, as appellant claims, the statute does not extend to materialmen's contracts, a bond may be conditioned more broadly than the statute requires and "is good at common law, if it is entered into voluntarily by competent parties for a valid consideration, and is not repugnant to the letter or policy of the law * * *." County v. Feldschau, 101 Ore. 369, 199 P. 953 (1921) and authorities cited therein; 18 A.L.R. 1227; 9 C.J. 29. Thus we look exclusively to the particular bonding contract here in issue.

[Headnote 2]

2. We first resort to general rules of contractual construction. Every word must be given effect if at all possible. As was noted in Reno Club v. Investment Co., 64 Nev. 312, 324, 182 P.2d 1011, 173 A.L.R. 1145 (1947), "[t]he court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter or of any material incident, or to insert words which the parties have not made use of. It cannot reject what the parties inserted, unless it is repugnant to some other part of the instrument." Also, Hoaglund v. City of Los Angeles, 103 Cal.App.2d 499, 229 P.2d 823 (1951); Johnston v. Miller, 326 Mich. 682, 40 N.W.2d 770 (1950); Musto v. Grosjean, 208 Cal. 453, 281 P. 1022 (1929).

[Headnote 3]

3. For purposes of this dispute, the instant contract has three crucial provisions: (1) that full compliance

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the State of Nevada and conditioned upon his compliance with all the provisions of this chapter; * * *

"3. Every person injured by the unlawful acts or omissions of a contractor who has filed a bond or posted a cash deposit as required under the provisions of this section may bring an action in a proper court on the bond or a claim against the cash deposit for the amount of the damage he suffered as a result thereof to the extent covered by the bond or cash deposit.

"4. The claim of any employee of the contractor for wages shall be a preferred claim against any such bond or cash deposit. * * *"

with Ch. 624 by Darby shall make the surety, Royal Indemnity's, obligation "null and void"; (2) that Royal's liability shall be "confined to unlawful acts, omissions, or defaults" of Darby; and (3) that Royal "shall in no event be liable for labor and material bills incurred by (Darby) prior to the date" of the bonding agreement. The problem is to give full effect to each of these provisions. If we accept appellant's argument that materialmen's defaulted bills were not included in the bond, there appears no purpose for Royal expressly denying liability for prior materials, thus, by implication accepting liability for materials procured after the date of the

bonding agreement.

[Headnote 4]

4. Royal argues that the provision for materials was surplusage; "the extraneous insertions of over-cautious attorneys." We cannot so discard plain words in a valid contract.

Royal next argues that the provision for materials must be read in context with Ch. 624, which does not expressly provide for guarantying the payment of materialmen's bills, and Royal was freed of all obligations if Darby "faithfully compl[ied] with all of the provisions of Chapter 624." We must attempt to reconcile "faithful compl[iance] with * * * Chapter 624" with the later clause whereby Royal Indemnity impliedly agreed to incur liability for materials obtained during the term of the bonding contract, though Ch. 624, standing alone, might not require such a bonding.

5. "If clauses in a contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them if possible." Quinerly v. Dundee Corp., 159 Fla. 219, 31 So.2d 533, 534 (1947); see Hull v. Burr, 58 Fla. 432, 50 So. 754, 765 (1909). It is only where clauses are totally irreconcilable that a choice may be made between them. Morgan v. Firestone Tire & Rubber Co., 68 Idaho 506, 201 P.2d 976 (1948). In the instant contract, compliance with Ch. 624 *can* be harmonized with payments for materials in either of two ways: (1) the contract only encompassed payments for "unlawful" materials—i.e., those

obtained incident to a violation of Ch. 624; or (2) the bonding contract assumed that failure to pay a due and owing bill to a materialman was not "faithful compl[iance] with all of the provisions of Chapter 634"—regardless of whether Ch. 624 required a bonding of such payments.

We cannot accept the interpretation as to "unlawful" materials. Parties to a bonding agreement seem unlikely to have singled out for protection materialmen supplying only wrongful contractors. Certainly Ch. 624 does not so require. "If one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would be in accord with reason and probability." Quinerly v. Dundee Corp., supra; see Hull v. Burr, supra.

6. It is our view that full compliance with Ch. 624, at least insofar as the instant parties and contract were concerned, encompassed payment of materialmen's bills in an appropriate spirit of "financial responsibility." See NRS 624.260. [2] Although the $5,000 limit of the statutory bond seems unrealistic when applied to the construction industry, it is the sum fixed by the legislature and can be changed by the legislature.

[Headnote 5]

7. We are reinforced in these views by a final point. The bonding requirements incident to a new contractor's license are expressly set forth in NRS 624.270, supra. If the instant bond

was intended only to fulfill that statute, as Royal insists, the parties could easily have drawn their contract in the exact wording of the statute. This to some extent they did—but they also spoke of "defaults" and "material bills." The only reasonable inference is that they intended to go beyond the statutory language.

Affirmed.

Thompson, J., and Gabrielli, D. J., concur.

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[2] "NRS 624.260. Applicant to show experience, financial responsibility. The board shall require an applicant to show such a degree of experience, financial responsibility and such general knowledge of the building, safety and health laws of the State of Nevada and the rudimentary principles of the contracting business as the board shall deem necessary for the safety and protection of the public."

Badt, J., being ill, the Governor designated Honorable John E. Gabrielli, of the Second Judicial District Court, to sit in his place.

STEVEN MESSMORE, Petitioner, *v.* JACK FOGLIANI, Warden, Nevada State Prison, Respondent.

No. 5002

April 19, 1966 413 P.2d 306

Original proceedings in habeas corpus.

Proceeding brought by defendant convicted of robbery. The Supreme Court, Thompson, J., held that where statement of robbery victim given at preliminary hearing, when defendant was without counsel, was received in evidence during trial as part of state's case in chief, defendant was denied any opportunity to have benefit of counsel's cross-examination of witness against him.

Writ granted and petitioner discharged.

Drennan A. Clark, of Reno, for Petitioner.

Harvey Dickerson, Attorney General, and *John G. Spann,* Deputy Attorney General, of Carson City, and *Edward G. Marshall,* Clark County District Attorney, of Las Vegas, for Respondent.

1. Habeas Corpus.
   Writ of habeas corpus may be utilized to determine whether defendant's constitutional right to confront witnesses was violated. U.S.C.A.Const. Amends. 6, 14.
2. Criminal Law.
   Where statement of robbery victim given at preliminary hearing, when defendant was without counsel, was received in evidence during trial as part of state's case in chief, defendant was denied any opportunity to have benefit of counsel's cross-examination of witness against him. U.S.C.A.Const. Amends. 6, 14.
3. Courts.
   United States Constitution neither prohibits nor requires retrospective application of judicial decision.

4. Courts.
   Court in determining whether decision should be retrospectively applied must weigh merits and demerits of particular case with reference to the constitutional right involved.
5. Courts.
   Sixth Amendment right of confrontation is so basic as to demand retrospective application of judicial decision that defendant's right of confrontation and of cross-examination of witnesses against him is obligatory on states in case where statement of robbery victim given at preliminary hearing, when defendant was without counsel, was received in evidence during trial as part of state's case in chief. U.S.C.A. Const. Amends. 6, 14.
6. Criminal Law.
   The rule of harmless error was inoperative where defendant was denied a fair trial because he was precluded from the confrontation and cross-examination, through counsel, of a material witness against him. NRS 169.110.

OPINION

By the Court, Thompson, J.:

[Headnotes 1, 2]

This is an original proceeding for a writ of habeas corpus. A jury convicted the petitioner of robbery. His request for release from prison rests upon an asserted violation of his Sixth Amendment rights. [1] The remedy is appropriate. Dean v. Fogliani, 81 Nev. 541, 407 P.2d 580 (1965); Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965). The statement of the victim of the robbery given at the preliminary hearing, when petitioner was without counsel, was received in evidence during the trial as part of the state's case in chief. Thus, petitioner was denied any opportunity to have the benefit of counsel's cross examination of a witness against him. In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), the United

States Supreme Court held that the right granted to an accused by the Sixth Amendment to confront the witnesses against him, which includes the right of cross examination, is a

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[1] The Sixth Amendment to the U.S. Constitution reads in part: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * * and to have the Assistance of Counsel for his defence."

fundamental right essential to a fair trial and is made obligatory on the states by the Fourteenth Amendment. Accordingly, that court ruled that the Sixth Amendment right of confrontation was denied when the transcript of the witness' statement offered against the petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross examine. Pointer v. Texas, supra, controls this case. See also: Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Our ruling today was foreshadowed by prior opinions of this court. In Victoria v. Young, 80 Nev. 279, 392 P.2d 509 (1964), we stated, "Appellant argues that a preliminary hearing is a critical stage of the procedure leading to the trial of an accused, because testimony taken there may be used by either party on the trial when the personal attendance of any witness cannot be had in court. NRS 171.405(10). We are of the opinion that this argument has no merit. Counsel anticipates that he will be prejudiced at the trial in the event the trial court should receive in evidence any testimony taken at the preliminary hearing. We do not believe that a trial court would invite such error in a case where an accused did not have the opportunity to cross-examine witnesses through counsel. Until such testimony is received in evidence at the trial, appellant cannot claim prejudice." The hypothesized occurrence which we discussed in Victoria happened in the instant case.

Again, in Coffman v. State, 81 Nev. 521, 407 P.2d 168 (1965), we equated the right of confrontation with the right to cross examine through counsel. There, a deposition was used in lieu of courtroom testimony, but the defendant and his counsel were present when the deposition was taken and defense counsel cross examined the deponent. Therefore, the defendant's Sixth Amendment rights were not violated.

[Headnotes 3-6]

A further question is presented: Should Pointer v. Texas, supra, be retrospectively applied? The petitioner was sentenced on March 20, 1963. Pointer was decided on April 5, 1965. The federal constitution neither

requires nor prohibits retrospective effect. Each case must be examined with reference to the constitutional right involved. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965). Tehan v. United States, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966). As noted in Linkletter, if the constitutional principle is aimed at the fairness of the trial—the very integrity of the fact finding process—retrospective application is in order. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). We think that the total preclusion of the right to confront and cross examine, through counsel, a material witness against the defendant, fatally infects the fairness of the trial. We hold, therefore, that the Sixth Amendment right of confrontation is so basic as to demand retrospective application. In this setting the rule of harmless error (NRS 169.110) is inoperative.

Writ granted and petitioner discharged.

Zenoff, D. J., concurs.

HAROLD RUSSELL SHUM, Appellant, *v.* JACK FOGLIANI, Warden, Nevada State Prison, Respondent.

No. 5047

April 22, 1966 413 P.2d 495

Appeal from order of the First Judicial District Court, Ormsby County; Frank B. Gregory, Judge.

Petitioner, whose probation had been revoked, brought habeas corpus proceeding. The lower court entered an order denying relief, and the petitioner appealed. The Supreme Court, Thompson, J., held that court is not required to appoint counsel for an indigent in proceeding to revoke his probation.

Order affirmed.

Wines, D. J., dissented.

Roger L. Erickson, of Reno, for Appellant.

Harvey Dickerson, Attorney General, and *John G. Spann,* Deputy Attorney General, of Carson City, for Respondent.

1. Criminal Law.
   Court is not required to appoint counsel for an indigent in proceeding to revoke his probation. Const. art. 5, § 14; NRS 176.300, subd. 1, 176.330, subds. 1, 2.
2. Habeas Corpus.
   Extraordinary remedy of habeas corpus is appropriate to test legality of conviction which is challenged on constitutional grounds.
3. Criminal Law.
   On proceeding to revoke probation, court is not concerned with probationer's guilt or innocence of underlying crime, and sole concern is whether privilege of probation should be revoked because of failure of probationer to meet conditions imposed. Const. art. 5, § 14; NRS 176.300, subd. 1, 176.330, subds. 1, 2.
4. Criminal Law.
   If revocation of probation is ordered, sentence probationer is required to serve is punishment for underlying crime rather than for his failure to comply with terms of probation. Const. art. 5, § 14; NRS 176.300, subd. 1, 176.330, subds. 1, 2.
5. Criminal Law.
   Probation is a privilege legislatively given, and without constitutional implications. Const. art. 5, § 14; NRS 176.300, subd. 1, 176.330, subds. 1, 2.
6. Constitutional Law.
   Since probation is a matter of legislative grace, Supreme Court is not at liberty to add requirements. Const. art. 5, § 14; NRS 176.300, subd. 1, 176.330, subds. 1, 2.

OPINION

By the Court, Thompson, J.:

[Headnote 1]

This appeal is from an order denying post conviction relief on a petition for habeas corpus. The petitioner had pleaded guilty to the crime of embezzlement. Sentence was imposed, its execution suspended, and the petitioner placed on probation. He was later brought before the court for having violated the conditions of probation. Probation was revoked and the petitioner imprisoned.

The issue in this habeas proceeding is whether the petitioner should be released from prison because he was not represented by counsel when brought before the court on the proceeding to revoke his probation. The petitioner is an indigent. We rule that a court need not appoint counsel for an indigent on a proceeding to revoke probation, and affirm the order below.

[Headnotes 2-4]

The extraordinary remedy of habeas corpus is appropriate to test the legality of a conviction which is challenged on constitutional grounds. Dean v. Fogliani, 81 Nev. 541, 407 P.2d 580 (1965); Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965). Here, of course, the constitutionality of the underlying conviction is not questioned. The petitioner's guilt of the underlying crime was constitutionally established. On a proceeding to revoke probation, the court is not concerned with the probationer's guilt or innocence of the underlying crime. Rather, its sole concern is whether the privilege of probation should be revoked because of the failure to meet the conditions imposed. And, if revocation is ordered, the sentence he is required to serve is punishment for the underlying crime rather than for his failure to comply with the terms of probation. Brown v. Warden, U.S. Penitentiary, 351 F.2d 564 (7th Cir. 1965). For these reasons, decisions regarding the federal constitutional right to counsel at various stages of a criminal prosecution are not controlling. Cf. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). In the cases just cited, the denial of counsel was deemed to have destroyed the validity of the conviction. That consideration is not present on a proceeding to revoke probation.

In the federal law, probation is a privilege granted by Congress. The source of the probationer's privilege is to be found in the Federal Probation Act. One convicted of crime is not given a right to probation by the

↓ 82 Nev. 156, 159 (1966) Shum v. Fogliani ↓

federal constitution. Burns v. United States, 287 U.S. 216, 53 S.Ct 154,77 L.Ed 266 (1932); Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935); Brown v. Warden, U.S. Penitentiary, supra; Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); United States v. Huggins, 184 F.2d 866 (7th Cir. 1950); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Bennett v. United States, 158 F.2d 412 (8th Cir. 1946). Accordingly, the rights of an offender in a proceeding to revoke his conditional liberty under probation or parole are not coextensive with the federal constitutional rights of one accused in a criminal prosecution. Hyser v. Reed, 115 U.S.App.D.C. 254, 318 F.2d 225 (1963); Richardson v. Markley, 339 F.2d 967 (7th Cir. 1965); Brown v. Warden, U.S. Penitentiary, supra.

[Headnote 5]

We think that the same reasoning applies to probation in Nevada. One convicted of crime

is not given a right to probation by the Constitution of Nevada. Art. 5, § 14, empowers the legislature to "pass laws conferring upon the district courts authority to suspend the execution of sentences, fix the conditions for, and to grant probation, and within the minimum and maximum periods authorized by law, fix the sentence to be served by the person convicted of crime in said courts." In line with that authority, the legislature provided for probation. The probationer's rights, therefore, must be found within the legislative expression and not elsewhere. Cf. Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960), where we held that parole was not a constitutional right but, rather, a right bestowed by legislative grace; Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965), wherein we intimated as much with regard to probation. New Mexico has ruled otherwise, expressing the view that due process requires that an indigent probationer be furnished counsel. Blea v. Cox, 75 N.M. 265, 403 P.2d 701 (1965). Though that point of view has appeal, we cannot accept it. Probation is a privilege legislatively given, and without constitutional implications. One is not deprived of his liberty without due process of law when he has pleaded guilty to the charge against him and does not question the validity of his conviction. He

might have been imprisoned forthwith. By reason of legislative provision, he was afforded an opportunity to gain conditional liberty on probation. People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912). Neither the federal constitution nor the Nevada constitution contains a specific provision designed to safeguard the rights of a convicted defendant whose case has become res judicata. As we find no federal or state constitutional right to counsel in a proceeding to revoke probation, we turn to consider whether such a right is given by statute. [1]

[Headnote 6]

The statutory command is that the court "shall cause the defendant to be brought before it." Counsel is not

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[1] The pertinent statutes read: NRS 176.300(1), "Whenever any person has been found guilty in a district court of the State of Nevada of a crime upon verdict or plea, the court, except in cases of murder of first or second degree, kidnaping, robbery or rape, other than statutory rape, may by its order suspend the execution of the sentence imposed and grant such probation to the convicted person as the judge thereof shall deem advisable. The court may grant probation to a person convicted of the infamous crime against nature or of lewdness only if a certificate of a psychiatrist, as required by NRS 201.190, 201.210 or 201.230, is received by the court."

NRS 176.330(1), "The period of probation or suspension of sentence may be indeterminate or may be fixed by the court and may at any time be extended or terminated by the court. Such period with any extensions

thereof shall not exceed 5 years.

NRS 176.330(2), "At any time during probation or suspension of sentence, the court may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the defendant to be arrested. Any parole and probation officer or any peace officer with power to arrest may arrest a probationer without a warrant, or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the probationer has, in the judgment of the parole and probation officer, violated the conditions of probation. The parole and probation officer, or the peace officer, after making an arrest shall present to the detaining authorities a statement of the circumstances of violation. The parole and probation officer shall at once notify the court of the arrest and detention of the probationer and shall submit a report in writing showing in what manner the probationer has violated the conditions of probation. Thereupon, or upon an arrest by warrant as herein provided, the court, or such other court to which the case may have been assigned, shall cause the defendant to be brought before it, and may continue or revoke the probation or suspension of sentence, and may cause the sentence imposed to be executed."

expressly provided for and funds have not been appropriated for counsel if the probationer is destitute. Cf. Hoffman v. State, 404 P.2d 644 (1965), where the Alaska Supreme Court held that equal protection required appointment of counsel for an indigent to avoid discrimination on the ground of poverty where the state statute specifically provided for right to counsel on proceedings for revocation of probation. In Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935), Justice Cardozo stated the aim of a revocation hearing under the federal act which required the probationer to "be taken before the court" for the district having jurisdiction over him. He wrote: "* * * there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper." A trial in the formal sense is not required. The inquiry to which the court referred in Escoe v. Zerbst, supra, is conducted by the court. This, we think, is likewise the kind of an inquiry contemplated by the Nevada statute. Accord: Thomas v. Maxwell, 175 Ohio St. 233, 193 N.E.2d 150 (1963); People v. Hamilton, 263 N.Y.S.2d 658 (1965); Kennedy v. Maxwell, 176 Ohio St. 215, 198 N.E.2d 658 (1964). Though it may be desirable for the legislature to provide for counsel to represent probationers, it has not done so. As probation is a matter of legislative grace, we are not at liberty to add requirements.

Affirmed.

Zenoff, D. J., concurs.

Wines, D. J., dissenting:

The petitioner was convicted upon a plea of guilty to the felony of embezzlement on November 5, 1963, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. Thereafter, the petitioner was sentenced to a term of 2 to 14 years in the Nevada State Prison, but the sentence was suspended and the petitioner admitted to probation.

Prior to October 9, 1964, the petitioner was arrested on a warrant charging him with a

violation of the terms

and conditions of his probation. A probation revocation hearing was held on October 9, 1964. The petitioner was present at the hearing and, although the record does not reflect this, he requested the assistance of counsel from the court. Petitioner's allegation to that effect in his petition was not denied by the respondent in his return and the issues argued in the district court assumed this to be true. This is also true of the briefs and oral arguments to this court.

The assistant district attorney and petitioner's probation officer were present at the hearing, and the probation officer "presented a probation report to the Court." Counsel for the state approved the report and stated that the petitioner's probation should be revoked. The court, without hearing from the petitioner, ordered that the probation be revoked and that the sentence theretofore imposed be executed. The petitioner's writ of habeas corpus, addressed to the First Judicial District Court, was denied and the petitioner has appealed to this court.

The issues before this court are: (1) Does our statute, NRS 176.330, subsection 2, require notice and a hearing to a probationer when revocation is being considered? (2) At such a hearing should the court hear from the probationer? (3) Is the petitioner entitled to the assistance of counsel, and if he is an indigent should the court, upon his request, appoint counsel to represent him?

We begin with this proposition. In Nevada, as in other jurisdictions, there is no constitutional right to parole or probation. It is a statutory right gained through legislative grace. Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960); Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937); Pagano v. Bechly, 211 Iowa 1294, 232 N.W. 798 (1930); People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912); State ex rel. Jenks v. Municipal Court of City of St. Paul, 197 Minn. 141, 266 N.W. 433 (1936); In re Weber, 75 Ohio App. 206, 61 N.E.2d 502 (1945). If constitutional rights are not involved, the probationer has only those rights the legislature grants him. Burns v. United States, 287 U.S. 216, 53 S.Ct. 54, 77 L.Ed.

266 (1932). The judiciary has recognized that the granting, denying, or revoking of probation are matters of judicial discretion and that the judge cannot act capriciously or arbitrarily. Hughes v. State, 137 N.W.2d 439 (Wis. 1965). Originally then, the rights of the probationer are found in the legislative policy enunciated in the statute.

Uniformity has not been a criterion when adopting a policy, as the legislation in several of our states illustrates this. Some states provide for notice and hearing before revocation; other jurisdictions dispense with notice and hearing; and other statutes contain no expression on the subject. For a discussion of the policies and practices of the various states see the annotation in 29 A.L.R.2d 1074. Despite repetition of the principle that a state is free to adopt any one of

these policies, the courts continue to discuss notice and hearing in terms of constitutional procedural due process. Due process in that sense is not involved herein. Rather, it is the due process found in the statute covering revocation.

The policy adopted by the legislature in this state is found in NRS 176.330(2). The statute reads that, upon the execution of the warrant for arrest, the probation officer "shall present to the detaining authorities a statement of the circumstances of violation." The officer next informs the court of the arrest and submits a report, in writing, describing in what manner the probationer has violated the conditions of the probation. "Thereupon * * * the Court * * * shall cause the defendant to be brought before it, and may continue or revoke the probation or suspension of sentence and may cause the sentence imposed to be executed."

This court has been asked by the respondent not to attempt a definition of the intent of the legislature. I do not find the language baffling in that degree nor is this court without aids.

It is self evident that in this statute the legislature implemented a policy. Statutes of identical or similar language have been construed by the courts of other jurisdictions. I am mindful, too, that when a state

adopts a statute of another state it is presumed that the legislature intended not only to adopt the statute but also the construction placed on that statute by judicial decision. Snyder v. Garrett, 61 Nev. 85, 115 P.2d 769 (1941); Ex parte Sullivan, 65 Nev. 128, 189 P.2d 338 (1948).

It is not our function to say what we think the policy ought to be. It is our duty to follow the statute as written.

My research has disclosed that there are four states in which the right to notice and hearing on revocation of probation has been deemed a constitutional right. These are: Ex parte Lucero, 23 N.M. 433, 168 P. 713 (1917); State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927); Brill v. State, 159 Fla. 682, 32 So.2d 607 (1947), dictum. A number of the cases cited in the annotations appearing in 54 A.L.R. 1471, 60 A.L.R. 1420, 132 A.L.R. 1248 and 29 A.L.R.2d 1074, support the proposition that notice and hearing are prerequisites to revocation, not because of constitutional guarantees, but because that is the policy enunciated by the legislature in its statute. See People v. Enright, 332 Ill.App. 655, 75 N.E.2d 777 (1947); Blusinsky v. Commonwealth, 284 Ky. 395, 144 S.W.2d 1038 (1940); People v. Myers, 306 Mich. 100, 10 N.W.2d 323 (1943); People v. Hill, 164 Misc. 370, 300 N.Y.S. 532 (1937); State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917); State ex rel. Vadnais v. Stair, 48 N.D. 472, 185 N.W. 301 (1921); Howe v. State, 170 Tenn. 571, 98 S.W.2d 93 (1936); In re Hall, 100 Vt. 197, 136 A. 24 (1927). A failure to give notice and hearing according to the ordinary standards of acceptable procedure may constitute reversible error. People v. Hodges, 231 Mich. 656, 204 N.W. 801 (1925); Sellers v. State, 105 Neb. 748, 181 N.W. 862 (1921); Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479 (1946).

The legislature was free to adopt a policy directing notice and a hearing or it could deny them to the probationer. I think the policy adopted was that notice and hearing are prerequisites to revocation. It borders on the absurd to assume that the elaborate procedures set out in our statute were intended to assure the physical presence of the probationer and then have him stand

mute. The policy adopted contemplates that the probationer is entitled to a court hearing on the issue of revocation, where he shall hear the charges against him and have an opportunity to challenge them.

If this hearing is to be effective as contemplated by our statute, the probationer should have the assistance of counsel. If he is indigent and takes issue with the charges against him, should the court appoint counsel to assist him and order a "full dress" hearing? Two considerations persuade us that the court ought to appoint counsel. First, I cannot conceive the legislature adopting a policy with no intent that it be implemented. There is no purpose served in having a probationer appear before the court unless that appearance affords an opportunity to refute the charges. To do this effectively the assistance of counsel is often indispensable. Secondly, the judicial conscience twinges when the charge is laid that the man of means is favored in our courts. The practical effect of any other rule is that unless the court intercedes on behalf of the indigent he is helpless. If it be suggested that the judge act "inquisitor to carry the probe deeper," it should be remembered that the judges are required by law not to practice advocacy. Further, the courts agree that the inquiry should be judicial in character.

This court knows nothing of the merits of the charges made against the petitioner here, but apparently he was intent on refuting the charges. He should have had an opportunity to challenge them with the assistance of counsel.

Since the revocation of his suspended sentence and probation, the petitioner has served some 18 months of a 2 to 14 year sentence. Because of one mishap or another, the petitioner has been delayed in presenting his writ. Due to these circumstances, I would order the writ made permanent and the petitioner discharged.

MICHAEL C. CATRONE, Appellant, *v.* 105 CASINO CORPORATION, a Nevada Corporation, and ROBERT VAN SANTEN, Respondents.

No. 5003

May 13, 1966 414 P.2d 106

Appeal from judgment of the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Action for malicious prosecution and false imprisonment. The lower court granted summary judgment for defendants, and appeal was taken. The Supreme Court, Thompson, J., held that claim for relief on grounds of false imprisonment could not be sustained where plaintiff did not claim that the warrant under which he was arrested was void, so that his imprisonment was under legal process, and that where allegations made by plaintiff in his affidavit opposing defendants' motion for summary judgment could not be the subject of his testimony at trial unless foundation as to competency could first be established, which foundation was lacking in the record, the affidavit was ineffectual for purpose of creating a genuine fact issue as to whether defendants induced or procured police to criminally prosecute plaintiff, so that court correctly granted defendants' motion for summary judgment.

Judgment affirmed.

Harry E. Claiborne, of Las Vegas, for Appellant.

Samuel S. Lionel and *Don L. Griffith* and *Jones, Wiener & Jones,* of Las Vegas, for Respondents.

1. False Imprisonment.
   Claim for relief on grounds of false imprisonment could not be sustained where plaintiff did not claim that warrant under which he was arrested was void, so that his imprisonment was under legal process.
2. Malicious Prosecution.
   Elements of a claim for relief for "malicious prosecution" are want of probable cause, malice, termination of litigation and damage.
3. Malicious Prosecution.
   One who procures a third person to institute a malicious prosecution is liable in damages to the party injured to same extent as if he had instituted the proceeding himself.

82 Nev. 166, 167 (1966) Catrone v. 105 Casino Corp.

4. Appeal and Error.
   Reviewing court must accept as true all evidence favorable to party against whom summary judgment was entered.
5. Judgment.
   Summary judgment for defendants in action for malicious prosecution was proper where all documents offered in support of the motion for summary judgment negated the allegation that defendants induced or procured police to criminally prosecute plaintiff for allegedly attempting to obtain money under false pretenses.
6. Judgment.
   Affidavit offered by plaintiff in opposition to motion for summary judgment in malicious prosecution

action, which stated that police officer was extremely friendly to third party and investigated certain incident for purpose of exonerating gambling club from liability, was a conclusion without factual support in the record and would not be admissible at trial and was equally ineffective for purpose of defeating the motion for summary judgment. NRCP 56(e).

7. Judgment.

Where allegations made by plaintiff in his affidavit opposing defendants' motion for summary judgment in malicious prosecution action could not be the subject of his testimony at trial unless foundation as to competency could first be established, which foundation was lacking in the record, the affidavit was ineffectual for purpose of creating a genuine fact issue as to whether defendants induced or procured police to criminally prosecute plaintiff, so that court correctly granted defendants' motion for summary judgment. NRCP 56(e).

OPINION

By the Court, Thompson, J.:

This appeal is from a summary judgment for 105 Casino Corporation and Van Santen, the defendants in an action brought by Catrone for damages for false imprisonment and malicious prosecution. On the record presented we must agree with the district court that there is no genuine issue as to any material fact. Accordingly, we affirm.

The corporation owns the Nevada Club, a gaming establishment in Las Vegas. Van Santen is the principal stockholder and president. Catrone claims to have marked a seven dollar keno ticket at the club on which all eight numbers marked were drawn, thus entitling him to $25,000. When he presented his ticket for payment, the club officials examined the machine original

ticket and duplicate and concluded that Catrone's ticket was suspicious enough to warrant investigation. The Club, the Las Vegas Police Department, and the State Gaming Control Board investigated. The police and Control Board investigations resulted from complaints lodged with those agencies by Catrone. The Control Board required the corporation to deposit $25,000 in trust pending the outcome of its inquiry. When the investigations were completed, the $25,000 was released to the corporation. Detective Compton of the Las Vegas Police signed a criminal complaint charging Catrone and three employees of the Nevada Club (who were in charge of the keno game on which Catrone was supposed to have wagered) with the crime of attempting to obtain money under false pretenses. The defendants were arrested pursuant to warrant. A preliminary hearing followed, at which the magistrate ruled that Catrone and two others be held to answer in the district court. The district court trial resulted in a dismissal of the charges against Catrone. This civil action followed.

[Headnote 1]

The false imprisonment claim for relief is without substance because Catrone does not

claim that the warrant under which he was arrested was void. His imprisonment was under legal process. Therefore, this claim fails. Dixon v. City of Reno, 43 Nev. 413, 187 P. 308 (1920); Buckley v. Klein, 206 Cal.App.2d 742, 23 Cal. Rptr. 855 (1962); Prosser, Torts, 53 and 646 (2d ed. 1955). "If the imprisonment is under legal process but the action has been carried on maliciously and without probable cause, it is malicious prosecution. If it has been extrajudicial, without legal process, it is false imprisonment." 1 Harper & James, Torts 232 (1956). Thus, we direct our attention to the claim of malicious prosecution.

[Headnotes 2, 3]

The elements of a claim for relief for malicious prosecution are want of probable cause, malice, termination of the litigation and damage. Miller v. Schnitzer, 78 Nev. 301, 371 P.2d 824 (1962); Bonamy v. Zenoff, 77 Nev. 250, 362 P.2d 445 (1961). Normally, the person

who signs the criminal complaint is a defendant in the later civil suit. This case is different as police officer Compton is not a defendant in this action. Catrone chose to sue only the 105 Casino Corporation and Van Santen on the theory that they maliciously induced Officer Compton to bring the criminal charges. We approve the rule that one who procures a third person to institute a malicious prosecution is liable in damages to the party injured to the same extent as if he had instituted the proceeding himself. Blancutt v. Burr, 100 Cal.App. 61, 279 P. 668 (1929); Collins v. Owens, 77 Cal.App.2d 713, 176 P.2d 372 (1947); Sandoval v. So. Calif. Enterprises, 98 Cal.App.2d 240, 219 P.2d 928 (1950); Restatement, Torts, par. 653, (g). We must, therefore, examine the record before us and ascertain if an issue of fact exists as to whether the defendants were the proximate cause of the criminal prosecution.

[Headnote 4]

All relevant factual data contained in the papers supporting the motion for summary judgment and in those opposing that motion show that the criminal investigation was instigated by Catrone rather than by the defendants. Mindful that we must accept as true all evidence favorable to Catrone, the party against whom summary judgment was entered, [Franktown v. Marlette, 77 Nev. 348, 364 P.2d 1069 (1961); Parman v. Petricciani, 70 Nev. 427, 272 P.2d 492 (1954); Smith v. Hamilton, 70 Nev. 212, 265 P.2d 214 (1953)] we note the statement of fact in his affidavit that the investigations arose by "my formal complaint filed both with the Gaming Control Board and the City of Las Vegas Police Department." To this extent, at least, the law was concededly put in motion by Catrone. Notwithstanding this fact, Catrone insists that the record shows the existence of a genuine issue of fact as to whether the defendant Van Santen maliciously induced Detective Compton to file a criminal charge.

[Headnote 5]

Detective Compton stated in his affidavit that "neither Van Santen nor any other person

employed by or associated with the Nevada Club requested or suggested that

any of the defendants in the criminal action be prosecuted criminally." The detective said that he recommended criminal prosecution because of his belief that the defendants had "participated in an unlawful attempt to defraud the Nevada Club by means of a fraudulent keno ticket." His belief was based upon personal observation of the machine original and duplicate tickets No. 3536, disclosing an unusual number of smudges and malalignment; the opinion of two questioned document experts that the keno tickets were not genuine; the refusal of Nevada Club employees in charge of the keno game to take a polygraph examination; a statement by a third party claiming that one of the Club's keno writers had a scheme by which to work a fraud on the Club and explaining that scheme; a report that a camera used to photograph the 20 balls in the "rabbit ear" tubes following each game had been tampered with and did not photograph the game in question; and other data. Detective Compton was the complaining witness who signed the criminal complaint, and testified fully at the preliminary hearing along with ten other prosecution witnesses. The complete record of the preliminary hearing, the affidavits of Compton and Van Santen, the criminal complaint and warrant for arrest were the documents offered in support of the motion for summary judgment. All of those papers negate the allegation that the defendants in this civil action induced or procured Detective Compton to criminally prosecute Catrone.

[Headnote 6]

Catrone offered his affidavit and that of Pearson in opposition to the motion. These opposing affidavits do not meet the requirements of NRCP 56(e). That rule demands that opposing affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The affidavit of Pearson does not touch upon the issue we are here considering,—i.e., whether the defendants induced or procured Detective Compton to criminally prosecute Catrone. The affidavit of Catrone

does deal with this issue but in an impermissible manner. He stated that Detective Compton was extremely friendly to Van Santen and investigated the incident for the purpose of exonerating the Club from liability. This is a conclusion without factual support in the record. The affiant's statement would not be admissible evidence at trial and is equally ineffective for the purpose of defeating a motion for summary judgment. Bond v. Stardust, Inc., 82 Nev. 47,

410 P.2d 472 (1966); Dredge Corp. v. Husite Co., 78 Nev. 69, 369 P.2d 676 (1962).

[Headnote 7]

Further, Catrone charges in his affidavit that Van Santen induced a third person to make a false statement to the police incriminating Pearson in a scheme to defraud the club; that Van Santen paid $250 for the false testimony of Wagner; and that the automatic camera, which photographed the 20 balls in the "rabbit ear" tubes after each game, had not been in operation for several months before the incident in question, and Van Santen knew this. Catrone is not shown to be competent to testify to those matters. The third person who is alleged to have been induced by Van Santen to make a false statement would be a competent witness to so testify, but his affidavit was not secured. Wagner would be a competent witness to testify that Van Santen paid him $250 for false testimony, but his affidavit was not secured. One with knowledge of the failure of the automatic camera sometime prior to the incident in question could testify to that fact, but his affidavit was not secured. In short, the allegations made by Catrone in his affidavit could not be the subject of his testimony at trial unless a foundation as to competency could first be established. This foundation is lacking in the record. We must therefore conclude that the Catrone affidavit is ineffectual for the purpose of creating a genuine fact issue as to whether the defendants induced or procured Detective Compton to criminally prosecute. Absent competent fact evidence establishing that Detective Compton commenced the criminal prosecution because

of direction, request, or pressure from 105 Casino Corporation or Van Santen, it was permissible for the district court to rule as it did.

Affirmed.

Zenoff, D. J., concurs.

Counsel stipulated to submit this proceeding to a two-judge court.

HECTOR PACHECO, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 4950

May 16, 1966 414 P.2d 100

Appeal from conviction of kidnapping in the first degree. Eighth Judicial District Court, Clark County; John F. Sexton, Judge.

The defendant was convicted in the trial court of kidnapping for purpose of committing rape or infamous crime against nature, and he appealed. The Supreme Court, Zenoff, D. J., held that references in newspaper articles to prior robbery conviction of defendant did not entitle defendant to mistrial, considering repeated admonitions to jurors to neither form nor express opinion during trial or until case was finally submitted to them and the lack of sanction of newspaper information with admission.

Affirmed.

Thompson, J., dissented.

J. Forest Cahlan, and *Robert Santa Cruz,* of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, *Edward G. Marshall,* District Attorney, and *Raymond D. Jeffers,* Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   That newspaper articles imparted to jurors the fact that

codefendant had pleaded guilty to kidnapping for purpose of committing rape or infamous crime against nature and to rape of female under age of consent did not require mistrial as to defendant charged with those crimes, considering repeated admonitions to jurors to neither form nor express opinion during course of trial and considering lack of request for additional admonitions or instructions. NRS 200.310.

2. Criminal Law.
   For news accounts brought to attention of jurors to require mistrial, the prejudice must be so great that traditional voir dire procedures and admonition are unavailing to insure a fair trial; in some instances, prejudice is inherent.
3. Constitutional Law.
   Defendant must be tried in manner which comports with due process. U.S.C.A. Const. Amend. 14.
4. Criminal Law.
   Trial court should augment the statutory admonition to jurors with further caution that they not read nor listen to news accounts. NRS 175.325.
5. Criminal Law.

References in newspaper articles to prior robbery conviction of defendant convicted of kidnapping for purpose of committing rape or infamous crime against nature did not entitle defendant to mistrial, considering repeated admonitions to jurors to neither form nor express opinion during trial or until case was finally submitted to them and the lack of sanction of the newspaper information with admission. NRS 200.310.

6. Criminal Law.

Improper argument is presumed injurious, but if case is free from doubt, appellate court will not reverse; if case is closely contested however, error will be presumed prejudicial.

7. Criminal Law.

Function of Supreme Court is to insure that all defendants receive a fair trial, and to that end each assignment of error is viewed with particularity.

8. Criminal Law.

Prosecutor's statement to jurors to effect that they should take first-degree kidnapping with infliction of serious bodily injury and return verdict of death and that "we" talk about rehabilitation but how can "you" rehabilitate a mad dog was error but not reversible error in view of fact that innocent verdict could not be supported. NRS 200.310.

9. Criminal Law.

Prosecutor's statement to jury that "we" talk about rehabilitation but how can "you" rehabilitate a mad dog was provoked by defense counsel who initiated the subject of rehabilitation as criteria on sentencing.

10. Criminal Law.

Prosecutor must avoid use of language that might deprive defendant of a fair trial.

11. Criminal Law.

Photographs in question were admissible against defendant.

OPINION

By the Court, Zenoff, D. J.:

Appellant, convicted of kidnapping for the purpose of committing rape or an infamous crime against nature (NRS 200.310), and sentenced by a jury to life imprisonment (NRS 200.320), here appeals that conviction by alleging three errors: (1) the jurors, after impanelment, read prejudicial newspaper articles; (2) the prosecutor made a prejudicial remark in closing argument, wherein he called appellant a "mad dog"; (3) the court admitted over objection prejudicial photographs. We reject all appellant's arguments and find no prejudice. We are convinced appellant received a fair and proper trial.

In the early evening hours of July 10, 1964, defendant, Hector Pacheco, and Patrick McKenna visited Judy, age 17, and Marcia, age 14, [1] to "drive around and drink for a little while." They were not unknown to each other. Their long-standing relationship was connubial without marriage vows.

On this particular evening they drove around, drank beer continuously, stopped to smoke marijuana cigarettes, and took further time out while McKenna and Judy had sexual intercourse.

Later, Pacheco became angered at Judy and when they arrived at the remote area of Sunrise Mountain, east of the Las Vegas city limits, defendant and McKenna commenced to kick Judy and to beat upon her with their fists. After an hour of this, in which she became bloody and bruised, they compelled her into the trunk of the car, and drove to the home of Arnold Crapsie threatening to cut her throat or shoot her if she cried out. They enticed Crapsie into the car, and, with Judy in the trunk, drove back to Sunrise Mountain.

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[1] Judy and Marcia being minors, their surnames will not be used.

From that point, a detailed account is unnecessary. By the use of threats of shooting and knifing; by beatings with fists, rocks, a beer bottle, a board with a protruding nail; and kickings, upon both Crapsie and Judy, McKenna and defendant compelled Crapsie to have intercourse with Judy, then each to perform oral copulation upon the other. Crapsie managed later to escape. Pacheco and McKenna then performed anal copulation upon Judy and fled in the car. They were later apprehended, and Judy was rescued by sheriff's deputies directed to the scene by Crapsie.

Pacheco and McKenna were charged with three counts: kidnap for the purpose of committing rape or an infamous crime against nature; rape of a female under the legal age of consent (18); and assault with intent to commit rape or an infamous crime against nature.

McKenna pleaded guilty to counts one and two and was sentenced to the state penitentiary. Pacheco was convicted of count one and sentenced to life imprisonment.

On this appeal, Pacheco contends (1) that some jurors after their impanelment, read newspaper accounts of the trial, which articles stated that Pacheco had previously been convicted of robbery and committing an infamous crime against nature, and that codefendant Patrick McKenna had pleaded guilty to kidnap and committing an infamous crime against nature; (2) that the admission into evidence of certain photographs was prejudicial to Pacheco; and (3) that prejudice was suffered when, in closing argument, the prosecutor stated: "We talk about rehabilitation, how can you rehabilitate a mad dog?"

The jury was impaneled on February 15, 1965. It then was released for the day, and the jurors were allowed to return home with the following admonition that is required by NRS 175.325:

"You are admonished that it is your duty not to converse among yourselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the case is finally submitted to you."

This was the same admonition given by the court on the occasion of each recess or adjournment during the trial.

In the evening edition of that same day, the Las Vegas Review Journal printed a story of the commencement of the trial and in it made reference to the fact that McKenna had pleaded guilty to kidnap and committing an infamous crime against nature and had been sentenced to the state penitentiary. The article also stated Pacheco had previously been convicted for robbery.

The following morning, at the opening of court defendant's counsel questioned each juror, in the presence of all, and developed that six of the jurors had read the Review Journal article. In reply to defense counsel's questioning, however, all six stated they could still give Pacheco a fair trial. A motion for mistrial was denied.

The same newspaper contained a story on February 16 entitled, "Vegas Kidnap Trial Starts," in which reference again was made to Pacheco's prior robbery conviction, and on February 17 a third story entitled, "Companion Slips Companion Whiskey During Court Trial." Only one juror read the kidnap article. He was also the only juror to say he had also read the whiskey article. Another juror told of reading the headline of the whiskey story and a third juror said he didn't read it but was told about it.

All three, again pursuant to defense counsel questioning in open court, stated they were not biased by these articles and still could give defendant a fair trial. A second motion for mistrial was denied.

1. At the outset, we note that the newspaper articles appeared factual and objective and not expressly intended to arouse community emotions. Cf. Sheppard v. Maxwell, 231 F.Supp. 37, 44-57 (D.C. Ohio 1964), rev'd, 346 F.2d 707 (6th Cir. 1965), cert. granted, 86 S.Ct. 289 (1965). Our present inquiry, then, centers upon the facts imparted to the jurors by these articles, specifically that of the guilty plea of codefendant McKenna and Pacheco's prior conviction for robbery.

[Headnote 1]

As to a codefendant's plea of guilt, there is substantial authority that such may be admitted in open court if

proper cautionary instructions [2] are given. U.S. v. Dardi, 330 F.2d 316, 333 (2d Cir. 1964); U.S. v. Crosby, 294 F.2d 928, 948, 950 (2d Cir. 1961). [3] This seems "implicit recognition * * * that the probable effect on the jury of such knowledge is not sufficiently harmful to require a new trial * * *." U.S. v. Crosby, supra, at 950 of 294 F.2d.

As to the jurors learning of defendant Pacheco's prior conviction for robbery, the situation is more complex. Such a prior crime would have been inadmissible as evidence here, not coming under the specific exceptions to the general rule. Cf. Nester v. State, 75 Nev. 41, 54,

334 P.2d 524 (1959). However, such evidence was *not* here admitted. The present facts only resemble an accidental blurting out. At no point did the trial court sanction the newspaper information with admission. Rather, the court ordered the jurors questioned to ascertain whether they could, in good faith, disregard the matter. It is within this context, then, that we must consider the newspaper information conveyed to the jurors.

In Marshall v. U.S., 360 U.S. 310, 312 (1959), the Supreme Court held the news accounts so prejudicial *in the setting of the case* as to warrant the exercise of its supervisory power to order a new trial. The court said, "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Holt v. U.S., 218 U.S. 245, 251. Generalizations beyond that statement are not profitable *because each case must turn on its own special facts* * * *." (Emphasis added.)

In Marshall, the issue of entrapment concerned newspaper accounts of the defendant's past history and was determinative, while in this case the final determination of defendant's guilt or innocence was conclusively established by the evidence without the need for reference,

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[2] We consider the repeated admonition to the jurors to neither form nor express any opinion during the course of the trial to provide the requisite cautionary safeguards under the particular facts of this case, and note that at no time did defendant request any additional admonitions or instructions.

[3] But cf. the eloquent dicta of Medina, J., in U.S. v. Kelly, 349 F.2d 720, 767 (2d Cir. 1965). We consider the present case to come within the "sudden impulse" area discussed in Kelly.

directly or indirectly, to McKenna's guilty plea or the past history of Pacheco. See U.S. v. Feldman, 299 F.2d 914, 917 (2d Cir. 1962).

The prejudicial effect of the newspaper publicity cannot be said to be manifest for the jurors were not exposed repeatedly and in depth to the news accounts. Cf. Sheppard v. Maxwell, supra; and Estes v. Texas, 381 U.S. 532 (1965).

[Headnotes 2, 3]

The main inquiry is whether there has been an effect on the substantial rights of the accused. The prejudice must be so great that traditional voir dire procedures and admonitions were unavailing to ensure a fair trial. An examination of the facts must be made in order to determine whether prejudice resulted. Irvin v. Dowd, 366 U.S. 717 (1961). In some instances prejudice is inherent. Rideau v. Louisiana, 373 U.S. 723 (1963); Turner v. Louisiana, 379 U.S. 466 (1965). The defendant must be tried in a manner which comports with the due process requirements of the 14th Amendment; thus, we must be alert to the inquiry as to whether this was a trial by newspaper or a trial in accordance with the rules of law.

[Headnotes 4, 5]

It is advisable that the trial court augment the statutory admonition to the jurors with a further caution that they not read or listen to news accounts. Failure to do so has resulted in reversal of cases that were closer on the issue of guilt than is this case. Marshall v. U.S., supra. In Pacheco's trial, however, we have confidence that the jurors gave heed to the instruction of the court not to *form* an opinion until the case was finally submitted to them. Adjmi v. United States, 346 F.2d 654 (5th Cir. 1965).

This assignment of error is denied.

2. In his closing argument, the prosecutor made this statement to the jurors:

"Now I will make a suggestion to you, that if you take your pick as far as I am concerned you will take first degree kidnapping with the infliction of serious bodily

injury, and return the verdict of death. We talk about rehabilitation, how can you rehabilitate a mad dog?"

Defense counsel moved for a mistrial which was denied without further comment by the trial judge. Appellant now contends such reference to a "mad dog" constituted prejudicial error and warrants reversal.

[Headnote 6]

Improper argument is presumed to be injurious. If the case, however, is free from doubt, the appellate court will not reverse. State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, 815 (1935); People v. Hines, 30 Ill.2d 152, 195 N.E.2d 712 (1964). If it is closely contested, the error will be considered prejudicial. Berger v. United States, 295 U.S. 78, 88 (1935); State v. Teeter, 65 Nev. 584, 648, 200 P.2d 657 (1948); People v. Talle, 111 Cal.App.2d 650, 245 P.2d 633, 648 (1952). As stated in Garner v. State, 78 Nev.366, 374, 374 P.2d 525 (1962), "If the issue of guilt or innocence is close, if the State's case is not strong, prosecutor misconduct will probably be considered prejudicial." Citing State v. Kassabian, 69 Nev. 146, 148, 243 P.2d 264 (1952); State v. Skaug, 63 Nev. 59, 66, 161 P.2d 708, 163 P.2d 130 (1945).

[Headnote 7]

Our function, of course, is to insure that all defendants receive a fair trial. To that end, we view each assignment of error with particularity. It makes no difference whether a defendant is sentenced to one day in jail or to prison for life, the standards and requirements are the same. Where there is doubt of the accused's guilt, we would be inclined to grant a new trial. However, this record is clear. An innocent verdict could not be supported. People v. Talle, supra.

[Headnotes 8, 9]

The alleged forensic misconduct of the prosecutor, while generally to be frowned upon, and certainly to be viewed with askance, in this instance cannot be classified as reversible error. First, the strongest factor against reversal on this ground is that the objectionable remark was provoked by defense counsel. Post v. State,

41 Ariz. 23 15 P.2d 246, 248 (1932). It was defense counsel who initiated the subject of rehabilitation as a criterion on sentencing. Second, since the record eliminates any doubt of the guilt of the accused, it seems clear that the offensive remark did not contribute to the jury verdict. The State made no effort to establish an act of intercourse by Pacheco with Judy. The only testimony presented by the defendant was directed solely to the kidnapping—and that testimony was offered by McKenna, a participant in the evening's sordid activities with the defendant, and by Marcia, who at the time the offense was committed was 14, and the mother of two children by Pacheco. The fact that the jury gave no credence to their testimony is understandable.

[Headnote 10]

Whatever the interpretation or definition of "mad dog," its use in common parlance with reference to the conduct of the defendant against Judy cannot be held prejudicial. Still, such toying with the jurors' imagination is risky and the responsibility of the prosecutor is to avoid the use of language that might deprive a defendant of a fair trial.

[Headnote 11]

3. Appellant's third assignment of error was directed to the admission into evidence of six photographs. Their admission was proper.

Appellant's counsel were appointed to prosecute this appeal. We commend their service and direct the lower court to give each of them the certificate specified in NRS 7.260(3) to enable them to receive compensation for their services on this appeal.

Affirmed.

Barrett, D. J., concurs.

Due to the illness of Badt, J., the Governor designated Honorable John W. Barrett, of the Second Judicial District Court, to sit in his place.

Thompson, J., dissenting:

I would reverse this conviction and remand for a new trial, not withstanding substantial evidence of guilt.

The constitutional requirement of a fair trial is not influenced by whether the accused is innocent or guilty, nor by the abhorrent nature of the offense charged. The standards of fundamental fairness must be met in each case. Here, newspaper stories disseminated while the trial was in progress, related inadmissible information about the prior crime record of the defendant, and were read by six of the jurors. That kind of prejudicial publicity poisons the mind and sometimes destroys one's capacity to reach a verdict based solely upon the evidence produced in court. Had such prejudicial matter been erroneously received in evidence we would, of course, set the conviction aside and order another trial. Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966); Garner v. State, 78 Nev. 366, 374 P.2d 525 (1962); State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948); Walker v. State, 78 Nev. 463, 376 P.2d 137 (1962), dissenting opinion. This case is different from those just cited only because the jurors learned of the defendant's criminal record from the newspapers rather than from evidence erroneously received during trial. In my view, this difference does not authorize us to rule that the prejudicial impact upon the defendant's right to a fair trial is somehow diminished or nullified. It is not. Marshall v. United States, 360 U.S. 310, 3 L.Ed.2d 1250, 79 S.Ct. 1171 (1959).

In the Marshall case, supra, the sole question considered was whether the exposure of some of the jurors to newspaper articles about the defendant's prior felony convictions was so prejudicial in the setting of the case as to warrant the Supreme Court to exercise its supervisory power over the federal district court and order a new trial. It did exercise that power and ordered another trial. In so doing, the court wrote: “The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. Michelson v. United States, 335 U.S. 469, 475, 93 L.Ed. 168, 173, 69 S.Ct. 213. It may indeed be greater, for it is then not tempered by protective procedures.” In Marshall, as here, each juror when questioned by the court, stated that he would not be influenced by the news

articles and would decide the case only on the evidence of record. Despite this the court reversed. The following are some of the federal decisions which agree with the rationale of Marshall v. United States, supra. United States v. Accardo, 298 F.2d 133 (7th Cir. 1962); Marson v. United States, 203 F.2d 904 (6th Cir. 1953); Lane v. Warden, Maryland Penitentiary, 320 F.2d 179 (4th Cir. 1963). See also the state court decisions of People v. Purvis, 60 Cal.2d 323, 33 Cal.Rptr. 104, 384 P.2d 424 (1963); Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1962); and cases collected at 31 A.L.R.2d 417.

Judicial frustration attends the problem at hand. The defendant has a constitutional right to a fair trial by an impartial jury. It is the judicial obligation to protect that right. On the other hand the United States Supreme Court has not yet restricted the First Amendment right to

freedom of the press where its exercise infects the fairness of the trial of a criminal case. See Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961), concurring opinion of Justice Frankfurter. The corrective action now available to an appellate court is to set aside the conviction and order another trial. Marshall v. U.S., supra; Estes v. Texas, 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628 (1965); Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965); Rideau v. Louisiana, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963). Little comfort is gathered from this corrective measure. Government must stand the expense of another trial. Jurors are again summoned from their daily tasks to perform jury service. Witnesses are once more subjected to the ordeal of the court room. The defendant's status is still undecided. The judicial machinery is clogged. I doubt that those in charge of news policy desire multiple trials of a criminal case. With their cooperation we can better realize the goal of a fair trial for all involved.

When a trial court learns that, during trial, jurors have read prejudicial news stories about the defendant, admonition and a cautionary instruction to disregard those stories are essential. The failure to so admonish and instruct will require another trial. United States v.

82 Nev. 172, 183 (1966) Pacheco v. State

Leviton, 193 F.2d 848 (2d. Cir 1951); United States v. Carruthers, 152 F.2d 512 (7th Cir. 1945); Hammons v. People, 153 Colo. 193, 385 P.2d 592 (1963); State v. Cox, 188 Kan. 500, 363 P.2d 528 (1963); Briggs v. United States, 221 F.2d 636, (6th Cir. 1955); King v. United States, 25 F.2d 242 (6th Cir. 1928); People v. Purvis, 60 Cal.2d 323, 33 Cal. Rptr. 104, 384 P.2d 424 (1963). Even when the court does utilize this technique its effectiveness is doubtful. Commonwealth v. Crehan, 345 Mass. 609, 188 N.E.2d 923 (1963). It is difficult, if not impossible, for a juror not to be at least subconsciously influenced by extra-judicial matters to which he has been exposed despite honest efforts to remain fair and impartial and to discharge his oath.

In the case at hand the admonition was not given. It is certain that the statutory admonition, NRS 175.325, to which the majority has referred, is not the admonition required to handle the problem. Nor did the lower court give the cautionary instruction contemplated by the cases cited above. Impliedly, therefore, the court allowed the jurors to retain the prejudicial newspaper information, so long as they remained “fair.” I have found no case which may be read to approve this procedure. None of the cases cited in the majority opinion would authorize an affirmance here.

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82 Nev. 183, 183 (1966) Lisby v. State

JAMES LISBY, Appellant, *v.* THE

STATE OF NEVADA, Respondent.

No. 4987

May 18, 1966 414 P.2d 592

Appeal from conviction of narcotics. Eighth Judicial District Court; John F. Sexton, Judge.

Narcotics sale prosecution. The trial court rendered judgment, and defendant appealed. The Supreme Court, Zenoff, D. J., held that evidence did not require finding of entrapment and that instruction on lesser included offense was not necessary, but that sentence was erroneous.

Affirmed.

82 Nev. 183, 184 (1966) Lisby v. State

Dorsey & Harrington, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, and *Edward G. Marshall,* District Attorney, and *Monte J. Morris,* Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   Evidence in narcotics sale prosecution, wherein defendant claimed entrapment, would support finding that criminal intent originated with defendant and that officer merely furnished opportunity for commission of crime. NRS 207.010.
2. Criminal Law.
   Entrapment is affirmative defense which defendant must prove.
3. Criminal Law.
   Playing on narcotics sale defendant's sympathies by telling him that narcotics were for addicts badly in need is no defense, as entrapment.
4. Indictment and Information.
   Test whether offense is necessarily included in offense charged is whether offense charged cannot be committed without committing lesser offense. NRS 175.455.
5. Criminal Law.
   Instruction on lesser included offense is mandatory without request where there is evidence which would absolve defendant from guilt of greater offense or degree but would support finding of guilt of lesser offense or degree. NRS 175.455.
6. Criminal Law.
   Instruction on lesser included offenses is unnecessary and erroneous where evidence would not support finding of guilt of lesser offense or degree, as where defendant denies any complicity in crime charged. NRS 175.455.
7. Criminal Law.
   Where elements of greater offense include all elements of lesser offense because it is very nature of greater offense that it could not have been committed without commission of lesser offense, trial court may

instruct on lesser offense, while if prosecution has met burden of proof on greater offense and there is no evidence tending to reduce offense, such instruction may properly be refused, but if there is any evidence at all on any reasonable theory under which defendant might be convicted of lower degree or offense, instruction must be given.

8. Criminal Law.
   Defendant in narcotics sale prosecution was not entitled to instruction on lesser offense of possession where defendant relied solely on defense of entrapment.
9. Criminal Law.
   Sentence of from 20 to 40 years, plus fine, on offense charged, and further sentence of 10 to 15 years as habitual criminal, was error. NRS 207.010 and subd. 1.

10. Criminal Law.
    Purpose of Habitual Criminal Act is not to charge separate substantive crime, and averment only affects punishment. NRS 207. 010 and subd. 1.
11. Criminal Law.
    When habitual criminal statute has been invoked and proved, court has mandatory duty to impose sentence prescribed in habitual criminal statute. NRS 207.010 and subd. 1.
12. Criminal Law.
    Trial court has no discretion to fix greater minimum or lesser maximum sentence than that which statute prescribes.
13. Criminal Law.
    Ten-year minimum sentence prescribed in habitual criminal statute controls only when minimum term of crime charged is less than ten years. NRS 207.010 and subd. 1.
14. Criminal Law.
    Defendant convicted of narcotics sale, under statute providing penalty of from 20 to 40 years, and found to be habitual criminal, was subject to sentence of from 20 to 40 years. NRS 207.010 and subd. 1.
15. Criminal Law.
    Failure properly to sentence did not render entire trial and proceeding a nullity; Supreme Court may modify erroneous sentence.

OPINION

By the Court, Zenoff, D. J.:

Appellant was convicted of selling narcotics. The State presented as its sole witness police officer Kingsbury who testified as to his contacts as an undercover agent with Lisby, relating several meetings at Lisby's residence. On the occasions of two of these meetings Kingsbury made purchases of heroin from Lisby, the last of which is the basis for this charge.

Kingsbury sought out Lisby, representing himself as a friend of a friend of Lisby. It appears that the undercover agent gave the impression that he was available to purchase heroin. On January 9, 1965, he went to Lisby's apartment and Lisby asked him if he wanted to buy some heroin. After receiving $60, Lisby left and four hours later turned over 12 capsules of heroin to Kingsbury indicating that he had used two capsules from the purchase for

himself.

➧ 82 Nev. 183, 186 (1966) Lisby v. State ➧

Lisby was arrested, charged, and convicted. The information included a count of habitual criminal pursuant to NRS 207.010. [1]

[Headnote 1]

1. Appellant cites as error the refusal of the trial court to rule as a matter of law that he was entrapped. There is substantial evidence that the criminal intent originated with the defendant and the police officer merely furnished the opportunity for the commission of the crime. In re Wright, 68 Nev. 324, 232 P.2d 398 (1951); In re Davidson, 64 Nev. 514, 186 P.2d 354 (1947); Wyatt v. State, 77 Nev. 490, 367 P.2d 104 (1961); Adams v. State, 81 Nev. 524, 407 P.2d 169 (1965); State v. Busscher, 81 Nev. 587, 407 P.2d 715 (1965); Barger v. State, 81 Nev. 548, 407 P.2d 584 (1965). See Sorrells v. United States, 287 U.S. 435 (1932).

[Headnotes 2, 3]

Entrapment is an affirmative defense and one that a defendant must prove. Wyatt v. State, supra. The trial court properly instructed this jury on entrapment and obviously the jury did not accept the defense. Playing upon the defendant's sympathies by telling him that narcotics were for addicts badly in need is no defense. People v. Hatch, 49 Ill.App.2d 177, 199 N.E.2d 81 (1964); People v. Hall, 25 Ill.2d 297, 185 N.E.2d 143 (1962).

[Headnote 4]

2. NRS 175.455 codifies the common law practice of allowing a defendant in a criminal trial to be found

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[1] NRS 207.010(1): "Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been three times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state prison for not less than 10 years."

➧ 82 Nev. 183, 187 (1966) Lisby v. State ➧

guilty of any offense which is necessarily included in that with which he is charged. [2]

We are here concerned with the question of whether or not, where the charge is *sale* of narcotics, the failure by the trial court to instruct the jury that the crime of possession of narcotics is an included offense is reversible error. We adhere to the rule that to determine whether an offense is necessarily included in the offense charged, the test is whether the offense charged cannot be committed without committing the lesser offense. State v. Carter, 79 Nev. 146, 379 P.2d 945 (1963); State v. Holm, 55 Nev. 468, 37 P.2d 821 (1914). "No sale of narcotics is possible without possession, actual or constructive." People v. Rosales, 226 Cal.App.2d 588, 38 Cal.Rptr. 329, 331 (1964). People v. Morrison, 228 Cal.App.2d 707, 39 Cal.Rptr. 874 (1964), points out three situations which are most commonly encountered in the problem of lesser included offenses:

[Headnote 5]

First, is that in which there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree. The instruction is mandatory, without request. See State v. Moore, 48 Nev. 405, 233 P. 523 (1925).

[Headnote 6]

Second, where the evidence would not support a finding of guilty of the lesser offense or degree, e.g., where the defendant denies any complicity in the crime charged and thus lays no foundation for any intermediate verdict or where the elements of the defenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. The instruction is not only unnecessary but is erroneous because it is not pertinent.

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[2] NRS 175.455. "In all cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged or may be found guilty of an attempt to commit the offense charged."

[Headnote 7]

Third is the intermediate situation where the elements of the greater offense include all of the elements of the lesser offense because it is the very nature of the greater offense that it could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense, e.g., kidnapping involving false imprisonment, sale of narcotics involving possession, felonious assault involving simple assault. In this intermediate situation, it is not error for a trial court to give instructions on the lesser included offenses since all *elements* of the lesser offenses have been proved. However, if the prosecution has met its burden of proof on the greater offense and there is no evidence at the trial *tending to reduce the greater offense,* an instruction on a lesser included offense may

properly be refused. But, if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must, if requested, instruct on the lower degree or lesser included offense. State v. Millain, 3 Nev. 409 (1876); State v. Donovan, 10 Nev. 36 (1875); State v. Johnny, 29 Nev. 203, 87 P. 3 (1906); State v. Enkhouse, 40 Nev. 1, 160 P. 23 (1916); State v. Moore, 48 Nev. 405, 233 P. 523 (1925); State v. Oschoa, 49 Nev. 194, 242 P. 582 (1926); State v. Fisko, 58 Nev. 65, 70 P.2d 1113 (1937).

[Headnote 8]

Here, no issue was created other than that of the sale of narcotics as charged. Defendant's counsel stated to the court that the only consideration was entrapment, that the sale was admitted or conceded. During the course of the defendant's testimony, he freely discussed the details of the transaction including the passing of money with the agent and admitted keeping two capsules of heroin for his own use. Clearly, the defendant was relying solely on the defense of entrapment which we have already held is without merit. Therefore, although the defendant was charged only with the sale of narcotics, the instruction by the trial court to the jury on the offense of possession of narcotics without a form of

verdict also being given does not constitute error, for no instruction on possession was necessary. The jury was not misled. People v. Hines, 30 Ill.2d 152, 195 N.E.2d 712, 714 (1964).

[Headnote 9]

3. The trial court set the sentence at 20 to 40 years, plus a $10,000 fine for the crime on Count 1 of selling narcotics in compliance with NRS 453.210(2)(a). He further sentenced the defendant to a term of 10 to 15 years on Count 2 as an habitual criminal. This was error.

[Headnote 10]

It is uniformly held that the purpose of an habitual criminal act is not to charge a separate substantive crime but it is only the averment of a fact that may affect the punishment. State v. Bardmess, 54 Nev. 84, 7 P.2d 817 (1932); People v. Dunlop, 102 Cal.App.2d 314, 227 P.2d 281 (1951); Williams v. Smith, 25 Wash.2d 273, 171 P.2d 197 (1946); Ex parte Broom, 198 Ore. 551, 255 P.2d 1081 (1953); Castle v. Gladden, 201 Ore. 353, 270 P.2d 675 (1954).

While this Court in State v. Bardmess, supra, did not reach the question of the validity of two concurrent sentences, one of which is based on the habitual criminal statute, it did say that "[a] statement of a previous conviction does not charge an offense. It is only the averment of a fact which may affect the punishment." Thus, there can only be one sentence.

[Headnote 11]

The courts are also in agreement that there is a mandatory duty on the sentencing court when the habitual criminal statute has been invoked and proved to impose the sentence prescribed in the habitual criminal statute. Dotson v. State, 80 Nev. 42, 389 P.2d 77 (1964). See also People v. Hamlett, 408 Ill. 171, 96 N.E.2d 547 (1951); Castle v. Gladden, supra; Macomber v. State, 181 Ore. 208, 180 P.2d 793 (1947).

This is our first occasion to consider an incongruity in certain of the sentencing statutes. The habitual act fixes the minimum term at "not less than 10 years." We have held today that the one sentence to be imposed

must be imposed under the habitual act. Yet, the minimum sentence statutorily designated for selling narcotics is twenty years. [3] Thus the question: What minimum is to be fixed?

[Headnote 12]

This Court has held that the trial court has no discretion to fix a greater minimum or less maximum sentence than that which the statute prescribes. Ex parte Melosevich, 36 Nev. 67, 133 P. 57 (1913); State v. Moore, 48 Nev. 405, 233 P. 523 (1925). See also Ex parte Weinroth, 46 Nev. 103, 207 P. 1103 (1922); State v. Squier, 56 Nev. 386, 54 P.2d 227 (1936); State v. Johnson, 75 Nev. 481, 346 P.2d 291 (1959); State v. Enkhouse, supra; NRS 176.180.

[Headnotes 13-15]

However, as the purpose of the habitual statute is to increase the prison sentence for the recidivist, we think that the ten-year minimum of that statute controls only when the minimum term of the crime charged is less than ten years. Accordingly, here, we uphold the twenty to forty year sentence under the narcotics law as having been given under the habitual act. Failure to properly sentence does not render the entire trial and proceeding a nullity, and the cases cited immediately above support this Court's authority to modify the trial court's erroneous sentence.

We direct the lower court to give appellant's court appointed counsel the certificate specified by NRS 7.260(3) for compensation of services on this appeal.

Affirmed.

Thompson and Collins, JJ., concur.

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[3] See also NRS 200.030, 200.310, 200.320, 200.340, 200.360, 212.060, 453.210.

GERALD ALFRED HOLLAND, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 5006

May 20, 1966 414 P.2d 590

Appeal from the Eighth Judicial District Court, Clark County; William P. Compton, Judge.

Defendant was convicted in the trial court of assault with a deadly weapon with intent to kill, and assault with intent to inflict great bodily injury, and appeal was taken. The Supreme Court, Zenoff, D. J., held that while simple assault is a lesser included offense of assault with a deadly weapon, an instruction on the lesser offense was not mandatory and it was not error to refuse it in a case in which defendant fired five shots into windshield of an automobile, since the evidence clearly showed guilt above the lesser offense.

Affirmed.

Charles William Johnnson, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, and *Edward G. Marshall,* District Attorney, Clark County, for Respondent.

1. Indictment and Information.
   Where offense charged cannot be committed without necessarily committing another offense, the latter is a "necessarily included offense" which may be a lower degree of crime charged or minor offense of the same character. NRS 175.455.
2. Criminal Law.
   Where elements of greater offense include all elements of lesser offense because, by its very nature, the greater offense could not have been committed without defendant having the intent and doing the acts which constitute the lesser offense, it is not incumbent upon court to instruct on lesser offense if evidence clearly shows commission of more serious crime charged and no other interpretation of defendant's conduct is reasonably probable. NRS 175.455.
3. Assault and Battery.
   While simple assault is a lesser included offense of assault with a deadly weapon, an instruction on the lesser offense was not mandatory and it was not error to refuse it in a case in which defendant fired five shots into windshield of an automobile, since the evidence clearly showed guilt above the lesser offense. NRS 175.455, 200.470.

4. Indictment and Information.

Aiming or discharging a firearm is not a lesser included offense of assault with a deadly weapon. NRS 175.455, 202.290.

OPINION

By the Court, Zenoff, D. J.:

The appellant, Gerald Alfred Holland, was charged in a two count information with assault with a deadly weapon with intent to kill and assault with intent to inflict great bodily injury upon the person of Paul S. Cunningham.

On the evening of January 13, 1965, Cunningham stopped his automobile at an intersection stop sign in Las Vegas. A car drove up and blocked his car from proceeding. He testified that he then opened his car door and asked the driver of the automobile, which was blocking his path, to move on. The driver of the car sat up, leveled a revolver at Cunningham and fired it. Cunningham managed to roll out of the car before four more shots were fired. These struck the windshield and driver's seat of Cunningham's car where he had been seated.

Holland was tried before a jury and found guilty of assault with intent to inflict great bodily injury. He was sentenced to not less than one nor more than two years in the Nevada State Prison.

Appellant seeks to reverse his conviction on the grounds that proper instructions as to lesser included offenses were not given by the trial court to the jury. He requested, but was refused, an instruction under NRS 202.290, aiming or discharging firearms; and NRS 200.470, simple assault. [1]

1. NRS 175.455 [2] allows a defendant in a criminal

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[1] NRS 200.470. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another, and every person convicted thereof shall be punished by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $500, or by both fine and imprisonment."

[2] NRS 175.455. "In all cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged, or may be found guilty of an attempt to commit the offense charged."

trial to be found guilty of any offense which is necessarily included in that with which he is charged.

[Headnote 1]

In State v. Carter, 79 Nev. 146, 379 P.2d 945 (1963), and Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966), the Court enunciated the test to be followed in determining lesser included offenses. "Where the offense charged cannot be committed without necessarily committing another offense, the latter is a 'necessarily included' offense."

We must decide whether simple assault is a lesser included offense of assault with a deadly weapon, [3] and whether a violation of NRS 202.290 [4] is a lesser included offense in the charge of assault with intent to kill or assault with intent to inflict bodily injury.

[Headnote 2]

The defendant deliberately aimed a pistol and fired five shots into the driver's seat of Cunningham's automobile. The pattern formed by the five shots on the windshield of the automobile appeared to be such that had Cunningham remained in the driver's seat he would have been killed or seriously injured. We held in Lisby v.

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[3] NRS 200.400. "1. An assault with intent to kill, commit rape, the infamous crime against nature, mayhem, robbery or grand larceny shall subject the offender to imprisonment in the state prison for a term not less than 1 year nor more than 14 years; but if an assault with intent to commit rape be made, and if such crime be accompanied with acts of extreme cruelty and great bodily injury inflicted, the person guilty thereof shall be punished by imprisonment in the state prison for a term of not less than 14 years, or he shall suffer death, if the jury by their verdict affix the death penalty.

"2. An assault with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, shall subject the offender to imprisonment in the state prison not less than 1 year or exceeding 2 years, or to a fine not less than $1,000, nor exceeding $5,000, or to both fine and imprisonment."

[4] NRS 202.290. "Every person who shall aim any gun, pistol, revolver or other firearm, whether loaded or not, at or toward any human being, or who shall willfully discharge any firearm, air gun or other weapon, or throw any deadly missile in a public place, or in any place where any person might be endangered thereby, although no injury result, shall be guilty of a misdemeanor."

State, 82 Nev. 183, 414 P.2d 592 (1966), that where the elements of the greater offense include all of the elements of the lesser offense because by its very nature, the greater offense could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense, it was not incumbent upon the court to instruct on the lesser offense if the evidence clearly shows the commission of the more serious crime charged and no other interpretation of the defendant's conduct was reasonably possible. In the instant case, there is nothing in the record to justify the finding of common assault only. Under the circumstances, a defendant who is charged with felonious assault is not entitled to

an instruction on common assault. Lisby v. State, supra; People v. Morrison, 228 Cal.App.2d 707, 39 Cal.Rptr. 874 (1964); People v. Lain, 57 Cal.App.2d 123, 134 P.2d 284 (1943); State v. Watson, 364 S.W.2d 519 (Mo. 1963).

[Headnote 3]

We hold, therefore, that while simple assault is a lesser included offense of assault with a deadly weapon, such an instruction is not mandatory and it was not error to refuse it in this case since the evidence clearly showed guilt above the lesser offense.

[Headnote 4]

2. As to the second assignment of error relating to NRS 202.290, commonly referred to as the "aiming or discharging a firearm" statute, we are of the opinion that the legislature did not intend that aiming or discharging of firearms was to be a lesser included offense of assault charges. The former statute is, we think, focused on the negligent use of firearms in public places, i.e., the statute sets the elements out in the disjunctive, aim a pistol or discharge a firearm. An assault with a deadly weapon with intent to kill or with intent to inflict bodily injury can be committed without violating any provision of NRS 202.290. Therefore, we hold that aiming or discharging a firearm is not a lesser included offense of assault with a deadly weapon.

Affirmed.

Thompson, J., concurs.

↓ 82 Nev. 191, 195 (1966) Holland v. State ↓

Wines, D. J., concurring:

I concur in the affirmance of the Judgment and Sentence.

I would also agree that simple assault is a lesser included offense. But I do not agree that the offered instruction was properly refused because the "evidence clearly shows the commission of the more serious crime charged and no other interpretation of the defendant's conduct was reasonably possible."

The offered instruction was properly refused because there is no evidence to support the giving of such an instruction. The Appellant did not testify but the complaining witness testified that the Appellant came into view from a reclining position in the car and "his eyes looked like he had been asleep or passed out." The officer who arrested the Appellant approximately 10 minutes after the incident stated the Appellant appeared to be "intoxicated" and in a "dazed condition" and "not normal." These testimonies the Appellant argues entitle him to the offered instruction. But this evidence bears upon the Appellant's capacity to form the required specific intent and the jury was properly instructed on that issue. A trial judge should refuse an instruction when the evidence does not raise an issue but he should not, in instructing the jury, determine the probative value of the evidence submitted. The trial judge is not a trier of the facts.

I would agree that the crime defined in NRS 202.290 is not a lesser included offense when the charge is assault with intent to kill or assault with intent to inflict bodily injury.

Judge Taylor Wines was designated to sit in the place of Judge Milton B. Badt, deceased.

WILLA DOYLE and MICHAEL S. DOYLE, Appellants, *v.* LOUIS JORGENSEN, Individually and as Guardian ad Litem for BRUCE E. JORGENSEN, a Minor, Respondents.

No. 4995

May 23, 1966 414 P.2d 707

Appeal from default judgment entered by the Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Proceeding on appeal by defendants from a judgment of the trial court reinstating default judgment after first setting it aside. The Supreme Court, Zenoff, D. J., held that where court based second default judgment on defendant's failure to comply with conditions of earlier setting aside of original default, and at least one of such condition was improper and thus invalid, reinstatement of first default was equally erroneous.

Reversed.

Richard P. Wait, of Reno, for Appellants.

Peter Echeverria and *Albert H. Osborne,* of Reno, for Respondents.

1. Domicile.
   Where facts are insufficient to justify different conclusion, it will be presumed that usual place of abode is not changed by entry into military service.
2. Armed Services.
   Soldiers' and Sailors' Civil Relief Act affords protection for litigant in military service after action has begun, but does not affect method of service of process prescribed by court rule. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1-700, 50 U.S.C.A. App. §§ 501-590; NRCP 4(d)(6).
3. Process.
   Each defendant must be served with copy of summons, even though both may share same place of abode and may even be members of same family. NRCP 4(d)(6).
4. Judgment; Process.
   Purported service on defendant driver by leaving copy of summons at his residence was ineffective, in that summons was addressed jointly to him and his mother but only one copy of summons was delivered, and default judgment subsequently entered against defendant driver on basis of such service was void. NRCP 4(d)(6).

5. Appearance.
   Defendant, who, although not properly served prior to entry of default judgment against him, did not confine his pleadings to jurisdictional matters of defective service or void judgment, but also sought relief on basis of mistake, inadvertence, surprise, or excusable neglect, made general appearance, and from that point on, waived any defects in service of process. NRCP 60(b)(1, 3), (c).
6. Courts.
   Rule that parties cannot confer jurisdiction on court which otherwise does not have such jurisdiction refers to jurisdiction over subject matter and not parties involved.
7. Judgment.
   Word "terms" as used in rule providing that on motion and on such terms as are just, court may relieve party or his legal representative from final judgment on specified grounds means reasonable conditions. NRCP 60(b).
8. Judgment.
   In striking out or opening judgment, court of law exercises quasi-equitable jurisdiction and has power to surround relief with precautionary conditions.
9. Judgment.
   Condition demanding that defendant waive his rights under Soldiers' and Sailors' Civil Relief Act was not "just term" for setting aside default, within purview of rule providing that on motion and on such terms as are just, court may relieve party or his legal representative from final judgment. NRCP 60(b); Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1-700, 50 U.S.C.A. App. §§ 501-590.
10. Judgment.
    Where court based second default judgment on defendant's failure to comply with conditions of earlier setting aside of original default, and at least one of such conditions was improper and thus invalid, reinstatement of first default was equally erroneous.
11. Judgment.
    Defendant, who entered timely answer after setting aside of her default, would not be subjected to second default based on conduct of her codefendant.
12. Judgment.
    Defaulting actions of one defendant cannot be imputed to another who behaves properly.

OPINION

By the Court, Zenoff, D. J.:

We are confronted with the relevance of a defendant's "general appearance" subsequent to a default judgment and the propriety of a trial court "reinstating" this default judgment after first setting it aside.

These and related procedural issues are outgrowths of an automobile collision on July 22, 1961, between a car driven by defendant Michael Doyle and one driven by Bruce E. Jorgensen, on whose behalf as Guardian ad Litem, and individually, a complaint was filed by Bruce's father, Louis Jorgensen, on July 18, 1963. Named codefendant with Michael was his mother, Mrs. Willa Doyle, her liability resting solely upon fault imputed pursuant to NRS 483.300. [1]

A single copy of the summons, addressed jointly to Willa and Michael, was delivered to the Doyle residence on July 19, 1963. The return certified the summons was personally served upon Willa. At the time, Michael was in the Armed Services and stationed outside Nevada.

No answer was filed by either Willa or Michael. On November 1, 1964, 17 months after service, plaintiff secured a default against both defendants. Judgment was entered on December 2, 1964. Nineteen days later, on December 21, the defendants, presenting a joint application and using the same counsel, moved the court to set aside and vacate the default judgment "upon the grounds, among others" that Michael was never legally served "and upon the further grounds that said Judgment against each of said Defendants should be vacated and set aside by reason of the mistake or inadvertence or surprise or excusable neglect of counsel for Defendants, within the meaning, terms and provisions of Nevada Rules of Civil Procedure 60(b)(1)."

The court, pursuant to oral argument, vacated the defaults as to both Willa and Michael "upon the following terms and conditions:

"a. That both defendants * * * forthwith file their answer to the Complaint on file.

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[1] NRS 483.300. Application of minors.

"1. The application of any person under the age of 18 years for an instruction permit or operator's license shall be signed and verified * * * by either or both the father and mother of the applicant * * *.

"2. Any negligence or willful misconduct of a minor under the age of 18 years when driving a motor vehicle upon a highway shall be imputed to the person who has signed the application of such minor for a permit or license, which person shall be jointly and severally liable with such minor for any damages caused by such negligence or willful misconduct."

"b. That Defendant, MICHAEL S. DOYLE waive any terms and provisions of the Soldiers and Sailors Relief Act that may apply to him in this case.

"c. That the matter be forthwith set for trial on the merits with a pretrial conference scheduled at least ten days prior to the trial setting.

"d. Plaintiff's claim for automobile property damage in the sum of $1,800.00 be stricken from the Complaint, it having been settled between the insurance carriers involved."

The order vacating the defaults was entered on April 13, 1965. On April 15, Willa Doyle filed her answer to the merits. However, there was no response from Michael. On July 6,

plaintiff moved for a reinstatement of the default on the basis of Michael's continued failure to answer. In opposition, defense counsel pleaded "mistake, inadvertence, surprise or excusable neglect" and attached a proposed answer on behalf of Michael. On August 2, the court "reinstated" the default judgment against *both* Willa and Michael "for the reason that defendant, MICHAEL S. DOYLE failed to comply with the Order of this Court issued on April 13, 1965, setting aside and vacating Default Judgment upon specific terms and conditions." [2]

From this reinstatement, defendants appeal, claiming that Michael still has not been properly served.

[Headnotes 1, 2]

1. We first note that the parties have proceeded on the presumption that Michael was not properly served because of his absence in the Armed Services. We disagree. NRCP 4(d)(6) provides that service may be made "to the defendant personally, or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * *." Authorities split as to whether an abode statute allows personal service at the civilian residence of a defendant in the Armed Service. 46 A.L.R. 2d 1239-1245 (1954). However, the federal courts have

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[2] In this reinstatement, judgment nevertheless was reduced by $1,800.00, the amount considered settled in the earlier order setting aside the defaults.

adopted a broad construction, viewing the statute as looking to a defendant's domicile. Karlsson v. Rabinowitz, 318 F.2d 666 (4th Cir. 1963); McFadden v. Shore, 60 F.Supp. 8 (E.D. Pa. 1945). The notes of the Advisory Committee formulating the Nevada Rules of Civil Procedure indicate an intent to emulate the federal practice in this area. As to NRCP 4(d), the Advisory Committee said, "[t]he provision for personal service upon an individual is broadened by adopting the provision for leaving copies as under federal practice." [3] We therefore look to the federal practice and hold that "[w]here the facts are insufficient to justify a different conclusion, it will be presumed that the usual place of abode is not changed by entry into the military service." Allder v. Hudson, 48 Del. 489, 106 A.2d 769, 770, 46 A.L.R.2d 1237 (1954). [4]

[Headnote 3]

Service upon Michael, however, still was ineffective in that two defendants were involved but only one copy of a summons was delivered. Each defendant must be served a copy of the summons, even though both may share the same place of abode and may even be members of

the same family. Chaney v. Reddin, 201 Okla. 264, 205 P.2d 310, 8 A.L.R.2d 337, 343 (1949); Tropic Builders v. Naval Ammunition Depot, 402 P.2d 440, 446 (Haw. 1965); 72 C.J.S., Process § 46.

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[3] NRCP Advisory Committee Notes, p. 104.

[4] This construction of NRCP 4(d)(6) in no way conflicts with relief otherwise available pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, ch. 888, §§ 1-700, 50 App. U.S.C.A. §§ 501-590. The Act provides that "[a]t any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." 54 Stat. 1181, ch. 888, § 201, 50 App. U.S.C.A. § 521. It appears clear that 50 App. U.S.C.A. § 510 et seq. only affords protection for a litigant in military service after an action has begun, but does not affect the method of service of process prescribed in rule 4(d). McFadden v. Shore, 60 F.Supp. 8, 9 (E.D. Pa. 1945); 50 App. U.S.C.A., p. 554.

82 Nev. 196, 201 (1966) Doyle v. Jorgensen

[Headnotes 4, 5]

2. Without proper service, the judgment against Michael was void. Thatcher v. Justice Court, 46 Nev. 133, 207 P. 1105 (1922); Martin v. Justice Court, 44 Nev. 140, 190 P. 977 (1920). Michael could have moved to set aside the judgment pursuant to NRCP 60(b)(3); [5] alternatively, [6] he could have sought a setting aside combined with permission to answer to the merits pursuant to NRCP 60(c). [7] Michael, however, did not confine his pleadings to these jurisdictional matters of defective service or void judgment. Rather, he *also* sought relief on the basis of "mistake, inadvertence, surprise, or excusable neglect" as provided by NRCP 60(b)(1). Michael therefore made a general appearance. Farmington Mut. Fire Ins. Co. v. Gerhardt, 216 Wis. 457, 257 N.W. 595 (1934); Aetna Ins. Co. v. Earnest, 215 Ala. 537, 112 So. 145 (1927), quoted with approval in Sachs v. Sachs, 179 So.2d 46, 48-49 (Ala. 1965); Dell School v. Peirce, 163 N.C. 424, 79 S.E. 687 (1913). From that point forward, Michael waived any defects in service of process. Perry v. Edmonds, 59 Nev. 60, 66, 84 P.2d 711 (1938).

[Headnote 6]

3. Parenthetically, a more difficult question is

[5] NRCP 60(b)(3) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) the judgment is void; * * *."

[6] He also could have sought relief pursuant to the Soldiers' and Sailors' Civil Relief Act, 54 Stat. 1178, ch. 888, § 200, 50 App. U.S.C.A. § 520, as amended 74 Stat. 820 (1960), which provides that plaintiff, in securing a default, must present the court either an affidavit or declaration under penalty of perjury to the effect that defendant is not in the military service. Failure to so provide permits a defendant in the military service to move, within ninety days, for the setting aside of default on proper showing of prejudice. People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956).

[7] NRCP 60(c): "Default Judgments: Defendant Not Personally Served. When a default judgment shall have been taken against any party who was not personally served with summons and complaint * * * and who has not entered his general appearance in the action, the court, after notice to the adverse party, upon motion made within six months from the date of rendition of such judgment, may vacate such judgment and allow the party or his legal representatives to answer to the merits of the original action. * * *"

whether such a waiver after judgment also may be applied retroactively so as to cure initial defects and render proper an otherwise void judgment. The authorities differ. 6 C.J.S., Appearances § 20, p. 61. Nevada has followed the minority position and refused to retroactively apply general appearances after judgment. Nevada Douglass Gold Mines v. District Court, 51 Nev. 206, 212, 273 P. 659 (1929); Perry v. Edmonds, 59 Nev. 60, 66, 84 P.2d 711 (1938); Ivaldy v. Ivaldy, 157 Neb. 204, 59 N.W.2d 373, 377-378 (1953). We question the logic of distinguishing between general appearances before and after judgment. [8] See Farmers & Merchants Natl. Bank v. Superior Court, 25 Cal.2d 842, 155 P.2d 823, 826 (1945). We fear that in distinguishing "between defects in practical proceedings, which constitute mere irregularities, [and] such [defects] as render the proceeding a total nullity and altogether void"—and holding that the latter "cannot be made regular by any act of either party" (Iowa M. Co. v. Bonanza M. Co., 16 Nev. 64, 72 (1881); Thatcher v. Justice Court, supra, at 138-139)—courts have confused the doctrine of retroactive waiver with that of harmless error, i.e., there are certain miniscule irregularities in procedure which will be overlooked regardless of protest if, under particular circumstances, such an overlooking will best serve the ends of justice. See Luebke v. City of Watertown, 230 Wis. 512, 284 N.W. 519 (1939); Borough of Hasbrouck Heights v. Agrios, 10 F.Supp. 371 (D.C.N.J. 1935); 49 C.J.S., Judgments § 268, pp. 484-485. In contrast, other procedural errors are deemed so prejudicial that they are never overlooked, but instead are said to render the proceeding void. This does not mean,

[8] The entire distinction between general and special appearances has been abolished for federal courts by Federal Rules of Civil Procedure, rule 12(b), 28 U.S.C.A. Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 P.2d 871, 873-874 (3rd Cir. 1944). Cf. Nevada Rules of Civil Procedure, rule 12(b), and Advisory Committee Notes, p. 106.

however, that these defects cannot be waived, absent particular dictates of public policy. [9]

[Headnotes 7-9]

4. As to the "conditions" attached to the setting aside the default, Rule 60(b) provides that "[o]n motion *and upon such terms as are just,* [10] the court may relieve a party or his legal representative from a final judgment," etc., upon the specified grounds then enumerated. We construe "terms" in the context used to mean reasonable conditions. See Comm. of Pub. Works v. Cities Svc. Oil Co., 308 Mass. 349, 32 N.E.2d 277, 283-284 (1941). The court therefore is entitled to look to the equities for all parties. "In * * * striking out or opening a judgment, a court of law exercises a quasi equitable jurisdiction, and it has power to surround the relief with precautionary conditions." Commercial Savings Bank v. Quall, 156 Md. 16, 142 A. 488, 489 (1928); Pioneer Oil Heat v. Brown, 179 Md. 155, 16 A.2d 880, 883 (1940). The condition demanding defendant waive his rights under the Soldiers' and Sailors' Civil Relief Act went beyond this power. It was not a "just term" for setting aside the default.

[Headnotes 10]

The court, however, based the second default upon Michael's failure to comply with the conditions of the earlier setting aside. Since at least one of these conditions was improper, and thus invalid, such a reinstatement of the first default was equally erroneous.

[Headnotes 11, 12]

5. Michael's answer now is before the court. [11] It

[9] It is true that parties cannot confer jurisdiction upon a court which otherwise does not have such jurisdiction, but this refers to jurisdiction over the subject matter, not the parties involved. Federal Underwriters Exchange v. Pugh, 141 Tex. 539, 174 S.W.2d 598, 600 (1943); Jasper v. Jewkes, 50 Nev. 153, 156-157, 254 P. 698 (1927), and cases cited therein.

[10] Emphasis added.

[11] As to Willa Doyle, she did enter a timely answer after the setting aside of her default and should not be subjected to a second default regardless of Michael's disposition. The defaulting actions of one defendant cannot

be imputed to another, who behaves properly. Miller v. Keegan, 92 Cal.App.2d 846, 207 P.2d 1073 (1949).

82 Nev. 196, 204 (1966) Doyle v. Jorgensen

would seem, under the particular circumstances before us and in light of this Court's repeated preference for resolving issues on their merits, that Michael's answer be accepted as offered and the matter proceed forthwith.

Reversed and remanded in accordance with the holdings herein.

Thompson, J., and Wines, D. J., concur.

Judge Taylor H. Wines was designated to sit in the place of Judge Milton B. Badt, deceased.

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82 Nev. 204, 204 (1966) Shelby v. District Court

CHARLIE SHELBY, Petitioner, *v.* THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Pershing, and THE HONORABLE MERWYN H. BROWN, Judge Thereof, Presiding, Respondents.

No. 5094

May 31, 1966 414 P.2d 942

Original proceeding in prohibition.

Proceeding to stay trial upon indictment. The Supreme Court, Thompson, J., held that writ of habeas corpus provided plain, speedy, and adequate remedy to present issue whether district court had jurisdiction to proceed further with prosecution of restrained accused upon indictment absent transcript of testimony before grand jury, and prohibition was thus not available.

Writ denied.

[Rehearing denied September 14, 1966, 82 Nev. 213, 418 P.2d 132]

J. Rayner Kjeldsen, of Reno, for Petitioner.

Roland W. Belanger, Pershing County District Attorney, of Lovelock, for Respondents.

1. Prohibition.

Writ of habeas corpus provided plain, speedy, and adequate remedy to present issue whether district court had

jurisdiction to proceed further with prosecution of restrained accused upon indictment absent transcript of testimony before grand jury, and prohibition was thus not available to stay trial. NRS 34.320, 34.330.

2. Prohibition.

Prohibition attacks jurisdiction and is not available when there is plain, speedy, and adequate remedy in ordinary course of law. NRS 34.320, 34.330.

3. Habeas Corpus.

Writ of habeas corpus is the plain, speedy, and adequate remedy by which to determine legal sufficiency of evidence supporting grand jury indictment. Const. art. 1, § 5; NRS 34.500, subd. 7.

4. Criminal Law.

To require one to stand trial is fundamentally unfair unless he is committed upon criminal charge with reasonable or probable cause. Const. art. 1, § 5.

5. Habeas Corpus.

Habeas corpus is available to test probable cause following preliminary examination resulting in an order that accused be held to answer in district court and is equally available for use following presentment and to test legal sufficiency of evidence supporting indictment. Const. art. 1, § 5; NRS 34.500, subd. 7.

6. Grand Jury.

Transcript must be made to preserve testimony and evidence presented to grand jury. NRS 172.010 et seq., 173.010 et seq.

7. Grand Jury.

Rule of secrecy of grand jury proceedings is not absolute. NRS 172.010 et seq., 173.010 et seq.

8. Criminal Law.

Secrecy of grand jury proceedings is no valid reason for denying pretrial examination of transcript of testimony after indictment is returned and accused is in custody or under restraint. NRS 172.010 et seq., 173.010 et seq.

9. Grand Jury.

Secrecy provisions of Nevada statutes are directed to grand jury members rather than to witnesses appearing before the grand jurors. NRS 172.330, 172.340.

10. Criminal Law.

For discovery purposes in criminal cases there is a distinction between ascertainment of facts forming jurisdictional basis for court to proceed to trial and discovery of evidence not necessarily related to power of the court to proceed.

11. Criminal Law.

Discovery of evidence not contained in transcript of testimony of witnesses before grand jury, at presentment hearing, or at preliminary examination is matter to be presented by motion addressed to discretion of trial court, and should the motion be denied, propriety of the ruling is subject to

review on appeal following conviction on ground of abuse of discretion.

OPINION

By the Court, Thompson, J.:

[Headnote 1]

This is an original proceeding in prohibition to stay a district court criminal trial upon a grand jury indictment. A transcript of the testimony of the witnesses, who appeared before the grand jury, was not prepared. The petitioner, who is in custody, contends that the jurisdiction of the district court to proceed further is not shown to exist, absent a transcript of the testimony before the grand jury upon which the indictment was returned. We heretofore issued an alternative writ staying proceedings below until we could give due consideration to the issue presented. We now conclude that the application for prohibition must be denied because the writ of habeas corpus provides a plain, speedy and adequate remedy by which to present the matter in issue.

Following indictment, the petitioner, Shelby, was brought before the district court for arraignment upon the charge of assault with a deadly weapon. Before entering his plea, he moved for an order allowing him to inspect the transcript of the testimony of the witnesses who had appeared before the grand jury. Three reasons were advanced in support of his motion: First, to determine if the requisite standard of proof had been met to justify return of the indictment; Second, to determine if the indictment had been brought on legally admissible evidence; and, Third, to use the transcript for discovery in preparation for trial. The district court denied this motion. Shelby then moved to quash the indictment upon the ground that without a transcript it could not be determined if the indictment was based upon legally sufficient evidence. The lower court refused to quash the indictment and set the case for trial. This prohibition proceeding followed. We propose to designate the appropriate remedy to reach the issue presented

and also to consider relevant statutory provisions and case law bearing on the right to a grand jury transcript.

[Headnotes 2, 3]

1. The extraordinary writ of prohibition attacks jurisdiction and is not available when there is a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.320; 34.330. [1] Since 1912 this court has recognized that the writ of habeas corpus is the plain, speedy and adequate remedy by which to determine the legal sufficiency of the evidence supporting a grand jury indictment. Eureka Bank Cases, 35 Nev. 80, 126 P. 655 (1912); Ex parte Stearns, 68 Nev. 155, 227 P.2d 971 (1951); Ex parte Colton, 72 Nev. 83, 295 P.2d 383 (1956). Therefore, the availability of habeas relief precludes prohibition, [NRS 34.330; State ex rel. Callahan v. District Court, 54 Nev. 377, 18 P.2d 449 (1933); Kabadian v. Doak, 65 F.2d 202, 205 (C.A.D.C. 1933); Note 22 Cal.L.Rev. 545], particularly where, as here, the petitioner is under restraint.

[Headnote 4]

2. It is fundamentally unfair to require one to stand trial unless he is committed upon a criminal charge with reasonable or probable cause. No one would suggest that an accused person should be tried for a public offense if there exists no reasonable or probable cause for trial. Our Constitution and Statute recognize this principle of fairness and provide for its protection by the writ of habeas corpus. Nev. Const. Art. 1, § 5, commands that the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety may require its suspension; and NRS 34.500(7) explicitly authorizes discharge from custody or restraint if one is

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[1] NRS 34.320 reads: "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."

NRS 34.330 reads: "The writ may be issued only by the supreme court to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested."

not committed upon a criminal charge with reasonable or probable cause.

[Headnote 5]

The writ has been most commonly used to test probable cause following a preliminary examination resulting in an order that the accused be held to answer in the district court. See: State v. Plas, 80 Nev. 251, 391 P.2d 867 (1964), writ denied; Beasley v. Lamb, 79 Nev. 78, 378 P.2d 524 (1963), writ denied; State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962), writ denied; Raggio v. Bryan, 76 Nev. 1, 348 P.2d 156 (1960), writ denied; Ervin v. Leypoldt, 76 Nev. 297, 352 P.2d 718 (1960), writ denied; Goldblatt v. Harris, 74 Nev. 74, 322 P.2d 902

(1958), writ denied; Ex parte Kline, 71 Nev. 124, 282 P.2d 367 (1955), writ granted; Ex parte Sullivan, 71 Nev. 90, 280 P.2d 965 (1955), writ granted; and many others. The remedy is equally available for use following a grand jury presentment [See: Ex parte Hutchinson, 76 Nev. 478, 357 P.2d 589 (1960), writ granted.], and, as already noted, to test the legal sufficiency of the evidence supporting a grand jury indictment. Ex parte Colton, 72 Nev. 83, 295 P.2d 383 (1956), writ denied; Ex parte Stearns, 68 Nev. 155, 227 P.2d 971 (1951), remanded to district court to take evidence; Eureka Bank Cases, 35 Nev. 80, 126 P. 655 (1912), writ granted.

All of the cases cited compel the conclusion that whether the prosecution elects to proceed by criminal complaint and preliminary examination, by grand jury presentment, or by grand jury indictment, it must assume the burden of showing the existence of reasonable or probable cause to hold the accused for trial, if challenged on that ground. That showing cannot be made in the absence of a transcript of the testimony of the witnesses.

In Scott v. State, 81 Nev. 380, 404 P.2d 3 (1965), the prosecution was initiated by criminal complaint. A transcript of the testimony of the witnesses, who appeared at the preliminary examination, was not made. He petitioned for habeas relief, contending that probable cause to hold him for trial in the district court was not shown to exist and that he should not have been

bound over. We granted his petition, stating: “We hold that a defendant's petition for habeas corpus filed pursuant to NRS 34.500(7) must be granted, if there is no record of the preliminary examination for review by the court in which the petition is filed. In such case no legal cause is shown for the continuation of the petitioner's imprisonment or restraint, and the judge must discharge him. NRS 34.480.” By a parity of reasoning that principle applies with equal force to a prosecution initiated by grand jury presentment or indictment.

[Headnote 6]

3. The statutes which govern the grand jury are found in NRS 172 and 173. Among other matters, they state what must be kept secret and what can be disclosed in the course of judicial proceedings. Unlike California, our statute does not specifically permit a defendant to have or make a copy of the grand jury transcript, nor does it require that a transcript be made. However, if the role of the grand jury and the rights of the defendant are to be realized, the statutes read in conjunction with one another make it evident that a transcript must be made to preserve the testimony and evidence presented to the grand jury.

For example, NRS 172.260(2) commands that the “grand jury can receive none but legal evidence and the best evidence in degree, to the exclusion of hearsay or secondary evidence.” The preceding subsection, NRS 172.260(1) provides that “in the investigation of a charge, for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of witnesses taken as provided in this title.”

Furthermore, NRS 172.280 designates the degree of evidence needed to warrant indictment. It provides that "the grand jury ought to find an indictment when all the evidence before them, taken together, is such as, in their judgment, would, if unexplained and uncontradicted, warrant a conviction by the trial jury."

It is apparent that without a transcript a court cannot intelligently determine whether the kind and quality of evidence contemplated by the code was in fact produced

before the grand jury, nor whether the indicted defendant should be held for trial.

[Headnote 7]

4. We know that pretrial inspection and copying of the transcript of the testimony of the witnesses who appeared before the grand jury will, to some degree, diminish the traditional secrecy of grand jury proceedings and allow the discovery of evidence heretofore denied the indicted defendant. However, we hasten to point out that the rule of secrecy is not made absolute by the Nevada statutes governing grand juries. Grand jury testimony is permitted to impeach a witness (NRS 172.330(2)), at the trial of an indictment for perjury (NRS 172.330(2)), and where the disclosure would promote justice in the "due course of judicial proceedings" (NRS 172.140).

The principal reasons for the rule of secrecy are expressed in the following opinions: United States v. Rose, 215 F.2d 617 (3d Cir. 1954); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959), dissenting opinion, Brennan, J. They are: (1) To prevent the escape of those whose indictment may be contemplated. (2) To insure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment, or their friends, from importuning the grand jurors. (3) To prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it. (4) To encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes. (5) To protect an innocent accused, who is exonerated, from disclosure of the fact that he has been under investigation.

[Headnote 8]

It seems to us that secrecy is not a valid reason for denying pretrial examination of the transcript of the testimony after indictment is returned and the accused is in custody or under restraint. California, Kentucky, Iowa, Minnesota, Florida, and New York to a limited

degree, allow such pretrial examination by statute. [2] Other states have done so by judicial decision. See: State v. James, 327 S.W.2d 278 (Mo. 1959); State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959); State v. Moffa, 36 N.J. 219, 176 A.2d 1 (1961); see 66 Dickinson L.Rev. 379 (1962).

[Headnote 9]

In any event, the secrecy provisions of the Nevada statutes are directed to the members of the grand jury rather than to the witnesses who appear before them and give testimony. NRS 172.330 states that "every member of the grand jury shall keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted in a matter before them;" and, NRS 172.340 reads: "No grand juror shall be questioned for anything he may say or vote he may give during any session of the grand jury, relative to a matter legally pending before the jury * * *." Clearly, the secrecy provisions do not preclude the disclosure of the testimony of witnesses. We, therefore, expressly overrule the inadvertent dictum found in Victoria v. Young, 80 Nev. 279, 284, 392 P.2d 509 (1964), "He is not even entitled to a transcript of the grand jury proceedings. NRS 172.330."

[Headnote 10]

5. The matter of pretrial discovery in a criminal case is but indirectly involved with the problem at hand. A distinction is properly drawn between the ascertainment of facts forming the jurisdictional basis for a court to proceed to trial, and the discovery of evidence which is not necessarily related to the power of the court to proceed further. The habeas corpus decisions of this court following indictment, presentment, or preliminary examination are examples of appropriate inquiry into the power of a court to proceed to trial. The issue presented is not one of criminal discovery,

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[2] Cal.Pen.Code tit. 4, § 925, 938.1 (1959); Ky.Rev.Stat. tit. b, ch. 1, § 110 (App. 1959); Iowa Code Ann. tit. 36, § 772.4 (1950); Minn.Stat.Ann. pt. 5, § 628.04 (1947); Fla.Stat.Ann. tit. 45, § 905.27 (1951); N.Y. Code Crim.Proc. tit. 14, § 952-T (1958).

though some discovery will incidentally result. Rather, the issue is jurisdictional in nature.

[Headnote 11]

On the other hand, the matter of criminal discovery, per se, unrelated to jurisdiction, has been ruled discretionary with the trial court and not subject to challenge by extraordinary writ. [See: Pinana v. Dist. Ct., 75 Nev. 74, 334 P.2d 843 (1959), where we denied mandamus

to compel the pretrial inspection by the defendant of certain statements made by her to the district attorney, results of certain blood alcohol tests, and an autopsy report; and Marshall v. District Court, 79 Nev. 280, 382 P.2d 214 (1963), where we held that the discretionary order of the trial court requiring the state to produce certain items of evidence for inspection and copying was not reviewable by certiorari.] Thus, the discovery of evidence which is not contained in the transcript of the testimony of the witnesses appearing before a grand jury, at a presentment hearing, or a preliminary examination, is a matter to be presented by a motion addressed to the discretion of the trial court. Should such motion be denied, the propriety of that ruling is subject to review on appeal following conviction upon the ground of an abuse of discretion.

6. Since Nevada case precedent has established the propriety of habeas corpus as the plain, speedy and adequate remedy to reach the issue here presented, we deny the petitioner's application for a permanent writ of prohibition and dismiss this proceeding. However, the guidelines suggested herein will aid in the future management of this case and others dealing with the same basic issue.

Collins, J., and Zenoff, D. J., concur.

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82 Nev. 213, 213 (1966) Shelby v. District Court

CHARLIE SHELBY, Petitioner, *v.* THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Pershing, and THE HONORABLE MERWYN H. BROWN, Judge Thereof, Presiding, Respondents.

No. 5094

September 14, 1966 418 P.2d 132

On petition for rehearing.

The Supreme Court, Thompson, J., held that habeas corpus may be used to determine whether any substantial evidence exists which, if true, would support a verdict of conviction, for if there is none grand jury has exceeded its powers, and indictment is void.

Rehearing denied.

Collins, J., dissented.

J. Rayner Kjeldsen, of Reno, for Petitioner.

Roland W. Belanger, Pershing County District Attorney, of Lovelock, for Respondents.

1. Habeas Corpus.
   Writ of habeas corpus is proper method for seeking relief from a grand jury indictment which was not based upon reasonable or probable cause.
2. Habeas Corpus.
   Court in passing on grand jury indictment in habeas corpus proceeding can inquire whether any substantial evidence exists which, if true, would support a conviction, for if there is none grand jury has exceeded its powers, and indictment is void.
3. Habeas Corpus.
   If prosecution elects to proceed by grand jury presentment or grand jury indictment, it must assume burden of showing existence of reasonable or probable cause to hold accused for trial if challenged on that ground by habeas corpus.
4. Indictment and Information.
   Absent transcript of testimony before grand jury on which indictment was returned, question whether kind and quality of evidence required by statute was produced before grand jury cannot be determined. NRS 172.260, subd. 2.
5. Indictment and Information.
   Person who has been indicted by grand jury may challenge indictment and test legal sufficiency of evidence supporting grand jury indictment as to whether it was in fact

"the best evidence" rather than mere "hearsay or secondary evidence". NRS 172.260, subd. 2.

OPINION ON PETITION FOR REHEARING

By the Court, Thompson, J.:

In seeking a rehearing on the recent decision rendered by this court in Shelby v. District Court, 82 Nev. 204, 414 P.2d 942 (1966), the respondents cite a single sentence of dictum [1] from Ex parte Stearns, 68 Nev. 155, 227 P.2d 971 (1951), also cited in Ex parte Colton, 72 Nev. 83, 295 P.2d 383 (1956). That dictum is inconsistent with the holding of the court in the Stearns case, supra, and conflicts with our expressions in Shelby, supra.

[Headnotes 1-4]

In both the Eureka Bank cases, 35 Nev. 80, 126 P. 655, 129 P. 308 (1912) and Ex parte Stearns, supra, this court held that the writ of habeas corpus was the proper method for seeking relief from a grand jury indictment which was not based upon "reasonable or probable cause," and that the court "can inquire whether any substantial evidence exists which, if true, would support a verdict of conviction, for if there is none the grand jury has exceeded its powers, and the indictment is void." Ex parte Colton, supra, Ex parte Stearns, supra, and the Eureka Bank cases, supra, all stand for the proposition that the prosecution, if it elects to proceed by grand jury presentment or grand jury indictment, must assume the burden of showing the existence of reasonable or probable cause to hold the accused for trial, if challenged on that ground. In the instant case we held that showing cannot be made in the

absence of a transcript of the testimony of the witnesses.

[Headnote 5]
Further, under the statute, NRS 172.260(2), the grand jury "can receive none but legal evidence, and the best

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[1] It reads: "There is no doubt that inquiry upon habeas corpus may not be extended to determine the sufficiency of the evidence before the grand jury to warrant a finding of an indictment." Id., at 157.

evidence in degree, to the exclusion of hearsay or secondary evidence." Under this mandate, a person who had been indicted by the grand jury could challenge the indictment and test the legal sufficiency of the evidence supporting the grand jury indictment as to whether it was in fact "the best evidence" rather than mere "hearsay or secondary evidence."

The inconsistent statement of dictum contained in Ex parte Stearns, supra, is expressly disapproved.

Rehearing denied.

Zenoff, D. J., concurs.

Collins, J., dissenting:
I would grant the rehearing.

In the Matter of STAN PHILIPIE on Petition
for a Writ of Habeas Corpus.

No. 5101

May 31, 1966 414 P.2d 949

Original application for habeas corpus.

The Supreme Court, Collins, J., held that an ordinance prohibiting distribution upon any

public place or private premises any handbill, dodger, circular "or other advertisement" is unconstitutional as impairing freedom of speech, as against contention that ordinance should be construed as having only the purpose of prohibiting purely commercial advertising.

Writ granted. Petitioner discharged.

Albert M. Dreyer, of Las Vegas, for Petitioner.

Richard Breitwieser, City Attorney of Reno, and *Samuel T. Bull,* Assistant, for Respondent.

1. Habeas Corpus.
   A person arrested, who seeks to test constitutionality of ordinance or statute under which he is arrested, even though admitted to bail, is entitled to apply for a writ of habeas corpus which is always available to one in custody or restrained of his liberty to test constitutionality of an ordinance or statute. NRS 34.540.

82 Nev. 215, 216 (1966) Ex Parte Philipie

2. Constitutional Law.
   The acts of legislative body are presumed to be valid until it is clearly shown that they violate some constitutional restriction.
3. Constitutional Law.
   The State and Federal Constitutions forbid impairment of freedom of speech, which does not mean such right may not be regulated under police powers of the state or federal government, but it cannot be forbidden entirely. Const. art. 1, § 9; U.S.C.A.Const. Amends. 1, 14.
4. Municipal Corporations.
   A municipality or other governmental body may, under its police power, enact ordinances or laws to regulate, control or prohibit purely commercial advertising.
5. Constitutional Law.
   An ordinance prohibiting distribution upon any public place or private premises of any handbill, dodger, circular "or other advertisement" is unconstitutional as impairing freedom of speech, as against contention that ordinance should be construed as having only the purpose of prohibiting purely commercial advertising. Const. art. 1, § 9; U.S.C.A.Const. Amends. 1, 14.

OPINION

By the Court, Collins, J.:

Petitioner was arrested for violation of Reno Municipal Code, Sec. 12-76. [1] He was distributing handbills [2]

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[1] "12-76 It shall be unlawful to distribute or cause to be distributed or thrown upon any street, sidewalk or

public place, or in or upon any private premises within the City of Reno any handbill, dodger circular or other advertisement."

[2] "AMERICAN FEDERATION OF CASINO AND GAMING EMPLOYEES 325 West Street Room 202 Local 55 Reno, Nevada. Notice to the Public. Exodus 23:1 'You shall not repeat a false report. Do not join the wicked in putting your hand, as an unjust witness, upon anyone.' This is an informational picket line. Its purpose is to inform the public of a labor dispute. The American Federation of Casino and Gaming Employees is chartered by the State of Nevada, registered with the LMR and recognized as a collective bargaining agent by the National Labor Relations Board.

"Exodus 23:6 'You shall not deny one of your needy fellow men his rights in his lawsuit.' The management of the Horseshoe Club have continually intimidated, threatened and fired employees for their sympathy for and membership in our organization. Our pickets do not eat in the Horseshoe Club.

"Levitous 19:13 'You shall not defraud or rob your neighbor. You shall not withhold overnight the wages of your day laborer.:'

"Remember the Sermon on the Mount—'Blessed are those who hunger and thirst for justice sake for they shall be satisfied.'"

in front of the Horseshoe Club in downtown Reno as a picket engaged in a strike against the club. Following arrest, he was admitted to bail and released. He sought an original writ of habeas corpus from this court, contending the ordinance to be unconstitutional. The writ issued to Elmer Briscoe, Chief of Police, City of Reno, commanding him to make return on the writ. The return indicated petitioner was not in custody, having been released on bail, and the City of Reno moved to dismiss the application on that ground. We thus have two issues presented by application for the writ and motion to dismiss:

(1) May a person admitted to bail seek a writ of habeas corpus?

(2) If the writ will lie, is the ordinance unconstitutional?

[Headnote 1]

On the first question we have concluded a person arrested, who seeks to test the constitutionality of the ordinance or statute under which he is arrested, even though admitted to bail, is entitled to apply for a writ of habeas corpus. Habeas corpus is always available to one in custody or restrained of his liberty to test the constitutionality of an ordinance or statute. Ex parte Rosenblatt, 19 Nev. 439, 14 P. 298 (1887); Ex parte Boyce, 27 Nev. 299, 75 P. 1 (1904); Ex parte Kair, 28 Nev. 127, 80 P. 463 (1905). Nevada law allows one committed on a criminal charge, who seeks a writ of habeas corpus, if the offense is bailable, to be released on a recognizance. NRS 34.540. This court has previously held that a writ of habeas corpus may be utilized to test the legality of the restraint of one on probation. Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965).

It seems compelling to us, and of the greatest logic, that if a statute or ordinance under which a person is arrested and held to stand trial is unconstitutional, there should never be a trial. No sound reason has been advanced why a person arrested thereunder, though admitted to bail, may not urge such contention. The California Supreme Court has ruled that habeas corpus is available to a person on bail regardless of the reason and has construed their statute

to hold that a person on

bail is restrained of his liberty, with actual detention or custody not being required for the writ to lie. In re Petersen, 51 Cal.2d 177, 331 P.2d 24 (1958). We are not yet prepared to go that far, but limit our holding to the facts presented in this case. We recognize there are many authorities holding a contrary view, but their reasoning is not entirely persuasive.

[Headnotes 2, 3]

We now turn to the question of the constitutionality of the ordinance. The acts of a legislative body (here the Mayor and City Council of Reno) are presumed to be valid until it is clearly shown that they violate some constitutional restriction. Ex parte Boyce, 27 Nev. 299, 75 P. 1 (1904); State v. Lincoln Co. P.D., 60 Nev. 401, 111 P.2d 528 (1941); Viale v. Foley, 76 Nev. 149, 350 P.2d 721 (1960). Does the ordinance, under which petitioner was arrested, clearly show some constitutional restriction? We hold that it does. The Constitution of Nevada, Art. 1, Sec. 9, and of the United States (First Amendment made applicable to the states by the Fourteenth Amendment to the Federal Constitution) forbid impairment of freedom of speech. This does not mean such right may not be regulated under the police powers of the state or federal governments, but it cannot be forbidden entirely. Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

There are many United States Supreme Court cases, involving the distribution of handbills, which hold that any ordinance prohibiting the distribution on the streets of materials expressing ideas political, social or economic are unconstitutional. Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), struck down an ordinance by which a Jehovah's Witness was convicted of passing out literature on a city street without having obtained written permission of the city manager. Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), held unconstitutional an ordinance prohibiting the distribution of handbills. Schneider v. State, supra, dealt with ordinances of four cities: A Los Angeles ordinance prohibited the distribution of any handbill on any street; a Milwaukee

ordinance prohibited anyone from circulating or distributing any handbill or other printed or

advertising matter on a city street; a Worcester, Massachusetts, ordinance absolutely prohibited the distribution of any handbill of any sort on any city street; and an Irvington, New Jersey, ordinance required written permission from the chief of police.

In Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1959), Mr. Justice Black, speaking for the court, stated precisely the constitutional importance of the right to distribute handbills when he said:

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."

[Headnotes 4, 5]

It is true a municipality or other governmental body may, under its police power, enact ordinances or laws to regulate, control or prohibit purely commercial advertising. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942). Respondent, City of Reno, argues that its ordinance, quoted in the footnote above, can be construed by this court as having only that purpose. As it is worded however, it purports to preclude distribution of any handbill or dodger circular, even though it does include the words "or other advertisement." We do not assume legislative powers, but feel the Mayor and City Council of Reno are able to draft and enact such ordinance as will reflect the will of their inhabitants regulating the distribution of commercial handbills. There is precedent for such ordinance. New York Sanitation Code 3118, as construed in Valentine v. Chrestensen, supra; People v. Johnson, 117 Misc. 133, 191 N.Y.S. 750 (1921); People v. La Rollo, 24 N.Y.S.2d 350 (1940); People v. Healy, 74 N.Y.S.2d 102 (1947).

Accordingly, the writ of habeas corpus is made permanent, petitioner is released from restraint and his bond exonerated.

Thompson, J., and Zenoff, D. J., concur.

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82 Nev. 220, 220 (1966) Screen v. Screen

JOHN P. SCREEN, Appellant, *v.* DOROTHY A. SCREEN, Respondent.

No. 5011

June 1, 1966 414 P.2d 953

Appeal from the Eighth Judicial District Court, Clark County; John F. Sexton, Judge.

Wife's action for divorce. The trial court granted divorce and denied husband's motion to vacate the decree, and an appeal was taken. The Supreme Court, Zenoff, D. J., held that if

lawyer desires to protect his client, it is incumbent upon him to request that court reporter be present or that all hearings be held in open court.

Affirmed.

Olsen & Lublin, of Las Vegas, for Appellant.

Jack G. Perry, of Las Vegas, for Respondent.

1. Trial.
   Trial court has considerable discretion in conduct of its own trials.
2. Trial.
   If lawyer desires to protect his client, it is incumbent upon him to request that court reporter be present or that all hearings be held in open court.

OPINION

By the Court, Zenoff, D. J.:

This is an appeal from a decree of divorce and a subsequent denial of appellant's motion to vacate the decree.

Respondent, Dorothy A. Screen, filed her complaint for divorce against John P. Screen on May 14, 1964, alleging two grounds and listing various property interests of the parties. A request was made for custody of the three children, support money, alimony, and attorney's fees.

Thereafter, the record indicates a hodgepodge of hearings, delays, conferences in chambers, and proceedings

that are landmarks for their obscurity. This appeal concerns appellant's complaint that he was not allowed to testify in his own behalf.

Although interrupted several times by calendar problems in the Eighth Judicial District, a trial was commenced after the usual motion by the respondent for temporary custody and support monies. Appellant failed to file an answering affidavit. At the trial, the respondent and her witnesses testified and appellant's attorney was allowed his right to cross-examination. It is clear from the record that appellant was present at the trial and conferred with his attorney throughout. However, he did not avail himself of his opportunity to testify at these proceedings.

Near the concluding portion of a cross-examination of the respondent, the trial judge interjected his disposition to grant separate maintenance and $500 per month for support. Appellant claims this indicated the court's prejudice against him. However, if the judge's threatened action had been taken it would have been detrimental to the respondent since she sought a divorce, not a decree of separate maintenance. The remark reflects the trial judge's understandable exasperation at the conduct of the trial. From what we can ascertain from the

record, the parties had agreed to a disposition of the property, custody of the children, and support. There is nothing to show that appellant objected to the divorce itself at this time.

We cannot determine the reason why appellant was seeking to forestall entry of the final decree, but his conduct implies that this was his intent after the parties had agreed on custody and support. Appellant's counsel, in the presence of appellant, who did not protest, stated that the parties were in agreement as to all matters touching upon the divorce and appellant's counsel did not object and state to the court that he wanted the trial to continue so that his client could testify. Instead, he participated in the termination of the trial at the conclusion of respondent's case and concluded the settlement.

A minute order clearly notes that the division of the

property, custody, and provisions for support were by stipulation. These provisions substantially coincide with the provisions of the final decree that was subsequently entered.

Appellant, who by this time was represented by a third attorney since the commencement of the action, then moved to have the decree reopened and the trial continued. Some confusion arose because appellant's third attorney became hospitalized and requested another attorney to appear at the hearing to reopen and secure a continuance. The hearing was set for the reopening of the trial and the court was prepared to proceed, but the trial court decided to close out the entire matter since appellant did not appear to present his case and the final decree had already been entered.

[Headnotes 1, 2]

1. The trial court has considerable discretion in the conduct of its own trials. Couturier v. Couturier, 76 Nev. 60, 348 P.2d 756 (1960). The record before us clearly illustrates that there was no more reason to continue with the trial than there is merit for this appeal. Whatever took place in chambers does not appear in the record, but it is apparent that the trial judge relied on the representation made by appellant in chambers for this was the basis of the property, custody, and support settlement. There was no demand that the conferences in chambers be reported, nor were they so reported. If a lawyer desires to protect his client, it is incumbent upon him to request that a court reporter be present or that all hearings be held in open court. This was not done. Counsel for both parties participated in these off-the-record conferences and there is nothing in the record to indicate that a demand was made that the trial continue and defendant be allowed to testify until after the final decree was entered.

Under the facts presented, we fail to find an abuse of discretion on the part of the trial court.

Affirmed.

Thompson and Collins, JJ., concur.

DILLARD R. MORTON, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5091

June 2, 1966 414 P.2d 952

Appeal from order denying petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Peter Breen, Judge.

Petition brought after preliminary hearing, which held petitioner and alleged accomplice to answer for murder, was denied, by the lower court, and petitioner appealed. The Supreme Court, Zenoff, D. J., held that evidence that petitioner and alleged accomplice were alone in motel room with victim when she was shot and killed, that victim's broken neck suggested killer had physical assistance, that angle of entrance of bullet could lead to inference victim was held when shot, and that petitioner helped remove body into back of automobile, was sufficient cause to hold petitioner to answer for murder charge.

Affirmed.

John P. Foley, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, *William P. Beko,* District Attorney, and *Chadwick E. Lemon,* Deputy District Attorney, Nye County, for Respondent.

Criminal Law.

Evidence that petitioner and alleged accomplice were alone in motel room with victim when she was shot and killed, that victim's broken neck suggested killer had physical assistance, that angle of entrance of bullet could lead to inference victim was held when shot, and that petitioner helped remove body into back of automobile, was sufficient cause to hold petitioner to answer for murder charge and to deny habeas corpus petition.

OPINION

By the Court, Zenoff, D. J.:

After a preliminary hearing, Dillard R. Morton, together with Robert G. Peoples, was held to answer to the charge of murder. Morton thereafter petitioned the

District Court for a writ of habeas corpus contending that there was insufficient evidence to establish that probable cause existed that he committed the offense. Morton appeals from the denial of the writ by the lower court.

We affirm. From an examination of the transcript of the preliminary hearing this court finds that there was sufficient cause to believe the defendant was guilty of the offense charged [1] or that he aided in its commission. [2]

Appellant, the victim Sharon Wilson, and her two small children, drove to Beatty in appellant's automobile. The victim rented a room at the El Portal Motel, registering under the name of Sharon Peoples. Defendant Peoples arrived in Beatty, via bus, on the afternoon of the day the alleged offense was committed. Peoples was met at the bus by appellant and the two children. Appellant drove Peoples to the Oasis Bar where the victim was employed. Appellant and Peoples spoke with the victim and after an altercation between Sharon and Peoples, at which time he threatened to kill her and shot at her, they all left for the motel with the appellant driving the automobile.

Morton was alone with Peoples and the victim in the motel room when she was shot and killed. An inference was created by the fact that the victim sustained a

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[1] NRS 171.455 (relating to commitment following preliminary examination):

"If, however, it appears from the examination that a public offense has been committed, and there is cause to believe the defendant guilty thereof, the magistrate must make or endorse on the depositions and statement an order signed by him to the following effect: * * *"

[2] NRS 195.020. *"Who are principals.* Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him."

broken neck along with the gunshot wound which might suggest that there was physical assistance given to the killer by holding the deceased. Further, the angle of the entrance of the bullet could lead to the same inference that the victim was held when she was shot.

Morton helped remove the body from the motel room to the back seat of the automobile,

directed the children to get into the car, and drove the vehicle to the Oasis Bar with Peoples and the deceased's children and the victim.

Appellant's acts were voluntary and he was under no apparent duress from Peoples, who, the evidence established, possessed the gun.

The record does not show that Morton was a reluctant participant at any time.

These facts were sufficient to establish probable cause within Beasley v. Lamb, 79 Nev. 78, 378 P.2d 524 (1963), and a host of other Nevada authorities.

Affirmed.

Thompson and Collins, JJ., concur.

CARL DEAN WHEELER, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, Respondent.

No. 5033

June 3, 1966 415 P.2d 63

Petition for Writ of Prohibition to prevent a second trial after order of the trial court for a mistrial was granted during jury deliberations.

The Supreme Court, Zenoff, D. J., held that accused had once been put in jeopardy on murder charge and he would not be retried, where after extensive jury deliberation the foreman informed the trial judge that jury then stood at 11 to 1 for acquittal and that the holdout juror had revealed that he had personal information about the case obtained outside of the trial, and trial

judge refused defendant's request that this juror be sworn and examined as a witness in presence of parties in accordance with statute, and trial judge declared a mistrial.

Writ of Prohibition granted.

Mowbray, D. J., dissented.

Carl F. Martillaro, and *Virgil A. Bucchianeri,* of Carson City, for Petitioner.

Harvey Dickerson, Attorney General, *William J. Raggio,* District Attorney, and *Herbert F. Ahlswede,* Deputy District Attorney, Washoe County, for Respondent.

1. Criminal Law.

   Whenever accused has been placed upon trial, upon valid indictment, before competent court, and jury duly impaneled, sworn and charged with the case, he has then reached "jeopardy," from the repetition of which the Constitution protects him, and therefore, the discharge of the jury before verdict, unless with consent of defendant, or intervention of some unavoidable accident, or some overruling necessity, operates as an acquittal, but inability of jury to agree upon verdict is recognized as creating such a necessity. Const. art. 1, § 8.
2. Criminal Law.

   Accused had once been put in jeopardy on murder charge and he would not be retried, where after extensive jury deliberation the foreman informed trial judge that jury then stood at 11 to 1 for acquittal and that the holdout juror had revealed that he had personal information about the case obtained outside of the trial, and trial judge refused defendant's request that this juror be sworn and examined as a witness in presence of parties in accordance with statute, and trial judge declared a mistrial. Const. art. 1, § 8; NRS 175.310.
3. Prohibition.

   Ordinarily, reviewing court will not grant prohibition until an objection has been made and overruled in lower court since it is assumed that any valid objection properly brought to attention of the court will prevail, and the writ will be unnecessary; such rule was adopted by reviewing tribunals as a matter of respect for and consideration of lower court and to aid in minimizing, if not preventing, unnecessary litigation.
4. Prohibition.

   Even though objection of double jeopardy had never been presented to trial court which ordered mistrial during jury deliberations, and while Supreme Court preferred that issue

first be raised in trial court, direct application to Supreme Court for prohibition to prevent second trial on ground of double jeopardy was proper, for once an alternative writ has issued, dismissing on a technicality only delays the case further.

OPINION

By the Court, Zenoff, D. J.:

Petitioner was charged with murder. He was brought jury trial in the Second Judicial District in September 1965, and after extensive jury deliberation the foreman informed the trial judge that one of the jurors revealed that he had personal information about the case, that the juror thought he had observed the defendant and deceased together in a Reno bar. This led

that juror to believe that the two were close personal friends, which would then effect the credibility of defendant's claim of self defense. Obviously, by colloquy between the court and the foreman in open court this was a crucial point since the jury then stood at 11 to 1 for acquittal. [1]

The following dialogue ensued between the court and the foreman of the jury when the court called for the jury to appear in the courtroom:

"The Court: Based upon the information which you have now conveyed to me, and taking into consideration the information that one of the jurors has now conveyed to you, is it impossible for you to reach a verdict based solely on the evidence presented in court?

"The Foreman: Yes, your Honor, it is.

"The Court: The Court will declare a mistrial.

"Mr. Martillaro: Just a minute, your Honor.

* * * * *

"The Foreman: Your Honor, it is possible I may have misunderstood your question.

"The Court: Is it impossible for you to reach a verdict under the circumstances where information has been conveyed to you by one of the jurors?

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[1] Counsel stipulated that the jury stood 11 to 1 for acquittal. That information does not otherwise appear in the record. The prejudice in subjecting the defendant to another jury, in the event the mistrial was proper, becomes obvious.

"The Foreman: No, your Honor, it is not impossible. I thought you asked me if it were possible and I replied—if you are asking me if it is possible for us to reach a decision based on the facts, yes, I think we can do that based on the facts presented so far in this case.

"The Court: And yet information and facts not received here in court have been conveyed to you by one of the jurors?

* * * * *

"The Foreman: Yes, sir.

"The Court: And that this juror can likewise do the same? That is, the juror who conveyed this information to you can do the same?

"THE FOREMAN: The juror who conveyed this information could not, by his own testimony, make a fair and just decision.

"The Court: Well, then, you can't reach a verdict based upon the evidence. I declare a mistrial.

"Mr. Martillaro: Just a minute, just a minute.

* * * * *

"I propose to voir dire that particular juror as to why—when he was selected to sit as a juror on this case he said that any preconceived ideas as to the guilt or innocence could be set aside by him and he could decide the evidence in this case solely upon the basis of the evidence brought out here.

"The Court: That will not be permitted."

Counsel for the defendant requested permission to question the particular juror but the court refused to permit him to do so. Defendant's counsel argued further for the same permission but the court again refused and stated as follows:

"* * * The fact that this kind of information (referring to the juror's private information) was conveyed to eleven of the jurors by one of the jurors regardless of what any voir dire may disclose that he wasn't sure that he knew him and whatnot, in itself is certainly grounds for mistrial. The fact is that he presented in the jury room information that was gleaned outside of this courtroom during the course of this trial."

Again, the court stated: "Also, I think the record will show that the foreman of the jury said that this

one juror could not change his mind and yet they could reach a verdict. And what he obviously meant in view of the message is that they wanted an alternate." Over the objection of defense counsel the court granted the mistrial and subsequently set a new trial date.

Petitioner now brings a petition for a writ of prohibition to prevent a second trial, alleging that petitioner has once been put in jeopardy. [2]

[Headnote 1]

1. Nevada has ruled that "whenever the accused has been placed upon trial, upon a valid indictment, before a competent court, and a jury duly impaneled, sworn, and charged with the case, he has then reached the jeopardy, from the repetition of which this constitutional provision protects him, and, therefore, the discharge of the jury before verdict, unless with the consent of the defendant, or the intervention of some unavoidable accident, *or some overruling necessity,* operates as an acquittal, but the inability of the jury to agree upon a verdict, is recognized as creating such a necessity." Ex parte Maxwell, 11 Nev. 428 (1876). (Emphasis supplied.)

Since the defendant did not consent, but rather objected, the law therefore requires a manifest necessity before discharging a jury before a verdict. See also State v. Pritchard, 16 Nev. 101 (1881), and State v. Eisentrager, 76 Nev. 437, 357 P.2d 306 (1960), where such manifest necessity must appear upon the record. Also 38 A.L.R. 706; 77 Harv.L.Rev. 1276 (1964).

[Headnote 2]

The controlling element of the instant case is NRS 175.310 requiring a juror to be sworn and examined as a witness in the presence of the parties when he possesses facts about the

case of his own knowledge. [3] The trial court refused defendant's request so to do.

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[2] Nev. Const., Art. 1, Sec. 8. "No person shall be subject to be twice put in jeopardy for the same offense."

[3] NRS 175.310. "If a juror has any personal knowledge respecting a fact in controversy in the case, he must declare the same in open court, during the trial. If, during the retirement of a jury, a juror declare any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness, and examined in the presence of the parties."

In Yarbrough v. State, 90 Okla.Crim. 74, 210 P.2d 375 (1949), the trial judge refused to allow examination of an allegedly biased juror and the Court of Criminal Appeals of Oklahoma held: "The defendant's right to have the jury pass upon his case was one which should not have been set aside except for a very cogent and compelling reason, and in such circumstances, the defendant and his counsel had the right to have the information allegedly known by the juror declared in open court, so that they would know just what it was, and in case of appeal, this court would know whether there was a necessity for the discharge of the jury.

"It is our conclusion that where the court determines that a mistrial should be declared before the case is finally submitted to the jury because it is disclosed that a juror has knowledge of certain controversial facts material to the issues involved, that the court should have the juror examined in open court in the presence of the parties in accordance with the statute, and after such examination, if the trial court concludes in the exercise of sound judicial discretion that a mistrial should be declared, that the essential facts upon which the discharge is based and the finding of the court thereon must be entered in the record."

It is apparent here that while the trial judge knew the basis of the juror's bias, no opportunity was given to the defendant to determine by examination of the juror whether or not the bias could be overcome or was groundless. Examination might have developed that the juror was mistaken in his identity of the deceased (no photographs of deceased had been presented at the trial) and, thus, the jury could have continued its deliberations.

We cannot call this a hung jury because the basis for the jury's failure to agree was the information received or used by the holdout juror that was obtained outside of the trial.

The requirements of "overruling necessity" were not met and, we must therefore uphold defendant's defense

of former jeopardy. See Downum v. United States, 372 U.S. 734 (1963).

[Headnotes 3, 4]

2. The objection of double jeopardy had never been presented to the trial court. Ordinarily, a reviewing court will not grant prohibition until an objection has been made and overruled in the lower court since it is assumed that any valid objection properly brought to the attention of the court will prevail, and the writ will be unnecessary. Sayegh v. Superior Court, 44 Cal.2d 814, 285 P.2d 267 (1955). See also Baird v. Superior Court, 204 Cal. 408, 268 P. 640 (1928); Hanrahan v. Superior Court, 81 Cal.App.2d 432, 184 P.2d 157 (1947); Citizens Utility Co. v. Superior Court, 31 Cal.Rptr. 316, 382 P.2d 356 (1963). There is, however, authority for the proposition that such a rule was adopted by reviewing tribunals as a matter of respect for and consideration of the lower court and to aid in minimizing, if not preventing, unnecessary litigation. Monterey Club v. Superior Court, 48 Cal.App.2d 131, 119 P.2d 349 (1941). Also, Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8 (1946).

While we prefer the issue first be raised in the trial court, direct application for prohibition to this court is proper, for once an alternative writ has issued, dismissing on a technicality only delays the case further. Rodriquez v. Superior Court, 158 P.2d 954 (1945), aff'd 27 Cal.2d 500, 165 P.2d 1 (1946).

Writ of prohibition granted. The defendant shall forthwith be released from custody and the charge dismissed.

Thompson, J., concurs.

Mowbray, D. J., dissenting:

At defendant's trial for murder it developed that during the jury deliberations one member of the jury stated he had personal knowledge respecting the facts in controversy which had not been submitted in open court during the trial and which information he presented to

➔ 82 Nev. 225, 232 (1966) Wheeler v. District Court ➔

his fellow jurors during their deliberation's. The trial court over defense counsel's objection declared a mistrial. [1]

Assuming arguendo that defense counsel's objection and demand to “voir dire” that juror was sufficient to place the trial court on notice of the procedure to be followed in cases of this instance, as outlined in NRS 175.310, did the trial court abuse its discretion in declaring a mistrial? I think not.

The provisions of NRS 175.310 are at best vague and ambiguous. This is true to such an extent that the California Legislature has amended its counterpart to said statute, Penal Code Section 1120, in order to clarify it:

“If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open Court during the trial. If, during the retirement of the jury, a juror

declares a fact which could be evidence in the cause, as of his own knowledge, the jury must return into Court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties *in order that the court may determine whether good cause exists for his discharge as a juror."* (Emphasis added.) Stats. 1965, ch. 299, Sec. 144, operative Jan. 1, 1967.

Before this amendment was adopted there was no method to determine how to apply the statute since it had never been interpreted by the Nevada courts and its counterpart has been cited only once by the California courts and therein without clarification, People v. Sarazzawski, 161 P.2d 934 (Cal. 1945), and alluded to twice by that State's courts without citation, People v. Young, 69 P.2d 203 (Cal. 1937), and People v. Kobey, 234 P.2d 251 (Cal. 1951).

Before amendment the section did not make it clear whether the examination in the presence of the parties is for the purpose of determining if "good cause" exists for the juror's discharge or whether this examination is for the purpose of obtaining the juror's knowledge as evidence in the case. The amendment eliminates the

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[1] The acquittal vote of 11 to 1 was not known to the court nor counsel until after the trial and later became a part of this record at the time of oral argument pursuant to the stipulation of counsel.

ambiguity in its provisions and provides assurance that the juror's examination is to be used solely to determine whether "good cause" exists for his discharge.

It was reasonable for the court to declare a mistrial in order that the trial could take place before another jury. If the court had done otherwise, it would have placed the juror-witness in an anomolous position. He manifestly cannot weigh his own testimony impartially. The party affected adversely by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror—and perhaps his fellow jurors as well. And if he does not attack the juror's testimony, the other jurors may give his testimony undue weight.

Accordingly, the trial judge did not abuse his discretion and the defendant should be re-tried:

"Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objections, and he may be retried consistently with the fifth amendment." Gori v. United States, 367 U.S. 364, 368 (1961).

The Writ of Prohibition should be denied.

Because of the death of Badt, J., the Governor designated Honorable John Mowbray, of the Eighth Judicial District Court, to sit in his place.

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82 Nev. 234, 234 (1966) Dickerson v. District Court

JACQUELINE M. DICKERSON, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, Respondent.

No. 5082

June 3, 1966 414 P.2d 946

Original proceeding in certiorari.

Proceeding brought for review of an order of the District Court appointing public administrator as administrator of intestate's estate. The Supreme Court, Thompson, J., held that "adverse interest" did not disqualify niece of intestate for appointment as administrator, and it was permissible for her to nominate bank as coadministrator.

Order appointing administrator vacated with directions.

[Rehearing denied July 1, 1966]

Paul L. Larsen, of Las Vegas, for Petitioner.

Charles E. Catt, of Las Vegas, for Respondent.

1. Certiorari.
   Certiorari is appropriate when an inferior tribunal has exceeded its jurisdiction, there is no appeal and there is no plain, speedy and adequate remedy; but if one of these essentials is missing, writ should not be granted. NRS 34.020, subd. 2, 155.190, subd. 1.
2. Executors and Administrators.
   Since statute expressly authorizes an appeal from order appointing administrator of an estate, review of that order by extraordinary writ is, in normal circumstances, precluded. NRS 34.020, subd. 2, 155.190, subd. 1.
3. Executors and Administrators.
   Since action of Supreme Court in granting authorization to file petition for writ of certiorari and setting date for certification of record and oral argument beyond time within which appeal could be taken from order appointing administrator might have lulled petitioner into feeling of procedural security, and since respondent's motion to dismiss was not filed until after time to appeal from order appointing administrator had run, justice demanded that Supreme Court excuse petitioner's failure to proceed by appeal. NRS 34.020, subd. 2, 155.190, subd. 1.

4. Executors and Administrators.
   Right to nominate administrator is subject to same qualifications governing right to administer estate, and since nonresident nephew and niece of intestate would not themselves have been entitled to letters of administration, they were without capacity to nominate someone else to act. NRS 139.010 and subd. 4, 139.040, 139.050.
5. Executors and Administrators.
   Statutory provisions fixing priority are mandatory, and court must appoint as administrator, if otherwise competent, person preferred by statute. NRS 139.040 and subds. 1(q), 2, 139.050.
6. Executors and Administrators.
   "Adverse interest" did not disqualify niece of intestate for appointment as administrator, and it was permissible for her to nominate bank as coadministrator. NRS 139.010, 139.050, 139.070.

OPINION

By the Court, Thompson, J.:

This is an original proceeding in certiorari to review an order of the district court appointing the public administrator of Clark County, Phil Cummings, as the administrator of the estate of Edwin L. Van Dyke. For reasons hereafter expressed, we nullify that order because it was made in excess of jurisdiction. However, before dealing with that issue, we must first consider the respondent's motion to dismiss upon the ground that the remedy of appeal existed when the petition for certiorari was filed with this court.

[Headnotes 1-3]

1. Certiorari is appropriate when an inferior tribunal has exceeded its jurisdiction, there is no appeal, nor any plain, speedy and adequate remedy. NRS 34.020(2). If one of the essentials is missing, the writ should not be granted. United Ass'n of Journeymen v. Dist. Ct., 82 Nev. 103, 412 P.2d 352 (1966); Gaming Control Board v. Dist. Ct., 82 Nev. 38, 409 P.2d 974 (1966); Schumacher v. District Court, 77 Nev. 408, 365 P.2d 646 (1961). Since NRS 155.190(1) [1] expressly

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[1] NRS 155.190(1) reads: "In addition to any order or decree from which an appeal is expressly permitted by this Title, an appeal may be taken to the supreme court from an order or decree: 1. Granting or revoking letters testamentary or letters of administration."

authorizes an appeal from an order appointing an administrator of an estate, review of that order by extraordinary writ, in normal circumstances, would be precluded. However, the peculiar circumstances of this case require that we excuse the petitioner's failure to proceed by appeal as we were partially responsible for her failure to do so. One day following the notice of entry of the order appointing the administrator, counsel for petitioner requested authorization from this court to file a petition for a writ of certiorari. Authorization was granted and a date set for certification of the record and oral argument. This date was beyond the time within which an appeal could be taken. By our action, allowing the petition to be filed while the remedy of appeal still existed, we may have lulled the petitioner into a feeling of procedural security. Additionally, we note that the respondent's motion to dismiss this proceeding was not filed until after the time to appeal from the order in question had run. In these special circumstances, justice demands that we excuse the petitioner's failure to proceed by appeal. Accord: Rohwer v. Dist. Ct., 41 Utah 279, 125 P. 671 (1912); Herald-Republican Pub. Co. v. Lewis, 42 Utah 188, 129 P. 624 (1913); Lund v. Superior Court, 61 Cal.2d 698, 394 P.2d 707 (1964). Therefore, we deny the motion to dismiss this proceeding and turn to resolve the issue of jurisdiction.

2. Edwin L. Van Dyke, a resident of Clark County, Nevada, died intestate on December 15, 1965. His only heirs are two nieces and a nephew. The nephew, Kenneth Lynch, and one niece, Wanda Lynch Hawkins, are residents of California. The other niece and the petitioner herein, Jacqueline Dickerson, is a resident of Clark County, Nevada. The nonresident heirs nominated Phil Cummings, the public administrator of Clark County, to be the administrator of the estate, and on December 29, 1965, Cummings petitioned the court for appointment. The resident heir filed objections and herself sought the appointment. Before a hearing was held on the Cummings petition and the objections thereto, all heirs filed a purported withdrawal of the nomination of Cummings and nominated Jacqueline Dickerson and the First National Bank of Nevada as coadministrators.

After a hearing, the court appointed Cummings to be the administrator and specifically found: That Cummings had entered upon the duties of administering the estate pursuant to his nomination to act in that capacity; that Jacqueline Dickerson "the only heir resident of Nevada is not qualified because of an adverse interest"; and, that the attempted withdrawal of the nomination of Cummings was made without a showing of incompetence or some other good cause. It is this order which the petitioner challenges as having been made in excess of jurisdiction.

[Headnote 4]

3. The qualifications entitling one to letters of administration are designated by NRS 139.010, [2] and the order of priority by NRS 139.040. [3] Those provisions and the provisions

of NRS 139.050[4] compel the conclusion that the right of one to nominate an administrator of an estate is subject to the same qualifications governing the right to administer an estate. Here, as the nonresident nephew and niece could not themselves be entitled to letters of administration (NRS 139.010(4)) they were equally without capacity to nominate someone else to act. Although it is true that the nonresident nephew and niece are "any other kindred entitled to share in the distribution of the estate" (NRS 139.040(1)(g)), they could not, as members of that class, secure

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[2] NRS 139.010 in pertinent part reads: "No person shall be entitled to letters of administration: 1. Who shall be under the age of majority; * * * 4. Who is not a resident of the State of Nevada."

[3] NRS 139.040 provides: "1. Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: (a) The surviving husband or wife. * * * (g) Any other of the kindred entitled to share in the distribution of the estate. * * * (i) The public administrator. * * * (k) Any person or persons legally competent.

"2. Persons in each of the foregoing classes shall have the right of nomination and appointment, and a nominated and appointed person shall have the same priority as his nominator and appointor."

[4] NRS 139.050 reads: "Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court."

a priority since subdivision 2 of NRS 139.040 demands that the party nominated "shall have the same priority as his nominator." Being themselves disqualified by virtue of their nonresidency, they had no priority to offer their nominee. A fortiori, their nomination of Phil Cummings to be the administrator was, and is, a nullity.

Our conclusion is strengthened by NRS 139.050. That section authorizes the grant of letters of administration to "one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in court," thus making it clear that the request, or nomination, must be made by one who is himself entitled to letters. Here, only the resident niece, Jacqueline Dickerson, could request that letters of administration be issued to the public administrator. She not only failed to nominate him, but objected to his nomination by the nonresident nephew and niece. For the reasons mentioned, we think it clear that the order appointing Phil Cummings the administrator of this estate was an order in excess of jurisdiction and void.

[Headnotes 5, 6]

4. The provisions of NRS 139.040 fixing priority are mandatory and the court must appoint the person preferred by statute if otherwise competent. In re Taylor's Estate, 61 Nev.

68, 114 P.2d 1086 (1941). In this regard, we note the finding below that "Jacqueline Dickerson the only heir resident of Nevada is not qualified because of an adverse interest." There is nothing in the record of this estate proceeding to explain what the lower court had in mind in so finding. In any event, NRS 139.010 does not specify that an "adverse interest" disqualifies. The four disqualifying conditions listed are minority, conviction of a felony, nonresidency, or proof leading to a judgment that the applicant for letters is "incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of integrity or understanding." None of the disqualifying conditions are reflected in this record.

The order appointing the public administrator Phil Cummings, as the administrator of the estate of Edwin L. Van Dyke, is vacated. The district court is directed

to issue letters of coadministration to Jacqueline Dickerson, the petitioner herein, and the First National Bank of Nevada. [5]

Collins, J., and Zenoff, D. J., concur.

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[5] Mrs. Dickerson nominated the First National Bank of Nevada as coadministrator. This was permissible. NRS 139.050; 139.070.

STEFAN ISSARESCU, Appellant, *v.* ILEANA ISSARESCU, Respondent.

No. 5031

June 8, 1966 415 P.2d 67

Appeal from judgment of the First Judicial District Court, Lyon County; Frank B. Gregory, Judge.

Divorce proceeding. The trial court granted plaintiff wife divorce on grounds of three-year

separation without cohabitation, and the defendant husband appealed. The Supreme Court, Thompson, J., held that court could permissibly infer voluntary separation with intention to disrupt marriage from fact of separation without cohabitation for three years.

Judgment affirmed.

Diehl & Recanzone, of Fallon, for Appellant.

Laxalt, Ross & Laxalt, of Carson City, for Respondent.

1. Divorce.
   Claim for relief under statute establishing three years' separation as ground for divorce contemplates voluntary separation without cohabitation for three years with intent by at least one of spouses to discontinue marital relationship. NRS 125.010, subd. 9.
2. Divorce.
   Court may permissibly infer voluntary separation with intent to disrupt marriage from fact of separation without cohabitation for three years. NRS 52.020, 125.010, subd. 9.
3. Divorce.
   Evidence of separation without cohabitation for three years establishes prima facie case for divorce, and burden of going forward then shifts to contesting defendant to offer

some credible evidence that separation was involuntary and without intent to discontinue marriage; if defendant does so, plaintiff may offer evidence in rebuttal and court will resolve conflict if one exists, and if defendant does not offer such evidence, court in its discretion may draw reasonable inferences from evidence of separation without cohabitation for three years. NRS 52.020, 125.010, subd. 9.

4. Divorce.
   In evaluating evidence as to bona fides of plaintiff's residence in divorce action, court was not bound to prefer letters, which were written before plaintiff came to state, and which allegedly could be read to mean that plaintiff intended to come to state solely for purpose of securing divorce, to plaintiff's trial testimony amply supporting finding in her favor on issues of residence and domicile.

OPINION

By the Court, Thompson, J.:

The district court granted Ileana Issarescu a divorce upon the ground of three years' separation without cohabitation. We are asked to reverse mainly because there is no explicit testimony or documentary evidence establishing that the separation was voluntary and with intent to discontinue the marital relationship. Mrs. Issarescu said nothing on the point, nor did her husband, the defendant, who contested the divorce and was personally present throughout

the trial.

[Headnotes 1-3]

A claim for relief under NRS 125.010(9) [1] contemplates a voluntary separation without cohabitation for three years with intent by at least one of the spouses to discontinue the marital relationship. Pearson v. Pearson, 77 Nev. 76, 359 P.2d 386 (1961); Sutherland v. Sutherland, 75 Nev. 304, 340 P.2d 581 (1959); Caye v. Caye, 66 Nev. 83, 211 P.2d 252 (1949). The issue presented is

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[1] NRS 125.010(9) reads: "Divorce from the bonds of matrimony may be obtained for any of the following causes: * * *

"9. When the husband and wife have lived separate and apart for 3 consecutive years without cohabitation the court may, in its discretion, grant an absolute decree of divorce at the suit of either party."

whether the trial court may permissibly infer a voluntary separation with intention to disrupt the marriage from the fact of separation without cohabitation for three years. We hold that the inference is permissible. NRS 52.020. [2] In our view, evidence of separation without cohabitation for the required period establishes a prima facie case. The burden of going forward then shifts to the contesting defendant to offer some credible evidence that the separation was involuntary and without intention to discontinue the marriage. If the defendant does so, the plaintiff may then offer evidence in rebuttal, and the court will resolve the conflict, if one exists. If the defendant does not offer such evidence, the court in its discretion, may draw reasonable inferences from the evidence of separation without cohabitation for three years.

We have heretofore held that, in the absence of an express finding that the separation was voluntary, this court will imply such a finding in order to support the judgment. Caye v. Caye, 66 Nev. 83, 211 P.2d 252 (1949). In a three-year separation case we have also implied the finding that a reconciliation is impossible. Baker v. Baker, 76 Nev. 127, 350 P.2d 140 (1960). Our ruling today is in line with those decisions.

[Headnote 4]

An error is assigned relating to the bona fides of the plaintiff's residence. It is claimed that the trial court did not consider letters from plaintiff's New York counsel bearing upon her intention to establish Nevada as her home. The letters were written before the plaintiff came to Nevada and could be read to mean that the plaintiff intended to come to Nevada solely for the purpose of securing a divorce. We do not decide whether the letters should have been

received in evidence. They were admitted and, we think, considered by the court. In evaluating the evidence, the court was not bound to prefer those letters to the plaintiff's trial testimony

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[2] NRS 52.020 reads: "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect."

which amply supports the court's finding in her favor on the issues of residence and domicile.[3]

Affirmed.

Collins, J., and Zenoff, D. J., concur.

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[3] The attorneys for the respondent on appeal were not her attorneys in the trial court.

MANUELA DOYLE, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 4729

June 15, 1966 415 P.2d 323

Appeal from judgment of the Second Judicial District Court, and from the court's refusal to grant a new trial, Washoe County; Grant L. Bowen, Judge.

The defendant was convicted in the trial court of unlawful possession of narcotics and he appealed. The Supreme Court, Collins, J., held that a person is in possession of narcotic when it is under his dominion and control and to his knowledge either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession is

immediate, accessible, and exclusive to him, but two or more persons may have joint possession of a narcotic if jointly and knowingly they have such dominion, control, and exclusive possession, and jurors were properly so instructed.

Affirmed.

[Rehearing denied July 11, 1966]

Samuel B. Francovich, of Reno, for Appellant.

Harvey Dickerson, Attorney General, of Carson City, and *William J. Raggio,* Washoe County District Attorney, and *Herbert F. Ahlswede,* Deputy District Attorney, of Reno, for Respondent.

1. Jury.
   Statute providing that when several defendants are tried together they cannot sever their peremptory challenges to jurors but must join therein is constitutional. NRS 175.015.
2. Jury.
   Statute providing that when several defendants are joined they cannot sever peremptory challenges of jurors but must join therein is mandatory, not directory. NRS 175.015.
3. Poisons.
   A person is in possession of narcotic when it is under his dominion and control and to his knowledge either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession is immediate, accessible, and exclusive to him, but two or more persons may have joint possession of a narcotic if jointly and knowingly they have such dominion, control, and exclusive possession, and jurors were properly so instructed.
4. Criminal Law.
   Incriminating statement made by defendant who was on bail awaiting trial after preliminary examination while represented by counsel and who went voluntarily to police officer to make that statement and was not secretly interrogated and was not the subject of deliberate elicitation of evidence by the officer was admissible.
5. Criminal Law.
   Cross-examination testimony of defendant charged with unlawful possession of narcotics concerning a prior narcotics offense was admissible in absence of objection by defense counsel.

OPINION

By the Court, Collins, J.:

A jury convicted Manuela Doyle of unlawful possession of narcotics. She and three other persons were arrested and charged with the crime. The complaint against two of the defendants was dismissed. Appellant and Richard M. Mills were tried jointly. The jury acquitted Mills but found appellant guilty. She appeals from the conviction and the trial court's refusal to grant her a new trial. She cites four grounds of error:

(1) Ruling of the trial court that appellant and Mills must join in exercising their peremptory challenges.

(2) Error of the trial court in giving Instruction No.

8 [1] and in refusing to give appellant's requested Instruction No. A. [2]

(3) Permitting a police officer to testify to an extrajudicial confession made to him by appellant after counsel was retained.

(4) Permitting evidence to be received against appellant of a prior narcotics offense.

During the early morning hours of March 19, 1963, the automobile in which appellant was riding as a passenger in the rear seat, right side, was stopped by the Reno police department for excessive speed. While one officer was talking to the driver on the left side of the auto, another officer observed two objects thrown from the right rear window. The objects proved to be a Kleenex tissue in which there were two marijuana cigarettes and a small canister containing marijuana.

[Headnote 1]

1. At the joint trial of appellant and Richard M. Mills, she claimed each of them was entitled to four peremptory challenges. The trial court required the defendants to join in the challenges and limited them to four peremptory challenges jointly, citing as authority NRS 175.015. [3] Appellant contends this statute to be unconstitutional, or if constitutional, directory rather than mandatory. This court recently ruled that the

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[1] Instruction No. 8. "Within the meaning of the law, a person is in possession of a narcotic when it is under his dominion and control, and, to his knowledge, either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him, provided, however, that two or more persons may have joint possession of a narcotic if jointly and knowingly they have the dominion, control and exclusive possession described."

[2] Instruction No. A. "Within the meaning of the law, a person is in possession of narcotic drugs when it is under his dominion and control and to his knowledge either is carried on his person or in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him."

[3] NRS 175.015. "Defendants cannot sever in challenges. When several defendants are tried together, they cannot sever their challenges, but must join therein."

statute is constitutional. Anderson v. State, 81 Nev. 477, 406 P.2d 532 (1965), citing Stilson v. United States, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919), and State v. McClear, 11 Nev. 39 (1876).

[Headnote 2]

In arguing that NRS 175.015 is directory and not mandatory, appellant cites Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), contending there must be "per capita equality of representation," in the selection of a jury. She also cites Cockrell v. Dobbs, 238 Ark. 348, 351, 381 S.W.2d 756 (1964); Turner v. State, 87 Fla. 155, 99 So. 334 (1924); and State v. Harvey, 128 S.C. 494, 122 S.E. 860 (1924). Those authorities are inapposite. Anderson v. State, supra. The statute uses mandatory words. NRS 175.015.

[Headnote 3]

2. Appellant next claims error in the giving of Instruction No. 8, citing People v. Winston, 46 Cal.2d 151, 293 P.2d 40 (1956). Instruction No. 8 is approved in Winston, but enlarged by the court below to include multiple defendants. Winston concerned a single defendant. We find no error in the giving of the instruction.

[Headnote 4]

3. Appellant urges it to be error that the trial court allowed a police officer to testify to a conversation with her in which she admitted she had the marijuana in her purse when stopped; that she took it out and handed it to someone. The conversation occurred while she was on bail awaiting trial, after a preliminary examination and while represented by counsel. The record indicates that appellant went voluntarily to the police officer to make the statement. There is no evidence in the record indicating secret interrogation or the deliberate elicitation of evidence by the officer. We find the testimony of the officer to be admissible. Cf., Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

4. Finally appellant urges error in the admission of evidence of a prior narcotics offense. This testimony was first elicited from appellant while being cross-examined

by the prosecuting attorney. No objection to the evidence was made by her counsel. We find no error.

Affirmed.

Thompson, J., and Zenoff, D. J., concur.

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ROBERT VINCIL CARTER, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5014

June 15, 1966 415 P.2d 325

Appeal from judgment of the Eighth Judicial District Court; John F. Sexton, Judge.

The defendant was convicted in the trial court of misdemeanor of receiving stolen goods, and defendant appealed. The Supreme Court, Thompson, J., held that statute making possession of property wrongfully taken from another within six months from the date of the taking sufficient for conviction for misdemeanor of receiving stolen goods, unless the property was a gift, the amount paid represented fair and reasonable value, or the buyer knew or made sufficient inquiries about seller or reported transaction to appropriate authorities violates due process on ground that presumption of guilt from possession is arbitrary.

Reversed and defendant discharged.

Mendoza, Foley & Garner, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, of Carson City; *Edward G. Marshall,* District Attorney of Clark County, and *Monte J. Morris,* Deputy District Attorney, of Las Vegas, for Respondent.

1. Constitutional Law.

Due process limits power of legislature to make proof of one fact or a group of facts evidence of existence of the ultimate fact on which guilt is predicated. U.S.C.A.Const. Amend. 14.

2. Constitutional Law; Receiving Stolen Goods.

Statute making possession of property wrongfully taken from another within six months from the date of the taking sufficient for conviction for misdemeanor of receiving stolen goods unless the property was a gift, the amount paid represented fair and reasonable value, or the buyer knew or made sufficient inquiries about seller or reported transaction to appropriate authorities violates due process on ground that presumption of guilt from possession is arbitrary. NRS 205.280; Const. art. 1, § 8; U.S.C.A.Const. Amend. 14.

OPINION

By the Court, Thompson, J.:

This appeal challenges the constitutionality of NRS 205.280 [1] which defines the misdemeanor of receiving stolen goods and authorizes a conviction upon showing that the defendant had possession of the goods within 6 months of the date of wrongful taking, unless specified circumstances are shown to exist. Carter was convicted and sentenced under this statute. He contends that the statutory presumption of guilt from mere possession within the 6 months period is constitutionally impermissible since there is no reasonable connection between possession (the fact proved) and knowledge that the goods were stolen (the fact presumed), thereby violating due process requirements. Tot v. United States, 319

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[1] NRS 205.280 reads: "Receiving stolen goods: When a gross misdemeanor.

"1. Every person who receives or buys property that has been wrongfully taken from any other person in any manner, whether or not the act of wrongful taking occurred outside the State of Nevada, and whether or not the property was bought or received from a person other than the person wrongfully taking such property, shall be guilty of a gross misdemeanor.

"2. If such person is shown to have had possession of such property within 6 months from the date of the wrongful taking, such possession shall constitute sufficient evidence to authorize conviction, unless: (a) The property was a gift; or (b) The amount paid for the property represented its fair and reasonable value; (c) The person buying such property knew or made inquiries sufficient to satisfy a reasonable man that the seller was in a regular and established business dealing in property of the description of the property purchased; or (d) The person receiving or buying such property has simultaneously with the receipt or sale reported the transaction to the appropriate local police authorities."

U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1942); United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965). Appellant also contends that the statute is constitutionally infirm because it compelled him to testify and explain his possession of the goods in violation of his Fifth Amendment privilege against self incrimination. On this point, his argument rests upon the dissenting opinions of Justice Black and Justice Douglas in United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965) and the concurring opinions of those justices in United States v. Romano, supra.

Only last year this court, relying upon New Jersey case authority [State v. Giordano, 121 N.J.L. 469, 3 A.2d 290 (1939); State v. Lisena, 129 N.J.L. 569, 30 A.2d 593 (1943); State v. Laster, 69 N.J.Super. 504, 174 A.2d 486 (1961)], declared NRS 205.280 constitutional, stating, inter alia: "The statute does not shift the burden of proof, nor deprive a defendant of due process, but is merely an evidentiary rule whereby the accused must go forward with an explanation to rebut the permissive presumption." Cox v. State, 81 Nev. 48, 398 P.2d 538, 539 (1965). Cox was decided before the United States Supreme Court handed down the opinions in United States v. Gainey, supra, and United States v. Romano, supra. In Gainey, by a vote of 7 to 2, the High Court upheld the constitutionality of 26 U.S.C. § 5601 (b) (2)

against the attack that it violated due process, while in Romano a unanimous court struck down a companion section 26 U.S.C. § 5601(a) (1), on due process grounds distinguishing Gainey. The guide lines established by Gainey and Romano have caused us to reconsider our holding in Cox v. State, supra, and we now conclude that Cox was erroneously decided.

[Headnotes 1, 2]

1. The due process clause of the Fourteenth Amendment sets limits upon the power of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1942). Our inquiry is whether NRS 205.280 transgresses those limits. As stated by the

court in Tot, "There must be a rational connection between the facts proved and the fact presumed * * *," to satisfy the requirements of due process. In Romano, supra, the court applied that test to a charge that the defendant was in "possession, custody and control" of an illegal still in violation of 26 U.S.C. § 5601(a) (1) and the statutory provision of 26 U.S.C. § 5601(b) (1) that "Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without a jury)." The issue was whether proof of the defendant's presence at the still site was evidence sufficient to authorize a conviction that he was in possession, custody or control of an illegal still. The court wrote: "The crime remains possession, not presence, and, with due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter." Mr. Justice White carefully pointed out that the defendant's presence at the still site was as compatible with other activities there as it was with possession of an illegal still and was, therefore, "too tenuous to permit a reasonable inference of guilt."

The same rationale applies with equal force to NRS 205.280. The legislature has provided that the defendant's mere possession of stolen goods within 6 months of the wrongful taking is evidence sufficient to authorize a conviction of the crime of receiving stolen goods with the knowledge that they were stolen. Though possession is relevant and admissible evidence, it does not necessarily point to guilt. The defendant may have purchased the goods for fair value, or they may have been given to him. In either case, he would not be guilty under the statute. Clearly, the statutory presumption of guilt from possession is arbitrary and cannot satisfy due process requirements, nor may it be said, in these circumstances, that the presumption meets the burden

cast upon the state to prove the defendant's guilt beyond a reasonable doubt. We hold that NRS 205.280 violates the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clause of Art. 1, § 8 of the Nevada Constitution. The case of State v. Kurowski, 210 A.2d 873 (R.I. 1965), relied upon by the prosecution, was decided under a statute quite different than ours and is inapposite. For other cases discussing this general problem, see Annot., 13 L.Ed.2d 1138.

2. It is unnecessary to consider other assigned errors and, particularly, whether the statute violates the rule against compelled testimony mandated by the Fifth Amendment.

Reversed and defendant discharged.

Zenoff, D. J., and Barrett, D. J., concur.

ROBERT E. LYERLA, Appellant, *v.* PEGGY SUE RAMSAY, Respondent.

No. 5004

June 17, 1966 415 P.2d 623

Appeal from order of the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Divorced wife made a motion to modify child custody provision giving her custody of son for ten months of year and divorced husband custody for two months during the summer. The lower court entered an order giving the divorced wife full custody and limiting the divorced husband to only right of visitation, and the divorced husband appealed. The Supreme Court, Thompson, J., held that evidence was insufficient to show such change of circumstances as to entitle divorced wife to full custody.

Affirmed in part and reversed in part.

Robert L. Gifford and *Tad Porter,* of Las Vegas, for Appellant.

Foley Brothers, of Las Vegas, for Respondent.

1. Divorce.
   Child custody adjudications by divorce decree are modifiable on showing of changed conditions affecting welfare of child.
2. Divorce.
   Where Kansas court was without power to change child custody provisions of divorce decree because there was no showing of changed circumstances, Nevada court was free to disregard Kansas order providing for change of custody.
3. Divorce.
   Welfare of son of divorced parents was paramount consideration in deciding motion for change of custody.
4. Courts.
   Where son of divorced parents had lived in Nevada for several years after Kansas divorce, Nevada court was preferred forum for adjudication of motion for change of custody.
5. Divorce.
   Evidence was insufficient to show change of circumstances which would justify change of custody of son of divorced parents to give divorced wife full custody of son for twelve months of year instead of ten months with divorced husband to have custody for two months during summer.
6. Divorce.
   Divorced husband should not have been required to pay divorced wife her travel expenses for taking their son from Kansas to Nevada, where she removed son from Kansas in violation of Kansas court order before it was determined that order was invalid.

OPINION

By the Court, Thompson, J.:

[Headnote 1]

This appeal concerns post divorce child custody litigation in the courts of Kansas and Nevada. At the various times involved each court had due process jurisdiction to rule, as both parents appeared and the child was present within the state where a change in custody was sought. Halvey v. Halvey, 330 U.S. 610 (1947); cf. May v. Anderson, 345 U.S. 528 (1953). Each state, in rearranging custody, purported to act upon a change of circumstances occurring since the last custody order [in Kansas and Nevada child custody adjudications are modifiable upon a showing of changed conditions affecting the welfare of the child. Bierce v. Hanson, 171 Kan. 422, 233 P.2d 520 (1951); Osmun v. Osmun, 73 Nev.

112, 310 P.2d 407 (1957)], thereby avoiding possible conflict with the full faith and credit clause of the United States Constitution which does not foreclose a custody modification based upon a subsequent change of circumstances. Kovacs v. Brewer, 356 U.S. 604 (1958).

We say “possible conflict” advisedly, for the United States Supreme Court has not yet precisely defined the protection afforded custody decrees by the full faith and credit clause [Ford v. Ford, 371 U.S. 187 (1962)], nor shall we attempt to do so here.

On December 7, 1959, a Kansas court granted Peggy Lyerla (now Ramsay) a divorce from her husband Robert, and custody of their two minor children, Bobby age 4 and Linda age 6, but allowed Robert weekend visitation rights and two months summer custody. On February 17, 1961, the Kansas court denied Robert's motion for a change of custody and granted Peggy's request to move the children to Las Vegas, Nevada, where she and her new husband established and still maintain a permanent residence. Since the summer of 1962 when Peggy denied Robert summer custody, they have been in continual litigation over the custody of their son Bobby.

The father sought to enforce his custodial rights under the Kansas decree by a habeas corpus proceeding in Nevada filed in June 1962. It is not useful to here record the full story of the subsequent litigation. [1] On three occasions, first in August 1962, then in June 1963, and finally on July 6, 1964, the Nevada court considered the opposing contentions of changed circumstances. Each time Nevada supported the Kansas custody disposition. On each occasion the father's custodial rights were recognized and enforced, and custody for ten months of the year remained with the mother. On July 28, 1964, just 22 days after the last mentioned Nevada adjudication, the Kansas court granted the father's modification motion and awarded him full custody of Bobby. [2] The mother disobeyed the court, took Bobby

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[1] The record shows at least 26 separate appearances before six Nevada judges over a three year period.

[2] Bobby was present in Kansas visiting his father. The mother appeared and contested the motion to modify.

from the father and returned to Las Vegas, Nevada, where she sought full custody. On June 22, 1965, the Nevada court gave the mother full custody and limited the father to visitation at the Las Vegas home. The appeal is from this order.

1. At the outset we noted that on each occasion when the custody of Bobby was rearranged the court purported to do so because of a change of circumstances. Yet there is nothing in the record to show that a change of circumstances occurred between July 6, 1964, when Nevada ruled, and July 28, 1964, when Kansas vested full custody in the father. Therefore, it is clear that Kansas did not give the Nevada order the protection of full faith and credit. The very circumstances Kansas considered had been litigated and decided in Nevada just 22 days earlier. [3]

[Headnote 2]

If full faith is to be accorded a child custody order, Kansas was without power to change custody on July 28, 1964, absent a showing of changed circumstances. That showing was not made. Therefore, we are free to disregard the Kansas order. State Tax Comm'n of Utah

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[3] The Kansas Supreme Court narrowly construed the Nevada order as not touching custody and therefore not raising the issue of full faith. Lyerla v. Lyerla, 195 Kan. 259, 403 P.2d 989 (1965). Respectfully we disagree. But for the matter of custody, the Nevada court would not have acted. Custody was the core of that hearing. The very facts related as controlling on the face of the Nevada court's decree—Bobby's alleged maladjustment and his entry into military school—are the identical facts which Kansas looked to as "changed circumstances." No new circumstances were considered by Kansas.

Nevada considered all existing circumstances relevant to Bobby's custody. It was alleged before us that the father orally withdrew his prior motion for full custody. Even assuming such an informal, unrecorded action could be noticed, it is immaterial. The crux of custody is a consideration of changed circumstances. So considering, a court may be presumed to be deciding the total welfare of the child. Though Nevada here centered on summer visitation, it obviously also considered the fall by ordering Bobby returned. Certainly, the father could not *preclude* the court from so acting; rather he could only present circumstances which should dictate otherwise.

Finally, the father was fully represented and had notice of every Nevada appearance. Both counsel and the record so reveal. Cf. Lyerla v. Lyerla, supra, 463 P.2d at 992.

v. Cord, 81 Nev. 403, 404 P.2d 422 (1965); Bowditch v. Bowditch, 314 Mass. 410, 50 N.E.2d 65 (1943).

[Headnotes 3, 4]

2. On the other hand, if the Nevada order of July 6, 1964, is not to be given the protection of full faith and credit by the Kansas court, still Kansas should have abstained on the principle of comity for Nevada had become the child's established home. The welfare of Bobby is the paramount consideration in deciding custody. Bobby moved from Kansas in 1961 and has since been living in Nevada. The evaluation of his physical, emotional and educational needs should now be made by the court having maximum access to the relevant evidence. The Nevada court can best hear witnesses and examine the environment in which Bobby is living [Ratner, Child Custody in a Federal System, 62 Mich.L. Rev. 795 (1964)] and is, in these circumstances, the preferred forum for adjudication, though both Kansas and Nevada possess the basic power to decide. Therefore, we turn to review the pertinent Nevada orders.

[Headnote 5]

3. The record shows that the order of July 6, 1964, was made after a full hearing at which the court considered Bobby's alleged maladjustment, his entry into military school and other

matters bearing upon the issue of custody. On the other hand, the later hearing of June 22, 1965, was concerned solely with support arrearages and expense matters. Evidence was not received which would authorize a change in the prior custody order of July 6, 1964. Therefore we reverse the Nevada custody order of June 22, 1965, as no showing was made to justify it; we refuse to recognize the Kansas order of July 28, 1964, for the reasons mentioned; and we reinstate the Nevada custody order of July 6, 1964, that is, the mother shall have custody of Bobby subject to the right of the father to have Bobby's custody for two months during the summer. The father shall pay all transportation expense for Bobby incident to the exercise of custodial rights.

[Headnote 6]

We also reverse that part of the June 22, 1965, Nevada order which required the father to pay $400.23 to Peggy Ramsay for her travel expenses incurred in taking Bobby to Nevada. We cannot condone the recovery of travel expense, as Peggy removed Bobby from Kansas in violation of the Kansas order of July 28, 1964, and before its validity had been determined.

We affirm that part of the Nevada order of June 22, 1965, adjudging the father to be $1,012.50 in arrears in child support payments and ordering him to pay that sum. The record supports that finding.

We recognize that the practical effect of our decision allows Bobby to be returned to Kansas for two months in the summer. This may again provoke a new round of bitter litigation in the Kansas court. We, as Kansas, worry over Bobby's future. His welfare must govern. We believe it unwise in the instant circumstances to permanently deprive him of the company of either parent. Of course, we must rely in part upon Kansas viewing this matter as we do and recognizing that, since Bobby's established home is in Nevada, his welfare is best reviewed here. We would abstain from exercising jurisdiction and honor the decision of Kansas were the situation reversed.

Waters, D. J., concurs.

Wines, D. J., concurring:

To the contention that the ruling of the Nevada court on July 6, 1964, determined the same issues raised by the motion in the Kansas court and is res adjudicata as to the question of custody and should be given full faith and credit, the Kansas Supreme Court answers and, I think, correctly:

“Again, reference must be made to the sequence of events. After Robert filed his motion of December, 1963, the Nevada court continued hearing thereon until after the end of the school year, and this continuance was still in effect on July 2, 1964, when the present action was commenced in Crawford County, Kansas.

"Meanwhile, however, and after Robert left Las Vegas with Bobby in June, 1964, Peggy had filed a motion in Nevada to cancel Bobby's visit to Kansas that year so that he might enroll in Elsinore's summer camp program. This motion was accompanied by affidavits of school officials attesting to Bobby's school record and the advisability of his attending camp. On July 6, 1964, four days after Robert's motion was filed in Crawford County, the Nevada District Court, without notice to Robert, entered the order which Peggy claims is res adjudicata.

"The phrasing of this order, viewed in the context of all attendant circumstances, permits little if any, doubt that it was made in response to Peggy's motion to terminate the summer visit. The limitations of space preclude us from reproducing the order in full but, in brief summary, it may be said that its pertinent provisions relate to summer visitation rights, to the parents' dispute over their son attending summer camp, and to affidavits and reports from Elsinore officials.

"We believe the Nevada court made no pretense of ruling on Robert's motion for change of custody, since its order contains no reference whatever thereto. Nor are we entitled to infer from any language used that the court intended to deal with the problem of permanent custody. Indeed, the presumption is quite the contrary, for Robert had not been advised that his motion was to be heard, although, as an interested party, he would be entitled to notice. The presumption is that public officers will perform their duties in a rightful manner and will not act improperly. We may not assume that the district court in Nevada would take the liberty of conducting a hearing on Robert's motion without giving him an opportunity to appear and be heard."

Despite my agreement with these findings and the rule on this issue, I am in accord with the conclusion appearing in Justice Thompson's opinion: "* * * Kansas should have abstained on the principle of comity for Nevada had become the child's established home. The welfare of Bobby is the paramount consideration in deciding custody. Bobby moved from Kansas in 1961 and has since been living in Nevada. The evaluation of

his physical, emotional, and educational needs should now be made by the court having maximum access to the relevant evidence."

This was the case law of Kansas prior to the enactment of K.S.A. 60-1610 except that the court spoke of domicile rather than "established home." See Lyerla v. Lyerla, 195 Kan. 259, 403 P.2d 989, 992.

I choose the "established home doctrine" not because it is the answer. Courts may disagree as trenchantly on what facts show an established home as they now do on what constitutes a

change of circumstances. It has the virtue, however, of "maximum access to relevant evidence." Nor does it prevent a court having jurisdiction of the parents and the child, providing peremptory or emergency relief. Finally, finding the established home is a simple task when compared with the perplexities of finding a change of circumstances.

I concur in the orders made in Justice Thompson's opinion.

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82 Nev. 257, 257 (1966) Schnepp v. State

DONALD JAMES SCHNEPP, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5030

June 22, 1966 415 P.2d 619

Appeal from the Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

The defendant was convicted of first-degree burglary. The trial court rendered judgment, and the defendant appealed. The Supreme County, Zenoff, D. J., held that police officers had probable cause to arrest defendant without warrant, where burglary and theft of television set and departure of suspect from scene in automobile had been reported to them, defendant's automobile was the only vehicle seen by them leaving the scene minutes after the report, this automobile was moving very slowly and its Oregon license plates were wired on, the two passengers were crowded against the automobile doors, and

82 Nev. 257, 258 (1966) Schnepp v. State

officers stopped automobile for check and looked through window and saw television set.

Affirmed.

David R. Hoy, of Reno, for Appellant.

Harvey Dickerson, Attorney General, *William J. Raggio,* District Attorney, and *David G. Parraguirre,* Deputy District Attorney, Washoe County, for Respondent.

1. Criminal Law.

Ordinarily, burden of showing illegal search and seizure is on moving party; however, when defendant proves that he was arrested without a warrant, he establishes prima facie case and burden rests on state to

show proper justification.

2. Criminal Law.

   Error in placing on defendant the burden of showing probable cause for arrest without warrant was harmless, where defendant established probable cause himself by examining arresting officers.

3. Arrest.

   "Reasonable cause for arrest" is such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that person is guilty; this includes suspicious conduct of defendant in presence of officers.

4. Arrest.

   Police officers had probable cause to arrest defendant without warrant, where burglary and theft of television and departure of suspect from scene in automobile had been reported to them, defendant's automobile was the only vehicle seen by them leaving the scene minutes after the report, this automobile was moving very slowly and its Oregon license plates were wired on, the two passengers were crowded against the automobile doors, and officers stopped automobile for a check and looked through window and saw television set.

5. Searches and Seizures.

   Looking through a window does not constitute an unreasonable search.

6. Criminal Law.

   An instruction in language of statute that every person who shall unlawfully enter any room shall be deemed to have entered same with intent to commit crime therein, unless such unlawful entry shall be explained by testimony satisfactory to jury to have been made without criminal intent was not a comment by court on defendant's refusal to testify. NRS 205.065.

7. Criminal Law.

   Instruction that one who is found in possession of property that was stolen from burglarized premises is bound to

explain such possession in order to remove effect of that fact as a circumstance pointing to his guilt and that if he has reasonable opportunity to show that his possession was honestly acquired and he refuses or fails to do so, such conduct is a circumstance that tends to show his guilt was not a comment on defendant's failure to testify, since instruction referred to conduct or comments of defendant at or before time of his arrest or even thereafter, but not to testimony in the courtroom.

OPINION

By the Court, Zenoff, D. J.:

At approximately 9:00 p.m., April 23, 1965, the manager of Jimmy's Motel, Reno, Nevada, observed a man leaving an unoccupied room in the motel carrying a large object.

The manager ran to the room and found the television set missing and called the police.

The police dispatcher immediately broadcast the reported burglary, gave the location of the crime, stated that a television set had been taken, and reported that the culprit had left in an automobile. An officer in the immediate vicinity responded. Some two to five minutes after the broadcast, the officer arrived at the scene and observed defendant's automobile approximately one-half block west of the motel moving at a slow speed. This was the only car on the street at the time, had an Oregon license plate tied loosely on by wire, and its occupants were seated crowded against their respective doors. After radioing for assistance, the officer stopped defendant's car. The defendant came running back to the police car, but the officer worked his way up to defendant's car to get a better look at the passenger. When alongside, the officer observed a television set partially covered with a sweater on the front seat. Defendant stated, “I don't know who it belongs to.”

Two other officers came to the aid of the officer who stopped the car, and they requested the passenger in defendant's automobile to remove himself from the car. At that time, one of the officers also observed the TV set on the seat.

The defendants were then arrested for first degree burglary. They were subsequently tried and convicted. Appellant Schnepp here appeals his conviction.

↓ 82 Nev. 257, 260 (1966) Schnepp v. State ↓

1. Prior to the trial appellant moved to suppress as evidence, the TV set, certain tools, and personal clothing and effects, contending there was no probable cause for his arrest, which arrest was made without a warrant. At the hearing the trial court placed the burden of proceeding upon the appellant.

[Headnotes 1, 2]

Ordinarily, the burden of showing an illegal search and seizure is on the moving party. Lyles v. State, 330 P.2d 734 (Okla. 1958). However, when a defendant proves that he was arrested without a warrant, he establishes a prima facie case and the burden rests on the state to show proper justification. Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23 (1956); People v. Dewson, 150 Cal.App.2d 119, 310 P.2d 162 (1957); See Beck v. Ohio, 379 U.S. 89 (1964).

Thus, the trial court erred in placing the burden on the defendant when it was that of the prosecution to show probable cause for the arrest. The error was harmless, however, because the defendant, in carrying the responsibility erroneously placed on him, established probable cause himself by examining the arresting officers. No prejudice is shown by appellant, who contends his procedural inability to cross-examine the police officers prevented his impeachment possibilities. [1]

[Headnotes 3-5]

2. Reasonable cause for arrest has been defined as such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that

the person is guilty. People v. Dewson, supra. This includes suspicious conduct of the defendant in the presence of the officers. Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, 38 (1956). The probable cause upon which the police officers testified consisted of the following facts: (1) They had heard the report of the burglary, (2) a television set had been taken, (3) the suspect left in an automobile,

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[1] Appellant was assisted in examining the officers by the court. Further, appellant made no attempt to establish the policemen as hostile, a possibility that might have given him the right to ask leading questions.

(4) defendant's car was the only car seen by them minutes after the report near the scene of the crime, (5) the car was moving very slowly, (6) the car had an Oregon license plate wired on, (7) the two passengers were crowded against their respective doors, and (8) the car was going away from the scene of the crime. Upon these circumstances the officer stopped the car for a check. When the defendant was stopped, he aroused the officer's suspicion further by running back to the police car. When the officer was able to see into the defendant's car, he observed a television set on the front seat. Since looking through a window does not constitute an unreasonable search the officers were entitled to act upon what they saw and arrest the defendant. People v. Martin, 45 Cal.2d 755, 290 P.2d 855 (1955); Whitley v. State, 79 Nev. 406, 386 P.2d 93 (1963).

[Headnote 6]

3. Appellant assigns as error the following instruction given by the court:

"Every person who shall unlawfully enter any room shall be deemed to have entered the same with intent to commit a crime therein, unless such unlawful entry shall be explained by testimony satisfactory to a jury to have been made without criminal intent."

Appellant complains that this instruction is a comment by the court on the defendant's refusal to testify.

This instruction is in the same language of NRS 205.065. The statute and instruction given in the language of this statute has been held constitutional. McNeeley v. State, 81 Nev. 663, 409 P.2d 135 (1965).

[Headnote 7]

4. It is further contended by appellant that Instruction No. 18 also is comment by the court on defendant's failure to testify. [2] As we read it, the instruction refers

[2] Instruction No. 18. "The mere possession of stolen property, however soon after the taking, unexplained by the person having possession, is not sufficient to justify conviction. It is, however, a circumstance to be considered in connection with other evidence in determining the question of innocence or guilt. If you should find from the evidence that a burglary was committed on the premises involved in this case and that thereafter the defendant was found in possession, or claimed to be the owner, of property

to the conduct or comments of the defendant at or before the time of his arrest or even thereafter, but not to testimony in the courtroom. People v. McFarland, 58 Cal.2d 748, 26 Cal.Rptr. 473, 376 P.2d 449 (1962); People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400 (1939); People v. Giffis, 218 Cal.App.2d 53, 32 Cal.Rptr. 215 (1963); see Griffin v. United States, 380 U.S. 609 (1965) and Fernandez v. State, 81 Nev. 276, 402 P.2d 38 (1965).

The court instructed the jury that no person can be compelled to be a witness against himself, and the prosecutor did not misrepresent Instruction No. 18 in his argument to the jury.

Our conclusion on this point is not in conflict with State v. Carter, 82 Nev. 246, 415 P.2d 325 (1966). In that case possession alone could authorize a conviction unless the defendant at trial testified to his acquisition of the property. Carter held unconstitutional the legislative expression that the fact of possession, unexplained by testimony at trial, constituted evidence sufficient to convict. NRS 205.280(2). In this case, the possession of stolen property unexplained at the time of arrest was a circumstance to be considered with other circumstances in determining the question of innocence or guilt by the jury, and the instruction given merely refers to those pretrial statements or conduct of the defendant established by the prosecution. The question is not here

stolen from the burglarized premises, such a fact would be a circumstance tending in some degree to show guilt, although not sufficient, standing alone and unsupported by other evidence, to warrant your finding him guilty. In addition to proof of possession of such property there must be proof of corroborating circumstances tending of themselves to establish guilt. Such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of the defendant, and any other proved circumstance tending to show the guilt of the accused.

"One who is found in the possession of property that was stolen from burglarized premises is bound to explain such possession in order to remove the effect of that fact as a circumstance, to be considered with all other evidence, pointing to his guilt; and if he gives a false account of how he acquired that possession or, having reasonable opportunity to show that his possession was honestly acquired, he refuses or fails to do so, such conduct is a circumstance that tends to show his guilt."

raised that the defendant refused to explain his possession in the exercise of his constitutional right to remain silent. Here, defendant stated when arrested, "I don't know who it belongs to." The fact of his possession and his failure to reasonably account for such possession were, as the instruction properly set out, circumstances to be considered by the jury in determining guilt.

Affirmed.

Thompson and Collins, JJ., concur.

METAL-MATIC, INC., a Minnesota Corporation, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark, and THE HONORABLE GEORGE E. MARSHALL, Judge Thereof, Respondents.

No. 5070

June 23, 1966 415 P.2d 617

Original proceedings in prohibition.

Proceeding brought by a Minnesota corporation that manufactured boat railing that allegedly collapsed and caused the decedent to drown to prevent trial court from proceeding further in tort action brought by decedent's heirs. The service had been made on the Minnesota corporation under the "long-arm" statute in action filed by decedent's heirs against the railing manufacturer and the boat manufacturer. The Supreme Court, Zenoff, D. J., held that Minnesota corporation could be properly served with process under "long-arm" statute where manufacturer could have foreseen that its product, if defective, could cause injury in Nevada.

Writ denied.

Elwin C. Leavitt and *S. Mahlon Edwards,* of Las Vegas, for Petitioner.

Singleton, De Lanoy & Jemison, Gregory & Gregory, Morse & Graves, Jones, Wiener & Jones, of Las Vegas, for Respondents.

1. Corporations.
   Minnesota corporation that manufactured boat railing that allegedly collapsed and caused decedent to drown could be properly served with process under "long-arm" or "one-act" statute where manufacturer could have foreseen that its product, if defective, could cause injury in Nevada. NRS 14.080.
2. Corporations.
   Even though boat with alleged defective railing had been purchased from independent middleman and someone other than manufacturer of railing had shipped product into Nevada, manufacturer of boat railing, Minnesota corporation, could be served under "long-arm" or "one-act" statute. NRS 14.080.
3. Courts.
   Nevada may acquire jurisdiction over foreign manufacturer of product which manufacturer reasonably may expect to enter interstate commerce, which does enter interstate commerce, and which because of an alleged defect, causes injury in Nevada to plaintiff. NRS 14.080.

OPINION

By the Court, Zenoff, D. J.:

Petitioner, a foreign corporation and codefendant in a tort action, seeks a writ of prohibition against the Eighth Judicial District Court claiming a lack of in personam jurisdiction. We deny the writ and affirm the trial court's denial of a motion to quash service of process.

This matter arose from a drowning in Lake Mead allegedly caused, at least in part, by a defective boat railing. The railing was manufactured by petitioner, a Minnesota corporation, which contends it never directly or indirectly solicited or conducted any business in the State of Nevada and, therefore, is not amenable to personal service in Nevada.

On May 17, 1963, John J. Caselli, and others, purchased a Kayot pontoon boat from Byrd's Pontoon Boats, a retailer of boats in Clark County. Two months later, while standing in the rear of the boat, Alphonse Caselli, the father of John, fell into the water and drowned. Action was commenced alleging that the railing at the rear of the boat had given way as Alphonse Caselli leaned against it and that his drowning resulted.

The heirs of Alphonse Caselli brought suit against Byrd, the distributor of the boat, Kayot, Inc., the manufacturer of the boat, a Minnesota corporation, and Metal-Matic, Inc., a Minnesota corporation, manufacturer of the railing. The boat with railing was assembled in Minnesota and shipped from there to the distributor in Clark County, Nevada.

[Headnote 1]

Plaintiff in the lawsuit contends that Metal-Matic can properly be served with process

pursuant to NRS 14.080, the so-called "one-act" or "long arm" statute of Nevada.

"NRS 14.080. Products liability: Service of process on foreign manufacturers, producers, suppliers.

"1. Any company, firm, partnership, corporation or association created and existing under the laws of any other state, territory, foreign government or the Government of the United States, which manufactures, produces, makes, markets or otherwise supplies directly or indirectly any product for distribution, sale or use in this state may be lawfully served with any legal process in any action to recover damages for injury to person or property resulting from such distribution, sale or use in this state in the manner prescribed in this section."

Plaintiff asserts that by supplying a component part to a product which, in the course of interstate commerce, could foreseeably be expected to find its way into Nevada, and injury resulted in some manner from the product, that the fact of injury was sufficient to place the manufacturer of the product within NRS 14.080.

Long arm statutes seek to provide one injured in the forum state with a method of acquiring jurisdiction over foreign corporations whose defective product within the forum state has caused injury. However, to satisfy due process, a court must have the power to subject a foreign defendant to its jurisdiction. Traditionally, in addition to the opportunity to appear and defend (i.e., proper notice), in personam power has depended upon a defendant's "presence" in the forum state, constructive or actual. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877). What constitutes such presence under

modern concepts has been examined by the U.S. Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 90 L.Ed. 95, 66 S.Ct. 154 (1945); McGee v. International Life, 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199 (1957); Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958). These cases concerned a right of action on causes arising from commercial transactions. Here, we are faced with a cause of action in tort.

Construction of such a statute was provided by the Illinois Supreme Court in Gray v. American Radiator Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961). It held that a statute providing that a nonresident who commits a tortious act within Illinois submits to the jurisdiction of that state and does not violate due process. [1] (But see New York's Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68 (1965), combined cases.)

The rationale of Gray, supra, rules this case. In Gray, the defendant manufactured a safety valve in Ohio and sold it to an independent company outside of Illinois. The valve was attached to a water heater in Pennsylvania and later sold to an Illinois consumer. An Illinois woman was injured in an explosion allegedly caused by the negligence of the manufacturer in Ohio. Illinois process was served in Ohio. The Illinois Supreme Court held that the "tortious act" (as prescribed in their statute), had been committed in Illinois because the injury occurred there.

[Headnote 2]

The injury occurred in Illinois and was a minimum contact with that state satisfying due process. This was considered sufficient to meet the constructive presence requirement. In our case, a manufacturer of a component part of a boat can presume or reasonably foresee that its potential market would be Lake Mead or Lake Tahoe, in Nevada, as well as the lake areas of Minnesota, Wisconsin, Michigan, or in any other part of the United States where navigable lakes or waters are located. It should not matter that the purchase was

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[1] Ill. Laws 1955, pp. 2238, 2245-46, Ill.Rev. Stat. c-110, § 17(1).

made from an independent middleman or that someone other than the defendant shipped the product into this state. Gray, supra, at 766.

Illinois was satisfied that "tortious act" meant "injury occurring within that state." Our statute says directly what the Illinois and New York courts had to interpret. NRS 14.080 specifically provides for service of process upon a foreign corporation whose product has caused *"injury * * * in this state."*

Despite some statements in Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958), the spirit of Pennoyer is almost buried. The parade away from its confines, from Hess v. Pawloski, 274 U.S. 352, 71 L.Ed. 1091, 47 S.Ct. 632 (1927), to the present, coincides with the rapid development of communications, travel, expansion of nation-wide markets, and that corporate defendants are more likely to have money to spend in defense of lawsuits than plaintiffs have to prosecute their lawsuits.

[Headnote 3]

Where it is reasonably foreseeable that a product will enter the flow of commerce, the manufacturers of that product can expect to be sued in any state where the product is alleged to have caused an injury. This is without regard to how many hands have touched the product from its production to the time or place of the injury. Whether it be labeled a minimal contact within the forum state if the litigation concerns a commercial transaction, or a one act tort, the effect is the same, i.e., jurisdiction in the forum state attaches. This has become a fact of legal life. It appears that the attractions of the most convenient forum will eventually be the jurisdictional test to be applied. 66 Columbia Law Rev. 199 (1966); 1963 U. of Ill. Law Forum 533 (1963); 25 U. of Chicago Law Rev. 569 (1957-58); Owens v. Superior Ct. of L.A. Co., 52 Cal.2d 822, 345 P.2d 921 (1959); Mardenborough v. Gov't of Virgin Islands, 235 F.Supp. 468 (1964); Atkins v. Jones & Laughlin Corp., 258 Minn. 571, 104 N.W.2d 888

(1960).

We conclude that under NRS 14.080 Nevada may acquire jurisdiction over a foreign manufacturer of a

product which it reasonably may expect to enter interstate commerce, which does enter interstate commerce, and because of an alleged defect, causes injury in Nevada to the plaintiff.

Writ denied.

Thompson and Collins, JJ., concur.

MARY JAEGGI, Appellant, *v.* ROBERT O'KRAKEL, Respondent.

No. 5063

June 27, 1966 416 P.2d 7

Appeal from judgment of the Eighth Judicial District Court, Clark County; John F. Sexton, Judge.

Action for personal injuries to wife and wrongful death of husband, who were both struck by defendant's automobile while crossing highway. The trial court entered judgment on jury verdict for defendant, and plaintiff appealed. The Supreme Court held that where evidence was directly conflicting as to whether husband and wife were within marked crosswalk when struck, jury's verdict would not be overturned.

Affirmed.

[Rehearing denied July 11, 1966]

Belli, Ashe and Gerry, of San Francisco, and *Robert Callister,* of Las Vegas, for Appellant.

Morse & Graves and *Lee R. Rose,* of Las Vegas, for Respondent.

1. Appeal and Error.
   Where evidence was directly conflicting as to whether pedestrian, who was injured, and her husband, who was killed, were within marked crosswalk when struck by defendant's automobile, reviewing court would not overturn jury verdict for motorist.
2. Trial.
   Where court's instructions to jury covered every material issue and no instruction was objected to, it was not error to

refuse additional instructions touching the same subject matter.

OPINION

Per Curiam:

This is a tort action to recover damages for personal injuries sustained by the appellant Mary Jaeggi, and for the wrongful death of her husband Hans Jaeggi. Mary claims that she was injured and her husband killed while walking within a marked crosswalk on U. S. Highway 91 in front of the Desert Inn Hotel, Clark County, by an automobile negligently driven by the respondent O'Krakel. A jury found for the defendant and this appeal followed.

[Headnote 1]

The main claim of error is that the jury should have found that the accident happened within the marked crosswalk as alleged by the appellant and, had the jury so found, a verdict in her favor would have been returned. The record shows a direct conflict in the evidence as to the place of the accident and also as to other matters relevant to the issue of liability. The jury was free to accept the evidence favorable to the defendant. We may not, in these circumstances, overturn the verdict on appeal.

[Headnote 2]

Subordinately, the appellant contends that the district court should have given certain jury instructions offered by her. The given instructions covered every material issue in the case. None was objected to. In these circumstances it is not error to refuse additional instructions touching the same subject matter. Duran v. Mueller, 79 Nev. 453, 386 P.2d 733 (1963).

Affirmed.

CHARLES E. HOYT, Appellant, *v.* HOWARD HOFFMAN, Sheriff, Ormsby County, State of Nevada, Respondent.

No. 5052

June 28, 1966 416 P.2d 232

Appeal from denial of petition for a writ of habeas corpus of the First Judicial District Court, Ormsby County; Richard L. Waters, Jr., Judge.

Proceeding to obtain habeas corpus was brought by petitioner who had been convicted of issuing a check without sufficient funds. The lower court denied petition and petitioner appealed. The Supreme Court, Zenoff, D. J., held that petitioner whose check in part payment of pre-existing debt was returned by bank for insufficient funds obtained no benefit from check since it did not affect debt, did not violate statute making issuance of check without sufficient funds criminal, and was entitled to habeas corpus where he was imprisoned upon conviction of that crime.

Reversed.

Stewart & Horton, of Reno, for Appellant.

Harvey Dickerson, Attorney General, and *Theodore H. Stokes,* District Attorney, Ormsby County, for Respondent.

1. False Pretenses.
   So called "cold check" statute making issuance of check without sufficient funds a crime makes provision only for a drawer who receives value in exchange for his check and is not applicable for pre-existing debt situations; such statutes are designed to charge a defendant who obtains a benefit as result of the check. NRS 205.130, subds. 1, 3.
2. False Pretenses.
   Petitioner whose check in part payment of pre-existing debt was returned by his bank for insufficient funds, obtained no benefit for the check since it did not affect debt, did not

violate statute making issuance of checks without sufficient funds criminal. NRS 205.130, subds. 1, 3.

OPINION

By the Court, Zenoff, D. J.:

Appellant, Hoyt, charged with issuing a check without sufficient funds, [1] appeals from a

denial of a petition for a writ of habeas corpus.

It was stipulated that Hoyt, a retailer, owed Lester Kirn the sum of $1,376.43 for meat purchased from Kirn, who was in the wholesale meat business. The amount was carried by Kin as an open account for almost a year until November 9, 1964, when Hoyt gave Kirn a check for $773.16, apparently to apply on account. The check was not honored by the bank for lack of funds, and a month later Kirn caused a criminal complaint to issue against Hoyt alleging violation of NRS 205.130(1).

Hoyt petitioned for a writ of habeas corpus alleging that the bad check statute was not applicable to checks

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[1] NRS 205.130(1). "Every person who for himself, or as the agent or representative of another, or as an officer of a corporation, willfully, with intent to defraud, shall make, pass, utter or publish any bill, note, check or other instrument in writing for the payment of money or for the payment of any labor claim or claims, or delivery of other valuable property, directed to or drawn upon any real or fictitious person, bank, firm, partnership, corporation or depositary, when in fact such person shall have no money, property or credit, or shall have insufficient money, property or credit with the drawee of such instrument to meet and make payment of the same in full upon its presentation, shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by imprisonment in the county jail for not more than 6 months, or by a fine not to exceed $500, or both such fine and imprisonment, unless such instrument, or a series of such instruments passed in the state during a period of 90 days, is in the amount of $100 or more, in which case such person shall be guilty of a felony and shall, upon conviction thereof, be punished by imprisonment in the state prison for not less than 1 year or more than 5 years. Any person having been previously convicted three times of a misdemeanor under the provisions of this section, or of any offense of a similar nature, in this state or any other state, or in a federal jurisdiction, who shall violate this section shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for not less than 1 year nor more than 5 years."

issued in payment of pre-existing debts. The trial court rejected this contention.

[Headnote 1]

1. Where a so-called cold check statute makes provision only for a drawer who receives something of value in exchange for his check, it is not applicable for pre-existing debt situations. Such statutes are designed to charge a defendant who obtains a benefit as a result of the check. Jackson v. State, 251 Miss. 529, 170 So.2d 438 (1965); Harris v. Florida, 123 So.2d 752 (Fla.App. 1960); State v. McLean, 216 La. 670, 44 So.2d 698 (1950). The weight of authority is in accord. 59 A.L.R. 2d 1159 (1956).

[Headnote 2]

In this case Hoyt did not receive a benefit as a result of making and delivering the check to his creditor, Kirn, nor was Kirn's position improved or damaged. The preexisting debt was not affected by Hoyt's conduct in giving a worthless check. The legislature did not intend to

make it a crime to issue a worthless check absent damage or injury to the payee thereof. Such damage or injury does not exist when the check is given for a preexisting debt.

2. Attention is directed to Subsection 3 of NRS 205.130. [2] That portion of the bad check statute contains

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[2] Subsection 3 of NRS 205.130. "As against the maker or drawer thereof, the making, drawing, uttering or delivering of any check for the purpose of obtaining money, merchandise, property, credit, thing of value or payment of obligation upon any bank, depositary, person, firm or corporation, payment of which is refused by the drawee when presented in the usual course of business because of insufficient funds, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depositary, if such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the protest fees, within 10 days after notice has been sent to the maker or drawer that such check, draft or order has not been paid by the drawee. Such notice shall be sent to the maker or drawer by registered mail, return receipt requested, at the address on the check, draft, or order. Return of the notice because of nondelivery to the maker or drawer raises a rebuttable presumption of intent to defraud. Refusal of payment by the drawee because of a nonexistent account is prima facie evidence of intent to defraud."

language referring to the issuance of a check "in payment of obligation." It is argued that "payment of obligation" includes pre-existing obligation. We do not agree. That phrase relates to an obligation created concurrently with the drawing of the check and not to a debt already existing. In any event, the substantive crime is defined in Subsection 1. Therefore, we hold that NRS 205.130(1) does not apply to checks given for preexisting debts.

Reversed. The complaint is ordered dismissed, the appellant released from custody, and the bail bond exonerated.

Thompson and Collins, JJ., concur.

OTIS TURNER and JUNE TURNER, His Wife,
Appellants, *v.* L. V. REDFIELD, Respondent.

No. 5022

July 11, 1966 416 P.2d 233

Appeal from judgment of the Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Action on promissory note. Defendants counterclaimed for money alleged to be due on stock transaction with defendant. The lower court rendered summary judgment for plaintiff on counterclaim and defendants appealed. The Supreme Court, Thompson, J., held that depositions and affidavits raised factual disputes as to whether plaintiff, in purchasing stock for defendants, acted on generous impulse or whether the stock transaction was a loan by plaintiff to defendants, to be repaid and enforcible as contract.

Reversed.

Woodburn, Forman, Wedge, Blakey, Folsom and Hug, and *Casey W. Vlautin,* of Reno, for Appellants.

Clel Georgetta, of Reno, for Respondent.

1. Appeal and Error.
   In reviewing propriety of summary judgment, all evidence favorable to parties against whom judgment was entered is accepted as true.
2. Judgment.
   Affidavits that plaintiff loaned defendants money for purchase of stock with understanding that defendants would bear loss if stock's value decreased and defendants delivered stock to plaintiff, at his request, to sell for them, but plaintiff retained stock in his name and defendants' claim that there was no enforcible contract because of absence of consideration presented factual dispute precluding summary judgment.

OPINION

By the Court, Thompson, J.:

We are asked to set aside a summary judgment in favor of L. V. Redfield, defendant to a counterclaim for money alleged to be due on a stock transaction with Otis Turner and June Turner, the counterclaimants. The Turners contend that if all facts in their favor are accepted as true, a genuine issue of material fact exists for resolution necessitating a full trial on the merits. We think that their contention is sound.

The action below was commenced by Redfield against the Turners to recover $4,500 plus accrued interest on a promissory note, which he satisfied by payment to the Security National Bank for and on behalf of the Turners. By answer, the Turners denied liability and counterclaimed as mentioned. Following his reply to the counterclaim, and after affidavits of witnesses and depositions of the parties were secured, Redfield moved for a summary judgment in his favor against the claim for relief asserted by the Turners in their counterclaim. In resisting that motion, the Turners relied upon the same depositions and upon

the counter-affidavit of Otis Turner. The lower court was persuaded that a genuine issue of material fact did not exist as to the issues raised by the counterclaim and the reply thereto, and entered summary judgment for Redfield on that phase of the litigation. This appeal followed. For reasons hereafter expressed, we cannot agree with the lower court.

[Headnote 1]

In reviewing the propriety of a summary judgment, we must accept as true all evidence favorable to the parties against whom judgment was entered. Catrone v. 105 Casino Corp., 82 Nev. 166, 414 P.2d 106 (1966); Franktown v. Marlette, 77 Nev. 348, 364 P.2d 1069 (1961); Parman v. Petricciani, 70 Nev. 427, 272 P.2d 492 (1954). Tested by this standard, there are genuine issues of material fact to be resolved at trial. A brief recitation of the stock transaction forming the basis for the counterclaim will reflect the verity of our conclusion.

[Headnote 2]

In January 1961, the Turners visited Redfield at the Washoe County Jail. They were tenants and friends of his. At that time Redfield owned about 20 percent of the outstanding stock of Pacific American Fisheries Corporation. He told the Turners that the stock was going to increase in value and that he, Redfield, had approximately $25,000 in idle funds. Since the Turners had been trying to assist him and had made very little as tenants on his farm, he suggested that he invest his idle money for the Turners and purchase 1500 shares of stock of Pacific American Fisheries. When the stock was sold, the Turners would repay Redfield the amount invested plus interest and could retain the profit realized from the sale. The record may be read to suggest that the Turners would bear the loss should the stock decrease in value. The Turners accepted Redfield's proposal.

Redfield ordered 1500 shares of Pacific American Fisheries stock in the Turners' names. He then delivered two checks to Otis Turner, as payee, totaling $25,343.88, the exact sum needed to purchase the 1500 shares. Turner took the checks to a brokerage firm and purchased the stock. The certificates were issued in the Turners' names and delivered to them in February 1961. Some time later, Redfield told them that the stock might suddenly appreciate and that they should execute a stock power and have their signatures verified. They did as he suggested. Then in June 1961 Redfield advised them that

the stock was selling at $24 per share (it had been purchased at prices ranging from $16.50 to $16.75 per share) and should be sold. Otis Turner immediately delivered the stock, endorsed

in blank, to Redfield to sell. Redfield did not sell it, but transferred the stock to his name and has since treated it as his own.

Shortly after Turner delivered the stock to Redfield for sale, Redfield asked him to work permanently at a lumber yard. When told by Turner that he could not do so, Redfield replied that the Turners' debt to him was so great that he would never be able to repay it by working on the ranch. When Otis asked what Redfield meant by that comment, he was told that he, Turner, owed Redfield the amount loaned him for the stock purchase.

The transaction is characterized by Redfield as the manifestation of a generous impulse on his part to help his friends; that an enforcible contract could not result because of the absence of consideration to support it. On the other hand, the Turners view the transaction as a loan of money by Redfield to them, which loan they were obligated to repay with interest. Should the stock depreciate they would stand the loss, and should it appreciate they would realize the gain pursuant to the understanding reached. If the Turners' point of view ultimately prevails, the doctrine of consideration does not bar them since Redfield received a benefit—the Turners' promise to repay the loan with interest—a legally sufficient consideration for Redfield's promise to make the loan. These opposite versions of the transaction—each finding support in the record, depending upon the interpretation to be accorded the evidence as a whole—show the existence of a genuine issue of material fact to be resolved after a full trial on the merits.

Other points were argued. However, it is apparent that none of them could have been the reason for the summary judgment entered below. Therefore, we shall not consider them.

Reversed.

Collins, J., and Zenoff, D. J., concur.

↓ 82 Nev. 277, 277 (1966) Berryman v. Int'l Bhd. Elec. Workers ↓

JAMES BERRYMAN, CECIL ADAMS, JESSE PATE, GERALD MERKT, ROY PINCOLINI, MARVIN BLANGERES, HOWARD KITNER, M. K. YOCHUM, TED MORRISSETT, WM. BEAMAN, FRANCIS TERRY, JOHN WILLIAMS, ROBERT JONES, WM. ROCKWELL, GEORGE LARKIN, JAMES LEONARD, ROY WELTY, SR., PERL A. DECKER, WM. D. EMBLEM, C. HUGHES, ROBERT COWING, and THOMAS CULLEN, Appellants, *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Respondent.

No. 5055

July 11, 1966 416 P.2d 387

Appeal from order of the Second Judicial District Court, Washoe County; Grant L. Bowen, Judge.

Proceeding on appeal from an order of the lower court refusing preliminary injunction against completion of intra-union disciplinary procedures. The Supreme Court, Thompson, J., held that intra-union dispute was not ripe for court intervention where remedial procedures within union framework had not been exhausted.

Affirmed.

Breen and Young, and *Jerry Carr Whitehead* and *Frank Fahrenkopf, Jr.,* of Reno, for Appellants.

Bissett, Logar & Groves, of Reno, and *Neyhart & Grodin,* of San Francisco, for Respondent.

1. Injunction.
   Whether preliminary injunction should be granted or refused is question addressed to discretion of district court.
2. Appeal and Error.
   Where district court has ruled on motion for preliminary injunction and its ruling has been challenged on appeal, task of Supreme Court is to search record and decide whether district court acted within permissible limits of judicial discretion.
3. Injunction.
   Generally, injunctive relief is not available in absence of actual or threatened injury, loss or damage. NRCP 65.
4. Injunction.
   In order to warrant issuance of injunction, there should exist reasonable probability that real injury will occur if injunction does not issue.

82 Nev. 277, 278 (1966) Berryman v. Int'l Bhd. Elec. Workers

5. Labor Relations.
   Where plaintiff union members had incurred no damage or injury, actual or threatened, by reason of intra-union disciplinary procedures, and hearings pursuant to disciplinary procedures had not been completed nor had union executive council been afforded opportunity to decide whether charges filed against plaintiffs were valid, it was permissible for district court to conclude that prerequisite for injunctive relief against completion of disciplinary procedures was absent. NRCP 65.
6. Labor Relations.
   Intra-union dispute was not ripe for court intervention where remedial procedures within union framework had not been exhausted.
7. Labor Relations.
   Where it is not shown that appropriate action would not be taken if intra-union procedures were pursued to completion, it is preferable that internal disputes of union be resolved within union itself.

OPINION

By the Court, Thompson, J.:

This appeal is from an order of the district court refusing a preliminary injunction against the completion of intra-union disciplinary procedures. The appeal is authorized. NRCP 72(b)(2). The lower court in its discretion ruled that the intra-union dispute was not ripe for court intervention since the prescribed union procedures for resolving the dispute had not been pursued to completion, nor had the plaintiffs below, appellants here, shown irreparable or any injury. We think that the lower court ruled correctly and affirm.

The plaintiffs-appellants are members in good standing of the International Brotherhood of Electrical Workers and of Local 401 thereof. Because of dissension within the local union, its executive board invited the International President of I.B.E.W. to establish a trusteeship over Local 401, as provided for by the constitution and bylaws of the I.B.E.W. This was done in January 1965. On April 6, 1965, John Byrne, the elected business manager of Local 401, filed charges under the I.B.E.W. constitution against 43 members of the I.B.E.W., including the plaintiffs-appellants in this action. He alleged that the 43 members had engaged in conduct

violative of their obligations under the I.B.E.W. constitution by encouraging a series of widespread, unauthorized work stoppages contrary to union policy. It was also claimed that certain of the members had participated in picketing the office and premises of Local 401, thereby interfering with the normal operations of the union. The charges were made in writing and the 43 members notified by registered mail.

The dispute within Local 401 apparently made it impossible to utilize the normal method of presenting the dispute to the local union executive board. Therefore, the charges were referred to and entertained by the International Executive Council of the I.B.E.W. pursuant to Art. 10, § 4, and Art. XXVII, § 2(19) of the I.B.E.W. constitution. [1] The International Executive Council delegated to its president and secretary, as a committee, the power to conduct a hearing on the charges made. The committee had no power of decision or recommendation, but only the power to conduct the hearing, after which the International Executive Council would decide, on the record made, whether disciplinary action should be taken.

In accordance with rules of procedure adopted by the I.E.C. and pursuant to written notice, hearings were held in Reno, Nevada, for a group of the appellants. A further hearing scheduled for that group did not take place because the I.E.C. chairman was served with a temporary restraining order obtained by the appellants when this suit was commenced.

The action below was for declaratory relief. NRS 30.010-30.160; NRCP 57. The plaintiffs allege that the intra-union hearings held, but not completed, were fundamentally unfair and violated due process requirements of the federal and state constitutions. They claim

[1] Art. 10, § 4 provides: "The I.E.C. shall have the power to try any local union or member charged with injuring the interests of the I.B.E.W. by actions in violation of the I.B.E.W. laws or the obligation of the member, and may revoke or suspend charter or membership."

Art. XXVII, § 2 (19) provides: "Any member may be penalized for committing any one or more of the following offenses: (19) causing a stoppage of work because of any alleged grievance or dispute without having consent of the local union or its proper officers."

that they were not allowed counsel at the hearings; that the prosecutor was allowed to be a witness; that evidence was received from persons not present and subject to cross examination; and other similar matters. The plaintiffs requested the court to declare "all prior proceedings void."

The propriety of declaratory relief in this setting is not an issue on appeal and we express no opinion on the point. As already noted, a temporary restraining order was granted on the day suit was commenced and, later, a motion for preliminary injunction was heard and denied.

[Headnotes 1, 2]

1. Whether a preliminary injunction should be granted or refused is a question addressed to the discretion of the district court. Rhodes Co. v. Belleville Co., 32 Nev. 230, 106 P. 561 (1910). Once that court has ruled, and its ruling has been challenged on appeal, our task is to search the record and decide whether the lower court acted within permissible limits of judicial discretion. For the reasons hereafter mentioned, we think it clear that the district court could refuse to grant a preliminary injunction without fear of reversal on review.

[Headnotes 3-5]

2. With some exceptions not here applicable, injunctive relief is not available in the absence of actual or threatened injury, loss or damage. NRCP 65; Carroll v. Associated Musicians of Greater New York, 206 F.Supp. 462 (1962), affirmed 316 F.2d 574 (1963). There should exist the reasonable probability that real injury will occur if the injunction does not issue. Sherman v. Clark, 4 Nev. 138 (1868). In the case before us the plaintiffs had incurred no damage or injury, actual or threatened. The intra-union disciplinary procedures were blocked by this law suit. The hearings had not been completed, nor had the International Executive Council been afforded the opportunity to decide whether the charges filed against the plaintiffs here were valid. On the showing made, it was permissible for the lower court to conclude that a prerequisite for injunctive relief was absent. Baron v. Newspaper Guild, 342 F.2d 423 (3d Cir. 1965).

In an effort to persuade us otherwise, the appellants cite a series of New York cases in which court injunctive relief was granted. Browne v. Hibbets, 25 N.Y.S.2d 573 (1941); Sullivan v. McFetridge, 183 Misc. 106, 50 N.Y.S.2d 385 (1944); Gallagher v. Monaghan, 58 N.Y.S. 2d 618 (1945); Schrank v. Brown, 192 Misc. 603, 81 N.Y.S.2d 687 (1948). In the Sullivan and Schrank cases the court intervened because the union had no jurisdiction. In Gallagher, the plaintiff had been expelled from the union. In Browne, disciplinary action had been taken. We do not perceive a lack of jurisdiction in the International Executive Council to resolve the instant dispute, nor have the plaintiffs here suffered discipline. The New York cases cited are inapposite.

[Headnotes 6, 7]

3. The ruling below was authorized for other reasons. The intra-union dispute was not ripe for court intervention since remedial procedures within the union framework had not been exhausted. Williams v. Vickers, 74 Nev. 48, 321 P.2d 586 (1958). Neither does the record necessarily suggest that appropriate action would not be taken if intra-union procedures were pursued to completion. Cf. Hickman v. Kline, 71 Nev. 55, 279 P.2d 662 (1955). In these circumstances, it is preferable that internal disputes of the union be resolved within the union itself. Falsetti v. Local Union No. 2026, 400 Pa. 145, 161 A.2d 882 (1960).

4. Our view of this appeal renders it unnecessary to consider the subordinate question of due process in resolving intra-union controversies. Whether the requirements of due process of the federal and state constitutions, as applied to court trials, have application to intra-union disciplinary proceedings is an issue that must await another case—one in which prescribed union procedures have been exhausted, the members disciplined, and the assertion made that a fair hearing was denied them.

The order refusing a preliminary injunction is affirmed.

Collins, J., and Zenoff, D. J., concur.

VICTOR HAVAS, Appellant, *v.* 105 CASINO CORPORATION, and GEORGE H. DAVIS, Respondents.

No. 5037

July 15, 1966 417 P.2d 239

Appeal from judgment of Eighth Judicial District Court, Clark County; John F. Sexton,

Judge.

Action for conversion of an automobile. From a judgment of the trial court the plaintiff appealed. The Supreme Court, Collins, J., held that the trial court erred in failing to admit plaintiff's exhibit consisting of certificate of registration and ownership issued by Department of Motor Vehicles or to make a ruling thereon, and by striking the testimony of plaintiff regarding ownership of the automobile at time of sale.

Reversed and remanded for new trial.

Calvin C. Magleby, of Las Vegas, for Appellant.

Samuel S. Lionel, Don L. Griffith and *Jerome F. Snyder,* of Las Vegas, for Respondents.

1. Evidence.
   In action for conversion of automobile, foundation for admission of certificate of Department of Motor Vehicles complied with statute in that it was certified by public officer having its custody as being a true, full and correct copy of the original and, since such certificate on its face was relevant from a reading thereof, no further offer of proof was necessary. NRS 49.050.
2. Evidence.
   Records which a private person is required to make and file with the government may be admissible as public records.
3. Evidence.
   In action for conversion of automobile, a certificate issued by registration division of Department of Motor Vehicles indicating registration and ownership of automobile sold by defendant was admissible, and while defects in affidavit of sale attached to certificate might affect the weight to be given to certificate, it did not destroy its admissibility. NRS 49.050, 108.310, 482.420(1).
4. Trial.
   The Supreme Court disapproves the practice of trial court's holding in abeyance rulings on evidence.
5. Appeal and Error.
   Error, to be prejudicial, when ruling on evidence is reserved, must be to material evidence.

↓ 82 Nev. 282, 283 (1966) Havas v. 105 Casino Corp. ↓

6. Trover and Conversion.
   In action for conversion of automobile, striking testimony of plaintiff that title to automobile issued to him in 1960 by Department of Motor Vehicles was still in effect in 1962, when public sale of the automobile was held, was error, where plaintiff was simply fortifying his chain of title to automobile which, unless purchaser at public sale acquired good title through the public sale, was still good. NRS 482.280, subd. 3.
7. Trover and Conversion.
   In action for conversion of an automobile, record failed to support finding that value of automobile was not proved.

OPINION

By the Court, Collins, J.:

This action involves the alleged conversion of a 1954 Cadillac automobile claimed to be owned by appellant but sold by respondents at a public auction sale pursuant to NRS 108.270-108.360, popularly known as the "Garagemen's Lien Law." Defendant George H. Davis, though served with process, did not appear and defend the action in the trial court. Havas sold the automobile to Dorothy L. Druachel on a conditional sales contract in 1961 and delivered possession to her, reserving title in himself. The automobile was left in a parking lot operated by respondent 105 Casino Corporation for an extended period of time. 105 Casino Corporation published a notice in a Las Vegas newspaper advertising the automobile for sale to satisfy a so-called storage lien, in which it was stated the registered and legal owners were unknown. The automobile was also misdescribed, both as to model year and motor serial number. It was sold on January 25, 1962 to Norma J. Jurun for $325. An affidavit to the above effect was executed by George H. Davis on behalf of the 105 Casino Corporation, although his oath before a notary public was not completed. For a reason not apparent from the record, the Registration Division of The Department of Motor Vehicles, State of Nevada, accepted Davis' partially completed affidavit of sale of the vehicle, required the purchaser to execute a release and issued a certificate of registration and ownership to Norma J. Jurun. The record reflects Havas' testimony that he never received

notice of the sale of the automobile by 105 Casino Corporation. No evidence to the contrary was offered. Havas had in his possession and offered in evidence, which was admitted as shown by the clerk's stamp, a certificate of ownership to the vehicle issued by The Department of Motor Vehicles, in 1960, being identical in description to the vehicle described in the certificate issued to Norma J. Jurun. This certificate of ownership, through endorsement on the reverse side, discloses Vic Havas Motor Company to be legal owner and Hubert Dubrow or Dorothy L. Druachel to be registered owners. Havas attempted to testify that such title was in effect in 1962, when the public sale took place, but apparently the trial court struck his answer upon motion by counsel for 105 Casino Corporation. The record reflects as follows:

"By Mr. Lionel: May we have the question and answer stricken then, Your Honor? I have no objection if that's being offered.

"By the Court: All right.

"By Mr. Lionel: Is that Your Honor's ruling?

"By the Court: Yes."

During the trial the question of value of the automobile at the time of sale at public auction in 1962 arose. Upon that issue the record reflects the following testimony of Havas and ruling by the court upon objection thereto by respondent's counsel.

"By Mr. Magleby: Q. Do you have an opinion, Mr. Havas, of the value of a 1954 Cadillac

convertible in the year 1962?

"By Mr. Lionel: To which I object, Your Honor, on the ground no—it's immaterial, irrelevant and no foundation laid. It has nothing to do with this case.

"By the Court: Go ahead, answer it.

"A. A Cadillac, first of all, mainly it's on the condition. Just to offer for counsel's benefit, I've had—I have bankers and different people in the different fields call me on what a car is valued at after seeing it, but I'd say we sold this car almost at the end of '60 and the first of '61, and at that time we had $1600.00 balance on this. I would say approximately a year later I would say this car would be worth, oh, I would say $1200.00.

"By Mr. Lionel: I must move to strike the answer, Your Honor. Strike the answer to that.

"By the Court: Motion denied."

When Havas offered in evidence his exhibit A, a certificate of Richard A. Herz, Chief Registration Division, Department of Motor Vehicles, State of Nevada, under his hand and seal, to which were attached copies of the affidavit of publication of the notice of sale of the automobile; certificate of registration and ownership issued to Norma J. Jurun; affidavit of Davis of sale of the vehicle by 105 Casino Corporation; and release from Norma J. Jurun to The Department of Motor Vehicles, the record reflects the following colloquy between the court and counsel:

"By Mr. Magleby: At this time, if the Court please, we would like to offer into evidence certified copies of The Department of Motor Vehicle records.

"By Mr. Lionel: To which we object, Your Honor, on several grounds. Number one, there is no foundation of any kind laid for its admission, and number two, of no kind, and number two, what purports to be an affidavit in there is not signed by anybody. If your Honor will look at the purported affidavit of one George Davis, you will find it's not notarized. It's supposed to be an affidavit on this form, and the next thing, Your Honor, there is no proof that that's George Davis' signature. The next ground, there is no proof whatsoever that he in any way represents the defendant, 105 Casino Corporation, and if the Court please, the Statute 49.050 provides, the original or a microfilm or photostatic copy, or copy of any record other than a judicial record, document or paper in custody of a public officer of this State or the United States, certified by such officer to be the original or to be a photostat or microfilm, or to be a true, full and correct copy of the original in his custody, may be received in evidence in any action or proceeding in the Courts of this State in like manner and with the like effect as the original could be if produced. Now, if that were the original, Your Honor, we would have a right to object on the ground there is no foundation laid for its admission. Here is a purported affidavit which

is not authorized, here we don't know whether that's George Davis' signature. We don't know whether or not George Davis represented or worked for the Nevada Club, was authorized to sign and even on its face it shows that he's not an officer of that organization. They are not bound by that, Your Honor, clearly inadmissible evidence, pure hearsay.

"By Mr. Magleby: I think the Statute provides, if the Court please, that a certification of a public official of this State can be introduced of the evidence on file, or the records that are on file in that office, and that's what that represents.

"By Mr. Lionel: Your Honor, the distinction is if it is a public record as distinct from a record in his custody and the Statute says in that case it is equally admissible with the original, if the original would be admissible. That is clearly not admissible, Your Honor. We object to its admission upon the grounds stated.

"By the Court: I will hold the ruling in abeyance. Go ahead."

The exhibit was marked for identification but no further action by the trial court indicating it was either admitted or rejected appears in the record. The clerk's stamp on the exhibit shows it to be marked for identification only, not admitted. What, if any, consideration was given by the trial court to the exhibit is likewise not apparent from the record.

Upon conclusion of the testimony and evidence, the court called counsel into chambers and later entered written findings of fact and conclusions of law as follows:

"Findings of Fact. 1. That plaintiff has not proved that defendant 105 Casino Corporation unlawfully sold a motor vehicle to Norma[n] J. Jurun as alleged.

"2. That plaintiff has not proved the value of the motor vehicle allegedly sold to Norma[n] J. Jurun by defendant 105 Casino Corporation at the time of such alleged sale.

"Conclusions of Law. 1. That plaintiff has not proved that defendant 105 Casino Corporation unlawfully sold a motor vehicle to Norma[n] J. Jurun as alleged.

"2. That plaintiff has not proved the value of the motor vehicle allegedly sold to Norma[n] J. Jurun by defendant 105 Casino Corporation at the time of such alleged sale.

"3. That the complaint, as to the defendant 105 Casino Corporation, must be dismissed."

The court then entered judgment and decree that Havas' complaint against 105 Casino Corporation be dismissed and awarded respondent an attorney's fee of $300 and costs against appellant.

From the judgment Havas appeals. We feel the judgment must be reversed and remanded for new trial because of the following prejudicial errors:

(1) Failure to admit appellant's exhibit A or to make a ruling thereon.

(2) Striking the testimony of Havas regarding ownership of the automobile in 1962.

1. Failure to admit appellant's exhibit A was error. Counsel for respondent objected to the exhibit on three grounds: (1) that no foundation was laid; (2) that despite the Public Record Statute, NRS 49.050, the offer was defective because the affidavit of George H. Davis was

not notarized; and (3) that the copy could be received in evidence in like manner and with the like effect as the original could be if produced—and the originals were hearsay evidence.

[Headnote 1]

Foundation for admission of the exhibit complied with the statute in that it was certified by the public officer having its custody as being a true, full and correct copy of the original. NRS 49.050. Furthermore, the exhibit on its face was relevant from a reading thereof, thus no further offer of proof was necessary. Carroll v. Beavers, 126 Cal.App.2d 828, 273 P.2d 56 (1954).

[Headnotes 2, 3]

We hold the certificate, with copies of attached documents, was admissible pursuant to the Public Records Act, NRS 49.050. To permit the Registrar of Motor Vehicles to issue a certificate of ownership and registration of the automobile to Norma J. Juran enabling her to operate it upon the public streets and highways, he

had authority to require them to be filed in his office. NRS 482.420(1) and 108.310. In 32 C.J.S., Evidence § 626, at 795, it is stated, "Records which a private person is required to make and file with the government may be admissible as public records." Accord: Sternberg Dredging Co. v. Moran Towing & Transp. Co., 2 Cir., 196 F.2d 1002, at 1005 (1952). The fact is the Registration Division, Department of Motor Vehicles, issued a certificate of registration and ownership to her for the identical automobile sold by respondent. Defects in the Davis affidavit attached to the certificate may affect the weight to be given the public record, but does not destroy its admissibility.

[Headnotes 4, 5]

We disapprove the practice of trial courts holding in abeyance rulings on evidence. It precipitates all manners of difficulty. People's State Bank of Hillsboro v. Steenson, 49 N.D. 100, 190 N.W. 74, 75 (1922); Seafield v. Bohne, 169 Mo. 537, 69 S.W. 1051, 1053 (1902); Asbury v. Hicklin, 181 Mo. 658, 81 S.W. 390, 392 (1904); Smoot v. Bankers' Life Assn., 138 Mo.App. 438, 120 S.W. 719, 730 (1909); Stone v. Fry, 191 Mo.App. 607, 178 S.W. 289, 290 (1915). Error, to be prejudicial, when ruling is reserved, must be to material evidence, as here. Hannan v. C.B.&Q.R. Co., 247 S.W. 436 (Mo.App. 1923).

Additional problems arise at the time in determining whose responsibility it is to either renew the offer of evidence upon which a ruling is reserved or held in abeyance, or to renew an objection to its admission. In re Coleman's Estate, 238 Iowa 768, 28 N.W.2d 500, 502 (1947); Proctor v. Proctor, 282 Ky. 20, 137 S.W.2d 354 (1940). We need not decide that question here. Exhibit A was excluded and we hold that to be error.

Careful trial counsel should, of course, protect his record by insisting that the court rule

either upon his offered evidence or his objection. A timorous attorney may find he has permitted a disastrous result to descend upon his client's cause if he does not politely but forcefully insist upon a ruling by the trial court. Bailey v. Bailey, 297 Ky. 400, 180 S.W.2d 316, 319 (1944). And it may well be, as could have been the case here, a busy

trial court simply overlooked the ruling. Trial courts are greatly inclined to make a good record upon rulings, but counsel must protect their own record.

[Headnote 6]

2. Striking the testimony of appellant that the title to the automobile issued to him in 1960 by The Department of Motor Vehicles was still in effect in 1962, when the public sale was held, is error. He was simply fortifying his chain of title to the automobile which, unless Norma J. Jurun acquired good title through the public sale of it by respondent, was still good. He was not trying to vary what the written certificate of title disclosed, but to support by oral testimony that it was still in effect and not changed. "* * * the certificate of ownership shall remain valid until canceled by the department upon a transfer of any interest shown therein and need not be renewed annually." NRS 482.280(3).

[Headnote 7]

3. Finally, because there must be a new trial in this matter, we feel the record fails to support the finding that the value of the automobile was not proved.

Reversed and remanded for new trial.

Thompson, J., and Gabrielli, D. J., concur.

PAUL STANLEY CARTER, Appellant, *v.* R. S. BARBASH and DARROL H. MORRISON, Doing Business as COLLECTION SERVICE OF NEVADA, Respondents.

No. 5053

July 25, 1966 417 P.2d 154

Appeal from judgment of Second Judicial District Court, Washoe County; Grant L. Bowen, Judge.

Action by collection company, surety company's assignee, to collect amount of embezzled funds that were reimbursed to bank by surety company. The debtor admitted debt in the principal amount but contested the

allowance of interest. The trial court rendered judgment in favor of the collection company and ordered debtor to pay interest at statutory rate of 7 percent per annum on entire sum embezzled from date debtor entered plea of guilty to charge of embezzlement until date of judgment. The debtor appealed. The Supreme Court, Collins, J., held that debtor who had embezzled money from bank owed interest on money to the surety company that reimbursed the bank and that collection company, surety company's assignee, was entitled to interest at 7 percent per annum from the date debtor entered plea of guilty to embezzlement until amount prayed for in petition was paid in full.

Affirmed as modified.

Roger L. Erickson, of Reno, for Appellant.

Loyal Robert Hibbs and *Michael V. Roth,* of Reno, for Respondents.

1. Appeal and Error.
   Debtor, who did not plead his defenses that collection company, surety company's assignee, waived right to interest on money wrongfully retained by debtor and that collection company was estopped by its conduct from claiming interest, was not entitled to raise questions of waiver and estoppel on appeal. NRCP 8(c).
2. Interest.
   Debtor who had embezzled money from bank was liable for interest on money to the surety company that reimbursed the bank. NRS 99.040, 99.050.
3. Interest.
   Complaint that contained no allegation regarding interest but in prayer did ask judgment for interest from date due was in compliance with form of complaint for money had and received of another as suggested in Rules of Civil Procedure and permitted recovery of interest from debtor on amount stated in prayer. NRS 99.040; NRCP, Appendix of Forms, No. 8.
4. Assignments.
   Where collection company, surety company's assignee, prayed for certain sum in its complaint in action to recover embezzled funds from debtor, collection company would be presumed to have stated its side of controversy as strongly and favorably as all the known facts would permit and collection company would be deemed to have waived any recovery greater than that stated in the complaint.
5. Interest.
   Collection company, assignee of surety company, was entitled to collect interest from debtor on money embezzled by

debtor from date debtor entered plea of guilty to charge of embezzlement until date of judgment and thereafter until judgment was satisfied at rate of 7 percent per annum. NRS 99.040, 99.050.

OPINION

By the Court, Collins, J.:

Paul Stanley Carter, appellant, pleaded guilty on January 17, 1958 to embezzlement of $2,683.50 from Nevada Bank of Commerce. He was placed on 5 years' probation by the U.S. District Court and ordered to make restitution in monthly payments of $44.70. He was discharged from probation on January 21, 1963, by which time he had repaid $980.00. Subsequently he paid additional amounts, all of which were applied only to the principal due, none to interest. When this action was commenced he admittedly still owed $1,528.50 of the amount embezzled.

A surety company paid the bank the funds embezzled and then assigned its cause of action to respondents who brought suit. The trial court heard the matter upon an agreed statement of facts, in which the principal amount was admitted to be owed, but contested the allowance of any interest. That court entered judgment for respondents and ordered appellant to pay interest at the statutory rate of 7 percent per annum on the entire sum embezzled, $2,683.50, from January 17, 1958 to November 4, 1965, date of judgment. Costs and an attorney's fee were also awarded respondents which are not in dispute.

[Headnote 1]

Appellant contends the trial court was in error in awarding any interest because there was an agreement between appellant and the surety company by which no interest would be charged and thus NRS 99.050 [1] would

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[1] "99.050 Limitations on agreed interest rates.

"1. Parties may agree, for the payment of any rate of interest on money due, or to become due, on any contract, not exceeding, however, the rate of 12 percent per annum. Any judgment rendered on any such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified

preclude the award of interest. Other grounds of error were urged but they are without merit. Subordinately, the appellant contends that the respondents waived their right to interest or

were estopped by their conduct in claiming interest. We need not relate the facts upon which the claims of waiver and estoppel are said to rest, because the appellant did not plead either of those affirmative defenses as required by NRCP 8(c). Ray Motor Lodge, Inc. v. Shatz, 80 Nev. 114, 390 P.2d 42 (1964); Coray v. Hom, 80 Nev. 39, 389 P.2d 76 (1964); Chisholm v. Redfield, 75 Nev. 502, 347 P.2d 523 (1959).

[Headnote 2]

As found by the trial court, the record fails to establish any agreement between Carter and the surety company foregoing interest on the embezzled funds. Instead, that court found Carter owed interest on funds belonging to another and wrongfully converted to his own use, citing McCormick on Damages, p. 214. The surety company, having reimbursed the bank, was subrogated to its right to recover from appellant and entitled to prevail. The court then found respondents entitled to interest at 7 percent per annum from the date the amount became liquidated and due January 17, 1958, as authorized by NRS 99.040, [2] and particularly subsection 4 thereof.

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in the judgment; but only the amount of the original claim or demand shall draw interest after judgment.

"2. Any agreement for a greater rate of interest than herein specified shall be null and void and of no effect as to such excessive rate of interest."

[2] "99.040 Interest rate when no express written contract. When there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of 7 percent per annum upon all money from the time it becomes due, in the following cases:

"1. Upon contracts, express or implied, other than book accounts.

"2. Upon the settlement of book or store accounts from the day on which the balance is ascertained.

"3. Upon judgment rendered by a court in this state.

"4. Upon money received to the use and benefit of another and detained without his consent.

"5. Upon wages or salary, if the same shall be unpaid when due, after demand therefor has been made."

There was evidence to sustain such finding, no error in application of the law, and we sustain the judgment, as hereinafter modified, Ormachea v. Ormachea, 67 Nev. 273, 217 P.2d 355 (1950), and cases cited therein.

Appellant further contends that if interest is allowable, it should be permitted only upon the amount of $1,528.50, the principal unpaid at the date of the judgment, November 4, 1965, prospectively. Respondents urge it should be paid on $1,722.18, the amount sued for, but from the date the amount of embezzled funds became liquidated, January 17, 1958. The sum $1,722.18 should be reduced by $18.68, an amount sought in an unrelated third cause of action by respondents against appellant. The principal figure to which interest applies would be then $1,703.50.

[Headnotes 3, 4]

Respondents' complaint makes no allegation regarding interest, but the prayer asks judgment for interest on $1,722.18 (corrected to $1,703.50 as stated above) "from the date due." This form of complaint for money had and received of another is in compliance with that suggested in NRCP, Appendix of Forms, No. 8. Respondents, having prayed for that amount are presumed to have stated their side of the controversy as strongly and as favorably as all the facts known to them would permit. They are deemed to have waived any greater recovery. Ser-Bye Corporation v. C. P. & G. Markets, 78 Cal.App.2d 915, 179 P.2d 342 (1947); Pry v. Pry, 225 Ind. 458, 75 N.E.2d 909 (1947); State ex rel. Stockton v. Leopold, 227 Ind. 426, 86 N.E.2d 530 (1949).

[Headnote 5]

We therefore affirm the holding but direct the matter be remanded to the trial court for recalculation of interest on $1,703.50 from January 17, 1958 until the date of judgment and thereafter until satisfied at the rate of 7 percent per annum.

Thompson, J., and Zenoff, D. J., concur.

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82 Nev. 294, 294 (1966) Downing v. Marlia

JOHN N. DOWNING, Appellant, *v.* THEODORE B. MARLIA, Respondent.

No. 5056

August 4, 1966 417 P.2d 150

Appeal from the Second Judicial District Court, Washoe County; John W. Barrett, Judge.

Automobile guest case. The trial court entered judgment for defendant, and plaintiff appealed. The Supreme Court, Zenoff, D. J., held that instruction which clearly dealt with concept of assumed risk by automobile guest but used phrase "contributory negligence" and charged plaintiff guest with knowledge he "should have" had with respect to intoxication of driver prejudicially limited plaintiff's chances for recovery.

Reversed.

Alex. A. Garroway, of Reno, for Appellant.

Vargas, Dillon, Bartlett & Dixon, and *James P. Logan,* of Reno, for Respondent.

1. Appeal and Error.

Concept of plain error permits occasional exceptions to otherwise strict requirements for compliance with

specificity of objections required by rule. NRCP 51.

2. Appeal and Error.
   Objection to refusal of instruction which merely informed court that refused instruction in counsel's opinion was proper and under evidence in case should be given was insufficient to preserve objection for review on appeal. NRCP 51.
3. Negligence.
   Contributory negligence does not relate to assumption of risk.
4. Negligence.
   Only actual knowledge can constitute assumed risk.
5. Negligence.
   Defense of assumed risk is based on theory of consent, and main requisites are a voluntary exposure to danger and actual knowledge of risk assumed.
6. Appeal and Error; Negligence.
   Instruction which clearly dealt with concept of assumed risk but used phrase "contributory negligence" constituted prejudicial error.
7. Negligence.
   On issue of assumed risk, existence of actual knowledge may be inferred from circumstances.

82 Nev. 294, 295 (1966) Downing v. Marlia

8. Appeal and Error.
   Instruction which clearly dealt with concept of assumed risk by automobile guest but used phrase "contributory negligence" and charged plaintiff guest with knowledge he "should have" had with respect to intoxication of driver prejudicially limited plaintiff's chances for recovery.
9. Automobiles.
   Refused instruction that contributory negligence of automobile guest is not element to be considered or dealt with as defense to an action for injuries caused by driver's gross negligence or willful or wanton conduct except where guest's contributory negligence itself consists of gross negligence or willful or wanton conduct correctly stated law as to defenses under guest statute. NRS 41.180.
10. Automobiles.
    Plaintiff automobile guest initially has burden of showing that his injury was proximately caused by defendant's intoxication, gross negligence, or willful conduct in order to overcome statute's limitations. NRS 41.180.
11. Automobiles.
    Defendant automobile operator may show that plaintiff guest knowingly assumed risk of defendant's conduct culpable as it may have been, or that plaintiff was equally the proximate cause of his own injury, but ordinary contributory negligence would not be enough. NRS 41.180.
12. Automobiles; Constitutional Law; Evidence.
    Plaintiff automobile guest's blood alcohol content two hours after accident was relevant to automobile operator's contention that plaintiff guest was jointly drinking with operator and therefor had actual knowledge of operator's intoxication and so assumed the risk, and fact that plaintiff's blood was tested without his consent was immaterial and did not violate due process. NRS 484.055, subd. 1 (c).

OPINION

By the Court, Zenoff, D. J.:

Appellant, plaintiff below in an automobile injury action, appeals from a judgment for defendant on grounds that the trial court erroneously admitted evidence of plaintiff's intoxication at the time of the accident and erroneously gave certain instructions over objection while refusing to give others.

Plaintiff Downing and defendant Marlia met and drank at the bar of the Fernley Inn beginning about 2:00 a.m., on Saturday, December 21, 1963. They had previously been strangers to each other. The two remained in the vicinity of the bar and drank for about

six hours, although there is dispute whether they continued to drink in each other's presence throughout. Shortly before dawn, Downing asked Marlia for a ride in Marlia's Ferrari automobile. About 8:00 a.m., they left in the auto with Marlia driving. During the course of the ride, Marlia stopped once and added oil to the automobile. A few moments later Marlia, driving at a speed of at least 90 miles per hour, lost control on a curve in a well-marked construction zone one mile east of the Fernley overpass on a detour off U.S. 40. Downing was thrown from the automobile suffering serious injuries for which he now seeks recovery.

A jury found for defendant. Downing here appeals on grounds the trial court erred in the giving and refusing of certain instructions and the admitting into evidence of a finding that Downing had a blood alcohol content of.206 two hours after the accident. [1]

A recital of two of the five disputed instructions, and appellant's trial objections thereto, is as follows:

The court gave Instruction No. 19:

"If a guest voluntarily rides in an automobile driven by one who he knows, or in the exercise of due care should know, is so intoxicated as to incapacitate him from safely and prudently driving it and under such condition proximately causes the accident, he is himself guilty of contributory negligence which will preclude his recovery of damages for any injuries he might sustain."

Appellant's entire trial objection to Instruction No. 19 was:

"I object to Instruction No. 19, the particular portion thereof being as follows on line 2: 'or in the exercise of due care should know,' for the reason it would leave to the jury the determination of the assumption of risk. If the jury should determine that plaintiff in the exercise of due care should have known, it is my contention that the law of Nevada is that plaintiff must have actually known."

The court refused to give appellant's Instruction B, which was:

"Under the law applicable to this case, contributory

[1] At .150 a driver is said to be under the influence. NRS 484.055(1)(c).

negligence of a guest is not an element to be considered or dealt with as a defense to an action for injuries caused by the defendant's gross negligence or willful or wanton conduct except where the guest's contributory negligence itself consists of gross negligence or willful or wanton conduct."

Appellant's trial objection to the court's refusal was, in its entirety, as follows:

"The Court: Does the plaintiff have any instructions to offer in addition to those the Court has indicated will be given?

"Mr. Garroway: The plaintiff has offered A, B, C and D, instructions that have been refused by the Court. Each of those instructions, in my opinion, is proper and under the evidence in this case should be given."

1. We first determine how specifically a party must object in the trial court to instructions he considers about to be erroneously given or refused in order to preserve his objection for review on appeal. NRCP 51 provides, in part, that "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." The rule expressly establishes the same standard for objections to given instructions as for objections to refused instructions. We thus turn to that standard.

[Headnote 1]

On four previous occasions, this Court has asked strict compliance with Rule 51, considering it a vital aid to the trial judge in his preparation of proper instructions. In Lathrop v. Smith, 71 Nev. 274, 275-276, 288 P.2d 212 (1955), appellants "formally and generally" excepted to the giving of an instruction, but it was held their protest did not go to the particular language argued upon appeal and thus the matter was precluded from review. Lathrop was cited with approval by Duran v. Mueller, 79 Nev. 453, 458, 386 P.2d 733 (1963), and Wagon Wheel v. Mavrogan, 78 Nev. 126, 129, 369 P.2d 688 (1962), both of which also refused review of given instructions, the trial objections to which did not comply with Rule 51. However, in both Duran and Wagon

Wheel no objection had been registered before the trial judge for granted instructions. That also was the factual situation of the most recent case, Hotel Riviera, Inc. v. Short, 80 Nev.

505, 513, 396 P.2d 855 (1966). [2]

In Duran v. Mueller, supra, objection was voiced to refusal of three instructions "on the ground that each of them correctly states the law and there is evidence pertaining to each of them in this case." This Court held that objection did not suffice under Rule 51, but overlooked the discrepancy on grounds the trial court had invited appellant to object in that manner.

[Headnote 2]

Appellant's objection to the refusal of Instruction B was insufficient under Rule 51. Merely informing the court that refused instructions "in my opinion, [are] proper and under the evidence in this case should be given" does not assist the trial judge in determining the grounds for objection so that he may properly consider whether to revise his initial decision and cure what otherwise might be error.

2. However, appellant did properly object to the granting of Instruction No. 19, which though using the phrase, "contributory negligence," clearly dealt with the concept of assumed risk.

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[2] Decisions interpreting the Federal Rule are no more conclusive. There are expressions in some decisions that an instruction not objected to becomes the law of the case. Pierce Consulting Engineering Co. v. City of Burlington, 221 F.2d 607 (2d Cir. 1955); Baker v. Chicago, B. & Q.R. Co., 220 F.2d 721 (8th Cir. 1955); Rittgers v. U.S., 154 F.2d 768 (8th Cir. 1946). Other courts also will look to see whether the given instruction was "plain error" and constituted manifest injustice, thereby warranting appellate review *regardless* of compliance with the specificity of objection requirements of Rule 51. Cf. Richmond, F. & P.R. Co. v. Brooks, 197 F.2d 404 (D.C. Cir. 1952) with Troupe v. C.D. & Georgian Bay Transit Co., 234 F.2d 253, 260 (2d Cir. 1956). See 2b Barron and Holtzoff, Federal Practice and Procedure, sec. 1106, pp. 472-473; 5 Moore's Federal Practice, para. 51.04, pp. 2503-2504.

We recognize that the concept of "plain error," and this Court's continuing desire to prevent manifest injustice, permit occasional exceptions to the otherwise strict requirements for compliance with the specificity of objections asked by Rule 51. However, we need not now decide what constitutes such exceptions. There was proper protest to at least one prejudicial instruction.

[Headnote 3]

The issues of contributory negligence and assumption of risk have been confused in a number of jurisdictions. Contributory negligence does not relate to assumption of risk, yet juries have been instructed to disallow recovery to plaintiffs as being contributorily negligent when the instructions spell out assumption of risk. This is our primary problem.

[Headnotes 4-6]

By giving the jury Instruction No. 19 over proper objection the court prejudicially erred. Only actual knowledge can constitute assumed risk. Frame v. Grisewood, 81 Nev. 114, 399

P.2d 450 (1965). “The defense of assumed risk is based on the theory of consent. The main requisites are a voluntary exposure to danger and actual knowledge of the risk assumed.”

[Headnotes 7, 8]

Existence of actual knowledge may be inferred from the circumstances, but this is not the same as charging plaintiff with knowledge he “should have” had. There is reasonable dispute under the instant facts as to whether plaintiff had actual knowledge of defendant's intoxication. There is conflict as to the length of time the two men were together, whether they were cognizant of each other's drinking during this entire period, and whether they were continuously within each other's sight. A jury may have found plaintiff did not have actual knowledge of defendant's intoxication. Instruction No. 19, by also including knowledge of a reasonable man, i.e., an objective test, prejudicially limited plaintiff's chances for recovery.

3. Because a new trial may occur, we will consider appellant's refused Instruction B, despite the fact that no proper objection was made.

[Headnotes 9-11]

That instruction correctly stated the law as to defenses under the guest statute. [3] Plaintiff guest initially has the burden of showing that his injury was proximately caused by the defendant's intoxication,

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[3] NRS 41.180.

gross negligence, or willful misconduct in order to overcome the statute's limitations. Once this is accomplished, however, recovery still is not automatic. Defendant may show that plaintiff knowingly assumed the risk of defendant's conduct, culpable as it may have been, or, in rare instances, that plaintiff was equally the proximate cause of his own injury. Ordinary “contributory negligence,” however, would not be enough. Such was our interpretation of California decisions as to that state's guest statute. Ormand v. Brehm, 82 Nev. 143, 413 P.2d 493, 495 (1966). We accept the same interpretation as to our own guest statute. Frame v. Grisewood, supra.

[Headnote 12]

4. We find no error in the introduction into evidence of plaintiff's blood alcohol content. It was relevant to the defense contention that plaintiff was jointly drinking with defendant, and therefore had actual knowledge of the latter's intoxication and so assumed the risk. It is immaterial here that plaintiff's blood was tested without his consent. This did not violate due process. Schmerber v. California, 86 S.Ct. 1826, 1829-30 (1966).

Reversed.

Thompson and Collins, JJ., concur.

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82 Nev. 300, 300 (1966) State ex rel. Orsborn v. Fogliani

THE STATE OF NEVADA, ex rel. JAMES HOWARD ORSBORN, Petitioner, *v.* JACK FOGLIANI, Warden, Nevada State Prison, Respondent.

No. 5121

August 4, 1966 417 P.2d 148

Original petition for writ of habeas corpus.

Proceeding to obtain release from prison under sentence of conviction as ex-felon in possession of firearm. The Supreme Court, Zenoff, D. J., held that since prior crime was misdemeanor petitioner could not be convicted as ex-felon, and since no crime was committed he was entitled to release.

Writ granted.

82 Nev. 300, 301 (1966) State ex rel. Orsborn v. Fogliani

Gary A. Sheerin, of Carson City, for Petitioner.

Harvey Dickerson, Attorney General, *William J. Raggio,* District Attorney, and *Herbert F. Ahlswede,* Deputy District Attorney, Washoe County, for Respondent.

1. Habeas Corpus.
   The test of availability of the writ of habeas corpus is no longer confined to one of jurisdiction, but has been expanded to allow presentation of questions of law that cannot otherwise be reviewed or that are so important as to render ordinary procedure inadequate.
2. Habeas Corpus.
   Where petitioner had been charged and convicted of felony of being ex-felon in possession of firearm, but prior crime was misdemeanor rather than felony, petitioner was wrongfully imprisoned and was entitled to his release. NRS 34.360, 202.360 and subd. 2.

OPINION

By the Court, Zenoff, D. J.:

On May 14, 1965, petitioner, James Howard Orsborn, entered a plea of guilty to an information filed in the Second Judicial District Court charging him with commission of a felony, i.e., ex-felon in possession of a firearm, in violation of NRS 202.360. [1] Orsborn was sentenced to the Nevada State Prison for not less than one nor more than five years.

After serving several months in prison, Orsborn learned that the felony, upon which his Nevada conviction was based, was not in fact a felony but a misdemeanor and that, therefore, he could not have been an ex-felon at the time of the Nevada proceeding. The State, in charging the felony originally, based its case upon a conviction for attempted burglary in the State of California which, under California law, can be either

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[1] NRS 202.360(2). "After July 1, 1925, no unnaturalized foreign-born person, and no person who has been convicted of a felony in the State of Nevada, or in any one of the states of the United States of America, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America, shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person."

a misdemeanor or felony, depending upon the sentence pronounced by the trial judge. [2] Petitioner had been sentenced in California to a term of one year in the county jail after he had violated probation. The court, by this sentence, made the conviction a misdemeanor.

At the time of the Nevada hearing, neither the petitioner, the prosecutor, the petitioner's attorney, nor the court was aware of the fact that petitioner had been convicted of a misdemeanor and not a felony in California. As a result, the district court pronounced judgment and sentenced petitioner as an ex-felon in possession of a firearm.

The State concedes that petitioner cannot be classified as an ex-felon and, therefore, was erroneously convicted and sentenced. There is not presented a fact question for resolution. All agree that the petitioner is not guilty of the offense to which he mistakenly pleaded guilty. However, the State does challenge the availability of the writ of habeas corpus.

1. NRS 34.360. "Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."

[Headnote 1]

The test of the availability of the writ of habeas corpus is no longer confined to one of jurisdiction, but has been expanded to allow the presentation of questions of law that cannot otherwise be reviewed, or that are so important as to render ordinary procedure inadequate and justify the extraordinary remedy. Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965);

Shum v. Fogliani, 82 Nev. 156, 413 P.2d 495 (1966); Dean v. Fogliani, 81 Nev. 541, 407 P.2d 580 (1965); Ex parte Philipie, 82

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[2] Section 17 of the California Penal Code reads: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority. * * *"

Nev. 215, 414 P.2d 949 (1966). (See also, Ex parte Bell, 19 Cal.2d 488, 122 P.2d 22 (1942) and Ex parte Byrnes, 26 Cal.2d 824, 161 P.2d 376 (1945).)

Our statute governing the availability of the writ of habeas corpus was borrowed verbatim from California. In the Matter of Sullivan, 65 Nev. 128, 189 P.2d 338 (1948); In the Matter of Fitzgerald, 65 Nev. 157, 189 P.2d 352 (1948). The California courts have used the writ to reach such matters as an adjudication of habitual criminality, Ex parte McVickers, 29 Cal.2d 264, 176 P.2d 40 (1946); Ex parte Seeley, 29 Cal.2d 294, 176 P.2d 24 (1946); Ex parte Rosencrantz, 211 Cal. 749, 297 P. 15 (1931); a prisoner's right to apply for relief from default in perfecting an appeal, In re Martin, 23 Cal.Rptr. 167, 373 P.2d 103 (1962); the erroneous imposition of an excessive sentence, Ex parte Morck, 180 Cal. 384, 181 P. 657 (1919); the improper rendition of multiple sentences, Neal v. State, 9 Cal.Rptr. 607, 357 P.2d 839 (1960); an erroneous conviction under an inapplicable statute, In re Zerbe, 36 Cal.Rptr. 286, 388 P.2d 182 (1964); and an incorrect conviction under a complaint not charging a public offense, In re Allen, 27 Cal.Rptr. 168, 377 P.2d 280 (1962).

More recently, a California court granted the writ to a petitioner who was seeking to have a judgment and commitment declared void and the sentence set aside. In re Perez, 48 Cal.Rptr. 809 (1966). Petitioner was improperly charged with and sentenced for the crime of escape while serving a sentence for a felony, rather than properly charging him with escape while serving a sentence for a misdemeanor. The petitioner pleaded guilty and the time for filing notice of appeal had elapsed after the error was discovered. The California court held that "a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct." Id., at 811.

This Court has repeatedly held that a person should be discharged via the writ of habeas corpus where it is clear and undisputed that he is held by reason of the commission of an act which the law does not prohibit

or penalize. Eureka Bank Cases, 35 Nev. 80, 126 P. 655, 129 P. 308 (1912); In the Matter of Kuhns, 36 Nev. 487 137 P. 83 (1913); Ex parte Roberson, 38 Nev. 326, 149 P. 182 (1915); Ex parte La Vere, 39 Nev. 214, 156 P. 446 (1916); Ex parte Twyeffort, 42 Nev. 259, 174 P. 431 (1918); Ex parte Stearns, 68 Nev. 155, 227 P.2d 971 (1951); Colton v. Leypoldt, 72 Nev. 83, 295 P.2d 383 (1956); Ex parte Rowland and Schuman, 74 Nev. 215, 326 P.2d 1102 (1958); Ex parte Hutchinson, 76 Nev. 478, 357 P.2d 589 (1960).

[Headnote 2]

In the case before us, petitioner was wrongfully imprisoned. He was convicted under a statute which did not prohibit his behavior and no crime was committed. There is no dispute as to these facts. Therefore, petitioner is entitled, through the medium of habeas corpus, to his immediate release. [3]

Counsel for petitioner, having competently performed his duty in representing the petitioner, may file a certificate in accordance with NRS 7.260(3) and be allowed an attorney's fee in the amount of $250.

Petition for habeas corpus is granted.

Thompson and Collins, JJ., concur.

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[3] This court at the time of hearing released Orsborn from custody.

↓ 82 Nev. 304, 304 (1966) White v. State ↓

ELLIS EARL WHITE, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 4955

August 15, 1966 417 P.2d 592

Appeal from judgment of the Second Judicial District Court, Washoe County; Jon R. Collins, Judge.

Defendant was convicted in trial court of murder and he appealed. The Supreme Court, Thompson, J., held that where defendant at beginning of his interrogation made known his desire for an attorney and interrogator

told him that "he'd be given an attorney eventually" defendant was denied right to counsel at that time, and where interrogator failed to advise defendant of right to remain silent statement made to interrogator was inadmissible, and subsequent interrogations by other interrogators which followed in unbroken sequence were fatally infected by failure to honor defendant's rights at the outset of interrogations, and that instructing jury in language of statute placing upon defendant burden of proving circumstances of mitigation was improper.

Reversed and remanded.

Thomas R. C. Wilson II, and *John C. Renshaw,* of Reno, for Appellant.

Harvey Dickerson, Attorney General, of Carson City; *William J. Raggio,* Washoe County District Attorney, and *Herbert F. Ahlswede,* Chief Criminal Deputy, of Reno, for Respondent.

1. Courts.
   Trial occurring after Escobedo decision and before Miranda decision was controlled by Escobedo.
2. Criminal Law.
   Where defendant was subjected to separate interrogations by four interrogators in continuous sequence, and first interrogator, upon defendant's making known his desire for counsel, stated "he'd be given an attorney eventually" and thereby denied defendant's rights to counsel, and where first interrogator failed to advise defendant of right to remain silent, subsequent interrogations were fatally infected with failure of first interrogator to honor defendant's rights.
3. Criminal Law.
   Statement by defendant voluntarily appearing at police station that he believed he was man police were looking for, made before he was suspect and before he was taken into custody, was properly admitted.
4. Criminal Law.
   Where defendant being interrogated by police sergeant asked how to proceed to obtain counsel and sergeant replied defendant would be given counsel "eventually," sergeant's response constituted denial of defendant's rights to counsel at that time.
5. Criminal Law.
   Instruction to jury in language of statute placing upon defendant burden of proving circumstances of mitigation may have misled jury to believe defendant had burden of proving

circumstances reducing homicide from first degree to second degree and was improper. NRS 175.235.

OPINION

By the Court, Thompson, J.:

A jury found White guilty of first degree murder and sentenced him to death. At issue is whether his federal constitutional rights were violated when the trial court allowed the state to introduce in evidence certain incriminating statements made by him while in custody and in response to official interrogation. For the reasons hereafter stated we hold that the reception of such evidence was constitutionally impermissible. Therefore, we set aside his conviction and remand for a new trial.

[Headnote 1]

The trial below occurred after Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and before Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Since the new constitutional doctrine announced in those cases has prospective application (Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966)), the issue at hand is controlled by Escobedo.

On October 30, 1964, Ray M. Davis was found dead in his car at the Sparks Nugget parking lot. He had been killed by multiple blows to the head. The same day, White, accompanied by his wife, went to the Reno police station and told the desk officer that he wished to talk to someone in charge about the death of a man in Sparks. The desk officer told Mrs. White to wait in the lobby. He then took White down a corridor to the Inspectors' Bureau where Sergeant Guardia was on duty. Police Officer Nielsen was also present. At approximately 5 p.m. interrogation was commenced by the sergeant, the first of a continuous series of interrogations lasting approximately 5 hours. When the sergeant had finished questioning, White was immediately taken to another room and interrogated by the district attorney. When the district attorney was through, White was turned over to the assistant police chief of the city of Reno for

more questioning, and finally to the police chief of the city of Sparks. Each interrogation was simply a part of one continuous process. Cf. Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954).

[Headnotes 2, 3]

As we read the record, neither the sergeant, the district attorney, the assistant police chief of the city of Reno, nor the police chief of the city of Sparks complied with the constitutional requirements expressed in Escobedo v. Illinois, supra. The trial court would not allow the

testimony of the sergeant who first questioned White, nor the statement of that inquiry prepared by the police officer and signed by White. However, the court did permit the state to introduce in evidence the interrogations by the district attorney, the assistant police chief of the city of Reno, and the police chief of the city of Sparks, which followed in unbroken sequence. [1]

[Headnote 4]

1. White testified that he asked the first interrogator, the sergeant, "what I would have to do to get an attorney now." His testimony is not denied by the sergeant. Indeed, the sergeant acknowledged that, at the very beginning of his interrogation, the subject of an attorney and the cost involved was mentioned. The sergeant advised White that "the cost varied with the attorney," and that "he'd be given an attorney eventually." White thus made known his desire for an attorney immediately. The sergeant's response that "he would be given an attorney eventually" was a denial of White's right to counsel at that time. Cf. Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965). Nor did the sergeant advise White of his absolute constitutional right to remain silent.

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[1] The trial court also allowed the desk officer to testify to his conversation with White when White voluntarily appeared at the police station. He testified that White said, " 'I'd like to see somebody in charge.' He stated that he believed that he was the man that we were looking for. And when I asked him in connection with what, he said 'the death of a man in Sparks' in the early morning hours of that date." This voluntary statement by White, made before he was a suspect, and before he was taken into police custody, does not fall within the prohibition of Escobedo. As to this bit of evidence the lower court ruled correctly.

Escobedo held that where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. at 342 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The procedural safeguards established by Escobedo were not followed by the sergeant. The trial court properly excluded his interrogation of White from jury consideration. The same ruling should have been made with regard to the subsequent interrogations by the district attorney, the assistant police chief of the city of Reno, and the police chief of the city of Sparks, since they were part of one continuous process. Leyra v. Denno, supra. The failure

of the first interrogator to honor the constitutional rights of White fatally infected the subsequent interrogations which followed in unbroken sequence. The confession given by White to the sergeant was simply filled in and perfected by the additional statements given in rapid succession to the district attorney and two police officers. [2] The error is prejudicial per se.

[Headnote 5]

2. White's second assignment of error also has merit. The language of NRS 175.235 was copied as a jury instruction. It provides: "Upon a trial for murder, the commission of the homicide by the defendant being

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[2] Subordinately, we note that the interrogations conducted by the district attorney, the assistant police chief of the city of Reno, and the police chief of the city of Sparks, if separately considered, also failed to meet the constitutional standards of Escobedo.

proved, the burden of proving circumstances of mitigation, or that justify or excuse it, shall devolve upon him, unless the proof on the part of the prosecution tends to show that the crime committed amounts only to manslaughter, or that the defendant was justifiable or excusable."

On a prior occasion this court condemned the giving of that instruction, State v. Fitch, 65 Nev. 668, 200 P.2d 991 (1948), but, in the circumstances there present, concluded that the error was harmless. California, from whom we borrowed our statute, has repeatedly held that the jury should not be instructed in the language of this statute. People v. Deloney, 41 Cal.2d 832, 264 P.2d 532 (1953); People v. Letourneau, 34 Cal.2d 478, 211 P.2d 865 (1949); People v. Cornett, 33 Cal.2d 33, 198 P.2d 877 (1948); People v. Valentine, 28 Cal.2d 121, 169 P.2d 1 (1946); People v. Thomas, 25 Cal.2d 880, 156 P.2d 7 (1945).

One vice of the instruction is its propensity to mislead. For example, it does not apply in determining the degree of murder, but applies only in deciding whether the homicide was murder or manslaughter, or was excusable or justifiable. Yet a jury might well interpret the words "circumstances in mitigation," to include circumstances that reduce the homicide from first degree murder to second degree murder, and require the defendant to establish those circumstances. If so interpreted, the burden cast upon the state to prove every element of the crime charged beyond a reasonable doubt would be substantially diluted, if not totally erased. This, of course, is impermissible, for that burden never shifts or changes. We conclude that the words of NRS 175.235 should never be copied as a jury instruction in a murder trial.

The defendant-appellant is indigent. We commend his court-appointed counsel for their

services and direct the lower court to give them the certificate specified in subsection 3 of NRS 7.260, to enable them to receive compensation for their services on appeal.

Reversed and remanded for new trial.

Zenoff, D. J., and Breen, D. J., concur.

PASO BUILDERS, INC., a California Corporation,
Appellant, *v.* R. T. HEBARD, et al., Respondents.

No. 5025

September 8, 1966 417 P.2d 910

On respondents' motion to require Clerk of District Court to transmit to Supreme Court and to counsel a true copy of Record on Appeal.

The Supreme Court, Thompson, J., held that where district court entered ex parte order that original papers be forwarded to appellate court in lieu of copies, on good cause shown, Supreme Court would grant motion of respondent's counsel to return original papers to district court to allow counsel for respondent ten days within which to conform their office records, and appellant was required to pay for and furnish a copy of reporter's transcript to each party since transcript had been designated as part of record.

Motion granted, in part, and denied, in part.

Collins, J., dissented in part.

Morton Galane, of Las Vegas, for Appellant.

Bell, Morris & Little; Michael L. Hines; James E. Rogers; and John Peter Lee, of Las Vegas, for Respondents.

1. Appeal and Error.
   Where appellant designated the complete record and all proceedings and evidence in action as impliedly authorized by rule, it obviated the need to serve with its designation a concise statement of points upon which it intended to rely. NRCP 75(a, d).
2. Appeal and Error.
   Whenever a reporter's transcript is designated as a part of record on appeal and district court has ordered the transmittal of the original papers and exhibits to the appellate court in lieu of copies, appellant must pay for and furnish a copy of the transcript to each party appearing separately. NRCP 75(a, d, g, i, o).
3. Appeal and Error.

Where district court had entered an ex parte order that the original papers and exhibits be sent to the appellate court in lieu of copies, appellant was not required to pay for and furnish a copy of the original papers to each party appearing separately but must pay for and furnish copy of transcript

which it had designated as part of record. NRCP 75(a, d, g, i, o).

4. Appeal and Error.

The main purpose in providing for an appeal on original papers is to save expense. NRCP 75(i).

5. Appeal and Error.

District court was entitled to make an ex parte order for the transmission of original papers to the appellate court in lieu of copies. NRCP 75(i, o).

6. Appeal and Error.

If district court orders transmission of original papers to appellate court in lieu of copies, respondent's counsel should, upon being served with a copy of court order, immediately contact clerk and conform his office file to record which clerk will transmit, and if counsel has, for good cause, failed to conform his office file and original has been sent to Supreme Court he may file motion with Supreme Court for return of original papers in order that he may conform his office file.

7. Appeal and Error.

Where district court entered ex parte order that original papers be forwarded to appellate court in lieu of copies, Supreme Court would grant motion of respondent's counsel on good cause shown to return original papers to district court to allow counsel for respondent ten days within which to conform office file. NRCP 75(i).

OPINION

By the Court, Thompson, J.:

Relying upon Rule 75(g), [1] the respondents have filed a motion to require the clerk of the district court to

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[1] NRCP 75(g) reads: "The clerk of the district court, under his hand and the seal of the court, shall transmit at the expense of appellant, to the appellate court and to counsel for each party appearing separately, a true copy of the matter designated by the parties, including the designated portions of the reporter's transcript filed pursuant to subdivision (b) of this rule, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification."

transmit, at the expense of the appellant, to this court and to counsel for each party appearing separately, a true copy of the record on appeal. The question raised by the motion is whether the appellant and the clerk of the district court are obliged to act as requested when the district court entered an ex parte order in accordance with Rule 75(i) [2] that the original papers and exhibits be sent to the appellate court in lieu of copies. There exists a disparity in practice and a difference in point of view among the members of the bar on this question which we hope to eliminate by this opinion.

[Headnotes 1-3]

1. Preliminarily, we note that in this case the appellant designated the complete record and all the proceedings and evidence in the action as authorized by implication by Rules 75(a) and (d), thus obviating the need to serve with its designation a concise statement of the points upon which it intends to rely. NRCP 75(d); Basic Refractories v. Bright, 71 Nev. 248, 286 P.2d 747 (1955). Included as a part of the record so designated is a reporter's transcript of testimony. We mention this particularly since Rule 75, when read as a whole, and especially parts (g), (i) and (o) thereof, requires that when a reporter's transcript is designated as a part of the record on appeal, the appellant must pay for and furnish a copy of the transcript to each party appearing separately. [3] Indeed, the appellant concedes that the respondents' motion is valid insofar as the reporter's transcript is concerned. However, the appellant denies that he must also pay for and furnish a copy of the original papers to each party appearing separately when the district court has ordered them sent to this court in lieu of copies. As to this, we agree with the appellant.

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[2] NRCP 75 (i) provides: "Whenever the district court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper."

[3] Parts of Rule 75 were amended following the decision of this court in Tryba v. Fray, 74 Nev. 320, 330 P.2d 499 (1958).

[Headnote 4]

2. The main purpose in providing for an appeal on the original papers is to save expense. 8 F.R.D. 143, 145. As a general proposition, each party appearing separately in the action has,

during the course of the litigation, been served with a copy of each original paper (pleadings, findings, conclusions, judgments, notices, motions, stipulations, master's reports, etc.) officially on file with the clerk of the court. Consequently, there does not exist a need for the appellant to supply his opponents with copies of original papers. An inconvenience and expense can be eliminated without prejudice to anyone. The same reasoning does not apply to the reporter's transcript. Normally, a transcript is not prepared unless it is ordered by the losing party who needs it for a contemplated appeal. His opponent does not have a copy in his files. For this reason the writers of Rule 75(g) and (o) required the appellant to pay for and furnish a copy of the transcript to each party appearing separately. Therefore, we hold that whenever a reporter's transcript is designated as a part of the record on appeal, the appellant must pay for and furnish a copy of that transcript to each party appearing separately; and, when the district court (or this court) orders an appeal on the original papers, the appellant need not pay for and furnish a copy of those papers to each party appearing separately. The original papers contemplated by Rule 75(i) and (o) do not include a reporter's transcript.

[Headnote 5]

3. The district court's order for transmission of the original papers in lieu of copies was made ex parte. The respondents contend that an ex parte order is not authorized. We do not agree. Though true that Rule 75(i) does not specifically authorize the order to be made ex parte, Rule 75(o) contemplates an ex parte order for the transmission of original papers when the request is presented to the Supreme Court, thus establishing the propriety of an ex parte order of this kind. We perceive no good reason for a different procedure when application for such an order is addressed to the district court.

[Headnote 6]

4. Initially, we mentioned a disparity in practice among the members of the bar when an order for transmission of the original papers is made. This comes about because the rule is silent as to what should occur after such an order is obtained. The rule does state that the district court shall make appropriate provision “for the safekeeping, transportation, and return thereof as it deems proper.” Sometimes the original papers are sent to this court before the respondents have had an opportunity to conform their office copies and prepare their own record for the appeal. If respondent's counsel practices in a locality other than Carson City, the inconvenience is evident. In such event, we offer two suggestions. First, when served with a copy of a court order for the transmission of the original papers, the respondent's counsel should immediately contact the clerk of the district court and conform his office file to the record which the clerk will transmit. This practice is common among attorneys practicing in some parts of our state, but is not followed elsewhere. Second, if counsel has, for good cause, failed to conform his office file as just suggested, and the original has been sent to this court, he may file a motion with us that the original papers be returned to the district court in order that he may conform his office file. If such a motion is filed, and good cause is shown in

support thereof, we will enter an appropriate order.

[Headnote 7]

In this case we order that the original papers, now on file with the clerk of this court, be returned forthwith to the district court to allow counsel for respondents an opportunity to conform their office records. They are to do so within 10 days after the clerk of the district court receives the file from this court. The appellant is ordered to pay for and furnish a copy of the reporter's transcript to each party appearing separately within 10 days after the clerk of the district court receives the file from this court.

Bowen, D. J., concurs.

Collins, J., concurring in part; dissenting in part.

I concur with certain parts of the majority opinion

but dissent with others. I agree that whenever a reporter's transcript is designated as part of the record on appeal, the appellant must pay for and furnish a copy of that transcript to each party appearing separately. I also agree that when a district court, or this court, orders an appeal on the original papers, the appellant need not pay for and furnish a copy of those papers to each party appearing separately.

I disagree, however, that a district court (as distinguished from this court) can make an order for transmission of the original papers, in lieu of copies, ex parte. Especially should that be so where the order is sought by one of the parties to the appeal, as was the case here. A careful reading of Rule 75 NRCP indicates the record on appeal should consist of *copies* of those portions of the record designated, with the originals of the documents to remain with the clerk of the district court. The exception to this general rule is stated in Rule 75(i). [1] No doubt there may be many occasions where it is desirable or even necessary for original papers or exhibits to be sent to the appellate court; i.e., a unique document or exhibit which could not be adequately reproduced by copy. There is authority for either the district court or this court to make such order. This court by express rule may make such order "without or with motion or notice." Rule 75(o). [2] The rule is not so liberal with the district court and it should not be so interpreted by decision of this court. If the rule is to be rewritten, let it be done in the manner contemplated by law.

Rule 75(o) does not say the district court can make the order ex parte, especially where the application for the order is by one of the parties and not of the court's own motion. It is silent on that point and I therefore feel

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[1] "(i) Order as to Original Papers or Exhibits. Whenever the district court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper."

[2] "(o) Transmission of Original Papers. Whenever the Supreme Court, without or with motion or notice, orders the hearing of an appeal on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. * * *"

other rules relevant to obtaining "orders" should be followed. Rule 7(b) (1) NRCP requires that "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Rule 5(a) NRCP provides, "Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, *designation of record on appeal,* and similar paper shall be served upon each of the parties. * * *" The granting of an ex parte order upon application of any party to an action should be discouraged or prohibited entirely unless clear authority appears for it. Ex parte orders are the bane of the trial court and should not be encouraged by construction of rules by this court.

If, in this case, a motion had been made to the district court for an order sending the original record to this court, with notice to respondent, all the problems created by that circumstance could have been avoided. The trial court could have made such orders as were fair to each party to the appeal and avoided the entire controversy in this court with attendant expense and delay to the parties. Furthermore, I do not approve the idea of this court making "suggestions" to the trial courts or parties. Our pronouncements should be in the form of binding rules and orders.

FAIRFIELD POPE DAY, Appellant and Cross-Respondent, *v.* FRANCES STATTER DAY, Respondent and Cross-Appellant.

No. 5048

September 9, 1966 417 P.2d 914

Appeal and cross-appeal from judgment of the Second Judicial District Court, Washoe

County; John E. Gabrielli, Judge.

Divorced wife sought money judgment against divorced husband for alimony arrearages under divorce decree. The trial court entered a judgment awarding the divorced wife recovery for arrearages and an attorney's fee, but denying part of her claim for interest, and the divorced husband appealed, and the divorced wife appealed from that part of the judgment denying part of the claim for interest. The Supreme Court, Collins, J., held that divorced husband was not entitled to retroactive modification of alimony provisions of divorce decree to give him credit against amount of arrearages because of amounts paid by him directly to son and because of alleged cessation of liability to make payments to divorced wife for daughter after daughter's marriage.

Judgment appealed by Fairfield Pope Day affirmed; judgment appealed by Frances Statter Day reversed and remanded for further action.

John P. Thatcher, of Reno, for Appellant and Cross-Respondent.

Leslie B. Gray, of Reno, for Respondent and Cross-Appellant.

1. Divorce.
   Payments once accrued under divorce decree for either alimony or support of children become vested rights and cannot thereafter be modified or voided.
2. Divorce.
   Divorced husband was not entitled to retroactive modification of alimony provisions of divorce decree to give him credit against amount of arrearages sought to be recovered by divorced wife because of amounts paid by him directly to

son and because of alleged cessation of liability to make payments to divorced wife for daughter after daughter's marriage. NRS 125.140, subd. 2, 125.170, 125.180.
3. Divorce.
   Where divorced wife recovered alimony arrearages under divorce decree in amount of $12,535.17, trial court did not violate its discretion in awarding divorced wife an attorney's fee of $1,500. NRS 125.180.
4. Interest.
   Where divorced wife within six months following the granting of divorce decree filed motion to modify decree on ground that she had been misled by divorced husband's attorney, but motion was never decided, and both parties abandoned any further effort regarding it, filing of motion did not bar wife on ground of estoppel or laches from recovering interest on subsequent judgment for alimony arrearages. NRS 125.180; NRCP 60(b).

OPINION

By the Court, Collins, J.:

The parties were formerly husband and wife. Hereafter, appellant and cross-respondent will be referred to as Fairfield, while respondent and cross-appellant will be referred to as Frances. They were divorced in Reno in 1949. The decree approved an agreement between the parties which this court previously held was merged in the decree. Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964). Frances, by remand of that action, seeks a money judgment against Fairfield for alleged arrearages under the decree. He contended in the trial court, and here, she is entitled, if at all, to a very nominal amount. The lower court awarded Frances judgment against Fairfield totaling $12,535.17, an attorney's fee of $1,500.00 and costs, from which he appeals. It limited interest at the statutory rate on the various sums totaling $12,535.17 to a time commencing January 1, 1960, from which she appeals.

Against amounts admittedly owed, Fairfield contends he is entitled to a credit of $1,972.00 paid directly to a son while attending college and prior to his 21st birthday; a credit of $1,562.20 representing tuition and living expenses paid directly to the son while attending college after reaching 21 years. He also contends there

should have been a cessation of liability to make payment to Frances for the daughter after her marriage; that the agreement between him and Frances should be construed as providing for support payments for the children rather than alimony to Frances; and that the trial court erred in awarding Frances an attorney's fee absent a showing of need.

The agreement, merged into the decree, provided payments from Fairfield to Frances to be alimony so that the money would be taxable to her rather than him under the federal income tax law. Both parties admit the agreement had that effect. Frances has paid all taxes on the sums received by her. Frances, in turn, obligated herself to support the children during their minority from such payments, and until they reached 25 years if either or both were enrolled in college. The alimony payments were to continue in accordance with a formula related to Fairfield's income, but to be reduced 50 percent in the event Frances remarried, which she did in 1956. The payments were also to be reduced 25 percent as each child reached 21 years unless attending college, in which event they were to continue until each child reached 25 years, graduated or ceased attending school.

The son entered college in 1957 but experienced academic difficulty. Frances, at the urging and with the agreement of Fairfield, for the purpose of bolstering the son's college career, stayed with him at the school through June 1958, when he quit because of scholastic problems. Thereafter Frances refused to continue the son in school. The son, at Fairfield's urging, returned to the same school in 1959, while still under 21, but quit again on April 1, 1960. The son reached 21 on March 21, 1960. He returned again but quit finally in October 1960. Fairfield paid the son directly $1,972.00 for college expenses before he reached 21 and claims the trial court erred in not giving him credit against the amount sought by and awarded

to Frances.

In June 1962, while 19, the daughter married. The agreement between Fairfield and Frances did not expressly provide for reduction in the alimony payments in the event one of the children married. There is dispute

in the evidence upon the point, but the trial court found Frances continued to make a home for the daughter and contribute to her college expenses even after marriage, and adjudged Fairfield to be liable for the payments due Frances under the agreement notwithstanding the daughter's marriage. Fairfield contends he is entitled to a credit for all sums due after the daughter's wedding.

The agreement also provided Fairfield was to supply Frances each year proof of his income in order that his obligation to her under the payment formula could be determined. He failed to do this from 1950 to 1959, during which period part of the arrearage accrued because he was not paying in accordance with the formula related to his income. Though disputed, the trial court found Frances had demanded these statements and Fairfield had neglected to provide her with them.

It should be clearly noted Frances brought her motion on May 9, 1963, to determine arrearages pursuant to NRS 125.180. [1] Following an appeal to this court, Day v. Day, supra, the trial court entered its findings, conclusions and decree on arrearages October 14, 1965. Prior to that time Fairfield had never brought a motion to modify or reduce the payments found to be due Frances under the agreement merged in the decree.

We hold the judgment of the trial court on Fairfield's appeal should be upheld, but reverse and remand for further proceedings on Frances' cross-appeal.

[Headnote 1]

Payments once accrued for either alimony or support

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[1] "125.180 Judgment for arrearages in payment of alimony and support.

"1. Where the husband, in an action for divorce, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the district court may make an order directing the entry of judgment for the amount of such arrears, together with costs and disbursements not to exceed $10 and a reasonable attorney's fee.

"2. The application for such order shall be upon such notice to the husband as the court may direct.

"3. The judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments.

"4. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law."

of children become vested rights and cannot thereafter be modified or voided. In Lockwood v. Lockwood, 160 F.2d 923 (D.C. Cir. 1947), it is stated:

"[W]e have held that a single award for the support of a wife and minor children is alimony payable to the wife and is not contingent on the minority of the children. True, the fact that the children do reach majority may be a ground for revision of the decree upon proper application, but a judgment on such an action looks only to the future and does not act in retrospect. It is well settled in this jurisdiction that the trial court is without power to effect a revision or remittance of past due alimony. The trial court acted correctly in enforcing the full payment of the accrued alimony."

[Headnote 2]

To a similar effect is Shuff v. Fulte, 344 Ill.App. 157, 100 N.E.2d 502, 506 (1951); Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764, 767 (1952); Distler v. Distler, 309 Ky. 454, 218 S.W.2d 26 (1949). Nevada statute, NRS 125.170 [2] also commands such a result, at least as to alimony and support of the wife. Likewise NRS 125.140(2) [3] allows the trial court to "modify or vacate" an award for care, education, maintenance and

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[2] "125.170 Installment judgments for alimony not accrued cannot be modified unless court expressly retained jurisdiction at final hearing.

"1. In divorce actions, installment judgments for alimony and support of the wife shall not be subject to modification as to accrued installments. Installments not accrued at the time a motion for modification is filed shall not be modified unless the court expressly retained jurisdiction for such modification at the final hearing. The provisions of this subsection apply to all such installment judgments whether granted before or after July 1, 1961.

"2. The provisions of this section shall not preclude the parties from entering into a stipulation as to accrued installments prior to the time a motion for modification is filed."

[3] "125.140 Disposition of and provision for children by the court; continuing jurisdiction of the district court.

* * * * *

"2. In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."

support of children, but even that authority implies a prospective rather than retroactive modification or vacation. Here the trial court refused a retroactive modification and we do not disagree. Certainly the trial court is not required to make such a modification.

We feel the same authority cited above governs the payments made by Fairfield directly to his son and for which he now claims credit against arrearages owed to Frances.

[Headnote 3]

As to the attorney's fee awarded Frances pursuant to NRS 125.180(1),[4] we feel a different rule applies than in an allowance for suit money provided for in NRS 125.040,[5] as recently construed in Allis v. Allis, 81 Nev. 653, 408 P.2d 916. NRS 125.180(1) has for its purpose the entry of a money judgment where arrearages under the divorce decree are accrued and vested, while NRS 125.040 has for its purpose the discretionary award of suit money to the wife by the trial court upon her showing of necessitous circumstances. Allis v. Allis, supra. The trial court in its award did not violate its discretion

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[4] "125.180 Judgment for arrearages in payment of alimony and support.

"1. Where the husband, in an action for divorce, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the district court may make an order directing the entry of judgment for the amount of such arrears, together with costs and disbursements not to exceed $10 and a reasonable attorney's fee."

[5] "125.640 Allowances and suit money for wife during pendency of action.

"In any suit for divorce now pending, or which may hereafter be commenced, the court, or judge, may, in its discretion, upon application, of which due notice shall have been given to the attorney for the husband if he has an attorney, or to the husband if he has no attorney, at any time after the filing of the complaint, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend such suit, and for her support and for the support of the children of the parties during the pendency of such suit. A court or judge may direct the application of specific property of the husband to such object, and may also direct the payment to the wife for such purpose of any sum or sums that may be due and owing the husband from any quarter, and may enforce all orders made in this behalf as provided in NRS 125.060."

to the amount awarded under all the circumstances. We find no error.

[Headnote 4]

Frances' cross-appeal from the judgment of the trial court denying her interest on the arrearages found due prior to January 1, 1960, is good and we reverse. The reasoning of the

trial court in such action by it is not clear from the record. The court adopted Fairfield's authorities upon this point as its ruling, and held Frances was either estopped from claiming interest on arrearages prior to January 1, 1960, or that she had made an election between two inconsistent rights. Within six months following the granting of the decree of divorce in 1949, Frances filed a motion to modify the decree on the ground that she was misled by Fairfield's attorney. This motion has never been decided and both parties have abandoned any further effort regarding it. This, Fairfield contends, is the election by Frances of a right inconsistent with her motion to determine arrearages and reduce them to judgment. Fairfield cites Rule XLV of the District Court Rules (NCL 1929, Vol. 4, p. 2484) [6] and contends a motion under this rule suspended the operation of the judgment and all proceedings under it. Rule XLV has since become NRCP 60(b) [7] . Rule XLV

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[6] "Vacating judgments and orders.—Time to amend—No judgment, order, or other judicial act or proceeding, shall be vacated, amended, modified, or corrected by the court or judge rendering, making, or ordering the same, unless the party desiring such vacation, amendment, modification, or correction shall give notice to the adverse party of a motion therefor, within six months after such judgment was rendered, order made, or action or proceeding taken."

[7] "(b) Mistakes; Inadvertence; Excusable Neglect; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud, misrepresentation or other misconduct of an adverse party which would have heretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void; or, (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have

apparently was never construed by this court. However, the point was clearly settled when NRCP 60(b) was adopted, because it specifically provides, "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." That, we hold, is the construction to be accorded Rule XLV. Therefore, until Frances' motion under Rule XLV was determined, which it never has been, the judgment was final and its operation not suspended. Furthermore, the trial court specifically found Fairfield had a mandatory duty to provide the sworn statements and certificates each year and that Frances had repeatedly requested the statements for the years 1950 to 1959, inclusive. We find there was no basis for the court below to refuse the award of interest on either the doctrine of estoppel or laches.

Therefore we hold Fairfield's appeal is not well taken and we sustain the lower court's judgment in favor of Frances.

On Frances' cross-appeal we reverse the ruling of the lower court and remand the cause for

the calculation and award of interest on the arrearage adjudged to be due her.

Zenoff, D. J., concurs.

Thompson, J., concurring:

I agree with some of the views expressed by Mr. Justice Collins, but not all of them. Therefore, I shall state my views separately.

By motion pursuant to NRS 125.180, Frances Day, the former wife of Fairfield Day, sought an order directing the entry of judgment for the amount of arrears claimed to be due for her support under a Nevada divorce judg

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prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

ment entered on April 7, 1949. [1] A threshold issue as to whether their written property settlement and support agreement were merged into the divorce judgment, and the support provisions thereof susceptible to an NRS 125.180 proceeding, was the subject of our opinion in Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964). There we held the proceeding permissible and remanded the matter for resolution of the motion to fix arrears. This appeal by Fairfield and cross-appeal by Frances is from the district court's determination of that motion. That court found that Frances was entitled to judgment in the sum of $12,535.17, plus interest at the rate of 7 percent per annum from January 1960, plus costs and attorney fees. The court refused to allow interest on arrearages prior to January 1960.

Fairfield's appeal assigns three errors. First, that the lower court mistakenly failed to allow him credit for $3,534.20 in ascertaining arrearages. That money was paid directly to his son, Fairfield, Jr., for tuition and living expenses while attending Harvard. Second, that the court should have recognized the marriage of his daughter, Estella, as terminating his obligation to make further payments on her account. Finally, that the court lacked power to award counsel fees absent a showing that Frances, his former wife, was in "necessitous circumstances." The cross-appeal of Frances claims that error occurred when the court refused to allow interest in the amount of $7,644.17 on arrearages between January 1, 1950 and January 1, 1960.

Before deciding these issues, one should first note the

[1] NRS 125.180 provides: "1. Where the husband, in an action for divorce, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the district court may make an order directing the entry of judgment for the amount of such arrears, together with costs and disbursements not to exceed $10 and a reasonable attorney's fee.

"2. The application for such order shall be upon such notice to the husband as the court may direct.

"3. The judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments.

"4. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law."

support provisions of the Day agreement which was merged into the divorce decree and, thereby, became a judgment for support. The agreement expressed three purposes: to settle property rights, to provide for the support of the wife, and to provide for the custody, education and support of the two minor children, Fairfield, Jr. and Estella. The mother was given custody, the father visitation rights, and they were to consult on major decisions affecting the welfare of the children. The relevant provisions regarding support obligated Fairfield to pay Frances "for her maintenance and support" a base sum of $9,000 yearly in equal monthly installments of $750. That sum represented 50 percent of his estimated annual future income. A provision for increase or decrease on the basis of Fairfield's income above or below $18,000 per year was inserted. Fairfield was to furnish a sworn statement of his income each year.

The amounts payable by Fairfield were to be automatically reduced by 50 percent should Frances remarry, and by 25 percent when either child became 21 years old, except that if such child was in college the reduction would not occur until the child became 25 years old, graduated from college or ceased attending, whichever first happened. In an effort to insure tax deductibility to Fairfield, all payments were to be made to Frances and she was obliged to support and educate the children.

Frances remarried in 1956. The daughter, Estella married in June 1962, became 21 years old in 1964, but continued her schooling. The son, Fairfield, Jr., became 21 years old in March 1960, and continued college for a while thereafter.

The main contention of Frances is that the payments ordered are alimony because specifically made for "her support and maintenance," to allow Fairfield a maximum income tax deduction. Since NRS 125.170 precludes modification of accrued alimony installments, and as Fairfield's request is, in realty, to modify the judgment, he must fail. [2] On the other hand, Fairfield argues that a

[2] NRS 125.170 provides: "1. In divorce actions, installment judgments for alimony and support of the wife shall not be subject to modification as to accrued installments. Installments not

fair construction of the payment provisions compels the conclusion that the payments were for alimony and child support. To rule otherwise would exalt form over substance. Therefore, he contends that NRS 125.170 does not bar his request for credits, and, that equitable considerations should have persuaded the lower court to allow his request. As I view this matter, we need not decide whether the payments required by the judgment are alimony, or alimony and child support, for, assuming the latter, the lower court acted within permissible limits of discretion in refusing credits for the sums paid by Fairfield directly to his son, and in ruling that his daughter's marriage did not affect his obligation to pay.

1. Direct payments to son. There is abundant authority for the proposition that accrued payments for alimony or child support may not be modified, since modification generally looks to the future and does not act retroactively. See Lockwood v. Lockwood, 160 F.2d 923 (D.C. Cir. 1947) and other authorities cited by Justice Collins; also, Annot., 6 A.L.R.2d 1277. However, I do not consider those authorities controlling on the issue of credits. The father does not here seek to modify the judgment. He states simply that he has paid $3,543.20 directly to his son for college expenses and should be allowed credit therefor. Special considerations of an equitable nature may justify a court in crediting payments made directly to a child rather than to the former wife for the child. Briggs v. Briggs, 178 Ore. 193, 165 P.2d 772 (1946); Mooty v. Mooty, 131 Fla. 151, 179 So. 155 (1938); Annot., 2 A.L.R.2d 831. The issue is one addressed to the discretion of the trial court, and the task on review is to decide whether that discretion was exercised within permissible limits.

No one particularly favors a double payment. On the other hand, there is merit in the notion that the method

accrued at the time a motion for modification is filed shall not be modified unless the court expressly retained jurisdiction for such modification at the final hearing. The provisions of this subsection apply to all such installment judgments whether granted before or after July 1, 1961.

"2. The provisions of this section shall not preclude the parties from entering into a stipulation as to accrued installments prior to the time a motion for modification is filed."

of payment directed by the judgment be followed. The seeds of further controversy may be sown when that method is unilaterally departed from. Here, the father was in arrears at the time he made direct payments to his son. Furthermore, the father and mother were not in accord as to the advisability of college for Fairfield, Jr. The lad's school record had been poor. Indeed, the conflicting information presented to the trial court may reasonably be read as indicating that Fairfield, Jr., attended Harvard only to please his father and for no other purpose. In these circumstances, we cannot rule that the lower court abused its discretion in refusing credit. Cf. Goodman v. Goodman, 68 Nev. 484, 236 P.2d 305 (1951).

2. The daughter's marriage. The father urges that the trial court should have treated his daughter's marriage as automatically reducing his support obligation by 25 percent. The merged agreement for support did not so provide, nor did the father ever seek to modify the judgment following Estella's marriage. Each case cited to support his claim was a modification proceeding [Crook v. Crook, 80 Ariz. 275, 296 P.2d 951 (1956); Peters v. Peters, 14 App.Div.2d 778, 219 N.Y.S.2d 906 (1961); Hayes v. Hayes, 156 S.W.2d 34 (Mo.App. 1941); Davis v. Davis, 96 F.2d 512 (D.C. App. 1938)], and may be read to stand for the proposition that the marriage of a minor daughter may sometimes persuade a court to exercise its discretion in favor of modification upon appropriate application therefor. Such an application was not made in this case. The only motion before the court was the mother's motion to fix arrears. In this context, I think that the lower court made the correct ruling.

3. Counsel fees. Fairfield contends that the district court lacked power to award fees to counsel for his former wife for services rendered in the proceeding below. His contention is bottomed on the admitted fact that Frances was not shown to be in necessitous circumstances. Unlike a suit money motion under NRS 125.040, where need is a prerequisite, (Allis v. Allis, 81 Nev. 653, 408 P.2d 916 (1965)), counsel fees may be allowed in an

NRS 125.180 proceeding whether the judgment creditor is in need or not. That statute authorizes “a reasonable attorney's fee” when an order is made directing the entry of judgment for arrears. The apparent legislative purpose is to permit a court to require the judgment debtor to pay costs and fees, since his failure to honor his judgment obligations caused the NRS 125.180 proceeding to take place.

4. Interest. The parties agree that interest on arrears which accrued between January 1, 1950 and January 1, 1960 amounts to $7,644.17. The lower court refused Frances that additional amount. I agree with Mr. Justice Collins that the doctrines of estoppel, laches, and election do not preclude her claim to interest, but wish to and a comment.

Fairfield does not challenge the principal amount found to be due as arrears for that period. A fortiori, he may not challenge interest absent an understanding between the parties that arrears would not carry interest, or a waiver of interest. Neither appears in this record. The statute directs that interest at the rate of 7 percent per annum upon money from the time it

becomes due shall be allowed "upon judgments rendered by a court of this state." NRS 99.040(3). A judgment directing installment support payments falls within the statute. See also: Annot., 33 A.L.R.2d 1455.

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82 Nev. 329, 329 (1966) Nootenboom v. State

ROGER WAYNE NOOTENBOOM, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 5097

September 26, 1966 418 P.2d 490

Appeal from judgment of the Eighth Judicial District Court, Clark County; William P. Compton, Judge.

Two informations against defendant for offenses of first and second degree kidnaping, rape, and robbery relating to the same event were consolidated for trial.

82 Nev. 329, 330 (1966) Nootenboom v. State

The trial court entered judgment of second degree kidnaping and rape and defendant appealed. The Supreme Court, Thompson, J., held that defendant should have been allowed eight peremptory challenges but that allowing only four peremptory challenges was not prejudicial where charge of first degree kidnaping was not submitted to jury and that items produced by search substantially contemporaneous with defendant's lawful arrest were correctly allowed in evidence.

Affirmed.

Irwin Aarons of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, Carson City; *Edward G. Marshall,* Clark County District Attorney, and *James H. Bilbray,* Deputy District Attorney, of Las Vegas, for Respondent.

1. Criminal Law.

   Defendant accused of first and second degree kidnaping, rape, and robbery should have been allowed eight peremptory challenges but allowing only four peremptory challenges was not prejudicial when charge of first degree kidnaping was not submitted to jury. NRS 175.085.

2. Jury.
   Statute providing for peremptory challenges does not apply to crimes carrying a fixed minimum prison term which may be extended to life. NRS 175.085.
3. Statutes.
   Judicial interpretation given by California courts to a statute borrowed from that state is persuasive.
4. Criminal Law.
   Instructions advising jurors they may be persuaded solely on basis of testimony of rape victim but to exercise caution because of the grave dangers attending were not conflicting.
5. Constitutional Law.
   Constitutional prohibition of Fourth Amendment is enforcible against the states through the Fourteenth Amendment. U.S.C.A.Const. Amends. 4, 14.
6. Arrest.
   Constitutional validity of an arrest for a felony not committed in the officer's presence depends on whether, at the moment the arrest is made, he had probable cause to make it.
7. Arrest.
   Probable cause exists for an officer to make an arrest for felony not committed in his presence when facts and circumstances known to the officer warrant a prudent man in believing that a felony has been committed by the person arrested.

8. Arrest.
   Identification of suspect by the victim does not validate prior arrest and fruits of the search contemporaneous with the arrest may not be used for that purpose.
9. Arrest.
   Arresting officer who had been informed by rape victim that assailant was anxious to leave town and who discovered suspect, answering description given by rape victim, in bus depot had probable cause for arrest, in view of fact that suspect had identification cards with two different names and that the claim by suspect that he had been with his father all day was denied by his father.
10. Arrest.
    That arresting officers advised rape suspect that he was being arrested as disorderly person was relevant to issue whether officers had probable cause to arrest him as the assailant but did not compel conclusion that arrest was unauthorized.
11. Criminal Law.
    Defendant's clothes, cigarettes, and a switchblade knife found on him by a search contemporaneous with a lawful arrest were admissible.

OPINION

By the Court, Thompson, J.:

Two informations were filed against Nootenboom in the district court charging him with the commission of four different offenses, each relating to the same transaction or event. The first information alleged first and second degree kidnaping in separate counts; the second, rape and robbery. Counsel stipulated that the two cases be consolidated for trial. The court allowed each side four peremptory challenges. During trial, evidence was received over the

objection that it was secured by an unreasonable search and seizure. At the close of the evidence and before jury argument, the state dismissed the first degree kidnaping and robbery charges. Only the second degree kidnaping and rape charges were submitted to the jury. The jury convicted Nootenboom of each crime. He was sentenced to prison for a term of not less than 10 years nor more than 15 years for second degree kidnaping, and to a term of not less than 5 years nor more than 10 years for rape. The sentences are concurrent. This appeal followed.

⬇ 82 Nev. 329, 332 (1966) Nootenboom v. State ⬇

Three errors are claimed. First, that the trial court should have allowed each side eight peremptory challenges since the crime of first degree kidnaping is punished by death or imprisonment for life, and the crimes of second degree kidnaping and rape carry sentences which may be extended to life. Second, that conflicting jury instructions were given about the credit to be accorded the testimony of the complaining witness. Third, that the arrest of Nootenboom without a warrant was unlawful, thereby precluding the reception of evidence taken from his person. We turn to consider these claims.

[Headnote 1]

1. The legislature has provided that each side shall have eight peremptory challenges "If the offense charged is punishable with death or by imprisonment for life"; otherwise, each side shall have four peremptory challenges. NRS 175.085. [1] Clearly the trial court should have allowed each side eight peremptory challenges since, among other offenses, the defendant was accused of first degree kidnaping which is punished by death or life imprisonment. However, that charge was dismissed before the consolidated cases were submitted to the jury and cannot, therefore, be the predicate for reversible error. The question remains whether second degree kidnaping (NRS 200.330) and rape without extreme violence and great bodily injury (NRS 200.360 (1)), each carrying a fixed minimum which "may be extended to life," come within the legislative mandate for eight peremptory challenges. This question was considered in State v. Squier, 56 Nev. 386, 54 P.2d 227 (1936), but not resolved.

[Headnotes 2, 3]

We conclude that NRS 175.085 providing for eight peremptory challenges when "the offense charged is punishable by imprisonment for life," does not apply to

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[1] NRS 175.085 reads: "1. If the offense charged is punishable with death or by imprisonment for life, the defendant is entitled to eight, and the state to eight, peremptory challenges. 2. If the offense charged is other than those mentioned in subsection 1, the defendant is entitled to four, and the state to four, peremptory challenges."

crimes carrying a fixed minimum prison term which may be extended to life. That part of NRS 175.085 applies only when no shorter sentence than life may be imposed. See People v. Shaw, 237 Cal.App.2d 606, 47 Cal.Rptr. 96 (1965), where the California cases since 1884 are cited. There is authority contrary to the California view. However, since our statute was borrowed from California, along with the judicial interpretation given by the California courts, we are persuaded to follow.

Since the first degree kidnaping charge was dismissed and none of the other offenses call for eight peremptory challenges, there can be no substance to the first claim of error.

[Headnote 4]

2. Two jury instructions concerning the credit to be accorded the testimony of the victim are challenged as conflicting.[2] We do not see any conflict. When read together they simply advise the jurors that they may be persuaded solely on the basis of the testimony of the complaining witness, but to exercise caution because of the grave dangers attending. Similar instructions were reviewed and approved in People v. Scott, 24 Cal.App. 440, 141 P. 945 (1914). This claim of error is without merit.

[Headnotes 5-7]

3. The last issue is whether there was probable cause for the arrest of the defendant leading to the search of

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[2] The instructions read: "Instruction No. 11: The Court instructs the Jury that it is your province to determine the weight and credibility to be given the testimony of a female upon whom it is alleged in an Information that a rape has been committed, and who testifies to the facts and circumstances of such rape, as of any other witness testifying in the case. And if such testimony creates in the minds of the Jury a satisfactory conviction and belief, beyond a reasonable doubt, of the Defendant's guilty [sic], it is sufficient of itself without other corroborating circumstances or evidence to justify a verdict of guilty of rape, upon the trial of the case.

"Instruction No. 13A: A charge of rape, such as that made against the defendant in this case, is one, which, generally speaking, is easily made, and once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the complaining witness with caution."

his person, which produced items of evidence important to the conviction. The constitutional prohibition of the Fourth Amendment is enforcible against the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). It commands that no warrants for either searches or arrests shall issue except upon "probable cause * * * ." [3] Our statute, NRS 171.235, [4] suits the constitutional standard, for it restricts the authority of an officer, to make a felony arrest without a warrant, to offenses committed in his presence or to instances where he has reasonable cause to believe that the person arrested has committed a felony. Thus, the constitutional validity of an arrest for a felony not committed in the officer's presence depends upon whether, at the moment the arrest is made, he had probable cause to make it. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that a felony has been committed by the person arrested. Henry v. United States, supra. A review of the relevant evidence is required.

On the afternoon of April 25, 1965, the victim, while in her parked car, was accosted by a man. With the aid

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[3] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[4] NRS 171.235 states: "1. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person: (a) For a public offense committed or attempted in his presence. (b) When a person arrested has committed a felony, although not in his presence. (c) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. (d) On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"2. He may also, at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony has not been committed."

of a long knife he forced her to drive into the countryside near Las Vegas. Thereafter, he bound her hands with her stockings, gagged her with her kerchief, blindfolded her with the jacket of her suit and raped her in the rear seat of the car. When finished, the assailant drove her back to Las Vegas, removed about $15 from her purse, and fled.

The assailant was unknown to her. She described him to the investigating officers, Huggins and McHale, as about thirty, with a light tan, crew-cut dish-water blond hair, about

six feet tall, slimly built, but with muscular arms and large hands, wearing a light grey sport shirt and dark grey trousers, and smelling strongly of body odor. She added that the assailant had an odd nose.

Since the victim had indicated that the assailant was anxious to leave town, and in view of the fact that he had taken only the small amount of money she had, Huggins and McHale checked the bus depot several times for probable suspects. They questioned a number of men and, finally, about 9:00 p.m. spotted the defendant, standing with a person who later proved to be his father, removing articles from a rented locker. The defendant seemed to fit the description: similar clothes, light tan, crew-cut, indications of heavy perspiration. However, he was of rather heavy build and, while his nose seemed ordinary, his ears were prominent.

The defendant was asked to step outside where he produced, on request, identification—a driver's license in the name of Roger Lawrence Nubo, and other identification bearing the name of Roger Wayne Nootenboom. On being questioned he indicated that he had come into town the previous night, had no money and no place to stay, and had spent the prior night gambling and walking the streets. When asked where he had been all day, he said with his father—the man inside the depot.

Officer McHale questioned the father, who said that he (the father) had been to the race track during the day from noon until about 7:00 p.m. and that his son was not with him. Nootenboom was then arrested for being a disorderly person. The officer searched him and found a switchblade knife. When booked at the jail his clothing

was taken and a package of Kent cigarettes was found in the pocket of his shirt. The officers had found two Kent cigarettes in the victim's car, though she smoked L and M's. The victim was called and immediately identified Nootenboom from a lineup of approximately six men at the police station. During the trial, the clothes, cigarettes and switchblade knife were received in evidence over objection.

[Headnote 8]

Of course, the lineup identification by the victim does not validate the prior arrest, nor may the fruits of the search be used for that purpose. The United States Supreme Court has consistently rejected the notion that a search, unlawful in its inception, may be validated by what it turns up. Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 250 (1927); United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). As already indicated, the issue of probable cause for the arrest depends upon the circumstances existing at the time the arrest is made.

[Headnote 9]

We hold that the arresting officers, at the time of arrest, had probable cause to believe that

Nootenboom was the person who had feloniously attacked the woman they had interviewed earlier that day. The physical description was close. One of the officers testified: "The description we had immediately he fitted perfectly just like somebody shined a light on him." When questioned, identification cards bearing two different names were submitted. Nootenboom's explanation of his whereabouts during the afternoon did not square with his father's story. True, the officers were not certain that he was the man they were looking for, but certainty is not required—only probable cause.

[Headnote 10]

The appellant stresses that he was arrest as a disorderly person. The record reflects that the officers so advised him. That evidence, though relevant to the issue, does not compel us to conclude that the arrest was, in

fact, for a misdemeanor. The officers were not obliged to tell Nootenboom anything. Their statement may have been prompted by caution and, perhaps, even fear, that if Nootenboom knew the true reason why he was being taken into custody, violence or flight might ensue. Indeed, such is a reasonable inference to be drawn from the testimony of Officer Huggins. He said: "The questions that he had answered previously as to his whereabouts and yet his appearance was so good, and the description was so close, that we felt that it was a very good possibility if he was arrested on a misdemeanor where he would be taken into the jail for a lineup."

[Headnote 11]

Since the arrest was lawful, the officers were authorized to contemporaneously search Nootenboom for weapons, or for the fruits of, or implements used to commit, the crimes. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed.145 (1925). Their search produced the switchblade knife. They were not obliged to undress him in public to secure his clothes and other identifying objects. We conclude that the lower court correctly allowed in evidence the defendant's clothes, cigarettes and switchblade knife, as items produced by a search substantially contemporaneous with a lawful arrest. Cf. Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777, (1964); Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); Thurlow v. State, 81 Nev. 510, 406 P.2d 918 (1965).

Counsel for appellant was court appointed. Accordingly, we direct the District Court to give him the certificate specified in NRS 7.260(3) to enable him to receive compensation as provided in NRS 7.260(4).

Affirmed.

Zenoff, D. J., concurs.

Collins, J., concurring:

I concur with the holding of the majority opinion, but for a different reason on the point dealing with the arrest. Officer McHale testified appellant was arrested as

a disorderly person, a misdemeanor. The officer had no warrant, but because the offense was committed in his presence he needed none. NRS 171.235(1)(a). Appellant was found guilty of the charge, was sentenced to jail, and served the time ordered. He in no way questioned the arrest nor appealed the conviction. Time for such appeal has since expired.

That arrest being valid, any reasonable search incident thereto would be valid. Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145 (1925); Carroll v. United States, 267 U.S. 132, 158, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

If arrest for the misdemeanor was valid, we do not need to speculate about probable cause to support his arrest without a warrant on the felony charge. It was the arrest for the misdemeanor which brought about the search which produced the evidence to support the felony conviction. The arrest for the misdemeanor was certainly validated in all legal respects when appellant was found guilty of the very charge for which he was arrested, served his time, took no appeal, nor otherwise attacked the judgment of conviction.

BEAUFORD JOHNSON, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5141

September 30, 1966 418 P.2d 495

Appeal from order of the Fifth Judicial District Court, Mineral County, denying habeas corpus; Peter Breen, Judge.

The trial court denied the relief sought, and an appeal was taken. The Supreme Court, Collins, J., held that magistrate ruled correctly in precluding witness' answer to question "Have you ever been arrested?"

Affirmed.

Leonard P. Root, of Hawthorne, for Appellant.

Harvey Dickerson, Attorney General, of Carson City, and *Leonard Blaisdell,* District Attorney, Mineral County, for Respondent.

1. Habeas Corpus.
   Petitioner who had made no motion either to magistrate or to district court to "correct the transcript to conform with the testimony as given and to settle the transcript so altered" could not successfully urge as ground for discharge on writ of habeas corpus that transcript of preliminary hearing had been edited and did not reflect true record of proceedings. NRS 171.405, subd. 7.
2. Habeas Corpus.
   Alleged delay of 22 days between arrest and appointment of counsel furnished no ground for discharge on writ of habeas corpus where record failed to reveal that any self-incriminating statements obtained from petitioner had been offered in evidence against him.
3. Criminal Law.
   To commit defendant for trial, State is not required to negate all inferences which might explain defendant's conduct but only to present enough evidence so as to support reasonable inference that defendant committed offense.
4. Habeas Corpus.
   Record would not sustain petitioner's contention that he was unlawfully held because there was insufficient evidence presented at preliminary hearing to constitute probable cause for holding him to face charge of violating statute proscribing unlawful taking of vehicles. NRS 205.272.
5. Witnesses.
   Witness' credibility may be attacked by showing his conviction of felony but not by showing mere arrest. NRS 48.020.
6. Witnesses.
   No legitimate inference of untruthfulness of witness can be drawn from fact that he has been convicted of frequent assaults and batteries.
7. Witnesses.
   Magistrate ruled correctly in precluding witness' answer to question "Have you ever been arrested?" NRS 48.020.

OPINION

By the Court, Collins, J.:

This is an appeal from the order of the Fifth Judicial District Court of Nevada, Honorable Peter Breen, district judge, denying appellant's discharge on a writ of

habeas corpus. In seeking the writ from the district court appellant contended he was unlawfully held because there was insufficient evidence presented at the preliminary hearing to constitute probable cause, and that the justice of peace had precluded appellant's counsel from cross-examining a witness for the state.

[Headnotes 1, 2]

Appeal to this court includes additional grounds not urged to the trial court that the transcript of the preliminary hearing had been edited and did not reflect the true record of proceedings; further that a delay of 22 days between arrest and appointment of counsel violated appellant's right under the decision of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Neither ground has merit. Appellant made no motion either to the magistrate or the district court to "correct the transcript to conform with the testimony as given and to settle the transcript so altered." NRS 171.405(7). We state in State v. Collyer, 17 Nev. 275, 279 (1883), "If a wrong has been committed the law intends that the party injured shall have a remedy; but where it provides the manner in which relief shall be given, the path pointed out should be followed."

The Miranda decision, supra, deals with incriminating statements offered against a defendant, not delay between arrest and appointment of counsel. The record fails to reveal that any such self-incriminating statements obtained from appellant while in custody were even offered.

[Headnotes 3, 4]

The record indicates appellant was arrested for violation of NRS 205.272. [1] Four persons testified at the preliminary examination, Curtis M. Cline, Gerard H. Wilson, Wilfred Kinerson and August Huffman Hays. Mr.

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[1] "205.272 Unlawful taking of vehicles; penalties.

"1. Any person who shall drive or take a vehicle as defined in NRS 482.135, not his own, without the consent of the owner thereof, and with intent either permanently or temporarily to deprive the owner of his title to or possession of such vehicle, with or without intent to steal the same, shall be guilty of a felony.

"2. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of

Cline testified no one, except employees, was authorized to use the truck and that appellant was not an employee. Mr. Wilson testified he observed appellant driving the truck and when asked if he had permission to use it, appellant responded he knew Mr. Cline and so he just took it. Mr. Kinerson said he also saw appellant in the truck. To commit a defendant for trial, the state is not required to negate all inferences which might explain the accused's conduct, but only to present enough evidence so as to support a reasonable inference that the accused

committed the offense. Beasley v. Lamb, 79 Nev. 78, 378 P.2d 524 (1963).

The second point of appellant came about during cross-examination of Mr. Kinerson. The record reflects the following:

By Mr. Root: "Q. Have you ever been arrested? A. Yes. Q. What for? Mr. Blaisdell: Objection, it has no bearing. The Court: Sustained. Mr. Root: I can ask this man questions going to his credibility. I can ask him any question I want. The Court: The objection has been sustained. Confine yourself at the points at issue. Mr. Root: Unless you permit me to test the credibility of this witness I can't cross examine him. The Court: I don't see where it is necessary. Mr. Root: I'll end my cross examination right there. No further questions."

[Headnotes 5-7]

Appellant contends he was denied the right of confrontation of the witness, in violation of the Sixth Amendment of the United States Constitution made applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965). That case is not in point. Here, the defendant confronted the witness. The issue is not one of confrontation. Rather, it is whether the magistrate ruled correctly in precluding the witness' answer to the question, "Have you ever been arrested?"

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such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person.

"3. Any person who assists in, or is a party to or an accomplice in, any such unauthorized taking or driving shall also be guilty of a gross misdemeanor or, if previously convicted of so assisting or being a party or accomplice, shall be guilty of a felony."

A witness' credibility may be attacked by showing his conviction of a felony but not by mere arrest. NRS 48.020. [2] It has also been held in State v. Huff, 11 Nev. 17 (1876): "[N]o legitimate inference of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries." The magistrate's action in sustaining the objection was correct. Counsel for appellant then refused to pursue further cross-examination.

Judgment sustained.

Thompson, J., and Zenoff, D. J., concur.

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[2] "NRS 48.020. No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his conviction of felony, but such conviction may be shown for the purpose of affecting his credibility, and the jury are to be the exclusive judges of his credibility, *

* *."

ROY WARREN OSBORNE, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5032

October 5, 1966 418 P.2d 812

Appeal from conviction of double murder in a consolidated case. Eighth Judicial District Court, Clark County; Clarence Sundean, Judge.

Defendant was convicted in the trial court of two counts of first-degree murder, and he appealed. The Supreme Court, Zenoff, D. J., held that defendant who did not own automobile or have right to its possession had no standing to object to its search or to admission into evidence of objects found therein.

Affirmed.

Babcock & Sutton, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, *Edward G. Marshall,* District Attorney, and *R. Ian Ross,* Deputy District Attorney, Clark County, for Respondent.

1. Searches and Seizures.
   Defendant who did not own automobile or have right to its possession had no standing to object to its search or to admission into evidence of objects found therein.
2. Criminal Law.
   Transposition of victims' names by jury in stating verdict convicting defendant of two first-degree murders was an inadvertent clerical error and was not cause for reversal.

OPINION

By the Court, Zenoff, D. J.:

Roy Warren Osborne was convicted of two counts of first degree murder following a consolidated trial. The jury in returning the verdict transposed the names in the two cases. On appeal, defendant asserts as error: (1) that the gun and other evidence used against him at the

trial were the fruits of an illegal search of the automobile made without consent, waiver, or a search warrant, and (2) misstatement of the verdict.

A few minutes after midnight on the morning of March 28, 1964, defendant drove a two-toned 1957 Chevrolet with a bullet-shattered window into the parking structure of the Fremont Hotel, in Las Vegas, Nevada. He turned the car over to the parking attendant and on exiting from the front seat he kicked a blood spattered towel onto the pavement. The attendant replaced the towel in the car and drove it to a stall whereupon he noted a pool of what appeared to be blood on the floor of the rear of the auto. A security guard (another employee of the hotel) was called. The security guard, after a cursory search of the vehicle, removed the registration slip from the steering post and placed it on the hood of the car. He then called the Las Vegas Police Department.

After the police arrived, a further search of the automobile yielded a revolver and ammunition in an open duffel bag under the front seat. When defendant finally returned to the parking lot he was arrested.

1. Investigation revealed that the car was registered to Norma Malloy Widick who was purported to be visiting Las Vegas with her mother. Both mother and

daughter were the victims of the double murder for which Osborne was convicted. After denial of a motion to suppress, the items of evidence taken from the car were introduced into evidence over objection. The basis for the trial court's ruling was that the defendant lacked "standing" to make the objection.

[Headnote 1]

The ruling was correct. We held in Dean v. Fogliani, 81 Nev. 541, 407 P.2d 580 (1965), that, in order for a person to have the right to claim an unlawful invasion of privacy, he "(3) must be anyone who was *legitimately* on the premises when the search occurs and the fruits of the search are proposed to be used against him." Supra, at 544. (Emphasis supplied.) While the sanction of suppressing evidence was developed to protect the individual's right to privacy, Dean who was not on the premises when the search was made, had permission of the owner to be there when items sought were placed there. This gave him standing to object to the search. By analogy that right clearly does not extend to Osborne who did not own the automobile, nor does the record show his right to its possession. Cf. Gispert v. State, 118 So.2d 596 (Fla. 1960).

[Headnote 2]

2. Following the trial, the jury returned a verdict of guilty on both counts. In stating the verdict, however, the names of the victims were transposed. On the information in Case No. 2914, charging defendant with the murder of Inez Mae Malloy, the jury verdict was guilty of murder in the first degree of Norma Malloy Widick. Conversely, on the indictment of Case

No. 3779, charging Osborne with the murder of Norma Malloy Widick, the jury found defendant guilty of murder in the first degree of Inez Mae Malloy.

Clearly, this is an inadvertent clerical error warranting no extensive comment. Since our ruling on the question of standing disposes of the essential elements of this appeal, we direct that the clerk of the court in which the trial was held to show the correction of the verdicts in the minutes of the court and a copy thereof be transmitted to the Warden of the State Prison where defendant is confined.

We direct the lower court to give appellant's court-appointed counsel the certificate specified by NRS 7.260(3) for compensation of services on this appeal.

Affirmed.

Thompson and Collins, JJ., concur.

HERMAN HOLLANDER, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5068

October 5, 1966 418 P.2d 802

Appeal from conviction of ex-felon in possession of a firearm and habitual criminal. Second Judicial District Court, Washoe County; John E. Gabrielli, Judge.

Defendant was convicted in the trial court of being an ex-felon in possession of firearm and violator of Habitual Criminal Act, and he appealed. The Supreme Court, Zenoff, D. J., held that life sentence imposed for violation of Habitual Criminal Act was a nullity since purpose of Act was not to charge separate substantive crime but only to aver fact that might affect punishment.

Affirmed.

Thompson, J., dissented.

Casey W. Vlautin, of Reno, for Appellant.

Harvey Dickerson, Attorney General, *William J. Raggio,* District Attorney, and *Robert Gaynor Berry,* Deputy District Attorney, Washoe County, for Respondent.

1. Criminal Law.
   Circumstances such as uncommon surnames, identity of first names and surnames, as well as other factors of fingerprints or photographs, should be considered in addition to copy of conviction in determining whether person charged as ex-felon has been previously convicted of a felony.
2. Criminal Law; Weapons.
   Exemplified copy of past conviction together with defendant's unusual last name, identical first name and the

added weight given to a conviction record of state in which ex-felon accusation is tried were sufficient to establish defendant's identity with prior offenses, in prosecution for being an ex-felon in possession of a firearm and violation of Habitual Criminal Act. NRS 207.010, subd. 6.
3. Criminal Law.
   Responsibility of proof beyond a reasonable doubt remains with state in prosecution on charge involving prior felony convictions. NRS 207.010, subds. 2, 6.
4. Arrest.
   Where police officer was informed that there was a suspicious looking person with two sets of questionable identification in gaming club and defendant attempted to shuffle off when officer indicated that he wished to talk to him and, when cornered, reached inside coat pocket whereupon officer removed at gunpoint a gun from defendant's inside coat pocket, there was probable cause to justify arrest and search.
5. Arrest.
   Reasonable cause for arrest consists of such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that person to be arrested is guilty and includes suspicious conduct of person in presence of officers.
6. Criminal Law.
   Defendant charged as ex-felon in possession of a firearm and as violator of Habitual Criminal Act was entitled to effective counsel. NRS 207.010, subd. 2.
7. Criminal Law.
   Counsel who offered or suggested to defendant charged as ex-felon in possession of firearm and as violator of Habitual Criminal Act every reasonable defense available was effective in pursuing his obligation to see that defendant's right to fair trial was not infringed. NRS 207.010, subd. 2.
8. Criminal Law.
   An attorney's ability and effectiveness cannot be measured by the number of times he refuses to submit to legally unsound whims and wishes of his client.
9. Criminal Law.
   When a controversy arises concerning appointed counsel and accused, it is within sound discretion of trial court to decide whether the matter will prevent a fair trial.
10. Criminal Law.
    A defendant has right to defend himself if he so desires under normal conditions.

11. Criminal Law.
    Court and prosecution are obligated to insure defendant who is defending himself at fair trial.
12. Criminal Law.
    Defendant who elected a defend himself after trial court's refusal to substitute counsel was afforded a fair trial where counsel was required to remain in courtroom and be

available to defendant for assistance at all times and did provide such assistance when called upon.
13. Mental Health.
    Granting of psychiatric examination to defendant who alleges he was mentally incompetent is within discretion of trial court. NRS 178.405.
14. Mental Health.
    Denial of motion for psychiatric examination by defendant charged as ex-felon in possession of a firearm and as violator of Habitual Criminal Act was not an abuse of discretion where only evidence relating to competency was army record reflecting discharge for psychoneurosis. NRS 178.405, 207.010, subd. 6.
15. Indictment and Information.
    Amendment of habitual criminal charge after completion of trial on substantive offense is discretionary providing it can be done without prejudice to substantial rights of defendant. NRS 173.100, subd. 2.
16. Criminal Law.
    Amendment of habitual criminal charge after completion of trial on charge of being ex-felon in possession of firearm did not prejudice substantial rights of defendant. NRS 173.100, subd. 2, 207.010, subd. 6.
17. Criminal Law.
    Life sentence imposed upon defendant charged as violator of Habitual Criminal Act was a nullity since purpose of Act was not to charge separate substantive crime but only to allow averment of fact that might affect punishment. NRS 207.010, subd. 6.
18. Criminal Law.
    Purpose of Habitual Criminal Act is not to charge a separate substantive crime but to allow averment of a fact that may affect punishment. NRS 207.010, subd. 6.
19. Criminal Law.
    Failure to properly sentence a defendant does not render the entire trial and proceedings a nullity.
20. Criminal Law.
    Where defendant was incorrectly sentenced to life upon conviction as violator of Habitual Criminal Act, Supreme Court had authority to modify the sentence. NRS 207.010, subd. 6.

OPINION

By the Court, Zenoff, D. J.:

Herman Hollander was arrested and charged on two counts, of ex-felon in possession of a firearm, and violation of Nevada's Habitual Criminal Act, NRS 207.010,

for having been convicted of three prior felonies. [1] He was tried before a jury on the first count and found guilty. On the second count he was adjudged guilty and sentenced to life imprisonment. He appeals the conviction alleging five grounds of error: (1) insufficiency of proof of past convictions, both as to the ex-felon charge and that of being an habitual criminal, (2) that he was illegally arrested and therefore the evidence seized at the time of the arrest was wrongfully used against him, (3) refusal of the trial court to grant his request for different counsel than that originally appointed, (4) refusal of the trial court to grant defendant's request for a psychiatric examination, and (5) the granting of the order amending the information charging him with past crimes.

1. Appellant's principal assignment of error is directed to the degree of proof required to establish defendant's identity with prior offenses. Both the primary charge of ex-felon in possession of a firearm and the additional charge that he violated Nevada's Habitual Criminal Act involve proof of earlier convictions.

The foundation offense to the ex-felon charge was supplied by the introduction into evidence of an exemplified copy of a 1954 Nevada conviction.

[Headnote 1]

Our concern, of course, is that an innocent person not be made to suffer for the guilt of another with a similar name. Ordinarily, positive identity is accomplished by the presentation of photographs, fingerprints, and any other available identity data. Circumstances in addition to the copy of the conviction should be considered. Such circumstances include uncommon surnames, identity of

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[1] NRS 207.010(2). "Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who shall previously have been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life."

first names and surnames, as well as the other factors of fingerprints or photographs.

[Headnote 2]

Here, the past conviction together with Hollander's unusual last name, identical first name, and the added weight given a conviction record of the state in which the ex-felon accusation is tried, are considered by us sufficient to justify the jury's conviction.

Referring now to the hearing before the court on the habitual count, the same applications can be made. The State introduced exemplified copies of felony convictions purporting to be those of Hollander. Five past felonies were charged of which two were admitted by him and three denied. The State contends that the record of the three prior convictions alone should be sufficient under our statute to convict the appellant of being an habitual criminal. [2]

Some courts hold that proof of a record merely containing defendant's name is not enough to overcome the presumption of innocence. People v. Casey, 399 Ill. 374, 77 N.E.2d 812, 11 A.L.R.2d 865 (1948). Others are satisfied that the earlier records sufficiently establish identity under the habitual criminal acts, that a properly authenticated conviction presumes identity of person as well as name. State v. Davis, 367 S.W.2d 517 (Mo. 1963); Buie v. Oklahoma, 368 P.2d 663 (Okl.Cr. 1962).

[Headnote 3]

The division of authorities preponderates in favor of allowing the copies to suffice if, as in the primary charge (that of being an ex-felon in possession of a firearm), further circumstances exist pointing to the defendant's identity of person and name. Here the circumstances that existed in the determination of guilt in the first charge were augmented by Hollander's admission to two of the convictions. Sometimes such admissions alone are sufficient to convict. State v. Wyckoff, 27 N.J.Super. 322, 99 A.2d 365 (1953); State v. Jameson, 78 S.D. 282,

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[2] NRS 207.010(6). "Presentation of an exemplified copy of a felony conviction shall be prima facie evidence of conviction of a prior felony."

100 N.W.2d 829 (1960). We also note 39 Iowa L.Rev. 156 (1953-54). However, we reject that authority which considers the defendant's failure to rebut the presumption created. The responsibility of proof beyond a reasonable doubt remains with the State.

2. The appellant also raises the issue that he was unlawfully arrested. The circumstances of the arrest were that officer Williams had received a phone call on the morning of the arrest, which according to his testimony led him to believe appellant answered the description of a suspect in another crime. The officer later the same morning also received information at Harold's Club that there was a person there with two sets of identification who was acting in a suspicious manner. The officer then left Harold's Club and went to the Nevada Club looking for the subject. When the appellant noticed officer Williams at the Nevada Club, after the

officer had spotted him, the appellant started to “shuffle off.” The officer stated to the appellant that he wanted to talk to him. This request was later repeated during the time the appellant was attempting to evade the officer. When cornered, the appellant reached inside his coat pocket, whereupon Williams told him, “Hold it, or I'll take your head right off at your shoulders.” The officer at that time removed a gun from the appellant's inside coat pocket.

[Headnotes 4, 5]

Hollander's contention is that the arrest was not made with probable cause. Considering the information supplied the officer that there was a suspicious looking person in the gaming club with two sets of questionable identification, and the suspicious conduct of the appellant immediately before he was advised to halt, there was sufficient probable cause to justify the arrest and the search. As this court pointed out in Schnepp v. State, 82 Nev. 257, 415 P.2d 619 (1966), “Reasonable cause for arrest has been defined as such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person is guilty. * * * This includes suspicious conduct of the defendant in the presence of the officers.”

See also Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

The concluding movement of the appellant before being confronted by the officer was to put his hand in his inside coat pocket. This final gesture provided the climaxing motivation for his arrest in this case. United States v. Fay, 239 F.Supp. 132 (1965).

3. Appellant contends he was denied effective counsel. This assignment of error is based on the refusal of the trial court to discharge the court-appointed attorney and provide new counsel. The objection is primarily grounded on the refusal of the appointed counsel to subpoena certain witnesses desired by the appellant and to otherwise conduct the hearing and trial in accordance with the appellant's wishes.

The expected testimony of the witnesses, the context of which was expressed to the trial judges below, was uniformly held by them to be irrelevant to the charges. We agree. To compel the attendance of the named public officials would have caused needless expense to the state and harassment to those officials without materially or relevantly aiding in the defense.

[Headnotes 6-8]

Appellant, of course, was entitled to “effective” counsel. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Ex parte Kramer, 61 Nev. 174, 122 P.2d 862 (1942). Counsel was “effective” here in pursuing his obligation to see that the appellant's right to a fair trial was not infringed. Under the circumstances, within his sound judgment, he offered or suggested to the appellant every reasonable defense available. An attorney's ability and effectiveness cannot be measured by the number of times he refuses to submit to the legally unsound whims and wishes of his client.

[Headnote 9]

It is always within the sound discretion of the trial court to decide when a controversy arises concerning appointed counsel and the accused whether the matter will prevent a fair trial. State v. Jukich, 49 Nev. 217, 242 P. 590 (1926). There was no showing of incompetency or neglect on the part of appointed counsel in this

case. On the contrary, it does not appear that under the circumstances of attempting to obtain the cooperation of a difficult client, that anything was left undone by counsel which would have substantially affected the out come of the case.

[Headnotes 10-12]

After the refusal by the trial court to substitute counsel, appellant requested that he be allowed to defend himself. He undoubtedly has the right to do so if he so desires under normal conditions. State v. Thomlinson, 78 S.D. 235, 100 N.W.2d 121 (1960), 77 A.L.R.2d 1229. This right has been imposed by the court itself under like circumstances. People v. Shields, 232 Cal.App.2d 716, 43 Cal.Rptr. 188 (1965). In this situation the obligation of the court and prosecution is still to insure the accused a fair trial. Garner v. State, 78 Nev. 366, 374 P.2d 525 (1962). This was adequately provided by the court in this instance. The court required counsel to remain in the courtroom and to be available to the appellant for assistance at all times. Appellant did confer with counsel during the course of the lower court proceedings. Counsel also did provide independent assistance whenever it was called for during the trial.

[Headnote 13]

4. The appellant further raises on this appeal the contention that he was mentally incompetent and should have been granted a psychiatric examination as requested. This, too, is within the discretion of the trial court. [3]

[Headnote 14]

The only evidence offered relating to appellant's competency was his Army record of 1943 reflecting his discharge from the armed forces for psychoneurosis. Nothing else was presented to justify a doubt that he

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[3] NRS 178.405. *"Question of sanity to be submitted when doubt arises prior to judgment.* When an indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if doubt shall arise as to the sanity of the defendant, the court shall order the question to be submitted to a jury that

must be drawn and selected as in other cases."

was not able to assist in his defense or that he was incapable of distinguishing right from wrong. There was no abuse of discretion in denying the request.

[Headnotes 15, 16]

Appellant's final contention of error is based on the amendment of the habitual criminal charge after the completion of the trial on the substantive offense. Such an amendment is discretionary providing it can be done without prejudice to the substantial rights of the defendant.[4] We find no such prejudicial effect in this case.

5. The trial judge found appellant guilty of the crime of five prior felony convictions listed on the amended information filed January 5, 1966, and punished him for the term of life.

[Headnotes 17, 18]

This sentence is a nullity. The very recent case of Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966), is controlling. In that case our court explicitly held: "It is uniformly held that the purpose of an habitual criminal act is not to charge a *separate* substantive crime but it is only the averment of a fact that may affect the punishment. State v. Bardmess, 54 Nev. 84, 7 P.2d 817 (1932). (Emphasis added.) * * *

"While this court in State v. Bardmess, supra, did not reach the question of the validity of two concurrent sentences, one of which is based on the habitual criminal statute, it did say that '[a] statement of a previous conviction does not charge an offense. It is only the averment of a fact which may affect the punishment.' Thus, there can only be one sentence."

Since the trial court imposed a separate sentence only on the crime of five prior felony convictions, it would appear to make this a substantive offense standing alone, which it is not. The trial court must sentence on the substantive crime charged (ex-felon), and then invoke the recidivist statute to determine the penalty.

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[4] NRS 173.100(2). "An information may be amended by the district attorney, without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant."

[Headnotes 19, 20]

As pointed out in Lisby, "Failure to properly sentence does not render the entire trial and

proceeding a nullity, and the cases cited immediately above support this Court's authority to modify the trial court's erroneous sentence." It is suggested that a proper sentence in this case would read:

"That Herman Hollander is guilty of the crime of ex-felon in possession of a firearm and that he be punished by imprisonment in the Nevada State Prison for the term of life, as provided for under NRS 207.010(2), upon a felony conviction followed by proof of the three prior felonies alleged."

Proceedings shall ensue to correct the imposition of sentence. The conviction in all other respects is affirmed.

We direct the lower court to give appellant's court appointed counsel the certificate specified by NRS 7.260(3) for compensation of services on this appeal.

Affirmed.

Collins, J., concurs.

Thompson, J., dissenting:

In a criminal case the burden rests with the state to prove the defendant guilty beyond a reasonable doubt. That principle is deeply imbedded in our history and has, I think, been violated here. Positive proof of identity is readily available to the state. Fingerprinting is routine procedure. Other evidence—less positive, but strong—photographs and testimony of witnesses, is normally within reasonable reach of the state's investigative power. These considerations, when balanced against the real possibility of grave error flowing from the assumption of identity from name alone, compel me to require more of the prosecution. I would hold that there is a failure of proof, not only with respect to the main charge (Gravatt v. United States, 260 F.2d 498 (10th Cir. 1958)) but with respect to the habitual hearing as well (People v. Casey, 399 Ill. 374, 77 N.E.2d 812 (1948); People v. Stewart, 23 Ill.2d 161, 177 N.E.2d 237 (1961)). This being so, the failure to object, for lack of

foundation, to the exemplified record offered during trial, is of no consequence.

NRS 207.010(6) concerning habitual criminals, states that "presentation of an exemplified copy of a felony conviction shall be prima facie evidence of conviction of a prior felony." That provision does not touch the issue at hand. Before that statute is operative, proof of identity beyond a reasonable doubt must first be offered. Once that is accomplished, other evidentiary items of the exhibit (type of prior felony, where committed, identity of sentencing court, etc.) may be prima facie evidence of the facts they purport to show. The heavy punishment prescribed for the recidivist demands that care be used in the handling of records to establish identity.

We must always be aware that the rule here announced will govern future cases. Our main concern is with the justice of the rule rather than with the result of the case in which the rule

is proclaimed. I fear that the principle announced by my colleagues (identity from name alone may be deemed proof beyond a reasonable doubt) may, before long, result in a grave miscarriage of justice.

I dissent.

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82 Nev. 355, 355 (1966) Buss v. Consolidated Casinos Corp.

HILDA M. BUSS, Appellant, *v.* CONSOLIDATED CASINOS CORPORATION, a Nevada Corporation, dba The Mint, Respondent.

No. 5083

October 5, 1966 418 P.2d 815

Appeal from judgment of the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Action against gambling casino to collect prize allegedly won in drawing. The lower court rendered summary judgment for defendant, and claimant appealed. The Supreme Court held that where motion by casino to dismiss for failure to state claim upon which relief could

82 Nev. 355, 356 (1966) Buss v. Consolidated Casinos Corp.

be granted was not supported by affidavits, depositions or answers to interrogatories and where copy of rules and regulations governing drawing for grand prize and an advertisement which were attached to motion were not authenticated, treatment of motion as a motion for summary judgment was not authorized and resulted in failure to rule upon legal sufficiency of complaint.

Reversed, with directions.

Jerry C. Lane, of Eureka, for Appellant.

Boyd and Leavitt and *William E. Freedman,* of Las Vegas, for Respondent.

1. Judgment.

Where motion by gambling casino against whom suit was filed to collect prize to dismiss action for failure to state claim upon which relief could be granted was not supported by affidavits, depositions or answers to interrogatories and where copy of rules and regulations governing drawings for grand prize and an advertisement which were attached to motion were not authenticated, treatment of motion as a motion for summary judgment was not authorized, and such treatment resulted in failure to rule upon legal sufficiency of complaint. NRCP 12(b) (5), 56 and (e).

2. Pleading.

Complaint by claimant who filed suit against casino to collect prize allegedly won in drawing was sufficient to defeat motion to dismiss for failure to state claim upon which relief could be granted. NRCP 12(b).

OPINION

Per Curiam:

Hilda Buss filed suit against The Mint to collect a grand prize of $2,400. She claims to have held the winning ticket and charges the defendant with destroying it and awarding the prize to another. A summary judgment was entered for the defendant casino. This appeal by the claimant followed. We reverse.

[Headnotes 1, 2]

The defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted. The

lower court treated that motion as one for summary judgment. This is permissible if "matters outside the pleading are presented to and not excluded by the court." NRCP 12(b). The difficulty in this case is that the record fails to show that "matters outside the pleading" were offered in any acceptable fashion. Affidavits, depositions, answers to interrogatories, were not presented in support of the motion. See NRCP 56(e). Attached to the motion was a copy of the rules and regulations governing drawings for the grand prize and an advertisement. Neither was authenticated. In this context the lower court was not authorized to treat the Rule 12(b)(5) motion as a motion for summary judgment under Rule 56. [1] The court's error resulted in its failure to rule upon the legal sufficiency of the complaint. We have studied that pleading and conclude that it is sufficient to defeat a Rule 12(b)(5) motion to dismiss. We therefore reverse the judgment, with direction that the defendant assert its defenses by a responsive pleading.

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[1] A prior motion to dismiss under Rule 12(b)(5) had been presented. That motion was supported by a fact affidavit and opposed by a counter affidavit. The court treated that motion as one for summary judgment and

denied it because an issue of material fact remained for trial.

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82 Nev. 357, 357 (1966) Troiani v. State

RALPH PHILIP TROIANI, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5077

October 6, 1966 418 P.2d 814

Appeal from conviction of robbery. Eighth Judicial District Court, Clark County; John Mowbray, Judge.

Defendant was charged with robbery and convicted in the lower court and defendant appealed. The Supreme Court, Zenoff, D. J., held that oral confession voluntarily made without interrogation to police officer, summoned by written communication from defendant nine hours after he had been lodged in jail and advised by

82 Nev. 357, 358 (1966) Troiani v. State

officer of his constitutional rights, was admissible in evidence, though admonition as to defendant's constitutional rights were not repeated prior to confession.

Affirmed.

Alfred Becker, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, *Edward G. Marshall,* District Attorney, *Monte J. Morris,* Deputy District Attorney, and *James D. Santini,* Deputy District Attorney, Clark County, for Respondent.

Criminal Law.

Oral confession voluntarily made without interrogation to police officer, summoned by written communication from defendant nine hours after he had been lodged in jail on charge of robbery and advised by officer of constitutional rights to remain silent and to be represented by counsel and that anything defendant said would be used against him in court, was admissible in evidence, though admonitions as to constitutional rights were not repeated prior to confession.

OPINION

By the Court, Zenoff, D. J.:

On December 5, 1964, at or about 5:00 a.m., Ralph Troiani was arrested in Las Vegas and charged with the crime of robbery. After he was lodged in jail, police officer Robert Manning attempted to interview him. Before any questions were asked he advised Troiani of the charge, of his right to remain silent, that anything he said would be used against him in a court of law, and that he was entitled to be represented by an attorney. The appellant's only response was that "he wouldn't say anything until he saw an attorney." Manning immediately ceased any further efforts to interrogate and left. Nine hours later the officer, in response to a written note from Troiani that he wanted to speak to Manning, went to see him, whereupon Troiani told Manning the details of the crime, but then refused to reduce the statement to written form saying that his employer would probably get a lawyer to assist him and that he wanted to wait for that event.

↓ 82 Nev. 357, 359 (1966) Troiani v. State ↓

At the trial, Troiani denied that he gave an oral confession, also denied participation in the crime, but was found guilty. His sole basis of appeal is that it was error to admit the purported confession into evidence for the reason that while the officer gave the required constitutional admonitions at the first meeting between Manning and Troiani, the warnings were not repeated at the second meeting when the incriminating statement was given.

1. The trial below occurred after Escobedo v. Illinois, 378 U.S. 478 (1964), and before Miranda v. Arizona, 384 U.S. 436 (1966). In accordance with Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772 (1966), the issue here is therefore controlled by Escobedo and is confined solely to the question of whether the constitutional safeguards once given, need be repeated before a subsequent interrogation.

We do not here meet the factual circumstances of White v. State, 82 Nev. 304, 417 P.2d 592 (1966), for here Troiani's statement was not in response to interrogation. Instead, this case is like that of Rainsberger v. State, 81 Nev. 92, 399 P.2d 129 (1965), wherein Rainsberger confessed after being confined almost ten days. There, we said, "* * * On that occasion Rainsberger sent word to a deputy sheriff that he wanted to talk to him. Talk he did. A full confession of his crime was voluntarily given * * * His confession was not coerced. He asked to speak out. His statements were not solicited. There is no evidence that he was abused by the police during the ten days of his confinement before he confessed. He was not threatened nor were promises made. Though it is true he complained of stomach pains, the services of a physician were neither requested nor needed. His jail cell was apparently as good as the area could then provide * * *."

Moreover, as in Rainsberger, supra, the contention is not made that Troiani lacks intellectual capacity. From the separate questioning by the trial judge, it is apparent that he does not. The mandate of Escobedo was met and satisfied at the first meeting between the officer and appellant and did not require repeating in order to insure Troiani's "awareness."

We direct the lower court to give appellant's court-appointed counsel the certificate specified by NRS 7.260(3) for compensation of services on this appeal.

Affirmed.

Thompson and Collins, JJ., concur.

M. E. LUNDBERG, FRED DRESSLER, R. L. KNISLEY, E. THAYER BIGELOW, EUGENE V. FRANCY, FOREST B. LOVELOCK and ANDREW ULRICH, JR., Petitioners, *v.* JOHN KOONTZ, Secretary of State of the State of Nevada, Respondent.

No. 5190

October 7, 1966 418 P.2d 808

Original proceeding in mandamus.

The Supreme Court, Thompson, J., held that signatures on documents comprising constitutional amendment initiative petition could not be counted in those instances in which the constitutionally required authenticating affidavit affixed to the document had not been executed by a signer of document to which affidavit was affixed, in view of constitutional requirement that each document have affixed thereto an affidavit made by one of the signers of the document.

Writ made permanent.

Zenoff, D. J., dissented.

Gray, Horton and Hill, of Reno, for Petitioners.

Harvey Dickerson, Attorney General, of Carson City, for Respondent.

1. Parties.

Under rule permitting intervention in action on timely application each requisite must appear, that is, inadequate representation of applicant's interest and a binding judgment in the action. NRCP 24(a)(2).

2. Parties.
   Where single issue presented by original mandamus proceeding challenging legal sufficiency of initiative petition for constitutional amendment for state lottery to be conducted by a Nevada corporation was an issue of law relating to meaning of constitutional provision respecting authentication of signatures on initiative petition, the interest of the corporation and the registered voters who moved to intervene was adequately represented by government since Attorney General answered for the Secretary of State, and right to intervene was not established. Const. art. 19, § 3; NRCP 24(a)(2).
3. Mandamus.
   Mandamus is appropriate to prevent improper action by the Secretary of State as well as to compel him to perform an act which is his duty under the law.
4. Constitutional Law.
   Signatures on documents comprising constitutional amendment initiative petition could not be counted in those instances in which the constitutionally required authenticating affidavit affixed to the document had not been executed by a signer of document to which affidavit was affixed, in view of constitutional requirement that each document have affixed thereto an affidavit made by one of the signers of the document. Const. art. 4, § 24; art. 19, §§ 1-3.
5. Affidavits.
   An affidavit must state the truth.
6. Statutes.
   There must be strict adherence to the authentication requirements of Constitution governing an initiative petition. Const. art. 19, § 3.

OPINION

By the Court, Thompson, J.:

The Nevada Constitution reserves to the people the power to propose a constitutional amendment by initiative petition, if submitted in proper form by registered voters equal to 10 percent, or more, of the number of voters who voted at the last preceding general election in not less than 75 percent of the counties in the state, and if the total number of registered voters signing the initiative petition is equal to 10 percent, or more, of the voters who voted in the entire state at the last preceding general election. Nev. Const., Art. 19, §§ 1, 2.

By an original proceeding in mandamus, seven citizens, voters and taxpayers of Nevada challenge the legal

sufficiency of an initiative petition filed with the Secretary of State on June 1, 1966. The initiative petition seeks to repeal Nev. Const., Art. 4, § 24, prohibiting lotteries, and proposes the issuance of a ten year exclusive license to Silver State Sweepstakes, Ltd., a Nevada corporation, to conduct a lottery or lotteries in Nevada upon specified terms. The initiative

petition consists of 580 separate documents bearing the signatures of 31,653 persons. Its validity is questioned upon the ground that only 4,086 signatures were authenticated by affidavit in the manner required by Nev. Const., Art. 19, § 3. This challenge, if true, destroys the validity of the petition for lack of the required number of signatures. [1]

The respondent Secretary of State filed an answer to the petition for mandamus, admitting the factual averments concerning the authentication of signatures. Silver State Sweepstakes, Ltd., and certain individuals who were citizens, registered voters and taxpayers of Nevada, moved to intervene. Oral arguments on the motions and the merits were heard September 26, 1966. The motions to intervene were denied that day, with Collins, J., dissenting. However, we invited Silver State to present argument upon the merits as an aid to the court. Cf. Stephens v. Bank, 64 Nev. 292, 182 P.2d 146 (1947). As the need for an early decision on the merits was pressing, we announced our decision from the bench on September 28, 1966, directing that the alternative writ of mandamus, heretofore issued, be made permanent (Zenoff, D. J., dissenting). The Secretary of State was ordered to refrain from taking any steps toward publishing the proposed initiative measure, causing it to be printed on the ballots and submitting it to the voters of Nevada at the general election to be held November 8, 1966. This opinion is in explanation of that decision.

[Headnotes 1, 2]

1. We first express our view about the motions to intervene. The movants claimed a right to intervene under NRCP 24(a)(2) which provides that "upon

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[1] 137,378 votes were cast at the last preceding general election in 1964. Ten percent of that number is 13,737.

timely application anyone shall be permitted to intervene in an action * * * when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Each requisite must appear, i.e., inadequate representation of the applicant's interest and a binding judgment in the action. Sam Fox Publ. Co. v. United States, 366 U.S. 683, 6 L.Ed.2d 604, 81 S.Ct. 1309 (1961). We need not reach the question of the binding effect of the judgment in this proceeding upon those seeking intervention, since we believe that their interests were adequately represented by the government (the Attorney General answered for the Secretary of State). The single issue presented by the mandamus proceeding is the meaning of Nev. Const. Art. 19, § 3,—an issue of law. What happened factually is disclosed by an examination of the 580 documents

making up the initiative petition. Evidence aliunde is not needed. The interests of the parties to this proceeding, the proposed intervenors, and the citizens of Nevada are identical insofar as the resolution of the legal issue is concerned. In this context the government's representative is adequate to represent the interests of those desiring to intervene. Accordingly, a right to intervene under NRCP 24(a)(2) is not established. Notwithstanding, Silver State was allowed to present oral argument upon the legal issue, as an aid to the court in deciding the matter.

[Headnote 3]

2. Mandamus is appropriate to prevent improper action by the Secretary of State, as well as to compel him to perform an act which is his duty under the law. McFadden v. Jordan, 32 Cal.2d 330, 196 P.2d 787 (1948); French v. Jordan, 28 Cal.2d 765, 172 P.2d 46 (1946); Gage v. Jordan, 23 Cal.2d 794, 147 P.2d 387 (1944); Yorty v. Anderson, 60 Cal.2d 312, 384 P.2d 417 (1963). Therefore, we turn to resolve the question of law presented by this proceeding.

3. The validity of the initiative petition before us depends upon the meaning of the third sentence of Nev. Const., Art. 19, § 3. It reads: "The petition may consist

of more than one document, but each document shall have affixed thereto an affidavit made by one of the signers of such document to the effect that all of the signatures are genuine and that each individual who signed such document was at the time of signing a registered voter in the county of his or her residence."

The content of the 580 affidavits affixed to the 580 documents comprising the initiative petition suits the Constitution. Each affidavit states: ".....", being first duly sworn, deposes and says: That (s)he is one of the registered voters of the State of Nevada who has signed the above document entitled 'An Initiative Petition Proposing an Amendment to the Constitution of the State of Nevada Relating to a State Lottery'; that all of the signatures to such document are genuine and that each individual who signed such document was at the time of signing a registered voter in the county of his or her residence." However, an examination of the 580 documents establishes that many of them were not, in fact, signed by the person who executed the affixed affidavit. Each affidavit, in those instances, is false. Because of this failure, the petitioners argue that the signatures of 27,567 persons signing the infirm documents may not be counted, thereby destroying the validity of the petition for lack of the required number of signatures.

In presenting oral argument at our invitation, Silver State Sweepstakes noted that the affiant, in most instances, did sign one of the documents which he had circulated, though not every document to which his affidavit was attached. It was suggested that we deem this to be substantial compliance with the Constitution. [2] If we were to accept this suggestion, the

initiative petition would contain the requisite number of signatures.

The Constitutional history of Art. 19, § 3 and relevant case authority destroy any possibility of merit in the suggestion of Silver State. In 1960 the Legislature, by joint resolution, proposed an amendment to that article

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[2] In every county, except Eureka and Storey, more than one person circulated the separate documents prepared for that county and, except for Eureka County, each circulator secured signatures of voters on more than one document.

and section. Stats. Nev. 1960, p. 512. At that time, the pertinent language of the Constitution read: "Each document comprising the initiative petition filed with the Secretary of State shall have affixed thereto, an affidavit made by one of the signers to each of said documents *or to the petition* * * *." [Emphasis supplied.] The proposed amendment, inter alia, deleted the underscored words "or to the petition." The amendment was passed by the 1960 Legislature and by the 1961 Legislature and was approved and ratified by the people at the 1962 general election.

[Headnotes 4, 5]

Before the amendment, one affidavit by a signer of a petition consisting of more than one document could satisfy the Constitution (if other requisites, not relevant here, were also met). This is no longer true. Now, each separate document shall have affixed thereto an affidavit made by a signer of that document. An affidavit must, of course, state the truth. In the present matter, many of the affidavits were untrue because the affiant did not sign the document to which the affidavit was attached. In such case none of the signatures on those documents may be counted. Fiannaca v. Gill, 78 Nev. 337, 372 P.2d 683 (1962); Caton v. Frank, 56 Nev. 56, 44 P.2d 521 (1935); In re Opinion of the Justices, 114 Me. 557, 95 A. 869 (1915).

Fiannaca v. Gill, supra, involved a recall petition. The relevant statute provided: "The petition shall consist of any number of copies thereof, identical in form with the original, except for the signatures and residence addresses of the signers. Every copy shall be verified by at least one of the signers thereof, who shall swear or affirm, before an officer authorized by law to administer oaths, that the statements and signatures contained in the petition are true." The court there held that the statute was not satisfied when a number of copies were attached together, and one signer of one copy verified that copy. Such verification could not meet the statutory mandate as to all joined copies. The court took note of Caton v. Frank, supra, where the verification did not show that the person making the affidavit was himself a signer of the petition and was, for that reason, defective.

[Headnote 6]

True, the Fiannaca and Caton cases are not factually identical with this case. In Fiannaca, the verification was made by a signer of a copy; here, as to the documents in dispute, the affidavit was not made by a signer of the document. In Caton, the content of the verification was defective, while here the content of the affidavit satisfies the Constitution. However, the underlying principle of Fiannaca and Caton is clear—the content of the verifying affidavit must satisfy designated requirements, and it must state the truth. This principle is sound because the assurance that legal requirements have been met rests upon the verity of the affidavit. If the affidavit is false, that assurance is destroyed. We must, therefore, demand strict adherence to the authentication requirements of the Constitution governing an initiative petition. [3]

The alternative writ of mandamus, heretofore issued, is made permanent.

Collins, J., concurring on merits, dissenting on motion to intervene:

On the motion to intervene:

I do not agree with the majority opinion of the court on the motion to intervene. I am of the opinion that Silver State Sweepstakes, Ltd., and the individuals who were citizens, registered voters, and taxpayers of Nevada, were entitled to intervene as a matter of right. It is apparent to me that the respondent Secretary of State could not, and did not, adequately represent the interest of those seeking to intervene. The motive of the Secretary of State is above reproach so far as the position he took in his answer, admitting factual averments concerning authentication of signatures to the documents supporting the petition. However, his honestly-taken position was clearly adverse to that of those

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[3] The separate documents comprising the initiative petition were circulated by county. Some of the signers of the documents did not "affix thereto * * * the name of the county in which he or she is a registered voter," (Nev. Const., Art. 19, § 3), though that information, arguably, was ascertainable from other data on the documents. We do not express an opinion whether the Constitution was satisfied in this regard.

seeking to intervene. This, I feel, gave intervenors the right to intervene pursuant to NRCP 24(a).

On the merits:

I concur in the opinion of Mr. Justice Thompson.

Zenoff, D. J., dissenting:

As properly recited in the majority opinion Article 19, Section 3 of the Constitution, permits a petition to consist of more than one document. There is no expressed definition of what constitutes a document. The design of that provision, at least, is to facilitate the circulation of a proposed amendment to the people. In effect, each document is a petition within itself. There is nothing specific that requires a document to be comprised of any certain number of pages, only that each document be verified by "one of the signers of the document
* * *."

The majority opinion requires each verifier of a document to also sign the document as a signer, or petitioner. Assuming such person to have circulated more than one document he is thereby required to sign the petition as many times as he has signed a document. Yet, his name as a petitioner can only be counted once.

On the other hand, it was conceded at oral argument that in this situation where the verifier has failed to sign some of the documents as a petitioner, the defect is cured simply by stapling a "good" document to those that he circulated and signed as a verifier but did not sign as a petitioner. It leads me to query what the answer would be if instead of a staple the documents were held together by a rubber band or a paper clip.

Efforts of the people to petition their government should be given liberal construction. The initiative and referendum are two forms of legislative power reserved to the people. Since they deal with the reserved powers of the people they should be liberally construed to uphold the power whenever that can reasonably be done. Collins v. City and County of San Francisco, 112 Cal.App.2d 719, 247 P.2d 362, 368-369; Brownlow v. Wunsch, 103 Colo. 120, 83 P.2d 775, 777.

There is no contention that those who signed as voters were not in truth registered voters, nor is it claimed that

those who signed were misled into signing. The record indicates a sufficient number of registered voters expressed their desire to have this measure placed on the ballot. Under the interpretation of the majority, the will of the people is frustrated by a mere mechanical deficiency which was not of their own doing. To adopt the narrow construction thwarts the efforts of the voters to petition their government and the courts should be reluctant to interfere with the legislative process. Collins, supra.

The vitality of an initiated petition is supplied by the number of valid signatures. Brownlow, supra. Here, the number of signatures required by law were those of people who, as registered voters, wanted a measure submitted to popular vote. In Fiannaca, this court said the copies remaining after the defective copies were discarded, would not contain enough signatures. That is not true in this case. If the liberal interpretation which I urge were to be adopted, more than twice the required number of signatures, duly authenticated, appear on the initiative petition.

I dissent.

In the Matter of the Application of SHIRLEY G. SMITH for a Writ of Habeas Corpus.

No. 5179

October 11, 1966 418 P.2d 997

Original petition for habeas corpus.

Petitioner charged with involuntary manslaughter arising out of collision brought habeas corpus proceedings. The Supreme Court, Zenoff, D. J., held that where it was customary procedure for contractor at highway repair site to install traffic signal, by his silence, a deputy engineer of state gave necessary permission to its location and installation and consequently contractor's truck driver was required to heed the direction of the red light, and when driver went through red light

and thereby killed motorist who had gone into intersection on green light, truck driver was properly charged with involuntary manslaughter.

Writ denied.

Vargas, Dillon, Bartlett & Dixon, of Reno, for Petitioner.

Donald M. Leighton, District Attorney, Humboldt County, for Respondent.

1. Automobiles; Highways.

   Where it was customary procedure for contractor at highway repair site to install traffic signal, by his silence, a deputy engineer of state gave necessary permission to its location and installation and consequently contractor's truck driver was required to heed direction of red light and when driver went through red light and thereby killed motorist who had gone into intersection on green light, truck driver was properly charged with involuntary manslaughter. NRS 200.070, 408.195, 408.210(1)(a), 484.0036, 484.0073, 484.0080.

2. Automobiles.

   Truck driver's justification for going through red light that light was hard to see was only exculpatory and must be presented and weighed on the merits at trial for involuntary manslaughter. NRS 200.070,

408.195, 408.210(1)(a), 484.0036, 484.0073, 484.0080.

OPINION

By the Court, Zenoff, D. J.:

Petitioner was charged with involuntary manslaughter arising out of a collision which took place in Humboldt County along a stretch of Highway 80 between the automobile driven by deceased and a 60-ton gravel "Catscraper" being operated by petitioner.

Smith, the petitioner, was one of several equipment operators engaged in hauling gravel from a pit on one side of the highway to a point on the other side. At the intersection or crossing of the dirt road used by the equipment with the highway, a four-way signal light was installed by the contractor and was manually controlled by an employee of the contractor. It was not a

signal normally located at that point, but was erected in order to control traffic not only for the safety of the driving public but to expedite the movement of the heavy duty equipment.

At the preliminary hearing there was evidence that the company drivers were instructed to keep the equipment moving and that the signal man at the control would turn the light to red to stop public traffic on the highway when the gravel trucks came to the turn from the pit into the intersection.

On the day of the accident, February 23, 1966, the signalman, following established procedure at lunch time, turned the light facing the highway to green (which thereby caused the red to face the dirt road upon which the trucks approached the intersection), and went to his car to eat lunch. He thought all the trucks had pulled into their area for the same purpose, but he had overlooked two trucks. One truck came through the red light without incident and almost immediately thereafter came the petitioner. Gloria Hammond, driving along the highway, entered the intersection, was crushed by petitioner's truck and was killed in the collision.

Petitioner contends that the traffic light was not a legal signal and that, therefore, he was not engaged in the "commission of an unlawful act" as required to constitute involuntary manslaughter.

1. Involuntary manslaughter "shall consist in the killing of a human being, without any intent so to do, in the commission of an unlawful act * * *." NRS 200.070. If the signal was one contemplated by NRS 484.0036 [1] petitioner's failure to obey the traffic signal was an unlawful act. We conclude that the charge was proper; also that, by reason of Smith's failure to stop at the red signal, probable cause was created warranting the magistrate to bind him over to district court for trial.

[1] NRS 484.0036. *"'Official traffic-control devices' defined.* 'Official traffic-control devices' means all signs, signals, markings and devices, placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, guiding, or directing traffic."

82 Nev. 368, 371 (1966) Ex Parte Smith

NRS 408.195 provides that the State Highway Engineer has general supervision of matters relating to highways and his power or authority may devolve to a deputy (NRS 408.015). The engineer may restrict the use of any highway for the protection of the public (NRS 408.210(1)(a)), and determine locations for traffic control devices for the safe and expeditious movement of traffic (NRS 484.0080). In this case the contractor placed the signal at its location.

[Headnote 1]

We do not agree that the traffic signal was nonofficial merely because it was installed by the contractor at a highway repair site instead of by the State. The record clearly reflects that customary procedure was followed in like situations. By his silence, the deputy engineer of the State gave the necessary permission to its location and installation. Consequently, Smith was required to heed the direction of the red light regardless of the orders of his employers to keep the equipment moving, or the duty of the signalman to make certain all trucks were in the parking area before he retired for lunch, or the safe clearing of the intersection of the truck preceding him. The principal purpose of placing the signal there was the protection and safety of the public on the highway and he should have stopped.

There are exemptions from obedience of traffic controls. [2] These are narrowly confined to actual work on the surface of the highways, and do not embrace going to and coming from the locus of the work. Gonsalves v. Petaluma Bldg. Materials Co., 181 Cal.App.2d 320, 5 Cal. Rptr. 332 (1960); Hoffman v. Barker, 80 Idaho 372, 330 P.2d 978 (1958).

[Headnote 2]

Smith's justification for going through the red light (notwithstanding the fact that, together with all of the

[2] NRS 484.0073. *"Persons working on highways; exceptions.* Unless specifically made applicable, the provisions of this chapter, except those relating to driving while intoxicated, shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work."

foregoing, the light was hard to see even had he been looking for it) is only exculpatory and must be presented and weighed at the trial on the merits. State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962).

Writ denied.

Thompson and Collins, JJ., concur.

ALMA SCHMIDT, Appellant, *v.* ARTHUR LOGAN MERRIWEATHER and RUTH MERRIWEATHER, Husband and Wife, Respondents.

No. 5076

October 13, 1966 418 P.2d 991

Appeal from the First Judicial District Court, Lyon County; Frank B. Gregory, Judge.

Action by sister against her brother and his wife to impress trust on property conveyed to son by their father before his death allegedly under undue influence of the brother. The trial court dismissed the action, and sister appealed. The Supreme Court, Collins, J., held that where father was an old man, very ill and suffering from hallucinations when son acquired title to property in dispute, and there was no evidence of consideration given by son and his wife to the father for the transfer, and son's dealings clearly deprived his sister, the only other heir of father and mother, of any share in their property, a constructive trust as to such property could be found to have resulted in favor of the daughter.

Reversed and remanded for further proceedings.

Diehl & Recanzone, of Fallon, for Appellant.

Flangas & Stone, of Yerington, for Respondents.

1. Trial.

   Upon motion under Rule of Civil Procedure at completion of plaintiff's case to dismiss action upon ground that a sufficient case for court sitting without a jury has not been proven, evidence and all reasonable inferences that can be

drawn from such evidence must be deemed admitted, and such evidence must be interpreted in the light most favorable to plaintiff. NRCP 41(b).

2. Trial.

Upon motion under Rule of Civil Procedure at completion of plaintiff's case to dismiss action upon ground that a sufficient case for court has not been proved, the court, even though acting without a jury, may not consider the weight of evidence or credibility of witnesses. NRCP 41(b).

3. Trusts.

A constructive trust will arise whenever the circumstances under which property was acquired makes it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relationship exists between the two and provided the raising of the trust is necessary to prevent a failure of justice.

4. Trusts.

Where father was an old man, very ill and suffering from hallucinations when son acquired title to property in dispute, and there was no evidence of consideration given by son and his wife to the father for the transfer, and son's dealings clearly deprived his sister, the only other heir of father and mother, of any share in their property a constructive trust as to such property could be found to have resulted in favor of the daughter.

5. Deeds.

Where confidential relations between parent and child are shown to have existed and where conveyance of property is made by the weaker to the dominant party, a presumption arises that the conveyance was obtained through the undue influence of dominant party, and the burden is on the person claiming, under such a conveyance, to show that the transaction was bona fide.

OPINION

By the Court, Collins, J.:

This is an appeal by plaintiff below from an order of involuntary dismissal of the action by the trial judge. The action was tried to the court alone and upon completion of plaintiff's case, the action was ordered dismissed under NRCP 41(b) [1] upon the ground that

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[1] "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer

plaintiff had failed to prove a sufficient case for the court.

[Headnotes 1, 2]

Upon this issue plaintiff's evidence and all reasonable inferences that reasonably can be drawn from it must be deemed admitted and the evidence must be interpreted in light most favorable to plaintiff. Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955); Gordon v. Cal-Neva Lodge, Inc., 71 Nev. 336, 291 P.2d 1054 (1955); Quimby v. City of Reno, 73 Nev. 136, 310 P.2d 850 (1957); Tryba v. Fray, 75 Nev. 288, 339 P.2d 753 (1959); Gunlock v. The New Frontier Hotel Corp., 78 Nev. 182, 370 P.2d 682 (1962). The court, even though acting without a jury, may not consider the weight of evidence or credibility of witnesses. Kilb v. Porter, 72 Nev. 118, 295 P.2d 856 (1956). We conclude the order of dismissal was in error and remand for further proceedings.

Plaintiff's evidence disclosed that her mother and father deeded jointly to her and her husband and her brother and his wife, respondents and defendants below, land in California, indicating they were to share alike in the property. The mother died in July 1964. In October of that year the father bought a housetrailer and asked the plaintiff and her spouse and respondents to convey title to the California land to a purchaser designated by him, which they did. Proceeds from the sale of the property paid for the trailer and left the father with a balance of about $4,000. He then moved to Fernley, Nevada, where respondents lived. In November 1964 a joint bank account of $4,000 was opened in the First National Bank of Nevada in the joint names of the father and both respondents. In January 1965 the father became ill and entered the hospital in Reno. On January

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evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for lack of an indispensable party, operates as an adjudication upon the merits."

20, 1965 respondent Arthur Logan Merriweather caused title to the trailer to be transferred from his father's name to his name. On April 9, 1965 respondent Merriweather withdrew all the money from the joint bank account and deposited it in his and his wife's name. On April 22, 1965 the father died while still in the hospital. He was 89 years of age.

Plaintiff's evidence further disclosed the father and mother told her and her brother they were to share alike in their property. After the father bought the trailer, plaintiff's testimony indicated that he had told her, "The trailer will be put in your name and Mr. Merriweather's name; here's the key, and I have a key." With regard to the money, plaintiff testified the father

wanted to put it in her name but she told him, “No, put it in my brother's name; he is the son.”

After the death of the father, plaintiff talked to her brother who told her the trailer had been given to Bill, his son, and the money had been given to him because he had a 10-year-old child to raise. In the same conversation plaintiff testified, “Why Art [her brother] what in the world is the matter with you? Mama and Dad would turn over in their grave if they knew you were trying to pull a stunt like this.” He replied that he didn't care and that he had no conscience.

[Headnotes 3, 4]

Construing this evidence, as both this court and the trial court must, most favorably to the plaintiff, and drawing therefrom all reasonable inferences, a constructive trust could result in favor of plaintiff. A constructive trust will arise whenever the circumstances under which property was acquired makes it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relationship exists between the two and provided the raising of the trust is necessary to prevent a failure of justice. 89 C.J.S. § 139, at 1019. Respondents contend, however, that a constructive trust cannot result in this case where the conveyance is from the parent to adult children because the parent is assumed to be the dominant party and there can be no presumption of fraud or

undue influence from the mere existence of the relationship, citing 39 A.L.R. 314(7). Facts favorable to the plaintiff show, however, that the father was an old man, very ill and suffering from hallucinations when the son acquired title to the property in question. There is also no evidence of consideration given by the respondents to the father for the transfer. The brother's dealings clearly deprived his sister, the only other heir of the father and mother, of any share in their property. We prefer the rule announced in Walters v. Walters, 26 N.M. 22, 188 P. 1105 (1920), which holds:

[Headnote 5]

“It is a rule of almost general acceptation that, where confidential relations between parent and child are shown to have existed and where a conveyance of property is made by the weaker to the dominant party, a presumption arises that the conveyance was obtained through the undue influence of the dominant party, and the burden is on the person claiming, under such a conveyance, to show that the transaction was bona fide. * * *

“And particularly should the presumption be indulged in in this case, where the conveyances were without consideration and where their effect was to deprive the other children of Robert O. Walters of their equal share in their father's estate.” See also Waters v. Harper, 69 Nev. 315, 250 P.2d 915 (1952).

A reasonable inference to be drawn from evidence favorable to plaintiff is a confidential relationship between the brother and father and the brother and sister. Barker v. Barker, 75

N.D. 253, 27 N.W.2d 576 (1947), 171 A.L.R. 447; All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741 (1942); Sinco v. Kirkwood, 228 Iowa 1020, 291 N.W. 873 (1940).

Reversed with costs to appellant and direction that the order of dismissal be set aside and for further proceedings.

Thompson, J., and Zenoff, D. J., concur.

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82 Nev. 377, 377 (1966) Mitchell v. District Court

CHARLES EDWARD MITCHELL, Petitioner, *v.*
SECOND JUDICIAL DISTRICT COURT, Respondent.

No. 5139

October 13, 1966 418 P.2d 994

Original proceeding in prohibition.

Proceedings to challenge constitutionality of statute providing for procedure in giving notice of service of process to motorist. The Supreme Court, Thompson, J., held that where registered document contained notice of service of process on director of Department of Motor Vehicles and copy of process was not delivered to motorist at the address which was obtained from accident report made by motorist, but document was returned with notation "moved, left no address", risk of nondelivery must fall on motorist in absence of fraud, and statute which provides for such procedure in giving notice of suit to motorist is constitutional.

Petition denied.

Richard P. Wait and *Donald A. Thorpe,* of Reno, for Petitioner.

Loyal Robert Hibbs and *Michael V. Roth,* of Reno, for Respondent.

1. Prohibition.
   Original proceeding of prohibition, filed in Supreme Court by nonresident motorist whose default was entered upon suit against him for damages sustained in automobile accident and whose motion to quash service of process made after default was denied, was proper remedy to test constitutionality of statute providing a method for giving notice of service of process on motorist who causes damage. NRCP 12(b)(3); NRS 14.070, 34.320, 34.330.
2. Automobiles.
   Statutory requirement that plaintiff send notice of service of process upon director of department of motor vehicles and copy of process by registered mail to motorist at address supplied by such motorist in his accident report, if any, and if not, to best address available to plaintiff establishes reasonable probability that motorist will receive actual notice of pending action and satisfies due process. NRS 14.070.

3. Automobiles.
   Affidavit by attorney's secretary that notice of service of process on director of department of motor vehicles and copy of process was sent to motorist's address as appeared on state accident report and that registered document was returned disclosing that motorist had moved to unknown address stated source of address best available to plaintiff and established good faith of plaintiff to give actual notice to defendant. NRS 14.070.
4. Automobiles.
   Probability of actual notice to motorist is not diminished by requirement that notice be mailed to best address available to plaintiff instead of last known address. NRS 14.070.
5. Automobiles.
   Where registered document contained notice of service of process on director of department of motor vehicles and copy of process was not delivered to motorist at the address which was obtained from accident report made by motorist, but document was returned with notation "moved, left no address", risk of nondelivery must fall on motorist in absence of fraud, and statute which provides for such procedure in giving notice of suit to motorist is constitutional and satisfies due process. NRS 14.070.

OPINION

By the Court, Thompson, J.:

This proceeding in prohibition questions the constitutionality of NRS 14.070. That statute provides a method for giving notice of the service of process to a defendant who operated a motor vehicle on a public road, street or highway in Nevada, and is alleged to have caused damage to another. At issue is whether the statutory scheme for giving notice satisfies due process.

[Headnote 1]

A motor vehicle driven by Charles Mitchell, in which Roberts and his wife were riding, overturned. The wife was killed and Harvey Roberts injured. An action requesting damages from Mitchell was subsequently commenced. The record shows that process was served upon the director of the department of motor vehicles, and the statutory fee was paid. Thereafter, notice of such service and a copy of the process was sent by registered mail, return receipt requested, to the defendant at his address as it appeared on the accident report. The registered document was returned to the sender marked,

"Returned to writer," "Moved, Left no address." An affidavit of compliance with the statute, to which was attached the registered document that had been returned and an

acknowledgment of service of process by the director of the department of motor vehicles, was filed in the action. The affidavit in part reads: "Thereafter, and on January 6, 1965 a notice of service of process upon the said Director was enclosed by me in an envelope with a copy of the process and was sent by me by registered mail to defendant, Charles Edward Mitchell, at the address supplied on the Motor Vehicle Accident Form of the State of Nevada, to wit 11400 South Virginia Street, Reno, Nevada, which to me, as secretary to plaintiff's attorney herein, is known to be the best address available to the plaintiff." The defendant did not appear within time, and his default was entered. He then presented a motion to quash service of process (NRCP 12(b)(3)) which was denied. This proceeding followed. The remedy selected is proper. NRS 34.320, 34.330; City of Los Angeles v. Dist. Court, 58 Nev. 1, 67 P.2d 1019 (1937).

1. Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928), designates the standard by which the constitutionality of NRS 14.070 [1] must be tested. In

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[1] NRS 14.070 reads: "Service of process on operators of motor vehicles involved in collisions, accidents.

"1. The use and operation of a motor vehicle over the public roads, streets or highways, or in any other area open to the public and commonly used by motor vehicles, in the State of Nevada by any person, either as principal, master, agent or servant, shall be deemed an appointment by such operator, on behalf of himself and his principal or master, of the director of the department of motor vehicles to be his true and lawful attorney upon whom may be served all legal process in any action or proceeding against him growing out of such use or resulting in damage or loss to person or property, and the use or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as though served upon him personally within the State of Nevada.

"2. Service of such process shall be made by leaving a copy of the process with a fee of $2 in the hands of the director of the department of motor vehicles or in his office, and such service shall be deemed sufficient upon the operator; provided, that notice of such service and a copy of the process shall forthwith be sent by registered mail by the plaintiff to the defendant at the address supplied by the defendant in his accident report, if any, and if

that case the nonresident motorist statute of New Jersey was held to violate due process. It provided for service of process on the Secretary of State, but did not contain a provision for notifying the defendant. The court ruled that, in order for such a statute to be valid, it must contain a provision making it reasonably probable that notice of service on the Secretary will be communicated to the defendant who is sued. In International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the court, in a case involving a statute dealing with the service of process upon a nonresident corporation, reiterated its position that service must give "reasonable assurance that the notice will be actual." [2]

[Headnote 2]

Endeavoring to meet the pronouncement of Wuchter v. Pizzutti, supra, Nevada requires the plaintiff to send

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not, at the best address available to the plaintiff, and a return receipt signed by the defendant or a return of the Post Office Department stating that the defendant refused to accept delivery or could not be located, or that the address was insufficient, and the plaintiff's affidavit of compliance therewith are attached to the original process and returned and filed in the action in which it was issued. Personal service of such notice and a copy of the process upon the defendant, wherever found outside of this state, by any person qualified to serve like process in the State of Nevada shall be the equivalent of mailing, and that such personal service may be proved by the affidavit of the person making such personal service appended to the original process and returned and filed in the action in which it was issued.

"3. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

"4. The fee of $2 paid by the plaintiff to the director of the department of motor vehicles at the time of the service shall be taxed in his costs if he prevails in the suit. The director of the department of motor vehicles shall keep a record of all such process, which shall show the day and hour of service.

"5. The foregoing provisions of this section with reference to the service of process upon such an operator defendant shall not be deemed exclusive, but if such operator defendant is found within the State of Nevada he shall be served with process in the State of Nevada."

[2] The efforts of state legislatures to meet the test of Wuchter v. Pizzutti, supra, and judicial construction of the many statutes is the subject of a comprehensive article by Professor Marshall J. Fox at 33 F.R.D. 151. See also 32 Mich.L.Rev. 325 (1936); 37 Mich.L.Rev. 58 (1938) and cases collected in 35 A.L.R. 951; 57 A.L.R. 1239; 99 A.L.R. 130.

notice of service and a copy of the process, by registered mail, to the defendant "at the address supplied by the defendant in his accident report, if any, and if not, to the best address available to the plaintiff." This procedure, we think, establishes a reasonable probability that the defendant will receive actual notice of the pending action and, therefore, satisfies due process. [3] We need not now decide whether the quoted statutory language contemplates an affirmative showing by the plaintiff that the address of the defendant appearing on the accident report was supplied by the defendant himself in his accident report (as distinguished from the officer's accident report), since in this case the affidavit of statutory compliance shows that the defendant was notified "at the best address available to the plaintiff," which happened to be the address of the defendant as it appeared on the accident report.

[Headnote 3]

When notice is sent to the "best address available to the plaintiff," the affidavit should state the source of that address. A mere conclusory statement will not suffice. A sworn

statement as to source will serve to establish the good faith of the plaintiff to give actual notice and will, to some extent, diminish the possibility of fraud. The present affidavit satisfies this requisite.

[Headnote 4]

Statutes providing for the mailing of notice to the "last known address" of the defendant have been held constitutional. Herzoff v. Hommel, 120 Neb. 475, 233 N.W. 458 (1930); St. ex rel. Cronkite v. Belden, 193 Wis. 145, 211 N.W. 916, 214 N.W. 460 (1927); Schilling v. Odlebak, 177 Minn. 90, 224 N.W. 694 (1929); Jones v. Paxton, 27 F.2d 364 (Minn. 1928). The "last known address" and the "best address available to the plaintiff" may, in a given case, be the same. In any event, it seems to us that the probability of actual notice is not

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[3] Grote v. Rogers, 149 A. 547 (Md. 1930), relied upon by defendant-petitioner is not necessarily contra. The Maryland statute established a "conclusive presumption" of notice if the statutory scheme was followed. Our statute does not give absolute verity to any stated address.

diminished by the Nevada requirement that notice be mailed to the "best address available to the plaintiff" instead of the "last known address." Indeed, that probability may, in the majority of instances, be enhanced.

[Headnote 5]

2. The record shows that the registered document was not delivered to the defendant at the address mentioned in the accident report. It was returned to the sender, marked "Moved, Left no address." This is fastened upon to show the weakness of the statutory scheme for giving actual notice. The identical circumstance confronted the Wisconsin court in Sorenson v. Stowers, 251 Wis. 398, 29 N.W.2d 512 (1947). It was held that in such event the risk of nondelivery must fall upon the defendant. See also: Waddell v. Mamat, 271 Wis. 176, 72 N.W.2d 763 (1955); Skinner v. Mueller, 1 Wis.2d 328, 84 N.W.2d 71 (1957). We approve that notion. NRS 14.070 may not be read to suggest that the plaintiff must, at his peril, ascertain the defendant's actual address. Of course, fraud by the plaintiff in the giving of notice is always a possibility. That possibility, however, is not reason to rule the statute unconstitutional. Hirsch v. Warren, 253 Ky. 62, 68 S.W.2d 767 (1934). When fraud is shown, the defendant has a remedy. NRCP 60(b). The statute contemplates good faith on the part of the plaintiff.

Prohibition is denied and this proceeding is dismissed.

Collins, J., and Zenoff, D. J., concur.

WILLIAM RICHARD BURKETT, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5054

October 18, 1966 418 P.2d 991

Appeal from the Eighth Judicial District Court, Clark County; Clarence Sundean, Judge.

Defendant was convicted in the trial court of burglary in the second degree, and he appealed. The Supreme Court held that evidence, including circumstantial evidence of entry by defendant was sufficient to show defendant's entry of the premises burglarized, and was sufficient to sustain conviction.

Affirmed.

Babcock & Sutton, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, of Carson City, and *Edward G. Marshall,* District Attorney, Clark County, and *R. Ian Ross,* Deputy District Attorney, of Las Vegas, for Respondent.

Burglary.

Evidence, including circumstantial evidence of entry by defendant was sufficient to show defendant's entry of the premises burglarized, and was sufficient to sustain conviction.

OPINION

Per Curiam:

Appellant Burkett was charged with burglary in the second degree and found guilty by jury. His appeal is based on an alleged failure of proof, in that the state failed to show that he had entered the premises burglarized. Our examination of the record shows substantial circumstantial evidence of an entry by the appellant. It was, therefore, permissible for the jury to find him guilty. No useful purpose is served by reciting the circumstantial evidence. The court has considered a subordinate assignment of error and finds it to be without merit.

Affirmed.

MARGARET ANN SMITH, Appellant, *v.* GEORGE THOMAS SMITH, Respondent.

No. 5093

October 26, 1966 419 P.2d 295

Appeal from judgment of the Second Judicial District Court, Washoe County; Grant L. Bowen, Judge.

Independent action to set aside divorce decree obtained by husband some 15 months earlier. The lower court rendered summary judgment for husband, and wife appealed. The Supreme Court, Thompson, J., held that where court prematurely heard divorce case 11 days after personal service outside state was actually received upon wife, and affidavit of sheriff, swearing that he had served process on wife 20 days prior to divorce hearing, was executed in good faith as he had mistakenly served third person whom he believed was wife, extrinsic fraud did not exist and basis for independent action to set aside divorce decree was precluded in view of failure of wife to move to set aside voidable divorce decree within six months after its entry, as allowed by Rules of Civil Procedure, on ground of surprise.

Judgment affirmed.

Bissett, Logar & Groves, of Reno, for Appellant.

Vargas, Dillon, Bartlett & Dixon, and *Albert F. Pagni,* of Reno, for Respondent.

1. Divorce.
   Court acquired jurisdiction over nonresident wife in divorce action when she was served with process at her parents' residence in Canada. NRCP 4(e)(2).
2. Divorce.
   Where process was sent for personal service outside state to wife's home and subsequently to her parents' home, and upon wife's default, court heard husband's divorce case and granted divorce 20 days after process was first sent but only 11 days after process was actually served upon wife at her parents' home, divorce hearing was premature and a procedural irregularity which rendered divorce judgment voidable but not void. NRCP 4(c)(2).

3. Divorce.
   Where court prematurely heard divorce case 11 days after personal service outside state was actually

received by wife, and affidavit of sheriff, swearing that he had served process on wife 20 days prior to divorce hearing, was executed in good faith as he had mistakenly served third person whom he believed was wife, extrinsic fraud did not exist and basis for independent action to set aside divorce decree was precluded in view of failure of wife to move to set aside voidable divorce decree within six months after its entry, as allowed by Rules of Civil Procedure, on ground of surprise. NRCP 4(e)(2), 55(c), 60(b, c).

OPINION

By the Court, Thompson, J.:

The issue on this appeal is whether the premature entry of a default divorce decree renders that decree absolutely void, or merely voidable. By an independent action, Margaret Smith attempted to set aside such decree obtained by her husband some fifteen months earlier. He moved for a summary judgment which the lower court granted. This appeal followed. We affirm.

The divorce action was commenced by George Smith on July 31, 1964. All procedural requirements for the service of process were met. Process was sent for personal service outside the state (NRCP 4(e)(2)) to Brookline, Massachusetts, the wife's home, and to Montreal, Canada, where her parents lived. According to the record, she was served with process twice; first in Brookline on August 3, 1964, and the second time in Montreal on August 14, 1964. Her default was entered, the case tried, and decree granted on August 25, 1964. The court heard the case because more than 20 days had passed since the Brookline service. It later developed that service was not in fact made upon the defendant on August 3, but that she was served in Montreal on August 14. [1] This being so, the hearing on August 25 was premature. The appellant contends that the divorce judgment is void under these circumstances and may be

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[1] The record before the trial court contained appropriate proof of each service.

set aside by an independent action at any time. The respondent urges that the divorce judgment is voidable, and must be challenged by motion within six months thereafter, or not at all. The respondent is correct.

[Headnotes 1, 2]

1. The court acquired jurisdiction over the defendant on August 14 when she was served with process in Montreal, Canada. Herman v. Santee, 103 Cal. 519, 37 P. 509 (1894). Its premature hearing of the case on August 25 was a procedural irregularity within jurisdiction (White v. Crow, 110 U.S. 183, 28 L.Ed. 113, 4 S.Ct. 71 (1884); California Casket Co. v. McGinn, 10 Cal.App. 5, 100 P. 1077 (1909); Dallam County Bank v. Burnside, 31 N.M. 537,

249 P. 109 (1926); Field v. Otero, 35 N.M. 68, 290 P. 1015 (1930)), rendering the judgment voidable. The Nevada decision of La Potin v. La Potin, 75 Nev. 264, 339 P.2d 123 (1959), does not touch the problem at hand since the defendant there was not served with process and the court never acquired jurisdiction. The appellant's reliance upon that case is misplaced.

[Headnote 3]

2. A voidable default judgment may be set aside "for good cause shown" (NRCP 55(c)), in accordance with the provisions of NRCP 60(b) and (c). [2] The court

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[2] NRCP 60(b) and (c) provide: "(b) Mistakes; Inadvertence; Excusable Neglect; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud, misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void; or, (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The

heard the divorce case prematurely through no fault of its own. Nor was it persuaded to do so by any improper conduct on the part of the plaintiff in that action—the defendant-respondent here. The affidavit of the deputy sheriff, swearing that he had served process on the defendant at Brookline, Massachusetts, on August 3, was executed in good faith. It later developed that he had served a third person, believing that person to be the defendant—an honest mistake as to identity. In these circumstances extrinsic fraud does not exist. Richert v. Penson Lumber Co., 139 Cal.App. 671, 34 P.2d 840 (1934); 3 Witken, Cal. Procedure § 64. Indeed, the record before us does not show fraud of any kind, nor does it reflect misrepresentation or misconduct. Therefore it was incumbent upon Mrs. Smith to move to set aside the voidable decree within six months after its entry, as allowed by NRCP 60(b)(1), upon the ground of surprise. This she failed to do. Since a basis for an independent action does not exist, the summary judgment entered below is affirmed.

Collins, J., and Zenoff, D. J., concur.

procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

"(c) Default Judgments: Defendant Not Personally Served. When a default judgment shall have been taken against any party who was not personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, and who has not entered his general appearance in the action, the court, after notice to the adverse party, upon motion made within six months from the date of rendition of such judgment, may vacate such judgment and allow the party or his legal representatives to answer to the merits of the original action. When, however, a party has been personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, he must make his application to be relieved from a default, a judgment, an order, or other proceeding taken against him, or for permission to file his answer, in accordance with the provisions of subdivision (b) of this rule."

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82 Nev. 388, 388 (1966) Bundrant v. Fogliani

WILLIAM LEE BUNDRANT, Appellant, *v.* JACK FOGLIANI, Warden, Nevada State Prison, Respondent.

No. 4997

October 27, 1966 419 P.2d 293

Appeal from denial of petition for habeas corpus. Fourth Judicial District Court, Elko County; Taylor H. Wines, Judge.

The trial court denied the petition and accused appealed. The Supreme Court, Zenoff, D. J., held that where accused seeking release from prison by habeas corpus had pleaded guilty to assault with intent to commit robbery at arraignment and was informed of right to counsel but waived counsel in hope of gaining probation and before accepting plea of guilty trial court did not inquire whether accused comprehended nature of charges or whether he had broad understanding of whole matter, fact of intelligent waiver of counsel was not established and conviction was expunged.

Reversed.

Collins, J., dissented.

Mann and Scott, of Elko, for Appellant.

Harvey Dickerson, Attorney General, and *Joseph O. McDaniel,* District Attorney, Elko County, for Respondent.

1. Criminal Law.

Though accused may tell judge that he is informed of his right to counsel and desires to waive this right, judge's responsibility to determine whether intelligent waiver has been made does not automatically terminate.

2. Criminal Law.

Accused has right to counsel at time of entry of plea even when he pleads guilty.

3. Habeas Corpus.

Record in habeas corpus case must show that accused waived right to counsel knowingly and intelligently.

4. Habeas Corpus.

Where accused seeking release from prison by habeas corpus had pleaded guilty to assault with intent to commit robbery at arraignment and was informed of right to counsel

but waived counsel in hope of gaining probation and before accepting plea of guilty trial court did not inquire whether accused comprehended nature of charges or whether he had broad understanding of whole matter, fact of intelligent waiver of counsel was not established and conviction was expunged.

OPINION

By the Court, Zenoff, D. J.:

William Lee Bundrant was arrested and charged with the crime of assault with intent to commit robbery. He waived preliminary hearing. Later, he appeared in district court for arraignment along with the codefendant, Arthur Richard Davis. After the reading of the information both were advised by the court of their right to counsel; that counsel would be furnished if they did not have their own funds. Davis, 21 years of age, requested counsel. Bundrant, then 23, waived counsel and entered a guilty plea. After the plea, he asked for probation. Subsequently the request for probation was denied and he was sentenced to prison for a term of 1 to 14 years. Bundrant sought to be released from prison by habeas corpus. His petition was denied and this appeal was taken.

[Headnote 1]

This court in Garnick v. Miller, 81 Nev. 372, 402 P.2d 850 (1965), placed rigid requirements on the trial court in advising a defendant of his rights before entering a plea. It was there stated that in order that waiver of his right to be represented by counsel be knowingly and intelligently made he must be informed of the right in such a manner that he comprehends the nature of the charges, the statutory offenses included within them, the possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. These were the long-established

confinements of Von Moltke v. Gillies, 332 U.S. 708, 723-724, 92 L.Ed. 309, 68 S.Ct. 316 (1948). Though the accused may tell the judge that he is informed of his right to counsel and desires to waive this right, the judge's responsibility does not automatically terminate. Von Moltke, supra.

↓ 82 Nev. 388, 390 (1966) Bundrant v. Fogliani ↓

[Headnotes 2,3]

The United States Supreme Court held in Hamilton v. Alabama, 368 U.S. 52, 7 L.Ed.2d 114, 82 S.Ct. 157 (1961), that counsel must be made available to indigent defendants at all critical stages of the criminal proceeding. The entry of a plea is such a stage and the right to counsel inures to a defendant even when he pleads guilty, Rice v. Olson, 324 U.S. 786, 788, 89 L.Ed. 1367, 65 S.Ct. 989 (1945), for the aid of counsel might do much to mitigate a sentence. Moore v. Michigan, 355 U.S. 155, 160, 2 L.Ed.2d 167, 78 S.Ct. 191 (1957). Not only should a proper waiver—i.e., one "knowingly and intelligently" made—be determined, the waiver must appear in the court record. Garnick, supra.

In this case the trial judge undoubtedly relied on long-established practice of our trial courts when he determined that Bundrant knowingly and intelligently waived his right to counsel at the arraignment. Yet, the record tells us only that he was informed that he could have counsel, that counsel would be provided if he had no funds, and that he was asked his age. None of the other requirements of Von Moltke were met before the guilty plea was accepted. [1] At the hearing on the writ on which this appeal is predicated Bundrant testified that at the arraignment he was primarily concerned about his wife and her physical condition brought about by a pregnancy

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[1] At the arraignment and after the defendants were identified, the court stated:

"Before proceeding to take your plea in this matter you should be advised that you have the right to have an attorney before entering your plea. And you are also advised that if you are a person without property or funds and can prove this to the Court, the Court will appoint an attorney to represent you.

"Mr. Davis: I would like to take advantage of that Your Honor.

"The Court: You would. And you Mr. Bundrant?

"MR. Bundrant: I will waive mine sir.

"The Court: How old are you Mr. Bundrant?

"Mr. Bundrant: Twenty-three.

* * * * *

"The Court: Mr. Bundrant, are you prepared to enter your plea at this time?

"Mr. Bundrant: Yes sir, I am.

"The Court: You do not wish an attorney?

"Mr. Bundrant: No, sir."

Thereafter, Bundrant entered a plea of guilty.

which her doctor warned would raise complications. He asserted he was thinking only of getting out on probation and that he thought he would have a better chance if he did not cost the state the expense of an attorney.

[Headnote 4]

At no time was he ever misled on this subject by the prosecutor or the trial judge. No promises were made. Yet, had he been represented by counsel the dim probability that probation would be granted would have been made known to him. A trained lawyer is able to discern these matters and may even be able to negotiate for sentencing consideration. A searching probe as required by Von Moltke, supra, would have better equipped the court to decide the subject of intelligent waiver. Such a probe was not conducted and we therefore reverse.

The guilty plea is set aside and the record of conviction expunged. Counsel is awarded attorney's fees as provided in NRS 7.260(1).

Thompson, J., concurs.

Collins, J., dissenting:

I feel the record at the arraignment, coupled with the reasons testified to by appellant at the hearing on the writ of habeas corpus do show a waiver of counsel, "knowingly and intelligently" made. Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965); Von Moltke v. Gillies, 332 U.S. 708.

Twice at the arraignment Bundrant was asked by the trial judge if he wanted counsel. Twice he said no in a manner that indicated complete understanding of the importance and nature of the right he was waiving. It is apparent from the record of the hearing on the habeas corpus petition he was "gambling" on his chances for probation and he lost. This is not an unknown practice of persons charged with felony crimes. But it clearly demonstrates to me he suffered no lack of knowledge or intelligence in making his waiver of counsel. Furthermore, he has since been released from prison on parole and cannot be retried.

I would let the conviction stand and deny the appeal.

FOSTER SHERWIN EDWARDS, Appellant, *v.*
VERA LOUISE EDWARDS, Respondent.

No. 5092

November 2, 1966 419 P.2d 637

Appeal from order denying motion to modify decree of divorce; Second Judicial District Court, Washoe County; Grant L. Bowen, District Judge.

The lower court denied motion by father to modify portion of divorce decree relating to alimony and child support, and appeal was taken. The Supreme Court, Zenoff, D. J., held that divorced husband was not entitled to $200 reduction in alimony and child support payments although his income had fallen from approximately $27,000 annually to less than $17,000 where it appeared that his monthly payment obligations, including insurance, for two excess automobiles he owned amounted to more than $200 a month.

Affirmed.

Cooke & Roberts, of Reno, for Appellant.

John Sanchez, of Reno, for Respondent.

Divorce.

Divorced husband was not entitled to $200 reduction in alimony and child support payments although his income had fallen from approximately $27,000 annually to less than $17,000 where it appeared that his monthly payment obligations, including insurance, for two excess automobiles he owned amounted to more than $200 a month. NRS 125.140, subd. 2, 125.170, subd. 1.

OPINION

By the Court, Zenoff, D. J.:

Foster Edwards and Vera Edwards were divorced on September 30, 1963. The decree of divorce incorporated the terms and conditions of an agreement entered into by the parties on the same date. Insofar as is pertinent, the agreement provided that Foster pay Vera a sum of $150 per month for alimony and $175 per month for each of two of their children; in all the total sum of

$500 per month. [1] The court also retained jurisdiction to modify its decree relative to custody, support, and alimony payments upon application of either party.

On August 13, 1965, Foster moved to modify that portion of the decree relating to alimony and child support by eliminating the requirement to pay alimony and reducing the child support payments by a total of $50 per month. In all, he requested a total reduction of $200 per month. The motion was denied and he appeals.

This proceeding is authorized by NRS 125.170(1) [2] and is governed by NRS 125.140(2), [3] as noted in Folks v. Folks, 77 Nev. 45, 359 P.2d 92 (1961), and Grenz v. Grenz, 78 Nev. 394,

374 P.2d 891 (1962).

The sole issue is whether the lower court violated its discretionary power in denying Foster's motion to modify. Goodman v. Goodman, 68 Nev. 484, 236 P.2d 305 (1951).

At the time of the divorce Foster was an orchestra leader at the Sparks Nugget, a casino and entertainment enterprise in Sparks, Nevada. He was earning $27,380 net annually, based on a work year of 50 weeks. The change of circumstances upon which he largely based the motion consisted of reduction of income, plus higher costs of maintaining his orchestra. In 1964, his net earnings were $19,800; in 1965, less than $17,000; and for 1966, he anticipated about the same income as in 1965. After 1963, the Nugget adopted an entertainment policy of importing some acts that provided their own music,

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[1] There were provisions made by the parties for two other children born of the marriage but such provisions have no relevancy to this motion to modify.

[2] NRS 125.170(1). "In divorce actions, installment judgments for alimony and support of the wife shall not be subject to modification as to accrued installments. Installments not accrued at the time a motion for modification is filed shall not be modified unless the court expressly retained jurisdiction for such modification at the final hearing. The provisions of this subsection apply to all such installment judgments whether granted before or after July 1, 1961."

[3] NRS 125.140(2). "In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."

thus not requiring Edwards' orchestra to perform. In addition, the Nugget decided to close the show room several weeks each year. Thus, Foster's period of employment was 44 weeks in 1964, 38 weeks in 1965, and it was estimated that he would work about 40 weeks in 1966. Because Foster had to pay more money in order to keep certain key musicians the costs of keeping his orchestra increased. Further, because of the Medicare program, withholding taxes were higher.

Besides these factors, Foster remarried, a child was born of the marriage, thus incurring the additional costs of living for his new family. In the meantime, Vera was able to work as a cocktail waitress and did so from time to time, although she admitted that her interest to work was not keen since she was able to live comfortably on the alimony and child support payments.

The trial court, however, was unimpressed by Foster's evident lack of desire to cut his own family expenses. He owned one automobile at the time of the divorce, but bought two more

after the divorce. He acknowledged that only one was necessary. The monthly payment obligations including insurance for the two additional automobiles totaled over $200 per month. This did not include maintenance and operating costs. The conclusion of the trial court then becomes apparent.[4] Since Foster asked for a reduction of $200 per month he could have obtained his own relief by disposing of the excess automobiles. We see no abuse of discretion.

Affirmed.

Thompson and Collins, JJ., concur.

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[4] In his decision the trial judge stated, "I do not believe that the defendant cannot meet the original order, even with his reduced income, if he would really make a showing of his desire to cut his own family expenses."

↓ 82 Nev. 395, 395 (1966) Robt. Pierce Co. v. Sherman Gardens ↓

ROBERT A. PIERCE CO., a Nevada Corporation, Appellant, *v.* SHERMAN GARDENS COMPANY, a Copartnership Consisting of ROBERT J. GORDON and DICK Y. NAKAMURA; FIREMAN'S FUND INSURANCE COMPANY, a California Corporation; and ALLIED CORPORATION, a Nevada Corporation, Respondents.

No. 5013

November 4, 1966 419 P.2d 781

Appeal from judgment and orders of the Eighth Judicial District Court, Clark County; Clarence Sundean and John C. Mowbray, Judges.

Lien foreclosure action. The lower court rendered judgment for apartment owner and others and lathing subcontractor appealed. The Supreme Court, Thompson, J., held that testimony of subcontractor's representatives which concerned statements made by contractor's representatives that $45,374.34 was correct sum owed to subcontractor, thereby indicating knowledge that $20,000 paid to subcontractor for labor and materials was properly applied by subcontractor to other accounts with contractor and not fraudulently credited to other accounts which would cause subcontractor to lose lien rights, was erroneously excluded as hearsay.

Judgment for Sherman Gardens and Fireman's Fund reversed; order appointing Don R. Beagle, receiver, is affirmed. Remanded.

Morton Galane, of Las Vegas, for Appellant.

Foley Brothers, of Las Vegas, for Respondents Sherman Gardens Co. and Fireman's Fund Ins. Co.

1. Mechanics' Liens.
   Though statement by contractor as to amount due subcontractor does not bind owner, it does not follow that statement is inadmissible in lien foreclosure case since statement may still be some evidence of reasonableness of claim submitted.
2. Evidence.
   Testimony of subcontractor's representatives which concerned statements made by contractor's representatives that $45,374.34 was correct sum owed to subcontractor, thereby

indicating knowledge that $20,000 paid to subcontractor for labor and materials was properly applied by subcontractor to other accounts with contractor and not fraudulently credited to other accounts which would cause subcontractor to lose lien rights, was erroneously excluded as hearsay in lien foreclosure action by subcontractor against owner, where testimony was not offered to prove that statements were true but as tending to show state of mind of declarants.

3. Fraud.
   Where intent to defraud is in issue, conversations with third persons, or statements made by them, tending to negate intent to defraud on part of party whose motive is material, are admissible.
4. Mechanics' Liens.
   Fraud in overstating lien claim is an affirmative defense and burden falls upon party asserting that defense to prove it by clear and convincing evidence. NRS 108.100(1); NRCP 8(c).
5. Appeal and Error.
   When evidence is split and case is close, it is likely that result would be sensitive to excluded testimony, and in this setting rule of harmless error is inoperative. NRCP 61.
6. Corporations.
   Where corporate subcontractor was dissolved during pendency of its lien foreclosure suit against apartment house owner and others to recover alleged amount due for labor and materials supplied, and court requested corporate representatives to nominate receiver after defendants requested such appointment, but representatives declined invitation, appointment of receiver by court was not erroneous. NRS 78.590, 78.600, 78.615.

OPINION

By the Court, Thompson, J.:

This is a lien foreclosure action brought by Robert A. Pierce Co., a Nevada corporation, to recover $45,374.34 claimed to be due for labor and materials supplied by it as a lathing

subcontractor on the apartment house project of Sherman Gardens Company, owner. The plaintiff lost below. In order to place the main appellate issue in focus, we need only recite that the Pierce Company was paid $20,000 which the court found should have been applied to the Sherman Gardens job, but which Pierce Company fraudulently credited to other accounts. Accordingly, that court concluded that the lien rights of the Pierce Company were lost, and entered

judgment for the defendants Sherman Gardens Company and Fireman's Fund Insurance Company. [1] The findings of the trial court are not challenged. The appellant Pierce Company admits that the findings and judgment are supported by substantial evidence. Notwithstanding this admission, the appellant contends that the trial was blemished with prejudicial error because the court refused to listen to certain offered rebuttal testimony which was relevant to the issue of fraud.

1. It is not necessary to recite in detail all evidence received on the issue of fraud. The court stated flatly in its findings of fact that it accepted the testimony of Mr. Geddie and Mr. Daball. Mr. Geddie was the office manager of Allied, and Mr. Daball its president. Their testimony was that Mr. Kibby, the superintendent of Pierce Co., knew the source of the $20,000 check which was delivered to him, and knew that it was to be credited to the Sherman Gardens job and not to other jobs on which Pierce Company was the lathing subcontractor for Allied. Their testimony was denied by Mr. and Mrs. Kibby and Jack Pierce, all in responsible positions with the Pierce Company. The $20,000 check bore no legend as to how it was to be credited. Thus, the evidence on this narrow issue was in sharp conflict. The credibility of the witnesses became a controlling factor for the trial judge. It is within this framework that we must evaluate the importance of the court's refusal to listen to certain offered rebuttal testimony.

About one month after the $20,000 check was delivered to Pierce Company, (and by it applied to accounts other than Sherman Gardens), a meeting was held at the Nevada State Bank. Mr. Humm of the bank, Pierce, Kibby, Daball, Geddie and Mr. Louis Kaminar, attorney for Pierce Company, were in attendance. Daball and

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[1] Fireman's Fund was joined as a defendant because it gave bond to discharge the lien of Pierce Company. Allied Corporation, with whom the Pierce Company made its subcontract, was also a defendant and, though served with process, did not appear and defend. Following the judgment for Sherman Gardens and Fireman's Fund, plaintiff secured a default judgment against Allied for $25,374.34.

Geddie, defense witnesses, were allowed to testify about the conversations that occurred at that meeting. Notwithstanding, the court refused to hear testimony from Kaminar, Kibby and Pierce, plaintiff's witnesses, upon the same subject. Kaminar would have testified (according to counsel's offer of proof) that, at the bank meeting, Geddie and Daball each said that $45,374.34 was the correct sum owing Pierce Company on the Sherman Gardens job. An offer of proof of the testimony of Pierce about the same meeting was not allowed, the court stating: “No, I have denied your right to complete your offer of proof.” Though an offer of proof was not made with respect to the testimony of Kibby, preliminary questions in the record show that his testimony also would have concerned the bank meeting.

[Headnotes 1-3]

The exclusionary ruling below rested on the notion that the statements of Geddie and Daball (representatives of Allied) at that meeting could not bind Sherman Gardens, the owner of the property liened by Pierce Company and were hearsay as to Sherman Gardens. Though a statement by the contractor as to the amount due a subcontractor does not bind the owner, it does not follow that the statement is inadmissible in a lien foreclosure case. It still may be some evidence of the reasonableness of the claim submitted, Stardust, Inc. v. Desert York Company, 78 Nev. 91, 369 P.2d 444 (1962), and where, as here, fraud is an issue, the statement may possess particular relevance. Geddie and Daball of Allied had testified that Pierce Company knew the source of the $20,000 check and knew that it was to be credited to the Sherman Gardens job. Yet (according to the offer of proof) one month later Geddie and Daball each admitted that Allied owed Pierce Company $45,351.94, thereby indicating knowledge that the $20,000 previously paid Pierce Company was properly applied to other accounts on which Pierce was a subcontractor for Allied. That evidence was erroneously excluded. The statements said to have been made by Geddie and Daball

were not offered to prove that the statements were true but as tending to show the state of mind of the declarants. Evidence of this kind is not objectionable as hearsay. Frank v. United States, 220 F.2d 559 (10th Cir. 1955); Buchanan v. United States, 233 F. 257 (8th Cir. 1916); Wigmore on Evidence, 3d ed. § 1789. Where intent to defraud is in issue, conversations with third persons, or statements made by them, tending to negate an intent to defraud on the part of the party whose motive is material, are admissible. Miller v. United States, 120 F.2d 968 (10th Cir. 1941); Bernstein v. United States, 256 F.2d 704 (10th Cir. 1958); United States v. Shavin, 287 F.2d 647 (7th Cir. 1961).

[Headnotes 4, 5]

2. As the trial progressed it became evident that the central issue was fraud. NRS 108.100(1) provides, in substance, that a claimant's lien rights may be lost if the variance between the lien and the proof "shall result from fraud." [2] Fraud is an affirmative defense (NRCP 8(c)) and the burden falls upon the party asserting that defense to prove it by clear and convincing evidence. Callahan v. Chatsworth Park, Inc., 204 Cal.App.2d 597, 22 Cal. 606 (1962); Distefano v. Hall, 218 Cal.App.2d 657, 32 Cal. 770 (1963); Wand Corp. v. San Gabriel Valley Lumber Co., 236 Cal.App.2d 855, 46 Cal. 486 (1965). The trial court found fraud—that Pierce Company had intentionally and fraudulently overstated its lien claim by $20,000—and denied foreclosure. In doing so, it failed to hear all relevant evidence offered on that issue. The evidence which was allowed was in sharp conflict. When the evidence is split and the case is close, it is likely that the result would be sensitive to the

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[2] NRS 108.100(1) reads: "Upon the trial of any action or suit to foreclose such lien no variance between the lien and the proof shall defeat the lien or be deemed material unless the same shall result from fraud or be made intentionally, or shall have misled the adverse party to his prejudice, but in all cases of immaterial variance the claim of lien may be amended, by amendment duly recorded, to conform to the proof."

excluded testimony. In this setting the rule of harmless error is inoperative. [3]

It is suggested that the majority opinion in Serpa v. Porter, 80 Nev. 60, 389 P.2d 241 (1964), is contra. The court held that an exclusionary ruling on evidence was harmless. The exclusion occurred because the trial judge believed that the offered testimony was "incredible." The opposite appears in the record now before us. When the trial judge refused to receive the testimony of Kaminar he stated: "I don't want to hear it. It might influence my decision in the matter." The rationale of the dissenting opinion in Serpa v. Porter, supra, has application to this case. It is not necessary to consider other assigned errors relating to rulings on evidence.

[Headnote 6]

3. A remaining assignment of error requires comment. After litigation was commenced, but before trial, Pierce Company was dissolved. The court was not advised, nor were the defendants aware, of the dissolution. After trial and judgment the defendants learned of it, filed a "suggestion of corporate dissolution" in the record of this case (NRS 78.615), [4] and requested the appointment of a receiver. By express language, that statute applies to suits against the dissolved corporation.

[3] NRCP 61 provides: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

[4] NRS 78.615 provides: "If any corporation organized under this chapter becomes dissolved by the expiration of its charter or otherwise, before final judgment obtained in any action pending or commenced in any court of record of this state against the corporation, the action shall not abate by reason thereof, but the dissolution of the corporation being suggested upon the record, and the names of the trustees or receivers of the corporation being entered upon the record, and notice thereof served upon the trustees or receivers, or if such service be impracticable upon the counsel of record in such case, the action shall proceed to final judgment against the trustees or receivers by the name of the corporation."

↓ 82 Nev. 395, 401 (1966) Robt. Pierce Co. v. Sherman Gardens ↓

Here the dissolved corporation was plaintiff. Upon dissolution, Pierce Company should have requested the court to continue the directors as trustees or appoint a receiver to complete the litigation as provided for by NRS 78.590 and 78.600.[5] However, when the defendants requested the appointment of a receiver after judgment, the court invited the representatives of Pierce Company to nominate a receiver stating that the nomination

[5] NRS 78.590 reads: "1. Upon the dissolution of any corporation under the provisions of NRS 78.580, or upon the expiration of the period of its corporate existence, limited by its certificate or articles of incorporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, real and personal, and divide the moneys and other property among the stockholders, after paying or adequately providing for the payment of its liabilities and obligations.

"2. After paying or adequately providing for the liabilities and obligations of the corporation, the trustees, with the written consent of stockholders holding stock in the corporation entitling them to exercise at least a majority of the voting power, may sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other state, and take in payment therefor the stock or bonds, or both, of such corporation and distribute them among the stockholders, in proportion to their interest therein. No such sale shall be valid as against any stockholder, who, within 30 days after the mailing of notice to him of such sale, shall apply to the district court for an appraisal of the value of his interest in the assets so sold, and unless within 30 days after the appraisal shall have been confirmed by the court the stockholders consenting to the sale, or some of them, shall pay to the objecting stockholder or deposit for his account, in the manner directed by the court, the amount of the appraisal. Upon the payment or deposit the interest of the objecting stockholder shall vest in the person or persons making the payment or deposit."

NRS 78.600 reads: "When any corporation organized under this chapter shall be dissolved or cease to exist in any manner whatever, the district court, on application of any creditor or stockholder of the corporation, at any time, may either continue the directors trustees as provided in NRS 78.590, or appoint one or more persons

to be receivers of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the district court shall think necessary for the purposes aforesaid."

would be honored. They declined that invitation. Thereafter the court appointed Don R. Beagle receiver, from which order Pierce Company has appealed. In these circumstances we find no error. The plaintiff should have acted pursuant to NRS 78.590 or 78.600 upon dissolution. It did not. Later, when invited to nominate a receiver, it refused. Someone has to represent the dissolved corporation in this litigation, so the lower court took the matter into its own hands and appointed that person. This claim of error is without merit.

The judgment for the defendants Sherman Gardens and Fireman's Fund is reversed. The order appointing Don R. Beagle, receiver, is affirmed. The case is remanded for a new trial in the name of Don R. Beagle, receiver for Robert A. Pierce Co., a dissolved Nevada corporation.

Collins, J., and Zenoff, D. J., concur.

DALE ARDEN MATHIS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5085

November 4, 1966 419 P.2d 775

Appeal from the Eighth Judicial District Court, Clark County; John Mowbray, Judge.

Defendant was convicted in the trial court of attempted grand larceny and he appealed. The Supreme Court, Collins, J., held, inter alia, that defendant who drove up with companion in truck to gate of air-conditioning company and who entered adjoining air-conditioning company's yard and loaded equipment onto truck was "principal" in commission of offense of attempted grand larceny within statutory definition.

Affirmed.

Albert Matteucci, of Las Vegas, for Appellant.

Harvey Dickerson, Attorney General, *Edward G. Marshall,* District Attorney, and *James D. Santini,* Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   Elements of attempt to commit a crime are intent to commit crime, performance of some act toward its commission, and failure to consummate its commission.
2. Larceny.
   Defendant who drove up with companion in truck to gate of air-conditioning company and who entered adjoining air-conditioning company's yard and loaded equipment onto truck was "principal" in commission of offense of attempted grand larceny within statutory definition. NRS 195.020.
3. Larceny.
   Evidence of extraneous or intervening cause preventing commission of completed crime was not required to be shown in prosecution for attempted grand larceny but cutting of lock with bolt cutters to air-conditioning company's yard by defendant's companion constituted overt act toward commission of crime, notwithstanding that defendant and companion, after cutting lock, returned to truck and drove off. NRS 195.020.
4. Criminal Law.
   Allowing witnesses whose names were not endorsed on indictment to testify was not prejudicial error, notwithstanding fact that statutes provide that prosecutor must endorse names of trial witnesses on information at time it is filed. NRS 173.080, 173.110.
5. Criminal Law.
   Even if evidence of separate and distinct offense is deemed to be admissible, trial court must be convinced that its probative value outweighs its prejudicial effect, and if admitted, trial court must inform jury that they may consider separate and distinct offense only for limited purpose for which it is admitted.
6. Criminal Law.
   Evidence of separate and distinct offense of grand larceny which was introduced after trial court had ruled it inadmissible in attempted grand larceny prosecution and to which defendant did not object even though he was specifically put on notice by court that it would not anticipate any ruling on objection to such evidence was not prejudicial where defendant cross-examined at length upon evidence

after it was offered by state and stipulated in open court before jury that he was to be tried at later date for the same separate and distinct offense of grand larceny.

OPINION

By the Court, Collins, J.:

Appellant was convicted by a jury of attempted grand larceny, a felony. He appeals from the conviction and the trial court's refusal to grant a new trial. He urges as error the lack of evidence to prove intent; failure to prove an extraneous or hindering cause which impeded the ultimate commission of the crime; failure of the state to endorse on the *indictment* names of witnesses to be called; and prejudice resulting from evidence admitted of a separate and distinct offense. The errors urged are without merit and we sustain the conviction.

The record discloses that appellant and Sanford Wara inquired at the Conditioned Air Company office, Las Vegas, Nevada, about air conditioning equipment. Shortly after leaving, they were observed by Conditioned Air Company employees looking into the adjoining equipment yard of Air Conditioning, Inc., victim in this case. Later that afternoon both returned to the office of Conditioned Air Company and inquired about the time in the morning it opened for business. A secretary's suspicions were aroused and she called the Las Vegas police who assigned two officers as a stakeout for both equipment yards. About 6:25 a.m. the next morning the two officers observed appellant and Wara drive up to the gate of Air Conditioning, Inc., yard in a rented truck and both got out. After looking around, Wara cut the lock on the gate with boltcutters, while appellant looked on. Neither entered the yard but returned to the truck. The officers lost sight of them for about five minutes, but then observed them inside the yard of an adjoining air conditioning company, loading equipment in the truck. They were later arrested nearby with stolen air conditioning equipment in their possession on the truck. Further examination by the officers revealed that

a chain locking the gate of the yard where the equipment was taken had also been cut with a boltcutter.

At the trial witnesses, whose names were not endorsed on the indictment, were called by the state and allowed by the court to testify. The indictment had subscribed on it only the names of witnesses who testified before the grand jury.

During the trial the prosecution offered evidence of a separate and distinct crime, grand larceny of the adjoining air conditioning company from which the equipment was taken. Objection was made to this evidence by appellant who cited Nester v. State, 75 Nev. 41, 334 P.2d 524 (1959). The trial judge sustained the objection after a hearing out of the jury's presence. During this hearing the prosecution sought to have clarified what, if anything, the witness could testify to regarding the separate offense. Appellant's counsel made a suggestion as to the evidence but the trial judge stated, “I'm not going to anticipate my rulings. You make the objections and I'll rule on them when the objections are made. What do you want to do? Bring the jury in?”

Thereafter evidence of the separate and distinct offense crept in through testimony of

several state's witnesses; but no further objection was made by defense counsel, who argues his objection was a continuing one as to all such evidence. Nevertheless he cross-examined the state's witnesses on the separate and distinct offense and during the trial stipulated with the prosecuting attorney that appellant would be tried on the grand larceny charge at a later date. Appellant offered no evidence or witnesses on his own behalf but argued that the state had failed to prove its case. The jury convicted appellant of the crime charged. No instruction was requested or given on the law of separate and distinct offenses, nor was objection made on further instructions requested by appellant.

[Headnotes 1, 2]

The early Nevada case, State v. Thompson, 31 Nev. 209, at 216, 101 P. 557 (1909), clearly sets forth the elements of attempt to commit a crime. They are:

"First—The intent to commit the crime. Second—Performance of some act towards its commission. Third—Failure to consummate its commission." At page 217 of that case it is further stated, "As in any other case where the intent is material, the intent need not be proved by positive or direct evidence, but may be inferred from the conduct of the parties and the other facts and circumstances disclosed by the evidence." It has not been urged by appellant that he was anything but a principal in the commission of the crime. NRS 195.020 [1] defines principals. Appellant clearly fits within that definition. Appellant argues there was no overt act on his part shown from the evidence and that as a matter of law there was insufficient evidence of an extraneous or hindering cause which impeded or hindered the ultimate commission of the crime of larceny.

[Headnote 3]

The overt act is clear. Wara cut the lock with boltcutters. Our law does not require evidence of an extraneous or intervening cause preventing commission of the completed crime. All that must be shown is failure to consummate its commission. State v. Thompson, supra. For a reason known only to appellant and his accomplice, after cutting the lock, they returned to the truck and drove off. A case greatly in point is People v. Walker, 33 Cal.2d 250, 201 P.2d 6 (1948). There a defendant was found guilty of murder in the first degree for killing a police officer in the attempted perpetration of a burglary. The California court said, at page 10, "At the time of the murder defendant had already snipped

[1] "195.020 Who are principals. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him."

the bolt on the door of the meat market and replaced the lock, and he was scouting the neighborhood to see that the coast was clear; in other words, he was in the process of completing his attempted burglary after commission of a definite overt act."

[Headnote 4]

Appellant complains it was prejudicial error for the trial court to allow witnesses to testify whose names were not endorsed on the indictment. He cites NRS 173.080[2] and NRS 173.110[3] and contends they are interchangeable. We have not ruled upon this point before but feel it has no merit. The statutes require an information to conform "as near as may be" to the indictment, but the converse is not required nor are they made expressly interchangeable. We perceive no error.

[Headnotes 5, 6]

The last issue, namely admission of evidence of a separate and distinct offense, causes us some concern. Generally it is not admissible. Garner v. State, 78 Nev.

[2] "173.080 District Attorney or his deputy to be informant; endorsement of names of witnesses; affidavits.

"1. All informations shall be filed in the court having jurisdiction of the offenses specified therein, by the district attorney of the proper county as informant, and his name shall be subscribed thereto by himself or by his deputy.

"2. He shall endorse thereon the names of such witnesses as are known to him at the time of filing the same, and shall also endorse upon such information the names of such other witnesses as may become known to him before the trial at such time as the court may, by rule or otherwise, prescribe; but this shall not preclude the calling of witnesses whose names, or the materiality of whose testimony, are first learned by the district attorney upon the trial.

"3. In all cases in which the defendant has not had or waived a preliminary examination there shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of affiant that the offense was committed."

[3] "173.110 Law applicable to indictment applies to information. All provisions of law applying to prosecutions upon indictments, to writs and process therein and the issuing and service thereof, to motions, pleadings, trials and punishments, or the passing or execution of any sentence, and to all other proceedings in cases of indictment, whether in a court of original or appellate jurisdiction, shall to the same extent and in the same manner, as near as may be, apply to informations and to all prosecutions and proceedings thereon."

366 374 P.2d 525 (1962). There are certain exceptions which are set forth in detail in Tucker v. State, 82 Nev. 127, 412 P.2d 970, at 971 (1966). Even if the evidence is deemed to be admissible the trial court must be convinced that its probative value outweighs its prejudicial effect. Tucker v. State, supra, at 971, and if admitted, the trial court must inform the jury that they may consider it only for the limited purpose for which it is admitted. Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965); State v. Monahan, 50 Nev. 27, 249 P. 566 (1926); State v. McFarlin, 41 Nev. 486, 172 P. 371 (1918). The record fails to demonstrate any of these requirements were followed. The evidence just "snuck" in, after the trial court had ruled it inadmissible, but *without objection* by defendant, even though he was specifically put on notice by the court that it would not "anticipate any rulings on objections" to such evidence. We thus need not consider it now. Cook v. State, 77 Nev. 83, 85, 359 P.2d 483 (1961); O'Briant v. State, 72 Nev. 100, 295 P.2d 396 (1956); Kelley v. State, 76 Nev. 65, 348 P.2d 966 (1960); State v. Boyle, 49 Nev. 386, 248 P. 48 (1926); State v. Moore, 48 Nev. 405, 233 P. 523 (1925). Moreover, after the state offered such evidence, during direct examination of its witnesses, the defendant cross-examined at length upon it. Finally the defendant sought and received a stipulation from the state in open court before the jury that he was to be tried at a later date for the same separate and distinct offense, namely grand larceny.

The trial court had no duty, under these circumstances, to intervene *sua sponte.* Garner v. State, 78 Nev. 366, 372, 374 P.2d 525 (1962).

Affirmed.

Thompson, J., and Zenoff, D. J., concur.

PAUL A. ROCHE, Guardian of the Person and Estate of JOHN B. ROCHE, An Incompetent Person, Appellant, *v.* THON PATRICK SCHARTZ, Respondent.

No. 5103

November 4, 1966 419 P.2d 779

Appeal from order granting involuntary dismissal under Rule 41(b), NRCP; First Judicial District Court, Churchill County; Richard L. Waters, Jr., Judge.

Action by guardian ad litem of passenger injured in collision with defendant's automobile. The lower court granted involuntary dismissal and plaintiff appealed. The Supreme Court, Zenoff, D. J., held that evidence that passenger's eastbound motor vehicle collided with defendant westbound motorist on slippery road, that all of wreckage came to rest on passenger's side of highway and that westbound motorist had smooth tire and was in hurry, when considered in light most favorable to passenger, made submissible case and granting of involuntary dismissal was improper.

Reversed.

Peter Echeverria, of Reno, for Appellant.

Vargas, Dillon, Bartlett & Dixon, and *Albert F. Pagni,* of Reno, for Respondent.

1. Trial.
   For purposes of dismissal under rule providing for dismissal on ground that upon facts and law plaintiff has failed to prove sufficient case for court or jury, plaintiff's evidence and all reasonable inferences that can reasonably be drawn from it must be deemed admitted and evidence must be interpreted in light most favorable to plaintiff. NRCP 41(b).
2. Negligence.
   Physical facts may justify jury finding that defendant is guilty of negligence and negligence may be inferred from facts and circumstances of each case.
3. Trial.
   In considering motion for involuntary dismissal at completion of plaintiff's case on ground that on the facts and the law the plaintiff has failed to prove a sufficient case for court or jury, the trial judge should not weigh or compare or balance inferences in favor of one party and against the other. NRCP 41(b).

4. Trial.
   Conflicting inferences from known facts are for jury determination.
5. Automobiles.
   Evidence that passenger's eastbound motor vehicle collided with defendant westbound motorist on slippery road, that all of wreckage came to rest on passenger's side of highway and that westbound motorist had smooth tire and was in hurry when considered in light most favorable to passenger, made submissible case. NRCP 41(b).
6. Witnesses.
   That plaintiffs had taken deposition of defendant's wife prior to trial without objection by defendants did not constitute waiver by defendants of protection afforded by statute prohibiting wife from testifying without husband's consent. NRS 48.040.

OPINION

By the Court, Zenoff, D. J.:

This appeal is taken from an order of the court below granting an involuntary dismissal under Rule 41(b), [1] Nevada Rules of Civil Procedure. Collaterally, appellant also contends that the respondent waived his privilege to preclude his wife's testimony when he agreed that her deposition might be taken before trial, and it was taken.

The action arose from an auto accident in 1957. John Roche, a passenger in a Jeep owned by the State of Nevada, was rendered incompetent by the accident, and this action was commenced by Paul Roche, his guardian ad litem. Defendant Thon Patrick Schartz was the driver of the other vehicle.

At the close of plaintiff's case in a jury trial the court

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[1] Rule 41(b). *"Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits."

granted defendant's motion for an involuntary dismissal. The notice of appeal subsequently was filed by Roche.

There were no eye witnesses to the accident. All of the evidence is circumstantial based on the physical facts available after the accident. Schartz has no recollection of events leading to the collision.

On November 2, 1957, Schartz and his wife left Great Bend, Kansas, enroute to Reno, Nevada, to attend a convention via Albuquerque, New Mexico, and Las Vegas, Nevada. They were driving a 1956 Mercury automobile. The collision occurred approximately 6 1/2 miles west of Fallon (about 47 miles from Reno), sometime between 1:00 p.m. and 1:55 p.m., November 4. The road was slippery from rain, snow and slush. At least one of the tires on the Mercury was smooth. Schartz was scheduled to attend a meeting in Reno at 2:00 p.m. He left Las Vegas early that morning, but was delayed because he initially became lost and some time elapsed before he was directed properly. He testified that at times he drove 70 to 75 miles per hour and at other times 40 to 50 miles per hour.

In the meantime, Leslie Lewis and John Roche, employees of the Nevada State Highway Department, were working along U.S. Highway 95 about seven miles southwest of the scene of the accident. Highway 95 is the main artery from Las Vegas to Reno and goes through Fallon. Lewis and Roche were called off work because of the adverse weather conditions and

were told to return to the Highway Department office in Fallon. Lewis was the driver of the Jeep, Roche a passenger. Lewis was killed in the accident.

Plaintiff was driving generally east toward Fallon and defendant west toward Reno. There is a curve near the scene of the collision. A side road intersects a short distance from where the cars came to rest. All of the wreckage and debris was on plaintiff's side of the highway, although no precise point of impact could be determined. No skid marks were found. Both cars ended up a considerable distance apart on plaintiff's side of the highway. Damage to the Jeep was on the driver's left

front including the door, while the Mercury's damage was primarily to the front of the vehicle. A trail of oil approximately eight feet south of the center of the highway led to a puddle of oil under the Mercury.

1. The foregoing facts were constructed from the testimony of Schartz and other witnesses. Appellant contends that the physical facts create a reasonable inference that defendant was negligent. Defendant maintains that it is just as reasonable to infer that Lewis and Roche drove up a side road to deposit some lunch garbage and then returned to the main highway into Schartz's line of travel.

Defendant points to the physical location of the damage on both automobiles, the side road leading to the garbage dump at the accident scene, and that when Lewis and Roche were secured from work they were to remain and clean up the area and then were free to go, thus, the theory that the two men drove to the dump to dispose of the remnants of their lunch.

[Headnotes 1-4]

However reasonable the inferences which could be drawn in favor of the defendant, nevertheless, we adhere to the well-established doctrine that for the purposes of a dismissal under NRCP 41(b) plaintiff's evidence and all reasonable inferences that can reasonably be drawn from it must be deemed admitted and the evidence must be interpreted in the light most favorable to the plaintiff. Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955), and Schmidt v. Merriweather, 82 Nev. 372, 418 P.2d 991 (1966), and cases cited therein. Physical facts may justify a jury finding that defendant is guilty of negligence and negligence may be inferred from the facts and circumstances of each case. Anderson v. Kearly, 20 N.W.2d 728 (Mich. 1945); Mitchell v. Stolze, 100 A.2d 477 (Penn. 1953). There may well be merit to defendant's theory of the case, but the function of the trial judge is not to determine the respective merits under a 41(b) motion. It is not for him to weigh or compare or balance the inferences in favor of the one party and against the other. Conflicting inferences from

known facts are for jury determination. Worth v. Reed, 79 Nev. 351, 356, 384 P.2d 1017 (1963).

[Headnote 5]

We have here the physical facts from which inferences can readily and easily be drawn in favor of the plaintiff. The location of the damaged vehicles and the debris was on the plaintiff's side of the highway. Schartz had rounded a curve, the road was slick, at least one tire was smooth, and he was in a hurry because he was late for a meeting. We cannot say from these facts in a light most favorable to the plaintiff that as a matter of law no negligence on the part of the defendant was shown.

[Headnote 6]

2. During the trial, plaintiffs called Mrs. Schartz as a witness. Defendants objected citing NRS 48.040[2] which prohibits a wife from testifying without her husband's consent. Plaintiff contends that because her deposition was taken prior to trial without objection that defendant thereby waived the protection of NRS 48.040. We do not agree. We need not decide the issue of waivers since the wife's testimony on deposition did not relate to the issue of liability. Dean v. Superior Court, 103 Cal.2d 892, 230 P.2d 362 (1951).

Reversed.

Thompson and Collins, JJ., concur.

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[2] NRS 48.040. *"Husband and wife; when one cannot be witness against the other.* A husband cannot be *examined as a witness* for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." (Emphasis added.)

↓ 82 Nev. 414, 414 (1966) Walsh v. Clark Co. School Dist. ↓

RICHARD JOSEPH WALSH, Individually; MARGARET ANN WALSH, Individually; and RICHARD JOSEPH WALSH and MARGARET ANN WALSH as the Surviving Parents, Legal Representatives and Heirs of TERRANCE PATRICK WALSH, a Deceased Minor, Appellants, *v.* CLARK COUNTY SCHOOL DISTRICT; City of Las Vegas, Nevada, a Municipal Corporation; Clark County, Nevada; and FREDERICK FRYE, Respondents.

No. 5106

November 4, 1966 419 P.2d 774

Appeal from judgment of the Eighth Judicial District Court, Clark County; John F. Sexton, Judge.

Action against school district for death of child as a result of accident on school property. The lower court entered a judgment adverse to the plaintiffs who appealed. The Supreme Court, Thompson, J., held that school district did not enjoy immunity from tort liability with respect to accident occurring several months before effective date of statute by which legislature had waived immunity from tort liability of state and its political subdivisions.

Reversed.

Henry R. Gordon and *Paul L. Larsen,* of Las Vegas, for Appellants.

Harvey Dickerson, Attorney General, of Carson City; *Edward G. Marshall,* Clark County District Attorney, and *Robert L. Petroni,* Deputy District Attorney, of Las Vegas, for Respondents.

1. Schools and School Districts.

   Since statute by which legislature has waived state immunity and that of its political subdivisions and has consented to be sued in tort actions does not direct any retrospective application, it could not be used to destroy governmental immunity of school district with respect to tort liability for accident occurring before the effective date of statute. NRS 41.031.

2. Schools and School Districts.

   School district did not enjoy immunity from tort liability with respect to accident occurring several months before effective date of statute by which legislature has waived immunity from tort liability of state and its political subdivisions. NRS 41.031, 386.010, subd. 5.

3. Schools and School Districts.

   Statute which gives each school district power to sue and be sued but which also states that statute does not constitute a waiver of immunity to tort liability does not create an immunity but rather assumes its existence. NRS 386.010, subd. 5.

OPINION

By the Court, Thompson, J.:

[Headnote 1]

The issue on this appeal is whether the Clark County School District, a political

subdivision of the State of Nevada, enjoyed governmental immunity from tort liability on March 7, 1965, when the cause of action precipitating this suit arose. [1] NRS 41.031, by which the legislature waived state immunity and that of its political subdivision and consented to suit, became effective July 1, 1965. Since that law does not direct retrospective application (County of Clark v. Roosevelt Title Ins., 80 Nev. 530, 396 P.2d 844 (1964); State ex rel. Progress v. Dist. Ct., 53 Nev. 386, 2 P.2d 129 (1931); Wildes v. State, 43 Nev. 388, 187 P. 1002 (1920)), it may not be used to destroy governmental immunity in this case. We must decide the issue at hand on the law as it existed when the accident occurred.

[Headnote 2]

1. The Nevada law regarding the rule of governmental immunity from tort liability was confused and uncertain before the enactment of NRS 41.031. The

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[1] On that date a 7-year-old boy, Terrance Patrick Walsh, fell from the roof of a school while attempting to retrieve a kite which had come to rest there. He died soon thereafter because of injuries received from the fall. Suit was commenced. The lower court granted a motion to dismiss presented by the School District and this appeal followed.

latest judicial expression before legislative abolition was Hardgrave v. State, 80 Nev. 74, 389 P.2d 294 (1964), where the rule of immunity was applied to defeat a suit against the State. Only nine months earlier, immunity was denied a county. Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963). When placed side by side those two decisions are difficult, if not impossible, to harmonize (see dissenting opinion Hardgrave v. State, supra) and we shall not attempt to do so here. We prefer the rationale of Rice v. Clark County, supra, and the dissenting opinion of Hardgrave v. State, supra, and hold that the Clark County School District did not enjoy immunity from tort liability when the present cause of action arose.

[Headnote 3]

2. It is suggested that NRS 386.010(5) [2] distinguishes this case from Rice v. Clark County, supra, in a material way. That statute provides: "Each school district shall have the power to sue and may be sued, but this legislative declaration in no way constitutes a waiver of immunity to tort liability, express or otherwise." That language does not create an immunity. Instead, it assumes the existence of an immunity which Rice v. Clark County, supra, in broad application declared nonexistent. Accordingly, we deem the statutory expression about immunity meaningless and ineffective. The balance of the statute, "Each school district shall have the power to sue and may be sued," is unimpaired. This opinion governs this case and other claims against school districts accruing before July 1, 1965, and

which are not barred by limitations.

Reversed.

Collins, J., and Zenoff, D. J., concur.

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[2] NRS 386.010(5) was in effect when the instant cause of action arose.

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82 Nev. 417, 417 (1966) Bank of Nevada v. Friedman

BANK OF NEVADA as Special Administrator of the Estate of JUAN RODRIGUEZ, Appellant, *v.* MAURICE H. FRIEDMAN and T. W. RICHARDSON, Respondents.

No. 5087

November 9, 1966 420 P.2d 1

Appeal from judgment of the Eighth Judicial District Court, Clark County; Clarence Sundean, Judge.

Action on a note against maker and guarantor. The lower court entered summary judgment for each defendant and plaintiff appealed. The Supreme Court, Thompson, J., held, inter alia, that defendant-maker was entitled to summary judgment where complaint showed on its face that cause of action was barred by limitations, and where plaintiff offered nothing to establish that process could not be served at defendant's abode upon someone of suitable age and discretion residing therein during resident defendant's absence from the state.

Judgment affirmed in part, and reversed in part.

[Rehearing denied December 8, 1966]

Johnson & Steffen, of Las Vegas, for Appellant.

Samuel S. Lionel, of Las Vegas, for Respondent Friedman.

Coultard & Smith, of Las Vegas, for Respondent Richardson.

1. Limitation of Actions.

Temporary absence of a resident defendant does not toll running of the statute of limitations if, in fact, there was a person of suitable age and discretion residing at defendant's dwelling house and usual place of abode, where proper service of process could be made; Todman v. Purdy, 5 Nev. 238 (1869) modified

accordingly. NRS 11.300; NRCP 4(d)(6).

2. Courts.

Construction of the statute of limitations to provide that temporary absence of a resident defendant from the state does not toll the statute if in fact there was a person of suitable age and discretion residing at defendant's dwelling or usual place of abode, upon whom service of process could be

made, did not modify a substantive right contrary to authority granted the Supreme Court in regard to rules of practice and procedure, but such construction of the statute and rule pertaining to service of process merely subjected a claimant's right to day in court to reasonable procedural requirements. NRCP 4(d)(6); NRS 2.120, 11.300.

3. Limitation of Actions.

When a complaint shows on its face that a cause of action is barred by limitations, burden falls upon plaintiff to satisfy the court that the bar does not exist.

4. Judgment.

Defendant-maker was entitled to summary judgment in action on a note where complaint showed on its face that the cause of action was barred by limitations, and where plaintiff offered nothing to establish that process could not be served at defendant's abode upon someone of suitable age and discretion residing therein during resident defendant's absence from the state. NRS 11.190; NRCP 4(d)(6).

5. Judgment.

Affidavits and pleadings created a genuine issue of material fact as to whether tolling provision of the statute of limitations became operative, precluding summary judgment for defendant-guarantor in an action on a note. NRS 11.310, subd. 1.

6. Guaranty.

A contract of guarantee on a note was a separate contract from the note, where written on the back of the note, and its effect had to be judged as a simple contract just as if it were on a separate paper.

7. Guaranty.

A guarantee appearing on the back of a note to the effect that guarantor guaranteed payment of the within note did not indicate an intention on part of guarantor to be bound as an endorser of the note rather than as a guarantor, and therefore provisions of the negotiable instruments law operating to discharge a person secondarily liable was not applicable, and it was possible for the bar of limitations to exist in favor of maker of the note and not to exist as to the guarantor. NRS 11.190.

OPINION

By the Court, Thompson, J.:

The main issue on this appeal is whether a resident defendant's temporary absence from Nevada tolls the running of the statute of limitations against a cause of action on a promissory note if service of process could have been effected, during the period of such temporary

absence, by leaving a copy of the summons and complaint at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion residing there. Subordinate questions are also involved. The lower court ruled that the running of the statute was not tolled and entered summary judgment for each defendant.

The Bank of Nevada, as special administrator of the estate of Juan Rodriguez, filed suit on a promissory note against Richardson as maker and Friedman as guarantor. The note was dated February 1958, in favor of Rodriguez, payee, for $75,000, and was due 60 days after date. The day in February that the note was executed is not known. For the purposes of this case we shall assume that execution occurred on the last day of that month, February 28, thus making the due date April 28, 1958. The bar of limitations is 6 years, NRS 11.190, [1] requiring commencement of suit before April 29, 1964. Rodriguez died June 9, 1964. This suit was commenced November 6, 1964. Each defendant is a resident of Nevada. Each was temporarily absent from Nevada, on business or vacation, for 45 days during the 6-year period. If such temporary absence tolled the running of the statute, the time within which to file suit was extended beyond the date of Rodriguez' death and, by reason of his death, for the further period of one year, NRS 11.310(1), [2] that is until June 9, 1965. In such event, suit was filed in time. On the other hand, if such temporary absence of the defendants did not toll the running of the statute, the action is barred.

1. The tolling statute, NRS 11.300, provides: "If, when the cause of action shall accrue against a person, he be out of the state, the action may be commenced within the time herein limited after his return to the

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[1] NRS 11.190 provides in part: "Actions * * * can only be commenced as follows: 1. Within six years: (a) * * * (b) An action upon a contract, obligation or liability founded upon an instrument in writing, * * *"

[2] NRS 11.310(1) reads: "If the person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within 1 year from his death."

state; and if after the cause of action shall have accrued he depart the state, the time of his absence shall not be part of the time prescribed for the commencement of the action." The

meaning of this statute was declared in Todman v. Purdy, 5 Nev. 238 (1869). The running of the statute is suspended when the person against whom the right of action exists is not within the jurisdiction of the state where it is to be brought. The temporary nature of the defendant's absence apparently made no difference. When Todman v. Purdy was decided service of summons had to be made upon the defendant personally. The law did not authorize an alternative method of service as it does now. NRCP 4(d)(6). [3] It is now permissible to leave a copy of the summons and complaint at the resident defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

Because provision is now made for an alternative method of serving process, it is urged that a resident defendant is not absent from the state, within the meaning of the tolling statute, if someone of suitable age and discretion is at his dwelling house or abode with whom process may be left. We are asked to apply the rationale of Cal.-Farm Ins. Co. v. Oliver, 78 Nev. 479, 375 P.2d 857 (1962). There service of process was effected under the nonresident motorist statute, NRS 14.070. At issue was whether the statute of limitations was tolled while the defendant was absent from Nevada. The court ruled that the statute was not tolled, stating at page 481: "'The statute tolling the period of limitations as to those outside the state must be deemed to be limited by its clear and specific purpose so as to apply only to those who reside out of the state and who are not otherwise subject to service of process in the state. The fictional presence of a defendant by an agent, imposed by law

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[3] NRCP 4(d)(6) reads: "In all other cases to the defendant personally, or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process."

upon the defendant, brings the defendant within the state for the purpose of service of process and the same fiction causes the period of limitations to run.'"

It has been held that the true test of the running of the statute of limitations is the liability of the party invoking its bar to the service of process during the whole of the period described. Dedmon v. Falls Products, Inc., 299 F.2d 173 (5th Cir. 1962). If there is continuous liability to service, the absence of the resident defendant would seem to be immaterial.

[Headnote 1]

Continuous liability to service exists under the motorist statute, NRS 14.070, since the director of the department of motor vehicles, or his office, is available to accept process, and

a question of fact on that score does not exist. Service in such case falls within the last proviso of NRCP 4(d)(6)—"to an agent authorized * * * by law to receive service of process." On the other hand, whether such continuous liability to service exists when considering service upon the defendant by leaving a copy of the process "at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein," does present a fact issue since such a person may or may not be there to accept service. This difference, however, does not destroy the validity of the underlying rationale—that the running of the statute is not tolled if, in fact, the defendant is continuously liable to service. We hold that the temporary absence of a resident defendant from Nevada does not toll the running of the statute of limitations if, in fact, there was a person of suitable age and discretion residing at the defendant's dwelling house or usual place of abode, upon whom service of process could be made. Clegg v. Bishop, 105 Conn. 564, 136 A. 102 (1927); note 36 Yale L.J. 1025 (1927). The ancient expression of Todman v. Purdy, supra, is modified to this extent. Were we to rule differently, a defendant could be "present" for the purposes of being sued but not present for the purposes of the statute of limitations—an anomaly which we reject.

↓ 82 Nev. 417, 422 (1966) Bank of Nevada v. Friedman ↓

[Headnote 2]

2. The 1951 legislature directed the Nevada Supreme Court to adopt and publish rules governing civil practice and procedure. NRS 2.120. Such rules "shall not abridge, enlarge or modify any substantive right * * *." The appellant suggests that NRS 11.300, the tolling statute, may not be interpreted in the light of NRCP 4(d)(6) without modifying a substantive right. We reject that suggestion. A statute of limitation affects the remedy and does not destroy the substantive cause of action. Wilcox v. Williams, 5 Nev. 206 (1869); Dubin v. Harrell, 79 Nev. 467, 386 P.2d 729 (1963) dictum. A claimant's right to a day in court is subject to reasonable procedural requirements.

[Headnote 3]

3. The complaint was filed November 6, 1964, seeking to collect on a promissory note dated February 1958 and due April 28, 1958. It is evident from the face of that pleading that the cause of action is barred by limitation. Each defendant answered and pleaded the bar of limitations as an affirmative defense and later presented motions for summary judgment. When the complaint shows on its face that the cause of action is barred, the burden falls upon the plaintiff to satisfy the court that the bar does not exist. Sullivan v. Shannon, 25 Cal.App.2d 422, 77 P.2d 498 (1938); Paine v. Dodds, 14 N.D. 189, 103 N.W. 931 (1905); Huus v. Huus, 75 N.D. 392, 28 N.W.2d 385 (1947); 2 California Procedure, Witkin, at 1466. [4] Here the plaintiff relied upon the absence of each defendant to toll the running of the statute, and we must, therefore, review the record and determine whether the plaintiff met its burden.

[Headnote 4]

Pursuant to NRCP 36 the plaintiff requested each defendant to admit absence from the state for 45 days between April 30, 1958, and April 30, 1964. Each defendant admitted such absence. However, the request for

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[4] This situation is to be distinguished from the case where the complaint does not show that the cause of action is barred by limitations. When the bar of limitations does not appear from the face of the complaint, that issue becomes a matter of affirmative defense to be pleaded and established by the defendant.

admissions did not seek information as to whether a person of suitable age and discretion was at the defendant's dwelling house or place of abode during such absence. When faced with the defendant's motions for summary judgment, the plaintiff offered nothing to establish that process could not be served at Richardson's abode upon someone of suitable age and discretion residing therein. As to the defendant Richardson, the plaintiff failed to show that the statute of limitations had not run. Accordingly, the summary judgment for Richardson must be affirmed.

[Headnote 5]

However, with regard to the defendant Friedman, the plaintiff offered affidavits in opposition to the motion for summary judgment. One of them, that of a maid of Friedman, states flatly that the Friedman residence was vacant during Friedman's absence from the state; that she took her vacation simultaneously with Mr. and Mrs. Friedman, and no one resided at the Friedman residence during that time. If believed, that affidavit rules out serving process upon someone of suitable age and discretion residing at the Friedman residence during the period of his absence from the state, and the tolling provision of NRS 11.300 would become operative. Though Friedman's affidavit disputes the verity of the maid's affidavit, a genuine issue of material fact is created on this point, precluding summary judgment. Dredge Corp. v. Wells Cargo, Inc., 80 Nev. 99, 389 P.2d 394 (1964).

4. A further point must be decided. Counsel for Friedman suggests that, if the statute of limitations bars relief against the maker of the note, the guarantor is automatically discharged from liability. The authorities are divided on this question. See Annot., 58 A.L.R.2d 1272. The majority of the cases hold that the bar of limitations with respect to an action against the debtor does not release or discharge the guarantor.

[Headnotes 6, 7]

The guaranty in this case appears on the back of the note and reads: “I hereby guarantee

payment of the within note. 2/ /58 [stet] Maurice H. Friedman." A contract of guaranty is a separate contract, and is to be

separately considered. Short v. Sinai, 50 Nev. 346, 259 P. 417 (1927); Bomud Co. v. Yockey Oil Co., 180 Kan. 109, 299 P.2d 72, 75 (1956). It may be written on the back of a promissory note, but its effect must be judged as a simple contract, just as if it were on a separate paper. The words used here do not indicate an intention on the part of Friedman to be bound as an endorser of the note rather than as a guarantor. Accordingly, we are not concerned with the provisions of the Negotiable Instruments Law relating to the discharge of persons secondarily liable. Therefore, it is possible for the bar of limitations to exist in favor of the maker of a note, and not exist as to the guarantor.

For the reasons mentioned, the summary judgment for Richardson is affirmed, and the summary judgment for Friedman is reversed because a genuine issue of material fact exists whether process could have been served upon someone of suitable age and discretion residing at his dwelling house during the period of his absence from the state.

Collins, J., and Breen, D. J., concur.

ISLANDIA, INC., a Nevada Corporation, Appellant, *v.*
LAURI MARECHEK, Respondent.

No. 5084

November 15, 1966 420 P.2d 5

Appeal from order granting summary judgment. Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Action against purchaser to recover real estate broker's commission. The lower court rendered summary judgment for broker's assignee and purchaser appealed. The Supreme Court, Zenoff, D. J., held that nature of assignor's services pursuant to contract which provided that assignor was to be paid for locating and negotiating for purchase of 71-acre tract was not presented in sufficient detail and substantial fact issue of whether assignor's services were within purview of real estate

brokers' statute was raised precluding summary judgment for purchaser.

Reversed.

Jones, Wiener & Jones, of Las Vegas, for Appellant.

Stanley W. Pierce, of Las Vegas, for Respondent.

1. Brokers.

   Requirements of real estate licensing statutes cannot be waived. NRS 645.030, subd. 1(a), 645.260, 645.270.

2. Brokers.

   Public interest in realty transactions requires pleading and proof that those who come within real estate licensing statute have licenses, without which, right to recover for services rendered does not exist. NRS 645.030, subd. 1(a), 645.260, 645.270.

3. Judgment.

   In action by assignee to recover for assignor's alleged services from purchaser pursuant to contract which provided that assignor was to be paid for locating and negotiating for purchase of 71-acre tract, nature of assignor's services was not presented in sufficient detail and substantial fact issue of whether assignor's services were within purview of real estate brokers' statute was raised, precluding summary judgment for purchaser. NRS 645.030, subds. 1(a), 2, 645.260, 645.270.

OPINION

By the Court, Zenoff, D. J.:

Appellant contends on this appeal that the lower court erred in granting the respondent's motion for summary judgment. We agree.

The appellant and Bruce T. Little had entered into an "AGREEMENT" which recited: "For services rendered the undersigned agree to pay to the order of BRUCE T. LITTLE the sum of $5,916.67 as Power of Attorney for the sole and singular purpose of locating and negotiating for the purchase of the 71 acres of property more fully described as:

> "Portion of the North One-Half (N 1/2) of the Northeast Quarter (NE 1/4) of Section 29, Township 20 South, Range 61 East, M.D.B. & M.

"Islandia Inc.

"Alvin J. Vitek."

On June 4, 1965 an action for the $5,916.67 was commenced by the respondent (Marechek) as Little's assignee alleging that Little had performed services for Islandia pursuant to the agreement for which payment had not been received. The complaint did not allege the nature of the services nor did it allege whether or not Little was a licensed real estate broker or agent. This omission was not raised by the initial answer.

Four months later plaintiff moved for summary judgment. His motion was supported by Little's affidavit that he had found the land, introduced Vitek (Islandia's representative) to one Ford, a real estate broker, and that a deal was later consummated. The "agreement" was attached to this affidavit.

No counter affidavits were filed by the defendant and a summary judgment was granted. The judgment was later set aside on defendant's request for a rehearing. Thereafter, defendant presented an affidavit from the Nevada Real Estate Division to the effect that Little was not a licensed broker or salesman at the time the services were rendered as required by NRS 645.030(a), 645.260, 645.270. [1] A motion was also made at this time to amend the answer to affirmatively allege respondent's failure to set forth Little's licensing status, and, among others, that the complaint failed to state a claim upon which relief could be granted.

On January 21, 1966 another hearing was held at which the trial court denied the motion to amend and again entered summary judgment for the respondent. Islandia appeals from that order.

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[1] NRS 645.030(a). "Who for another and for a compensation, or who with the intention or expectation of receiving a compensation, sells, exchanges, options, purchases, rents, or leases, or negotiates or offers, attempts or agrees to negotiate the sale, exchange, option, purchase, rental, or lease of, or lists or solicits prospective purchasers of, or collects or offers, attempts or agrees to collect rental for the use of, any real estate or the improvements thereon; * * *"

NRS 645.260. *"One act constituting a person a real estate broker or real estate salesman.* Any person, copartnership, association or corporation who, for another, in consideration of compensation by fee, commission, salary or otherwise, or with the intention or expectation of receiving compensation, does, offers or attempts or agrees to do, engages in, or offers or attempts or

[Headnotes 1, 2]

Unlike the Statute of Frauds (Coray v. Hom, 80 Nev. 39, 389 P.2d 76 (1964), requirements of the real estate licensing statutes cannot be waived. The public interest in realty transactions requires pleading and proof that those who come within the statute have licenses, without which, the right to recover for services rendered does not exist. Whiddett v. Mack, 50 Nev. 289, 258 P. 233 (1937).

[Headnote 3]

1. When the plaintiff's motion for summary judgment was reheard, the record before the court showed: First, that Bruce T. Little (plaintiff's assignor) performed services for the defendant which services may have placed Little within the intendment of NRS 645.030(2) reading: "Any person * * * who, for another and for a compensation, aids, assists, solicits or negotiates the procurement, sale, purchase, rental or lease of public lands shall be deemed to be a real estate broker within the meaning of this chapter"; and Second, that Bruce T. Little was not licensed as a broker when he performed services for the defendant. If, in fact, Little's services were such as to bring him within the Real Estate Act, he could not prevail, for he was not a licensed broker. Whiddett v. Mack, supra. On the other hand, if the services are not within the act, a broker's license was not required. The nature of Little's services was not presented in sufficient detail to allow the court

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agrees to engage in, either directly or indirectly, any single act or transaction contained in the definition of a real estate broker in NRS 645.030, whether the act be an incidental part of a transaction, or the entire transaction, shall constitute such person, copartnership, association or corporation a real estate broker or real estate salesman within the meaning of this chapter."

NRS 645.270. *"Allegation and proof of licensed status in action for compensation.* No person, copartnership, association or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in NRS 645.030 without alleging and proving that such person, copartnership, association or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

to decide that factual issue—the key issue in the case. The cause, therefore, must be remanded for trial as a genuine issue of material fact remains. Magill v. Lewis, 74 Nev. 381, 333 P.2d 717 (1958); Dredge Corp. v. Husite Co., 78 Nev. 69, 369 P.2d 676 (1962); McColl v. Scherer, 73 Nev. 226, 315 P.2d 807 (1957); Short v. Hotel Riviera, Inc., 79 Nev. 94, 378 P.2d 979 (1963); Buss v. Consolidated Casinos Corp., 82 Nev. 355, 418 P.2d 815 (1966).

Our determination on this question controls the course of the entire proceeding. It becomes unnecessary to review the trial court's refusal to allow an amended answer.

Reversed.

Thompson and Collins, JJ., concur.

JOSEPH OBERLE, Petitioner, *v.* JACK FOGLIANI,
Warden, Nevada State Prison, Respondent.

No. 5192

November 22, 1966 420 P.2d 251

Original proceedings in habeas corpus.

Proceeding challenging legality of petitioner's prison confinement resulting from conviction by jury of grand larceny. The Supreme Court, Thompson, J., held that defendant by not appealing from denial of habeas relief sought for alleged delay in trial waived his right to present same issue collaterally in habeas corpus proceeding after trial and conviction.

Petition denied and proceeding dismissed.

Harry. E. Claiborne and *Annette R. Quintana,* of Las Vegas, for Petitioner.

Harvey Dickerson, Attorney General, and *George G. Holden,* Deputy Attorney General, of Carson City, for Respondent.

1. Criminal Law.
   Sixth Amendment right to a speedy and public trial does not extend to state court cases. U.S.C.A.Const. Amend. 6; NRS 178.495.
2. Criminal Law.
   Under statutory right to speedy trial, if defendant is responsible for delay of trial beyond 60-day limit, he may not complain. U.S.C.A.Const. Amend. 6; NRS 178.495.
3. Criminal Law.
   Under statutory right to speedy trial, court may give due consideration to condition of its calendar, other pending cases, public expense, health of judge, and the rights of co-defendant, and burden of showing good cause under the statute is upon the prosecution and, if not shown, the accused will be discharged upon timely application. U.S.C.A.Const. Amend. 6; NRS 178.495.
4. Criminal Law.
   Statute authorizing a dismissal and providing that another prosecution for same felony is not barred may

not be used as a device to secure delay of trial. NRS 34.380, subd. 3, 178.520.

5. Habeas Corpus.

   Defendant by not appealing from denial of habeas relief sought for alleged delay in trial waived his right to present same issue collaterally in habeas corpus proceeding after trial and conviction. NRS 34.380, subd. 3, 178.520.

6. Habeas Corpus.

   Remedy of appeal to Supreme Court from denial of habeas corpus writ by a district judge precludes an additional and independent application for a writ of habeas corpus to a justice of Supreme Court, where no new grounds are asserted and where petitioner did not avail himself of right of an appeal to Supreme Court. NRS 34.380, subd. 3, 178.520.

7. Habeas Corpus.

   Where habeas corpus petitioner's complaint about jury instruction was one that could have been presented by appeal following conviction and instruction was not constitutionally infirm, Supreme Court would not consider complaint in original habeas corpus proceedings.

OPINION

By the Court, Thompson, J.:

[Headnotes 1-3]

This is an original habeas corpus proceeding challenging the legality of the petitioner's present prison confinement resulting from his conviction by a jury of

grand larceny. He claims that his constitutional right to a speedy trial was violated. Subordinately, he questions the propriety of a jury instruction given at the close of the evidence. He did not appeal from the conviction, nor does he, by this collateral proceeding, raise a due process issue aimed at the fairness of the trial. We have concluded that his habeas application must be denied.

1. The Nevada Constitution does not contain a speedy and public trial provision. The Sixth Amendment to the Federal Constitution does. It reads: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." However, this part of the Sixth Amendment has not been extended to state court cases (Gaines v. Washington, 277 U.S. 81 (1927), on public trial; Phillips v. Nash, 311 F.2d 513 (7th Cir. 1962); In re Sawyer's Petition, 229 F.2d 805 (7th Cir. 1956); State v. Squier, 56 Nev. 386, 54 P.2d 227 (1936); Cooper v. State, 196 Kan. 421, 411 P.2d 652 (1966)), because due process, being primarily concerned with the fairness of the trial itself, has not yet been regarded as applicable to pretrial delay. [1] Accordingly, we are not faced with a habeas application bottomed upon a constitutional violation.

2. The right to a speedy trial in Nevada is legislatively given. [2] The "60-day rule" therein prescribed has flexibility. If the defendant is responsible for the delay of trial beyond the 60-day limit, he may not complain. The trial court may give due consideration to the

condition of its calendar, other pending cases, public expense, the health of the judge, and the rights of codefendants. State v. Squier, 56 Nev. 386, 54 P.2d 227

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[1] Of course, other parts of the Sixth Amendment have been extended to state trials. Gideon v. Wainwright, 372 U.S. 335 (1963), right to counsel; Pointer v. Texas, 380 U.S. 400 (1965), right of confrontation.

[2] NRS 178.495 provides: "If a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the finding of the indictment or filing of the information, the court shall order the indictment or information to be dismissed, unless good cause to the contrary is shown."

(1936); Ex parte Groesbeck, 77 Nev. 412, 365 P.2d 491 (1961). Ex parte Hansen, 79 Nev. 492, 387 P.2d 659 (1963). The burden of showing good cause is upon the prosecution and, if not shown, the accused will be discharged upon timely application. Ex parte Morris, 78 Nev. 123, 369 P.2d 456 (1962).

In the matter at hand an information was filed May 26, 1964. On May 28 counsel was appointed, and on June 2 a not guilty plea was entered. On June 5 the court set the case for trial to commence October 5, 1964. The record does not show an objection to the trial date. On October 5, after the roll of jurors had been called, the prosecutor orally moved for a continuance. His motion was grounded upon the fact that two of the state's witnesses were not available to testify. Subpoenas had been issued for them just 3 days earlier, but had not been served. The court denied a continuance of trial because the prosecutor had not been diligent in taking steps to procure the attendance of the two witnesses. The prosecutor then moved to dismiss the information, which was granted. Defense counsel informed the court that he had not waived the 60-day rule, but would not object to a dismissal. The prosecutor then filed a new complaint charging the defendant with the same crime. On July 14, 1965, trial before a jury in the district court finally occurred.

In an effort to block that trial, defense counsel presented a habeas petition to the district court, based in part upon the unusual and unwarranted delay in bringing his client to trial. About one year and two months had passed since his initial arrest in the spring of 1964. The court denied habeas relief, believing that the subsequent prosecution was not foreclosed in view of the language of NRS 178.520. [3] The defendant did not appeal from the denial of habeas, though that remedy was

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[3] NRS 178.520 provides: "An order for the dismissal of the action, as provided in this chapter, shall be a bar to another prosecution for the same offense, if it be a misdemeanor, but it shall not be a bar if the offense

charged be a felony."

available. [4] NRS 34.380(3). Trial occurred and he was convicted.

[Headnotes 4-6]

Had an appeal been taken from the order denying habeas, we would have ordered the defendant discharged. The statute authorizing a dismissal and providing that another prosecution for the same felony is not barred (NRS 178.520) may not be used as a device to secure the delay of trial. It is apparent from the record before us that the prosecutor was not ready to go to trial on October 5, 1964, and when his request for a continuance was denied, sought to obtain his desired delay by dismissing and recharging the defendant. We abhor such callous disregard of the defendant's rights and would not have allowed it to occur had the matter been presented to us before trial. This was not done. As a consequence, the defendant waived his right to present the same issue collaterally after trial and conviction. Cf. Ex parte Merton, 80 Nev. 435, 395 P.2d 766 (1964), where we stated: "This court is of the opinion that when the legislature amended the habeas corpus statute to provide for an appeal to the supreme court from a denial of the writ by a district judge, this remedy precluded an additional and independent application for a writ of habeas corpus to a justice of the supreme court where no new grounds are asserted and where he did not avail himself of the right of an appeal to this court." This reasoning is especially appropriate when applied to a statutory (as contrasted with constitutional) violation. We hold that the failure of defense counsel to fully protect his client's statutory right to a speedy trial, by appropriate action before trial, precludes post-conviction habeas relief, seeking discharge because of trial delay. [5]

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[4] NRS 34.380(3) reads: "An applicant who has petitioned the district judge of a judicial district, as provided in this chapter, and whose application for such writ is denied, may appeal to the supreme court from the order and judgment of the district judge or district court refusing to grant the writ or to discharge the applicant, but such appeal shall be taken within 30 days from the day of entry of the order or judgment."

[5] Counsel for petitioner was not his counsel in the lower court.

In line with the tone of this opinion, we strongly recommend that the proper state authority

allow the petitioner credit for time served in jail awaiting trial.

3. We noted initially that the petitioner also complains about a jury instruction. The complaint is one that could have been presented by appeal following conviction. Since we do not believe the instruction constitutionally infirm, we decline to consider it now.

The petition is denied and the proceeding is dismissed.

Collins, J., and Zenoff, D. J., concur.

KENNETH RONALD GRAVES, Appellant, *v.* C. W. YOUNG, Sheriff of Washoe County, Respondent.

No. 5215

December 5, 1966 420 P.2d 618

Appeal from the Second Judicial District Court, Washoe County; Thomas O. Craven, Judge.

Proceeding on appeal from a judgment of the lower court denying discharge on habeas corpus. The Supreme Court, Collins, J., held that legislature did not intend to limit prosecution of all attempted homicides under its definition of assault with intent to kill, but rather person may be charged with attempted murder.

Affirmed.

[Rehearing denied January 19, 1967]

Harry E. Claiborne and *Annette R. Quintana,* of Las Vegas for Appellant.

Harvey Dickerson, Attorney General, *William J. Raggio,* District Attorney, and *Robert Gaynor Berry,* Deputy District Attorney, Washoe County, for Respondent.

1. Homicide.

   Legislature did not intend to limit prosecution of all attempted homicides under its definition of assault with intent to kill, but rather person may be charged with attempted murder. NRS 200.030, 200.400, 208.070.

2. Homicide.

   There is distinction in factual allegations which must be made and proved in attempted murder and assault with intent to kill, and in former, malice and premeditation must be alleged and proved, whereas in latter, there is no such requirement of allegation or proof to convict. NRS 200.030, 200.400, 208.070.

3. Homicide.

   Words "murder in first degree" are legal conclusion, and facts alleged in indictment and proof at trial determine degree.

4. Indictment and Information.

   Words "first degree" in indictment charging defendant with felony of attempted murder in first degree were mere surplusage. NRS 208.070.

5. Indictment and Information.

   In prosecution for attempted murder, assault with intent to kill may be lesser included offense if there is evidence of assault, but if there is no evidence of assault, it is not lesser included offense. NRS 200.400, 208.070.

6. Homicide.

   Attempted murder can be committed with or without assault. NRS 208.070.

OPINION

By the Court, Collins, J.:

Appellant was charged by indictment with the felony of attempted murder in the first degree, a violation of NRS 208.070, [1] being an attempt to violate NRS 200.030. [2]

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[1] NRS 208.070

"Punishment for attempts. An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime; and every person who attempts to commit a crime, unless otherwise prescribed by statute, shall be punished as follows:

"1. If the crime attempted is punishable by death or life imprisonment, the person convicted of the attempt shall be punished by imprisonment in the state prison for not more than 20 years."

[2] NRS 200.030

"Degrees of murder; jury, three-judge district court to find degree and fix penalty.

"1. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or

He was denied discharge on habeas corpus by the lower court. His appeal raises one question: Does the law of Nevada permit a person to be charged with attempted murder?

Appellant contends he can be charged only under NRS 200.400, [3] which defines assault with intent to kill and urges that "all assault with intent to kill is an aggravated unlawful attempt, coupled with a present ability, with intent to kill another person, irrespective of whether the crime, if completed, would have constituted manslaughter or murder." He relies upon State v. O'Connor, 11 Nev. 416 (1876).

O'Connor, supra, held it was not error to refuse a jury instruction requested by defendant that unless they found that if the victim had died the killing would have been murder, they could not find the defendant guilty of assault with intent to kill, but could only find him guilty of assault and battery or acquit. The decision involved two early Nevada statutes. The first regular session of the legislative assembly, Territory of Nevada (1861), by

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burglary, or which shall be committed by a convict in the state prison serving a sentence of life imprisonment, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree.

* * * * *

"4. If the jury shall find the defendant guilty of murder in the first degree, then the jury by its verdict shall fix the penalty at death or imprisonment in the state prison for life with or without possibility of parole, except that if the murder was committed by a convict in the state prison serving a sentence of life imprisonment, the jury shall fix the penalty at death or imprisonment in the state prison for life without possibility of parole. Upon a plea of guilty the court, as provided in subsection 3, shall determine the same; and every person convicted of murder of the second degree shall suffer imprisonment in the state prison for a term of not less than 10 years, which term may be extended to life."

[3] NRS 200.400

"1. An assault with intent to kill, commit rape, the infamous crime against nature, mayhem, robbery or grand larceny shall subject the offender to imprisonment in the state prison for a term not less than 1 year nor more than 14 years; but if an assault with intent to commit rape be made, and if such crime be accompanied with acts of extreme cruelty and great bodily injury inflicted, the person guilty thereof shall be punished by imprisonment in the state prison for a term of not less than 14 years, or he shall suffer death, if the jury by their verdict affix the death penalty."

enactment of Chapter XXVIII, Sec. 47, Page 64, created the crime of "Assault with intent to commit murder." Nevada thereafter became a state and in 1873 the legislature amended Sec. 47 to read "Assault with intent to kill." Laws of Nevada 1873, Chapter LXII, Sec. 3, page 119.

This court in O'Connor, supra, interpreting those two statutes, said, "This instruction does not present the law of the case, even if the appellant's interpretation of the statute were correct. But he is mistaken in supposing that the statute only embraces assaults with intent to kill, where the circumstances are such as would make the killing murder. By the act of 1861, a penalty was prescribed for assault with intent to commit *murder.* In 1873, the section

containing this provision was amended by substituting 'assault with intent to *kill,*' showing clearly that the design of the legislature was to impose the prescribed penalty in all cases where the killing, if effected, would be unlawful. It may be true, as counsel contends, that this indictment charges an attempt to murder; but certainly that does not make it any the less a good indictment for an attempt to kill; and as the penalty is the same in all cases, it would have been worse than useless to ask the jury to make a special finding as to what the grade of the homicide would have been if the person assaulted had been killed."

[Headnote 1]

Did the legislature intend to limit prosecution of all attempted homicides under its definition of assault with intent to kill? We think not and specifically overrule that implication in State v. O'Connor, supra.

When the territorial legislature of 1861 created the crime of assault with intent to murder, Chapter XXVIII, Sec. 47, page 64, it also created the crime of attempt to commit a public offense which included murder. Chapter XXVIII, Sec. 158, page 89. [4] It is logical to assume when

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[4] "Sec. 158. Every person who shall attempt to commit a public offense, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:

the 1861 act was amended in 1873 changing the crime of assault with intent to murder to assault with intent to kill, the legislature knew attempted murder was adequately covered by the general attempt statute but that lesser degrees of attempted homicide, especially those involving assault, were not.

[Headnote 2]

Also there is a distinction in the factual allegations which must be made and proved in attempted murder and assault with intent to kill. In the former, malice and premeditation must be alleged and proved. In the latter, there is no such requirement of allegation or proof to convict. Likewise the legislature has seen fit to require a more severe penalty for attempted murder (not more than 20 years) than assault with intent to kill (not less than 1 nor more than 14 years).

Inferentially this court recognized the crime of attempt to commit rape, State v. Charley

Lung, 21 Nev. 209, 28 P. 235 (1891). In that case, however, there was no direct urging of the point in issue here. We did affirm a conviction of attempt to commit grand larceny, State v. Thompson, 31 Nev. 209, 101 P. 557 (1909); attempt to commit the infamous crime against nature, State v. Verganadis, 50 Nev. 1, 248 P. 900 (1926); attempt to commit rape, State v. Pierpoint, 38 Nev. 173, 147 P. 214 (1915); State v. Squier, 56 Nev. 386, 54 P.2d 227 (1936). These charges were all brought under the general attempt statute, NRS 208.070, notwithstanding the assault statute, NRS 200.400.

First. If the offense so attempted to be committed, be such as is punishable by death or by imprisonment in the Territorial Prison for a term which may extend to life, the person convicted of such attempt shall be punished by imprisonment in the Territorial Prison not exceeding ten years. Second. If the offense so attempted is a misdemeanor, the person so convicted of such attempt shall be punishable by a fine not exceeding one half of the largest amount, or by imprisonment in the county jail or Territorial Prison, as the case may be, for a term not exceeding one half of the longest time prescribed by law, upon a conviction of the offense so attempted. Third. If the offense so attempted is a felony, not punishable by death or imprisonment, which may extend to life, the person convicted of such offense shall be punished by imprisonment in the Territorial Prison, for a term not exceeding one half the longest time which may be imposed upon a conviction of the offense so attempted."

↓ 82 Nev. 433, 438 (1966) Graves v. Young ↓

[Headnotes 3, 4]

Appellant contends in any event there is no crime known as attempt to commit murder in the first degree. The words "murder in the first degree" are a legal conclusion. The facts alleged in the indictment and proof at trial determine degree. The crime attempt to commit murder is made a crime by statute. The words "first degree" are mere surplusage. State v. Roderigas, 7 Nev. 328 (1872).

[Headnotes 5, 6]

Because this matter will be tried, we feel one more point should be ruled upon. There is a question whether under prosecution for attempted murder, assault with intent to kill may be a lesser included offense. If there is evidence of an assault we hold that it would be. We said in Ex parte Curnow, 21 Nev. 33, at 39, 24 P. 430 (1890), "In determining the question whether, under such indictment [a murder indictment in which defendant was found guilty of assault with intent to kill], a verdict for the lower offense can be sustained, court should look at the evidence submitted at the trial, as well as to the language of the charge contained in the indictment." If there were no evidence of an assault, it would not be a lesser included offense. Attempted murder can be committed with or without assault.

Judgment affirmed.

Thompson, J., and Zenoff, D. J., concur.

SHOSHONE COCA-COLA BOTTLING COMPANY, a Corporation, dba COCA-COLA SHOSHONE BOTTLING COMPANY, Appellant, *v.* LEO L. DOLINSKI, Respondent.

No. 5112

December 7, 1966 420 P.2d 855

Appeal from judgment of the Second Judicial District Court, Washoe County; John W. Barrett, Judge.

Plaintiff sought to recover for physical and mental distress allegedly suffered when he partially consumed the contents of a bottled beverage containing a decomposed mouse. The trial court entered judgment on jury verdict in favor of plaintiff and defendant-manufacturer appealed. The Supreme Court, Thompson, J., held that evidence including testimony of toxicologist who examined bottle and contents on the day plaintiff drank from it that mouse feces which he found on the bottom of the bottle must have been there before liquid was added was sufficient to justify finding that mouse was in bottled beverage when it left manufacturer's possession.

Affirmed.

[Rehearing denied January 5, 1967]

Woodburn, Forman, Wedge, Blakey, Folsom and Hug, of Reno, for Appellant.

William L. Hammersmith and *Loyal Robert Hibbs,* of Reno, for Respondent.

Amicus Curiae: *Gary Bullis* and *John Squire Drendel,* of Reno, representing Nevada Trial Lawyers Association.

1. Negligence.
   One who places upon the market a bottled beverage in a condition dangerous for use must be held strictly liable to the ultimate user for injuries resulting from such use, although the seller has exercised all reasonable care, and the user has not entered into a contractual relation with him.
2. Torts.
   The doctrine of strict liability may be approved by court declaration.

3. Torts.

Plaintiff who sues under doctrine of strict liability must establish that his injury was caused by a defect in the product, and that such defect existed when the product left the hands of the defendant.

4. Food.

Evidence including testimony of toxicologist who examined bottle and contents on the day plaintiff drank from it that mouse feces which he found on the bottom of the bottle must have been there before liquid was added was sufficient to justify finding that mouse was in bottled beverage when it left manufacturer's possession.

5. Negligence.

Where positive proof is not available as to whether bottled beverage was tampered with after it left manufacturer's possession, inferences must be drawn from best available evidence produced by each side.

6. Food.

Evidence which was sufficient to raise a reasonable inference for jury's consideration that mouse entered or remained in the bottle while in the exclusive control of the manufacturer was sufficient to allow the jury to find an absence of tampering.

7. Food.

Evidence showing that defendant manufactured, bottled, and sold carbonated drink, that it furnished one of its vending machines to plant where plaintiff was employed, that it delivered carbonated drink to that plant to be placed in the machine, and that almost immediately after the plaintiff drank from bottle containing decomposed mouse and became ill, incident was reported to defendant, whereupon defendant's salesman came to the plant to investigate was sufficient for jury to conclude that defendant was the manufacturer and distributor of the bottle from which plaintiff drank.

8. Appeal and Error.

Jury instruction was not reviewed on appeal where record on appeal did not show what objection, if any, had been made to the giving of the instruction.

9. Damages.

Award in amount of $2,500 for physical and mental distress suffered by plaintiff when he partially consumed the contents of a bottled beverage containing a decomposed mouse was not so excessive as to support determination that the damages must have been given under the influence of passion or prejudice. NRCP 51, 59(a)(6).

10. Evidence.

A non-treating doctor may give his expert opinion at trial based upon hypothetical question.

11. Evidence.

Physician, who is otherwise a competent witness, may give opinion testimony on behalf of a plaintiff as to the plaintiff's physical or mental condition, even though he did not

treat the plaintiff and his opinion is based, in whole or in part, upon the personal history related by the plaintiff. NRCP 35.

OPINION

By the Court, Thompson, J.:

The important question presented by this appeal is whether Nevada should judicially adopt the doctrine of strict tort liability against a manufacturer and distributor of a bottled beverage. Subordinate questions are also involved and will be discussed.

1. Leo Dolinski suffered physical and mental distress when he partially consumed the contents of a bottle of "Squirt" containing a decomposed mouse. As a consequence he filed this action for damages against Shoshone Coca-Cola Bottling Company, the manufacturer and distributor of "Squirt." His complaint alleged alternative theories of liability; breach of the implied warranties of quality (which theory this court has rejected, in the absence of privity of contract: Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963)); negligence (Underhill v. Anciaux, 68 Nev. 69, 226 P.2d 794 (1951)); and strict tort liability. The breach of warranty and negligence claims were subsequently abandoned, and the case was presented to the jury solely upon the doctrine of strict tort liability. The jury favored Dolinski with its verdict and fixed his damages at $2,500. This appeal by Shoshone ensued.

[Headnote 1]

We affirm the verdict and judgment since, in our view, public policy demands that one who places upon the market a bottled beverage in a condition dangerous for use must be held strictly liable to the ultimate user for injuries resulting from such use, although the seller has exercised all reasonable care, and the user has not entered into a contractual relation with him. Perhaps the supporting policy reasons are best expressed by William L. Prosser in his article, "The Fall of the Citadel," 50 Minn.L.Rev. 791, 799 (1966): "The public interest in human safety requires the maximum possible protection

for the user of the product, and those best able to afford it are the suppliers of the chattel. By placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising, and otherwise, they do everything they can to induce that belief. The middleman is no more than a conduit, a mere mechanical device, through which the thing is to reach the ultimate user. The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he made no contract with the consumer, or that he used all reasonable care."

In Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, 440 (1944), Justice Traynor, in a concurring opinion, wrote: "Even if there is no negligence, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." That point of view ultimately became the philosophy of the full court in Greenman v. Yuba River Products, Inc., 27 Cal.Rptr. 697, 377 P.2d 897 (1962). There justice Traynor wrote: "The purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are

powerless to protect themselves."

[Headnote 2]

We believe that the quoted expressions of policy are sound as applied to the manufacturer and distributor of a bottled beverage. Indeed, eighteen states have judicially accepted strict liability, without negligence and without privity, as to manufacturers of all types of products; and six more have done so by statute. See Prosser, "The Fall of The Citadel," 50 Minn.L.Rev. 791, 794, 795, 796 (1966). Though the appellant suggests that only the legislature may declare the policy of Nevada on this subject, the weight of case authority is contra. As indicated, most states approving the doctrine of strict liability have done so by court declaration.

[Headnote 3]

2. Our acceptance of strict tort liability against the manufacturer and distributor of a bottled beverage does not mean that the plaintiff is relieved of the burden of proving a case. He must still establish that his injury was caused by a defect in the product, and that such defect existed when the product left the hands of the defendant. The concept of strict liability does not prove causation, nor does it trace cause to the defendant.

[Headnote 4]

In the case at hand Shoshone contends that insufficient proof was offered to establish that the mouse was in the bottle of "Squirt" when it left Shoshone's possession. On this point the evidence was in conflict and the jury was free to choose. The Vice-President and General Manager of Shoshone testified, in substance, that had the mouse been in the bottle while at his plant, it would have been denuded because of the caustic solution used and extreme heat employed in the bottle washing and brushing process. As the mouse had hair when examined following the plaintiff's encounter, the Manager surmises that the rodent must have gotten into the bottle after leaving the defendant's possession. On the other hand, the plaintiff offered the expert testimony of a toxicologist who examined the bottle and contents on the day the plaintiff drank from it. It was his opinion that the mouse "had been dead for a long time" and that the dark stains (mouse feces) which he found on the bottom of the bottle must have been there before the liquid was added. The jury apparently preferred the latter evidence which traced cause to the defendant.

We turn to the question of tampering. Shoshone insists that a burden is cast upon the plaintiff to prove that there was no reasonable opportunity for someone to tamper with the bottle after it left Shoshone's control. Underhill v. Anciaux, supra, where the claim was based upon negligence, may be read to suggest that such a burden is cast upon the plaintiff. We cannot agree with that suggestion.

[Headnote 5]

The matter of tampering is inextricably tied to the problem of tracing cause to the defendant. This is so whether the claim for relief is based on negligence or strict liability. Whenever evidence is offered by the plaintiff tending to establish the presence of the mouse in the bottle when it left Shoshone's possession, the defense is encouraged to introduce evidence that the mouse must have gotten there after the bottle left Shoshone's control, thus interjecting the possibility that the bottle and its contents were tampered with by someone, perhaps as a practical joke or for some other reason. In this case, as in most cases, positive proof either way is not available. Inferences must be drawn from the best available evidence produced by each side. We have already alluded to that evidence.

[Headnote 6]

It is apparent that the moment plaintiff produces evidence tending to show that the mouse was in the bottle while in the defendant's control, he has, to some degree, negated tampering by others. The converse is likewise true. A fortiori, once it is decided that enough evidence is present to trace cause to the defendant, that same evidence is sufficient to allow the jury to find an absence of tampering. For this reason, any notion that there is a burden of proof as to tampering, simply does not make sense. The sole burden is upon the plaintiff to prove that his injury was caused by a defect in the product and that such defect existed when the product left the hands of the defendant. The defendant, of course, may offer evidence suggesting tampering under a general denial of liability. Therefore, we expressly disapprove any contrary implication in Underhill v. Anciaux, supra.

The Supreme Court of Oregon is in accord. In Keller v. Coca Cola Bottling Co., 214 Ore. 654, 330 P.2d 346 (1958), the court wrote: “We hold, therefore, that there was a reasonable inference for the jury's consideration that the cigar stub entered or remained in the bottle while in the exclusive control of the defendant. It was not incumbent upon the plaintiff to prove that tampering did not exist. Having established the delivery to be in the normal course of processing and dispensing, plaintiff

was not required to negative the doubtful possibility of unwarranted or unlawful acts by other persons.” [1]

[Headnote 7]

3. Shoshone next complains that there was not enough evidence to identify it as the

manufacturer and distributor of the bottle in question. The record shows that Shoshone manufactured, bottled, and sold "Squirt"; that it furnished one of its vending machines to the Sea and Ski plant where the plaintiff was employed; and that it delivered beverages, including "Squirt," to the Sea and Ski plant to be placed in the machine. Almost immediately after the plaintiff drank from the bottle and became ill, an employee of Sea and Ski telephoned Shoshone and reported the incident, whereupon a Shoshone salesman came to the Sea and Ski plant to investigate. On this evidence it was permissible for the jury to conclude that Shoshone was the manufacturer and distributor of the bottle in question. If the cases relied upon by Shoshone (Wilkes v. Memphis Grocery, 134 S.W.2d 929 (Tenn. 1939); Wilkes v. Jones, 139 S.W.2d 416 (Tenn. 1939); Jackson Coca-Cola Bottling Co. v. Grubbs, 108 So. 732 (Miss. 1926)), may be read to intimate otherwise, we decline to follow them.

[Headnote 8]

4. The final claim of error dealing with the doctrine of strict tort liability is directed to the correctness of the jury instruction given about that doctrine. The record on appeal does not show what objection, if any, was made to the giving of that instruction. Therefore, we refuse to consider this claim of error. NRCP 51; Downing v. Marlia, 82 Nev. 294, 417 P.2d 150 (1966); Duran v. Mueller, 79 Nev. 453, 386 P.2d 733 (1963); Wagon Wheel Saloon v. Mavrogan, 78 Nev. 126, 369 P.2d 688 (1962).

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[1] The appellant assigns as error an order by the court precluding him from arguing to the jury that someone may have tampered with the bottle and contents after it was delivered to the Sea and Ski plant where Dolinski worked. We have searched the record with care and do not find such preclusive order. The citation to the record in appellant's brief is to numbered pages of the transcript which are not contained in the record on appeal. We, therefore, do not consider this assignment of error.

[Headnote 9]

5. The jury awarded Dolinski $2,500 as compensatory damages. Shoshone urges that the award is excessive. Upon drinking the "Squirt," Dolinski immediately became ill, visited a doctor, and was given pills to counteract nausea. At the time of trial more than two years later, he still possessed an aversion to soft drinks, described by a psychiatrist to be a "conditioned reflex" that could continue indefinitely. He lost 20 pounds. In these circumstances we cannot say that the damages must have been given under the influence of passion or prejudice or that our judicial conscience is shocked. NRCP 59(a)(6); Miller v. Schnitzer, 78 Nev. 301, 371 P.2d 824 (1962).

6. Finally, Shoshone asks that the judgment be reversed because the trial court allowed a psychiatrist, who did not treat Dolinski, to give opinion testimony. This claim of error is bottomed upon the rule approved in Kitselman v. Rautzahn, 68 Nev. 342, 232 P.2d 1008

(1958). In that case a psychiatrist was asked to give his expert opinion as to the mental condition of a party litigant. The trial court ruled that he could not give such opinion if it was based in whole or in part upon that party's history as privately related to the psychiatrist-witness. On appeal, the court quoted a passage from 20 Am.Jur. 728: “The general rule is that the opinion of a physician or surgeon as to the condition of an injured or diseased person, based wholly or in part on the history of the case as related to the physician or surgeon in the course of an examination of the former made out of court for the purpose of qualifying the physician or surgeon to testify as a medical expert, is not admissible.” The court then concluded that it was apparent from the record that the witness examined the party for the purpose of testifying in court, and not for the purpose of treating him, and approved the trial court's exclusionary ruling.

[Headnote 10]

In our view the Kitselman rule is unsound, does not promote the trial search for truth, and is not fair. NRCP 35 provides that, when the mental or physical condition

of a party is in controversy, the court may order him to submit to a physical or mental examination by a physician. That physician may later testify at trial, even though he does not treat the party. The “independent medical examination” usually is of the plaintiff, comes about at the request of the defendant, and the doctor so selected by the defendant testifies at the trial. [2] Indeed, the doctor is sometimes identified as an “insurance company” doctor, and testifies in many cases during the course of a year. If such testimony is permissible, it is difficult to understand why a doctor selected by the plaintiff for the purpose of giving his expert opinion at trial should be precluded. The fear of fabrication may exist in either instance, but that fear is not relevant to the doctor's competency as a witness, and is best allayed in the usual manner, by cross examination, jury argument and the like. It is also accepted that a non-treating doctor may give his expert opinion at trial based upon a hypothetical question.

[Headnote 11]

These two examples point up the lack of fundamental fairness inherent in the Kitselman rule. California rejects the limitation that the doctor must treat the party in order to qualify as a witness. Groat v. Walkup Drayage & Warehouse Co., 14 Cal.App.2d 350, 58 P.2d 200 (1936). We now expressly disapprove the Kitselman rule and hold that a physician, who is otherwise a competent witness, may give opinion testimony on behalf of a plaintiff as to the plaintiff's physical or mental condition, even though he did not treat the plaintiff and his opinion is based, in whole or in part, upon the personal history related by the plaintiff.

Collins, J., and Zenoff, D. J., concur.

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[2] A medical examination of a defendant may also be ordered in appropriate circumstances. Schlagenhauf v. Holder, 379 U.S. 104, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964).

WALKER IVEY, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5193

December 12, 1966 420 P.2d 853

Appeal from denial of Writ of Habeas Corpus by the Second Judicial District Court, Washoe County; Thomas O. Craven, Judge.

The lower court denied relief, and petitioner appealed. The Supreme Court, Thompson, J., held that defendant who by habeas corpus challenged probable cause to hold him for trial was entitled to have transcript of testimony of witnesses who appeared before grand jury, and judge's in camera inspection of transcript was not sufficient.

Reversed.

Collins, J., dissented.

Woodburn, Forman, Wedge, Blakey, Folsom and Hug and *Richard O. Kwapil, Jr.,* of Reno, for Appellant.

Harvey Dickerson, Attorney General, Carson City; *William J. Raggio,* District Attorney, and *Herbert J. Santos,* Deputy District Attorney, Washoe County, Reno, for Respondent.

Habeas Corpus.

Defendant who by habeas corpus challenged probable cause to hold him for trial was entitled to have transcript of testimony of witnesses who appeared before grand jury, and judge's in camera inspection of transcript was not sufficient. NRS 34.500, subd. 7.

OPINION

By the Court, Thompson, J.:

This appeal is from an order denying a petition for habeas corpus. A grand jury indictment

was returned, charging Ivey with statutory rape. In line with Shelby v. District Court, 82 Nev. 204, 414 P.2d 942 (1966), Ivey petitioned for habeas to secure a copy of the transcript of the testimony of the witnesses who appeared

before the grand jury, in order that he might determine whether reasonable or probable cause was shown to hold him for trial. [1] The district court apparently believed that an *in camera* inspection of the transcript by the court on the issue of probable cause would satisfy our holding in Shelby, and denied relief.

It is true that in Shelby we were not asked to decide whether the trial court, *in camera,* could resolve probable cause, when faced with a habeas petition bottomed on the failure of the state to show the existence of probable cause to hold the accused for trial. Yet that opinion carried strong statements bearing on the point. We there wrote: "We know that pretrial inspection and copying of the transcript of the testimony of the witnesses who appeared before the grand jury will, to some degree, diminish the traditional secrecy of grand jury proceedings, and allow the discovery of evidence heretofore denied the indicted defendant." Id., 82 Nev. 204, 210, 414 P.2d 942, 945. Furthermore, we pointedly overruled the dictum of Victoria v. Young, 80 Nev. 279, 284, 392 P.2d 509, 512 (1964), that a defendant "is not even entitled to a transcript of the grand jury proceedings." Id., 80 Nev. 279, 284, 414 P.2d 942, 945, 946. Those expressions are not consonant with an *in camera* review. They can only mean that an accused must be allowed to test probable cause in an adversary manner. This cannot be accomplished unless he is supplied a copy of the transcript.

In our opinion the notion of an *in camera* review by the court denies precepts which are basic to our system of justice. In this country, criminal justice is accusatorial, not inquisitorial. One has a right to be free from harassment and restraint if probable cause for trial is not shown to exist. That right necessarily carries with it the right to know what evidence was formally received by the grand jury and supplied the basis for its indictment. Surely the quality of justice is enhanced by adversary contention. A court needs the assistance of counsel

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[1] NRS 34.500(7) authorizes discharge from custody or restraint, if one is not committed upon a criminal charge with reasonable or probable cause.

for both sides if it is to judge wisely. We now hold that a copy of the grand jury transcript of the testimony of the witnesses appearing before it must be furnished the accused if, by habeas corpus, he challenges probable cause to hold him for trial.

We reverse the order below, and direct the district court to furnish the petitioner with a copy of the grand jury transcript within 30 days from this date. If not so furnished, the indictment shall be dismissed and the petitioner discharged from custody or restraint.

Zenoff, D. J., concurs.

Collins, J., dissenting:

The majority opinion of the court holds that a defendant indicted by a grand jury, who challenges that indictment for probable cause, has a right to be provided a copy of the transcript of the testimony of witnesses. This in my opinion goes too far.

I agreed in Shelby v. District Court, 82 Nev. 204, 414 P.2d 942 (1966), that it was necessary for a transcript of the testimony of witnesses to be made, otherwise there was no effective way to test probable cause if challenged. We said in that case, Id. 414 P.2d 942, at page 945, "It is apparent that without a transcript a *court* cannot intelligently determine whether the kind and quality of evidence contemplated by the code was in fact produced before the grand jury, nor whether the indicted defendant should be held for trial." (Emphasis supplied.)

In order to implement the decision in Shelby we are faced with a difficult dilemma. We are asked to hold the defendant is entitled to the transcript of the testimony of witnesses as a matter of right, or to rule that the trial judge before whom the indictment is attacked by habeas corpus shall make an *in camera* inspection and thereafter, for cause shown, exercise discretion how the transcript may be used in determining probable cause. I feel the latter course is consonant with law and reason.

In petition for rehearing the Shelby decision, 82 Nev. 213, 418 P.2d 132, I dissented from a denial of the request because I felt the holding needed clarification.

↓ 82 Nev. 448, 451 (1966) Ivey v. State ↓

That need for clarification is most apparent in this case. The majority opinion seems to confirm this because it says, "The district court apparently believed that an *in camera* inspection of the transcript by the court on the issue of probable cause would satisfy our holding in Shelby, and denied relief."

We are now asked by appellant to rule he has a right to a copy of the transcript of the testimony of the witnesses. The trial court denied such right and, after an *in camera* examination of the transcript, held appellant had not shown sufficient good cause warranting the court, in the exercise of its discretion, to order the transcript to be supplied him. The order should be affirmed.

Even the majority opinion concedes that appellant is entitled to no more than a transcript of the witnesses' testimony. Thus the transcript must be edited to eliminate from that part given appellant whatever a grand juror may have said or how he voted on a matter before them, NRS 172.330. A question arises whether appellant is also entitled to legal documentary evidence or depositions of witnesses before the grand jury, NRS 172.260. The questions before this court are of great complexity and cannot and should not be answered in too broad and sweeping an order. I fear we will be opening a floodgate freeing a torrent of practice and procedure we do not now perceive or comprehend.

The handling of grand jury transcripts can best be accomplished, in my opinion, by legislative enactment. By that means a comprehensive statute regulating the entire matter can be set down. It may be the legislature will not see fit to concern itself with the problem. In that event, by granting discretion to the trial courts, the problem can be dealt with case by case and a workable plan evolved within the framework of our present statutes and cases.

There is authority for this position. This court said in Ex parte Colton, 72 Nev. 83, 86, 295 P.2d 383 (1956), "The court entertaining the writ may, then, properly limit the scope of the examination. As stated by this court in the Eureka Bank cases, 35 Nev. 80, 113, 126 P. 655, 665 '[T]he court issuing the writ will look into the evidence far enough to see whether there is any tending

to show that an offense was committed and that there was cause to believe that the accused committed it.'" I do not mean to be understood that the underlying rationale of Shelby can be disregarded by the trial court in the exercise of its discretion. It may ultimately prove to be such that no other way can be found to test probable cause except by furnishing defense counsel a copy of the testimony of the witnesses before the grand jury. If that be so, because no other feasible way, just to both the prosecution and the defense and recognizing the historical position of grand juries can be found, then so be it. But I think we should explore the whole spectrum of the possibilities slowly, deliberately and cautiously before we throw open the gate. The mind can fashion all sorts of problems resulting from the majority holding. For example, if an indictment charges several defendants and testimony against one is not admissible against another in finding probable cause, yet the evidence is so interwoven as to be impossible of intelligent editing, what then? And who, except the trial judge, can do the editing that must of necessity be done even under the majority rule, because discussions and voting of members of the grand jury are absolutely secret under our statute, NRS 172.330 and 172.340, except for perjury alleged to have been committed by a member of the grand jury in making an accusation or giving testimony to his fellow jurors.

It is good, if it can be done without danger to legal precedent, to announce a clear, sharp rule of law in every case. But seldom are legal rights that precise and there is ever present the danger that a given decision, unless cautiously made, will produce completely unthought of

results. Try as mightily as we can, neither this court, nor any court, can foresee the agility of the legal mind of good counsel in applying an announced rule to facts which are but a shade of difference away.

I would affirm the trial court's decision.

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82 Nev. 453, 453 (1966) Arabia v. State

FELIX JOHN ARABIA, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 5099

December 20, 1966 421 P.2d 952

Appeal from the Eighth Judicial District Court, Clark County; Taylor H. Wines, Judge.

Defendant was convicted of crime of possession of narcotics. The trial court refused to suppress evidence of defendant's possession of marijuana and defendant appealed from that order and his conviction. The Supreme Court, Collins, J., held that where defendant was observed by police officer in intoxicated condition, arrested without warrant for driving under influence of alcohol, transported to police station, booked, ordered to exchange his clothes for jail garb, and officer while helping him found in an inside coat pocket a polyethylene bag containing marijuana, search and seizure were reasonable and evidence was admissible.

Affirmed.

[Rehearing denied January 19, 1967]

Mendoza, Foley & Garner and *Douglas J. Shoemaker,* of Las Vegas, for Appellant.

Harry Dickerson, Attorney General, *Edward G. Marshall,* District Attorney, and *James D. Santini,* Deputy District Attorney, Clark County, for Respondent.

1. Automobiles.
   Police officer lawfully arrested defendant without warrant for driving under influence of alcohol committed in presence of officer and officer was entitled to search person of defendant and to seize weapons, contraband, fruits or implements of crime without a warrant.
2. Arrest.
   Search must be substantially contemporaneous with and confined to immediate vicinity of arrest.
3. Arrest.
   Right to search and seize without a warrant extends to things under accused's immediate control when arrested.
4. Criminal Law; Searches and Seizures.

Where defendant was observed by police officer in intoxicated condition, arrested without warrant for driving under influence of alcohol, transported to police station, booked,

ordered to exchange his clothes for jail garb, and officer while helping him found in an inside coat pocket a polyethylene bag containing marijuana, search and seizure were reasonable and evidence was admissible in prosecution for possession of narcotics. U.S.C.A.Const. Amend. 4; NRS 453.030.

5. Automobiles.

Failing to take intoxicated defendant who was arrested without warrant for driving under influence of alcohol immediately before a magistrate for arraignment and fixing of bail was not unreasonable or in contravention of municipal ordinance providing that arrested person shall be taken before magistrate without unnecessary delay. NRS 171.200, 171.300.

OPINION

By the Court, Collins, J.:

Appellant was charged with and convicted of the crime of possession of narcotics (marijuana). The trial court refused to suppress evidence of his possession of the marijuana and he appeals from that order and his conviction. We feel the ruling was correct and affirm the conviction.

At approximately 8:15 a.m., in the 1400 block of Maryland Parkway, City of Las Vegas, Nevada, appellant was observed by a police officer driving in an erratic manner. He was weaving back and forth across the dividing line of the northbound lane and traveling approximately 25-30 miles per hour in a school zone posted for 15 miles per hour. He was stopped, and observed by the officer to be unsteady on his feet, with slurred speech, bloodshot eyes and the odor of alcohol on his breath. With the assistance of another officer, a field sobriety test was administered and appellant was arrested without a warrant for driving under the influence of alcohol. The record indicates no attack upon the legality of that arrest.

At the scene appellant was cursorily searched, with no weapons or contraband being found. He was transported to the police station, located in the City Hall, approximately two miles away. At this time the municipal court was in session in the same building.

Appellant was booked and while emptying his pockets at the desk a package of cigarette papers was observed. He was then taken to the jail section and ordered to

exchange his clothes for jail garb. An officer, while helping him, found in an inside coat

pocket a polyethylene bag containing marijuana. About twenty minutes had elapsed since his initial arrest. He was then re-arrested, later charged and convicted of possession of narcotics.

Appellant contends: that the trial court should have suppressed the evidence; that his conviction was unlawful because the search was not contemporaneous in time or place with the arrest; that the search and seizure were not reasonable under the circumstances of the arrest; that the search was invalid because appellant was illegally held at the time; that appellant did not consent to the search; that he had standing to complain; and that the admission of the evidence so seized was prejudicial. We find no merit to these contentions.

[Headnotes 1, 2]

Appellant was lawfully arrested without a warrant for a misdemeanor committed in the presence of the police officer. This entitled the officer to search the person of the accused and to seize weapons, contraband, fruits or implements of the crime without a warrant. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B 834 (1914); Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409 (1925); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790 (1925). The search must be substantially contemporaneous with and confined to the immediate vicinity of the arrest. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); Agnello v. United States, supra; Thurlow v. State, 81 Nev. 510, 406 P.2d 918 (1965).

[Headnote 3]

Does the inventory at the booking desk (where the cigarette papers were found) and the security check on admission to jail (where the marijuana was found) constitute a search within the restrictions of the Fourth Amendment of the Constitution of the United States and the law of this state? We think that it does but, under the circumstances, it was not unreasonable, hence not a search prohibited by the Federal Constitution. This

right to search and seize without a warrant extends to things under the accused's immediate control, Carroll v. United States, supra. This is not a case where there was a search of an automobile, Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); Thurlow v. State, supra, nor of a house, Agnello v. United States, supra; Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); but the immediate person of the defendant. This search did not invade the orifices of the body such as the mouth, People v. Sanchez, 11 Cal.Rptr. 407 (1961); the rectum, Blackford v. United States, 9 Cir., 247 F.2d 745 (1957); or the stomach, Blefare v. United States, 9 Cir., 362 F.2d 870 (1966), but his clothing. Can anyone

doubt if the officer had found the marijuana when he frisked appellant at the car there would have been any problem whatsoever with its admission into evidence?

The search of appellant's clothing at the booking desk and upon entry into jail was a *continuation* of the lawful search commenced at the automobile and not unreasonable. United States v. Caruso, 2 Cir., 358 F.2d 184 (1966); People v. Montgomery, 252 N.Y.S.2d 194 (1964).

Furthermore the evidence found was contraband, Bringegar v. State, 97 Okl.Cr. 299, 262 P.2d 464 (1953), and its possession was illegal per se. NRS 453.030. [1] A continuing felony was being committed in the officers' presence.

[Headnote 4]

This is not a case where the evidence seized was per se legal but would lead to other evidence demonstrating criminal culpability. Nor was the search one where force or deception was employed. United States v. Gorman, 2 Cir., 355 F.2d 150, 157, 159 (1965). It was simply a case where contraband, illegal per se, was inadvertently found on the person of defendant during a reasonable

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[1] "453.030 Acts prohibited. It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in NRS 453.010 to 453.240, inclusive."

search incident to a lawful arrest. Harris v. United States, 10 Cir. 151 F.2d 837 (1945); Annot., 169 A.L.R. 1413, 1419, aff'd 331 U.S.145, 67 S.Ct. 1098, 91 L.Ed. 1399. Further, appellant and his clothes were constantly in custody and sight from the moment of his initial arrest until the marijuana was found. The search and seizure under the circumstance were reasonable. United States v. Caruso, supra, and cases cited therein. The record fails to disclose the police had any reason to suspect appellant of being in possession of narcotics and had employed the traffic misdemeanor arrest as a deception or means of fraud or force to search him for evidence of a felony. Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960). Further, this search consisted of nothing more than that which is occasioned by normal and accepted booking procedures customary to an arrest under these circumstances.

[Headnote 5]

We do not feel the search was conducted at a time when appellant was illegally held, thus making any search unlawful. The evidence indicates he was intoxicated to an extent he was unsteady on his feet and had to be helped in the booking procedure and at the jail in removing his clothes. We cannot say it was unreasonable or in contravention of the ordinance of the

City of Las Vegas, Title 10, Chap. 21, Section 2, [2] or the Nevada

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[2] "WHEN PERSON ARRESTED MUST BE TAKEN IMMEDIATELY BEFORE A MAGISTRATE: Whenever any person is arrested for a violation of this Code punishable as a misdemeanor, the arrested person shall be immediately, or as soon as court time permits, taken before a magistrate, in any of the following cases:

"(A) When a person arrested demands an immediate appearance before a magistrate;

"(B) When the person is arrested upon a charge of negligent homicide;

"(C) When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

"(D) When the person is arrested upon a charge of intoxication in or about a vehicle;

"(E) When the person is arrested upon a charge of failure to stop in the event of an accident causing death, personal injury or damage to property;

"(F) In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided."

Statutes, NRS 171.200 and 171.300, [3] not to take him immediately before a magistrate for arraignment and fixing of bail in that condition of intoxication. This is so even though a magistrate was in the same building and technically available at the time of the booking procedure on the misdemeanor charge. It might have been a better practice to take him before the magistrate in his intoxicated condition and let the magistrate continue the arraignment until appellant were sober, if that be his pleasure.

In view of the foregoing holding it is unnecessary to decide the other contentions of error.

Affirmed.

Zenoff, D. J., concurs.

Thompson, J., concurring:

I agree with the majority opinion, but wish to add a comment. The Fourth Amendment proscription against unreasonable searches and seizures is aimed at protecting one's right of privacy (Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), 84 A.L.R.2d 933; Kaplan, Search and Seizure, 49 Cal.L.Rev. 474, 481 (1961), and at the deterrence of unlawful police activity (People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955)). Those aims are not frustrated by the conduct here in question. One's right of personal privacy is dramatically diminished when he has been lawfully placed in jail. He

[3] "171.200 Defendant to be taken before magistrate without delay. The defendant must, in all cases, be taken before the magistrate without unnecessary delay."

"171.300 Person arrested without warrant to be taken before nearest magistrate; complaint laid before magistrate.

"1. Except as provided in subsection 2, when an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be laid before such magistrate.

"2. When an arrest is made without a warrant by a member of the Nevada highway patrol acting pursuant to the duties prescribed by NRS 481.180, or by an inspector or field agent of the motor carrier division of the department of motor vehicles, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate having jurisdiction, and a complaint, stating the charge against the person, must be laid before such magistrate."

must then submit to reasonable measures designed to promote jail security and the orderly handling of inmates. The segregation of prisoners and the inventorying of their personal belongings is a matter of internal police administration, and does not offend the purposes of the Fourth Amendment. During the period of police custody, an arrested person's personal effects, like his person, are subject to reasonable inspection, examination, and test. People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923). See also Nootenboom v. State, 82 Nev. 329, 418 P.2d 490 (1966); United States v. Caruso, 2 Cir., 358 F.2d 184 (1966); People v. Rogers, 50 Cal.Rptr. 559 (1966); People v. Long, 152 Cal.App.2d 716, 313 P.2d 174 (1957).

MARSHALL W. KRAUSE, ARTHUR BRUNWASSER, in Behalf of ROBERT BRYAN PATE, Appellants, *v.* JACK H. FOGLIANI, Warden of the Nevada State Penitentiary, Respondent.

No. 5117

December 21, 1966 421 P.2d 949

Appeal from order dismissing post-conviction habeas corpus petition. First Judicial District Court, Ormsby County; Merwyn H. Brown, Judge.

The lower court dismissed the petition and appeal was taken. The Supreme Court,

Thompson, J., held that judge was required to order hearing to determine competency before accepting plea of guilty from defendant who had been committed by him to mental hospital, and who, to judge's knowledge, was an escapee from mental institution at time kidnaping offense was committed, in absence of evidence to suggest that defendant had recovered from his mental illness.

Order reversed and case remanded.

Marshall W. Krause and *Arthur Brunwasser,* of San Francisco, for Robert Bryan Pate.

Harvey Dickerson, Attorney General, and *Daniel R. Walsh,* Chief Deputy Attorney General, of Carson City, for Respondent.

1. Habeas Corpus.
   Where alternative ground for dismissal of post-conviction habeas corpus petition was that counsel for petitioner, who verified petition, did not possess personal knowledge of the facts therein alleged, and that counsel should have made his charges on information and belief, and counsel offered to amend and allege on information and belief, it was error not to allow amendment.
2. Constitutional Law.
   The conviction of an accused while he is legally incompetent violates due process. U.S.C.A.Const. Amend. 14; NRS 178.400, 178.405.
3. Mental Health.
   Once committed as insane, an accused cannot stand trial, nor waive trial and plead guilty, unless certified by hospital superintendent as competent for that purpose. U.S.C.A.Const. Amend 14; NRS 178.400, 178.405.
4. Mental Health.
   Judge was required to order competency hearing before accepting plea of guilty from defendant who had been committed by him to mental hospital, and who, to judge's knowledge, was an escapee from mental institution at time kidnaping offense was committed, in absence of evidence to suggest that defendant had recovered from his mental illness. U.S.C.A.Const. Amend 14; NRS 178.400, 178.405.
5. Mental Health.
   Failure of defendant to request competency hearing did not waive his right. U.S.C.A.Const. Amend 14; NRS 178.400, 178.405.
6. Habeas Corpus.
   Defendant who was entitled to be discharged from confinement upon his conviction for kidnaping, unless retried within reasonable time, because he had been deprived of competency hearing, could raise issue at retrial of his competence to stand trial and request special hearing.
7. Habeas Corpus.
   Defendant who had been sentenced, without required competency hearing, for kidnaping was entitled to discharge unless state, within reasonable time, elected to retry him.
8. Mental Health.
   If sufficient doubt exists as to defendant's present competence, a competency hearing must be held.

OPINION

By the Court, Thompson, J.:

[Headnote 1]

This is an appeal from an order of the district court dismissing a post-conviction habeas corpus petition filed

on behalf of Robert Bryan Pate who is serving a life sentence at the Nevada State Prison for kidnaping. The purpose of the habeas proceeding was to have an evidentiary hearing on the claim that federal constitutional protections were ignored in the kidnaping case. [1] The hearing did not occur. The merits of the asserted claims were never reached. The lower court dismissed the petition, ruling that it did not allege facts which, if true, establish a denial of federally protected rights. It is not useful to recite the factual averments of the petition. Without question, they are sufficient to place in issue the constitutional violations claimed. An alternative ground for dismissal was that counsel for Pate, who verified the petition, did not possess personal knowledge of the facts therein alleged, and should have made his charges on information and belief. Counsel offered to amend and allege on information and belief, but the court would not allow it. This was error. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 15 L.Ed.2d 807, 86 S.Ct. 845 (1966). The court should not have summarily dismissed the habeas application. We are asked to either reverse with direction to hold an evidentiary hearing on the constitutional issues raised, or, in line with Pate v. Robinson, 383 U.S. 375, 15 L.Ed.2d 815, 86 S.Ct. 836 (1966), order a new trial on the kidnaping charge.

Pate is a recidivist. While serving a robbery sentence at the Nevada State Prison, he became mentally ill and, on August 14, 1958, the district court committed him to the Nevada State Hospital. Ten days later he escaped from the hospital. Three days after that a kidnaping occurred. Pate was charged with that crime. He was apprehended in California and returned to Nevada. On November 6, 1958, a preliminary examination was held, and Pate was bound over to the district court for trial. Thereafter he was arraigned, and counsel was appointed to represent him. A not guilty plea was entered. On the day scheduled for trial, Pate changed his plea to guilty. Counsel did not advise him to change his plea. That decision was made by Pate. The court accepted his

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[1] Pate first sought habeas relief in the federal court. The proceeding was dismissed, since he had not exhausted his state post-conviction remedy. Pate v. Wilson, 348 F.2d 900 (9 Cir., 1965).

guilty plea, pronounced judgment, and sentenced him to life imprisonment. The main constitutional issue presented, and upon which an evidentiary hearing was not held, is whether Pate was denied due process of law under the Fourteenth Amendment to the Federal Constitution because of the failure of the district judge to order a hearing on his mental competency before accepting a plea of guilty to the kidnaping charge. We have concluded that the record before us shows a denial of due process, and that a need does not exist for an evidentiary hearing on that point.

[Headnotes 2, 3]

1. The conviction of an accused while he is legally incompetent violates due process. Bishop v. United States, 350 U.S. 961, 100 L.Ed. 835, 76 S.Ct. 440 (1956). One may not be punished for a public offense while he is insane (NRS 178.400). [2] If doubt arises the court shall order the question submitted to a jury (NRS 178.405). [3] Once committed as insane, an accused shall not stand trial, nor waive trial and plead guilty, unless certified by the hospital superintendent as competent for that purpose (Sollars v. District Court, 71 Nev. 98, 281 P.2d 396 (1955), reversed on other grounds, 73 Nev. 248, 316 P.2d 917 (1957)), or is otherwise shown to possess sufficient understanding to know the nature of the charge against him and to be able to assist his counsel.

[Headnotes 4, 5]

When the district judge accepted the guilty plea he stated: "The court will take judicial notice of the fact that Robert Bryan Pate was committed to the Nevada State Hospital in August 1958 as a mentally ill person. The court will also take judicial notice of the fact that he was an escapee from that hospital at the time this

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[2] NRS 178.400 reads: "An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense while he is insane."

[3] NRS 178.405 provides: "When an indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if doubt shall arise as to the sanity of the defendant, the court shall order the question to be submitted to a jury that must be drawn and selected as in other cases."

offense was committed. The record will also show that the court has heretofore read the transcript of the preliminary hearing. We are satisfied from an examination of the record that

the defendant, Robert Bryan Pate, was on the 27th day of August, 1958, legally sane." As a matter of fact, that judge was the same judge who had committed Pate to the mental hospital. The transcript of the preliminary hearing, to which the judge referred, is silent about Pate's mental condition. When Pate changed his plea he spoke only five words. Nothing was offered to the court to suggest that Pate had recovered from his mental illness. The court knew that he was an escapee from a mental institution. In these circumstances, we hold that the court, *sua sponte,* was required to order a competency hearing. Cf. Hollander v. State, 82 Nev. 345, 418 P.2d 802 (1966). The failure of the defendant to request that hearing did not "waive" his right. "It is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, 383 U.S. 375, 15 L.Ed.2d 815, 821, 86 S.Ct. 836 (1966).

[Headnotes 6-8]

2. The challenged conviction and sentence occurred more than seven years ago. It is difficult to now hold a limited hearing as to Pate's mental competency at that time. Accordingly, we prefer the disposition chosen by the United States Supreme Court in Pate v. Robinson, supra. We order that Pate be discharged from confinement upon his conviction for kidnaping, unless the State, within a reasonable time elects to retry him. [4] Should the State so elect, Pate may raise the issue of his competence to stand trial and request a special hearing. If a sufficient doubt exists as to his present competence, such a hearing must be held. If found competent to stand trial, he will have the usual defenses available to an accused.

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[1] Our order does not discharge Pate from his commitment to the Nevada State Hospital, nor does it release him from the prison sentence he was serving when committed to the Nevada State Hospital.

82 Nev. 459, 464 (1966) Krause v. Fogliani

The order below is reversed and this case is remanded to the district court for action consistent with this opinion.

Collins, J., and Compton, D. J., concur.

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82 Nev. 465, 465 (1966) In Memoriam

MEMORIAL

HONORABLE MILTON B. BADT

To the Honorable Chief Justice Gordon Thompson, the Honorable Associate Justice Jon R. Collins, and the Honorable Associate Justice David Zenoff, of the Supreme Court of the State of Nevada:

In obedience to your Order of April 21, 1966, the undersigned Committee, members of the Bar of the State of Nevada, respectfully submit the following Resolution, expressing the high regard, not only of the Bar, but of the Bench and of all the people of the State of Nevada, for the life and character of Justice Milton B. Badt, and the deep grief and sadness caused by his passing.

Orville R. Wilson
Chairman
W. Howard Gray
William C. Sanford, Sr.
Robert Taylor Adams
Paul Laxalt
Robert F. List
Theodore H. Stokes, Jr.
William J. Crowell
Bert Goldwater
Louis I. Wiener, Jr.

RESOLUTION

Whereas, The Honorable Milton B. Badt, who served the State of Nevada as District Judge and Justice of the Supreme Court, both as Associate and Chief Justice, departed this life on April 2, 1966; and

Whereas, by a long and diligent life in his profession and on the Bench, he honored the State of Nevada and his country;

Now, Therefore, Be It Resolved:

Justice Milton B. Badt was a product of the State of Nevada. He was born July 8, 1884, and received his early education in the State of Nevada, and his legal education at Hastings College of Law in the State of California. He was admitted to the practice of law in

1908, and practiced in San Francisco until 1914, when he moved to Elko, Nevada. He lived and practiced law in Elko until 1945, when he was appointed to the District Bench. In 1947, he was appointed to the Supreme Court of Nevada, and moved to Carson City, Nevada, where

he continued to live until his death. He served as Chief Justice of the Supreme Court of the State of Nevada from January, 1951, to January, 1953, and from January, 1957, to January, 1959, and again from January, 1961, to January, 1963.

He was married on June 29, 1927, to Gertrude L. Nizze and to this union there came two children, Milton B. Badt, Jr., now a Western Electric engineer stationed in Germany, and Nancy Badt Drake residing in Fairhaven, New Jersey. He enjoyed an ideal family life. He was of a kindly disposition, yet firm in the matter of personal habits. He enjoyed his neighbors, and was modest and retiring. He was equally at home with the prince and the ordinary citizen. He was beloved by his fellow lawyers.

Before assuming his duties on the Bench, Justice Badt enjoyed a substantial law practice. From time to time, he was City Attorney of Elko, Carlin and Wells. His practice embraced mining, grazing rights and water rights. He enjoyed the confidence of the people of his community—confidence in his legal ability, his loyalty, his absolute integrity and trustworthiness.

Justice Badt, although a busy man, and eminent in his profession, was an outstanding citizen. He loved his county and his state. He was generous in his contribution of time and substance in all worthwhile community projects. He was active in Rotary and in the local Chamber of Commerce. He was Exalted Ruler of the Elks Lodge and Master of the Masonic Lodge. He became interested in Scouting and was chosen on the Executive Boards, both state and national. He served on local school boards. In these activities he was always a wise counselor, a diligent worker, a devoted friend.

Justice Badt did not neglect the public duties of his profession. He was an active member of the American

and State Bar Associations and the American Judicature Society, taking his place on committees and ever watchful of the judicial branch of our government. In 1963, he received signal recognition from his Alma Mater, Hastings College of Law, by being named, among all graduates, as the “Man of the Year.”

Justice Badt's decisions, while a member of the Supreme Court of Nevada, were distinguished by the depth of his reasoning, based upon his abilities and experience, and were always aptly, and many times refreshingly, phrased.

Until his final illness, Justice Badt was an avid scholar. He not only kept himself well informed on current events and current developments in the law, but pursued a vigorous program of study in the fields of literature, music, art and foreign languages. He was well known and admired for his flawless and effective use of the English language and his thorough knowledge of Latin. His unquenchable thirst for knowledge and perfection was an inspiration to all who knew him.

Justice Badt will be missed—not only by his close associates on the Bench, and all members of his profession, but by every citizen who cherishes his home and loves his country and his state and believes in democracy and human dignity. He devoted a long life to his ideals, for which we will be ever grateful.

Therefore, Be It Resolved: That this Resolution be approved by this Court and become a part of the permanent record thereof.

A SPECIAL SESSION

of the

SUPREME COURT

of the

STATE OF NEVADA

Thursday, May 5, 1966

SPECIAL SESSION OF SUPREME COURT

Thursday, May 5, 1966

A special session of the Supreme Court of the State of Nevada, commencing at 10 a.m., Thursday, May 5, 1966.

Present: Acting Chief Justice Thompson (presiding), Justice Collins, and District Judge Zenoff; Members of the State Bar of Nevada; Officers of the Court; State Officials; relatives and friends of Justice Collins.

Thompson, J.:

Good morning, Ladies and Gentlemen.

A few weeks ago a very dear friend of the bench and the bar of this state passed away. Milton Badt had served Nevada faithfully as a jurist for many years; and all of us shall miss him very, very much.

Our gathering this morning, however, is for a happy purpose: That of welcoming to the Supreme Court of Nevada the successor to Mr. Justice Badt. We are grateful to the Governor for his selection and we are particularly grateful for him for paying heed to the recommendation of the Board of Governors of the State Bar. As you know, the Board of Governors is the governing body of the Bar Association. The Governor requested that group to meet and to recommend the man to succeed Justice Badt. The board recommended the Honorable Jon Collins and we are delighted with the recommendation and particularly grateful to the Governor for appointing Judge Collins.

We have some distinguished people present this morning to offer words of welcome to Judge Collins and I should first like to call upon one of the truly great lawyers in Nevada's history. George Vargas enjoys the deep respect of all who have been active in the legal fraternity. He is a splendid gentleman. Mr. Vargas.

82 Nev. 471, 472 (1966) Special Session

Mr. George Vargas:

Honorable Justices, members of the Collins family, distinguished State officials, and friends:

I have, over the past 30 years, made a number of speeches before this bench, but, on serious reflection, I cannot recall an occasion where I was happier to speak in this courtroom than I am this morning and that is notwithstanding the fact that, as far as I can remember, this is the first speech I have ever made before this Court for which I was not being paid. [Laughter from the audience.]

You know, it is an old cliché, but we are today truly facing a changing world. Across the street next Monday, Nevada's Legislature, as we have known it during our lifetime, will convene. This will be the last session of that particular combination of legislators. We read in the national papers of various changing things and we watch with bated breath the Federal Government's announcements of the rapidly increasing gross national products. I recall down in Tonopah, Nevada, one time I defended a lawsuit and when that was over the gross consumption of the gross national product went up rather sharply. This was because of considerable indulgence in Tonopah mountain dew. [Laughter from audience.]

All of which brings His Honor Judge Collins and me before this Court this morning. Judge Collins is a native Nevadan, born in Ely, and educated in the Ely public school system. Subsequently he got his Bachelor of Science degree at the University of Pennsylvania. I haven't been able to find out, and I couldn't learn from Martindale [Martindale-Hubbell Law Directory] just how he got from Ely to Philadelphia but, nevertheless, that is where he went. [Laughter from the audience.]

He then served with distinction in the Navy in World War II and subsequently obtained his law degree from Georgetown University. Thereupon he returned to Nevada to practice law and became District Attorney of White Pine County. He served there one term and then went on the District Court bench and, at the present time, he is in the progress of his second term as a District Judge. He is married to the former Rita Baird who

is sitting here [indicating]. They have four delightful young daughters. Could I ask you [addressing the Collins family] to pleas stand. [The Collins family stands.] The Collins family. [Applause from the audience.] They are accompanied this morning, on this happy occasion, by Mrs. Baird (Mrs. Collins' mother), and the proud father of the new Supreme Court Justice, Mr. Joe Collins. Would you please stand? [Mrs. Baird and Mr. Collins stand, as the audience applauds.] May I say to you we all join you in this very outstanding moment in Nevada history.

You know, I have somewhat of a tinge of regret in seeing Judge Collins going on the Supreme Court bench, because I think the district bench loses one of the most outstanding judges that it has had during my 32 years before the courts of Nevada. I have had only one opportunity to really engage in combat before His Honor Judge Collins sitting on the district bench, and I was impressed, probably as I never have been impressed in a courtroom, with the manner in which Judge Collins conducted the district court of the Seventh Judicial District. He demonstrated great control over court decorum. During that case, on many occasions, the civics classes from White Pine County came into the courtroom, in the middle of the proceedings, a number of them trooping in and out. They were welcomed with dignity. They perceived the court was conducted with dignity and they so conducted themselves, and I am quite sure they were greatly impressed with the American judicial system because of the manner in which Judge Collins conducted his Seventh Judicial District Court. He is energetic; he is able; and he is dedicated. All of these things were amply demonstrated to me during the course of that trial. The trial was difficult. The rulings were difficult, but they came from the bench firmly and without hesitation. I am sure practitioners like myself are going to miss Judge Collins presiding as a district judge.

On the other hand, we recognize that because of these same capabilities he is going to have an outstanding career as a Justice of the Nevada Supreme Court. On

behalf of just the plain old practitioners of the courtroom, I offer all of our congratulations and very best wishes to His Honor Justice Jon Collins.

Thank you, Mr. Chief Justice.

[Mr. Vargas concludes.]

Thompson, J.:

Thank you, Mr. Vargas, on behalf of the plain old practitioners. [Laughter from audience.]

I should next like to ask one of the distinguished members of the Board of Governors of the State Bar of Nevada to say a few words. Thomas Cooke, who is practicing in Reno, has been a member of the Board of Governors for many, many years, even though he is a young man, and he has been outstanding in service for the State Bar of Nevada, and was one of the group that recommended to the governor the appointment of Judge Collins to the Supreme Court. Mr. Cooke.

Mr. Thomas Cooke:

Chief Justice Thompson, Judge Zenoff, Mr. Justice Collins, distinguished guests, ladies and gentlemen, the Collins family: It is a real privilege for me to have the honor of representing the Board of Governors of the State Bar of Nevada here this morning on this happy and very important occasion.

President Gezelin, unfortunately, was unable to attend because he is at the State Bar Conference in Phoenix, Arizona, but he particularly asked me to express to the Court his sincere regrets and, Mr. Justice Collins, to extend to you his personal and warmest congratulations.

The Supreme Court of the State of Nevada is the highest and the most exalted professional office that any lawyer or any judge can aspire to or attain in this State. I am very proud to say that, over the years, the Justices of this Court have always endeavored to carry out the duties of their high office with dignity, wisdom, and with honor.

When Governor Sawyer graciously asked the Board of Governors to recommend a man whom they thought

most highly qualified to fill the late beloved Justice Milton Badt's vacant chair, this obligation was undertaken conscientiously and with a deep, strong and abiding awareness of our

responsibility, not only to the Governor, but to this Court, to the bar, and to the people of this State. The decision of the Board of Governors was not made hastily, but only after careful deliberation, after candid and frank discussion. The members of the Board, as you know, come from all areas of the State, and their collective judgment and opinion should, therefore, mirror the opinion and judgment of lawyers and judges from every district; and I think that it does. The man who was recommended and eventually appointed to this high office is qualified, and we are confident that his service (as Mr. Vargas pointed out) as a District Judge in White Pine County and Lincoln County will materially, very materially, assist this Court in its future deliberations.

Over 2,000 years ago a great Athenian philosopher laid down the guidelines which we endeavor to follow. Socrates said, "The qualities a good judge should have are to hear courteously, and serve wisely, consider soberly, and decide impartially." When the Board of Governors made its recommendation to the Governor of this State, we represented to him and to the people that this man, The Honorable Judge Collins, has these qualities.

On behalf, then, of the Board of Governors, Mr. Justice Collins, I give you our most earnest, genuine, and our unreserved congratulations.

[Mr. Cooke concludes.]

Thompson, J.:

Thank you, Mr. Cooke.

I mentioned, I believe, a little while ago, that we have many distinguished people here today, but there is only one present, as far as I know, who really bears the title of "A Distinguished Nevadan." Our next speaker is The Honorable Thomas O. Craven, District Judge, from Reno, Nevada. Perhaps all of you have read, as I did, in the past two weeks, that the University of Nevada

has honored Judge Craven and, this year, at its commencement exercises, will present him with the award of "Distinguished Nevadan." He, more than anyone else, is responsible for the establishment at the University of Nevada of the National College of State Trial Judges.

His service on the district bench has been much appreciated by the attorneys practicing in this State; and we are truly delighted that he is here today representing the District Judges of the State. Judge Craven, would you like to speak some words of welcome to Mr. Justice Collins?

Judge Thomas O. Craven:

If it may please the Court, Judge Collins: It has been exactly 27 years, 38 days and 15 minutes, since I stood before this Honorable Court, on this same spot, before this same podium, on the 28th day of March 1939, and delivered a eulogy for a good friend of mine, a former Justice of this Court, Benjamin Wilson Coleman, who had passed away but a few days

before.

He was, Judge Collins, a most illustrious predecessor from your home town, Ely, Nevada, where he was elected District Judge in 1909, and he was, like you, elevated to the Supreme Court of this State in 1914, the position to which he was successfully re-elected in 1920, 1926, 1932 and 1938. He was a Justice of the Supreme Court of Nevada for 25 years.

Among other things, on that day, I said as follows:

"By his knowledge of the law, his astuteness, and his positive passion for conformity to the principles of right, he contributed immeasurable and everlastingly to the solid foundation of justice, upon which the superstructure of the State is built."

The passage of time has proved those statements about Justice Coleman to be prophetically true.

But, appropriate to the present occasion, it is of great pleasure to me, because of our warm personal friendship, to confirm, and to remind all who will hear, that you have exemplified outstanding qualities as a trial and appellate judge during your service as a District Judge

from Ely, Nevada, by sitting frequently in every district in this State, and by sitting frequently on this Supreme Court, from 1959 to date. By your knowledge of the law, your astuteness and courage, and because of your positive passion for conformity to the sound and proven principles and rules of trial and appellant procedure, and your awareness that this is a government based upon sound principles and rules of law and justice, you, too, will inevitable contribute everlastingly to the solid foundations of justice in this State. It is an easy, and I believe an accurate prediction of your future career that your qualities will leave indelible and constructive impressions which will be manifest upon the legal annals of this State, and which, also, will endure the passage of time.

I know I speak the sentiment of all who are present in complimenting you on your elevation to this high court, and to wish you a long, successful, and happy career as a Justice of the Supreme Court of Nevada.

[District Judge Thomas O. Craven concludes.]

Thompson, J.:

Thank you, Judge Craven.

I should like to call upon the highest legal adviser to the affairs of the State Government, the respected Attorney General of our State, the Honorable Mr. Harvey Dickerson. Mr. Dickerson.

Attorney General Harvey Dickerson:

Honorable Justices, distinguished members of the bench and bar, and honored guests, and the family of Judge Collins: I come before this Court today, not as a stranger, but because Jon

Collins and I have been warm, close, personal friends, since the time he first became a member of the bar. He brought to his profession a link in the highest ideals; and those of us, who knew him in those early days, recognized that his love of the law and his devotion to its ideals would result in a fruition of his highest aims and ambitions.

He has served with honor as a dedicated District Judge, and he will bring to this Court, if Your Honors please, a probing but impartial mind.

I am proud to have been selected to participate in this ceremony today, and I know that his father, who is here today, and who is a friend of mine, is very proud, as are his devoted wife, Rita, and their children, and the rest of the family.

I sincerely hope for you, Judge Collins, in the future, the help of Divine Providence in the post to which you are about to succeed.

[Attorney General Harvey Dickerson concludes.]

Thompson, J.:

Thank you, Mr. Dickerson.

Most of you know, I believe, that since May of last year Judge David Zenoff has been serving this Court in the place of Chief Justice McNamee who was incapacitated. I can't really express properly the appreciation of the Court to Judge Zenoff for his marvelous service. He has been a fine friend to me, and his work for the Court and the State has been outstanding in every respect. I would like to ask Judge Zenoff to make a few remarks.

Zenoff, D. J.:

Thank you, Mr. Justice Thompson.

Members of the Court, distinguished members of the State Bar of Nevada, and our dear friends: The remarks of the Chief Justice merely reflect that my service in this Court has been a pleasure and a deep honor, which we have sincerely appreciated and we give your utter devotion and dedication to this service.

We speak today of Justice Collins. My relationship to Justice Collins governs not his early childhood or even his early days of practice, but it has been my experience and pleasure to serve with him on the District Court throughout Nevada. I am well aware, through the accolades of the members of the bar of this State, of the many capabilities of Justice Collins,

and I am certainly more than well aware of the depth and sincerity of his friendship. Both Rita and Jon Collins just simply blend in with all of us. You don's just meet the Collinses—you

immediately like them, and they take to you as we take to them.

The work on this Court requires a mutual respect, a deep sincerity, and dedication to our profession, a disregard for outside influences, and the utter ability and willingness to disagree among ourselves. I have had that wonderful experience both with Justice Badt and Justice Thompson, and I know that the experience of working with Justice Jon Collins will be as rewarding as is my past experience on the bench with him and many sincere and wonderful friends that we enjoy.

I extend our congratulations from my family, from the members of the bar and people of Clark County, to this welcome addition to the Nevada Supreme Court.

Thank you.

[District Judge Zenoff concludes.]

Thompson, J.:

It will now be my pleasure to administer the Oath of Office to Justice Collins. Will you [addressing Judge Collins] stand, please. [Whereupon Judge Collins rises and Justice Thompson administers the Oath of Office.]

Congratulations, Mr. Justice Collins. [Applause from the audience.]

Justice Collins, we would like to hear a few words from you, if we may, at this time.

Collins, J.:

Mr. Chief Justice, Mr. Justice David Zenoff, and members of the District Court bench, and members of the Board of Governors of the State of Nevada, friends: I am most grateful and humble to come here and stand in the shoes of the late Justice Milton Badt. I argued the first case I argued in this Court before Justice Badt, and I assure you that I did not believe at that moment that I would have the honor some day of sitting in his seat; and, for that occasion, I am most grateful.

Also I would like to state that it is a very humbling and honorable experience for me to sit in this Court, a court of such illustrious predecessors as the late Senator Patrick McCarran who was once Chief Justice of this Court, and also the late Justice William Orr of Lincoln County, and Justice Benjamin Coleman. It is indeed a humbling and grateful experience to know that you follow such men.

I am also most grateful to the Governor of the State of Nevada, and to the members of the Board of Governors of the State Bar of Nevada who saw fit to recommend me to the Governor for this appointment.

I will try my honest, level best to do a fair, capable, honest job as a member of this Court.

Thank you.

[Justice Collins concludes.]

Thompson, J.:

Thank you, Mr. Justice Collins. We are certainly delighted to have you.

I wish to thank everyone who participated in the ceremonies this morning and particularly all of you who are in attendance and paying honor to Justice Collins.

Mr. Clerk [addressing the Clerk of the Court, Mr. C. R. Davenport], it will be the order of the Court that the proceedings this morning be transcribed and published in the 1966 volume of Nevada Reports, spread upon the minutes of the Court, and certified copies delivered to the Collins family.

There being no further business this morning, the court is adjourned.

[Whereupon the Special Session of the Supreme Court was adjourned at 10:30 a.m.]

Anna Rebol, *Court Reporter.*

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