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NEBRASKA SUPREME COURT REVIEW

Nebraska Law Review takes pride in presenting the fourth annual Supreme Court Review. This section is devoted to analyses of recent Nebraska decisions of first impression or landmark rulings which substantially alter a particular area of case law in Nebraska. This section is devoted to the practitioner and is intended to provide attorneys with a comprehensive study of selected case holdings and an analysis of how these decisions relate to previous Nebraska decisions and the case law of other jurisdictions.

These cases discussed here were decided in the September term 1970, and the January term 1971.

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

Richard E. Kopf
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Nebraska Editors

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I. CONSTITUTIONAL LAW

A. Constitutionality of Non-Resident Tuition Statute

In *Thompson v. Board of Regents*[1] the Nebraska Supreme Court upheld the constitutionality of a state statute which required four months continual residence, independent of attendance at any institution of learning within the state, before a person could qualify as a resident for tuition purposes.[2] Although the residency require-

[1] 187 Neb. 252, 188 N.W.2d 840 (1971).

[2] The statutory residency requirements for tuition purposes at issue in the case were set out in Neb. Rev. Stat. § 85-502 (Reissue 1968), which in part stated:

> "A person shall not be deemed to have established a domicile in this state . . . unless: (1) Such person is of legal age and shall have actually resided in this state continually for four months with the intention of making this state his or her permanent residence . . . . No such such person shall be deemed to have established a residence in this state during the time of attendance at such state institution as a student, nor while in attendance at any institution of learning in this state . . . ."

It must be noted that this section of the Nebraska Revised Statutes was amended by the 1971 Nebraska Legislature by L.B. 408 and the new statutory scheme for determining residency for tuition purposes provides:

> "A person shall not be deemed to have established a domicile in this state, for the purpose of sections 85-501 to 85-504, unless: (1) Such person is of legal age and shall have established a home in Nebraska where he is habitually present, with the intention of making this state his permanent residence;

ments were changed by the legislature, and in this respect the particular problem presented by the plaintiff is moot, an analysis of the *Thompson* case presents an interesting insight into how the Nebraska Supreme Court may resolve other problems which arise prior to corrective legislation. In upholding the statute the court rejected the petitioner's allegations that it violated his constitutional rights as protected by the privileges and immunities clause of Article IV, Section 2 of the United States Constitution, the guarantees of equal protection of the Fourteenth Amendment and the implicit fundamental right of interstate travel. The following analysis of the *Thompson* case will focus on the court's handling of these constitutional issues.

The challenge to the former Nebraska statutory scheme for tuition residency requirements arose under the following circumstances. On September 5, 1967 the plaintiff, Raymond S. Thompson III, moved to Nebraska with his wife and two children with the intention of making Nebraska his fixed and permanent residence. Shortly after his arrival the plaintiff enrolled in the law school at the University of Nebraska and began his studies there. However, he was charged the higher nonresident tuition rate during the three years and the summer session he attended the law school. After graduation he brought this suit against the Board of Regents alleg-

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(2) The parents, parent, or guardian having custody of a minor registering in a state educational institution shall have established a home in Nebraska where such parents, parent, or guardian is habitually present with the intention of such parents, parent, or guardian to make this state their, his, or her permanent residence; *Provided,* that if a person has matriculated in a state educational institution while his parents had an established domicle in this state, and the parents leave the state, such person shall not lose his domiciliary status by reason of such parents, parent, or guardian having ceased to reside in this state if such person has the intention to make this state his permanent residence;
(3) An emancipated minor, who shall have established a home in Nebraska where he is habitually present with the intention of making this state his permanent residence, and shall not have lived with nor been supported by his parents, or either of them, for two years or more prior to such registration;
(4) Such person is a nonresident of this state prior to marriage, and marries a person who has established a home in Nebraska where he is habitually present with the intention of making this state his permanent residence;
(5) Such person, if an alien, shall have begun processing his United State naturalization papers, and shall have established a home in Nebraska where he is habitually present with the intention to make this state his permanent residence;
(6) Such person is a dependent of a staff member of the University of Nebraska or one of the Nebraska state colleges who joins

ing that he was damaged in the amount of 1,624.50 dollars[3] since he was charged the nonresident tuition rate rather than the lower resident rate. In support of this contention Thompson offered a substantial amount of uncontradicted evidence to show that he was, in fact, a resident rather than a nonresident and, therefore, entitled to the lower tuition rate. The uncontested facts included the following: Thompson had actually resided in Nebraska since September 5, 1967. Shortly after his arrival he and his wife purchased a home in Lincoln and paid property tax on that home. Thompson paid state sales and income taxes as well as Nebraska motor vehicle taxes. Thompson and his wife were registered to vote and did vote in

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the staff immediately prior to the beginning of a term from an out-of-state location; or

(7) Such person is on active duty with the armed services of the United States and has been assigned a permanent duty station in Nebraska, or is a legal dependent of a person on active duty with the armed services of the United States assigned a permanent duty station in Nebraska." NEB. REV. STAT. § 85-502 (Reissue 1971).

"No person shall be deemed to have established a home in Nebraska where he is habitually present unless he shall execute an affidavit of intent that the State of Nebraska is his permanent residence and has been his permanent residence for one year immediately prior to the execution of the affidavit of intent, and he shall:

(1) Have been registered to and be eligible for voting in Nebraska state elections;

(2) Have continually for one year immediately prior to the beginning of the semester or summer session for which the student is enrolling:

(a) Paid applicable Nebraska sales and Nebraska income tax as a Nebraska resident; and

(b) Registered and had assessed for appliable taxation in Nebraska, all personal property requiring registration, as may be owned by such person; or

(3) Own a home in Nebraska in which such person is residing, or have executed a contract to purchase and be making payments on a home in Nebraska in which such person is residing." NEB. REV. STAT. § 85-502.01 (Reissue 1971).

"The provisions of sections 85-502 to 85-502.02 shall apply to enrollment of students after August 31, 1972." NEB. REV. STAT. § 85-502.02 (Reissue 1971).

Although the amendments made several changes in the statute under which Thompson brought his suit, the basic change was the substitution of the four month continual residence apart from attendance at an institution of learning with a straight residency requirement of one year for a person of legal age with the intent to make Nebraska his permanent residence.

[3] Brief for Appellee at 7, Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971). This figure was arrived at by taking the differences between the nonresident tuition rate and the resident tuition for six semesters and the summer session that Thompson attended the law school.

Nebraska and nowhere else. Thompson had no residence or home in any other state and was not allowed resident tuition rates in any other state. In 1968 he was a qualified delegate to the Lancaster County Democratic Convention and was an alternate to the State Democratic Convention. In addition, he was appointed by the County Judge of the County of Lancaster, State of Nebraska, to act and serve as guardian for minor children in that county. Also he had employment in Nebraska and nowhere else since September 1967.[4]

The trial court entered judgment determining the statute[5] to be valid and constitutional to the extent that it provided for an initial four-month waiting period before residency for tuition could be established. The court further found that the last sentence of the statute, which specified that no one could establish a residence for tuition purposes while a student at any institution of learning in the state, was unconstitutional and invalid and was also severable from the rest of the statute. As a result, the court awarded Thompson 1,375.50 dollars, plus the costs of the action.[6] The Board of Regents appealed and the Nebraska Supreme Court reversed, holding the entire statute constitutional.

In order to fully understand the decision in *Thompson* one must understand not only what was at issue in the case but also what arguably was not at issue. The parties were in agreement that a state may constitutionally charge a higher tuition rate to a nonresident than to a resident. In addition, the parties agreed that a state may also constitutionally impose an original durational residency requirement for a nonresident to qualify as a resident for tuition purposes.[7] Consequently, these two issues, which centered on the words "nonresident" and "original" durational residency requirement, ostensibly were not at issue in the case. In contrast, the appellee contended he was a resident of the State of Nebraska and he argued that the State of Nebraska was arbitrarily discriminating between its own citizens by charging a higher tuition rate to those "residents" who had not met the statutory requirements of tuition residency compared to those "residents" who had met the requirements.[8] Moreover, he contended that the requirement of four months

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[4] Brief for Appellee at 4-6, Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

[5] NEB. REV. STAT. § 85-502 (Reissue 1968). *See* note 2, *supra.*

[6] The judgment for $1,374.50 amounted to the difference in resident and nonresident tuition for the term of enrollment except for the first semester thereof.

[7] 187 Neb. at 254, 188 N.W.2d at 842.

[8] Brief for Appellee at 10, Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

continual residency independent of attendance at an institution of learning created an unconstitutional irrebuttable presumption that he was a nonresident for tuition purposes. Thus, Thompson contended that the irrebuttable presumption denied him the opportunity to prove his actual residency and the statutory scheme with its irrebuttable presumption of nonresidency was a denial of equal protection. In addition, he argued that the statutory scheme was a denial of fundamental rights guaranteed to him by the United States Constitution and that the burden was on the State of Nebraska to show a compelling interest in this statutory scheme. Thompson based his claim on three constitutional grounds: the privileges and immunities clause of Article IV, Section 2 of the United States Constitution, the Fourteenth Amendment's guarantee of equal protection, and the synthesis of constitutional guarantees producing the fundamental right to travel.[9]

The first problem to which the court addressed itself was to ascertain the proper standard to be applied with regard to the attack on the statute. Relying on *Starns v. Malkerson*[10] the court decided

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[9] *Id.* at 17.

[10] 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). According to the court in *Starns* the one year residency requirement in Minnesota was not an infringement of the fundamental right to interstate travel recently announced by the Supreme Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969). The Minnesota federal district court felt that the welfare situation in *Shapiro* could be distinguished on two grounds. First, there were no facts which showed that the one year waiting period for resident tuition purposes had a specific objective of excluding or even deterring out-of-state students from attending state universities since statistics showed some 6,000 nonresident students at Minnesota state universities. Hence, the court found that there was no chilling effect on the right to travel. Second, in the tuition situation there was no problem with the denial of basic necessities of life to needy persons as there was in the welfare situation in Shapiro. *But cf.* Comment, *Residence Requirements After Shapiro v. Thompson,* 70 COLUM. L. REV. 134, 152-53 (1970), where the author states:

> 'For a person of limited income, the difference in tuition at the university of a neighboring state will often be enough to dissuade him from attending. The New York *Times* has reported that: '[i]ncreasingly, universities in the Middle West and elsewhere are taking direct or indirect steps to limit the number of enrollees from outside their state borders.' Among the measures taken according to the *Times,* is increasing nonresident tuition. The chilling effect of higher tuition is, therefore, recognized by university administrators and state legislators . . . ."

In *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961), the issue was whether a student is entitled to procedural due

that the plaintiff had not alleged any impairment or denial of a fundamental right. Consequently, the proper test to be applied was the traditional equal protection test of whether there was a reasonable basis for the classifications. By holding that Thompson did not claim infringement of a fundamental constitutional right, the court, in effect, held that interstate travel is not by itself a fundamental constitutional right. With respect to the leading case on the right to interstate travel, *Shapiro v. Thompson*,[11] the court observed: "The limit of its reach illuminates the path of of our decision."[12] It should be noted that in striking down a statute which required one year's residency before a person could receive welfare payments, the Court in *Shapiro* specifically left open the question of the constitutionality of residency requirements for lower tuition rates. In an oft-quoted footnote, the Court in *Shapiro* stated:

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.[13]

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process when university officials attempted to expel him for alleged misconduct. In ruling that the plaintiffs were entitled to notice and an opportunity for a hearing, the court made the following observation about the importance of education:

> "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." *Id.* at 157.

In addition, a recent United States Supreme Court decision, *Dunn v. Blumstein*, 405 U.S. 330 (1972), cast considerable doubt on the continuing validity of the requirement that the purpose of the challenged statute be to deter travel. The court held that the durational residence requirement of one year before a resident could vote in Tennessee was an unconstitutional infringement on the right to vote and on the right to travel. Referring to the *Shapiro* case, the Court noted: "Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterence." *Id.* at 339-40.

[11] 394 U.S. 618 (1969).

[12] 187 Neb. at 254, 188 N.W.2d at 842.

[13] 394 U.S. at 638 n.21. This footnote from *Shapiro* has served as a springboard for a number of commentators who have attempted to ascertain the impact of the *Shapiro* decision. For a general discussion of the problems presented by the footnote see Comment, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. LAW REV. 134 (1970). For a particular discussion of the problems relating to residence requirements for tuition see Clarke, *Validity of Discriminatory*

Consequently, according to the court in *Thompson* it appears that whether a person's right to travel is classified as a fundamental right depends on the person's reason for travel, on the penalties or obstacles that a state imposes upon the person as a result of his travels, and the specific objective of the challenged statute in creating obstacles to the right to travel. In other words, the right to travel is a fundamental right only when there is a statute whose specific objective is to discourage interstate travel and when the traveler is somehow penalized or denied a basic necessity of life.[14]

Having decided that the reasonable basis test was the proper standard to be applied, the court found a reasonable basis for the statute. The court said:

> In classifying students for the purpose of charging tuition, the state had a legitimate objective of attempting to achieve a partial cost equalization between *those persons who have, and those who*

Nonresident Tuition Charges in Public Higher Education Under the Interstate Privileges and Immuity Clause, 50 NEB. L. REV. 31 (1970); Comment, *Nonresident Tuition Charged By State Universities in Review,* 38 U.M.K.C.L. REV. 341 (1970); Comment, *Residency, Tuition and the Twelve-Month Dilemma,* 7 HOUS. L. REV. 241 (1969). Note, *The Constitutionality of Nonresident Tuition,* 55 MINN. L. REV. 1139 (1971).

[14] However, whether this is still the state of the law in light of *Dunn v. Blumstein,* 405 U.S. 330 (1972), is open to question. There is language in the case which would imply that in order for any durational residence law, or any classification based on recent interstate travel, to be upheld the state would have to show a substantial and compelling reason for the statute. In striking down the one year residence requirement before a resident could vote, the Court stated:

> "In the present case, whether we look at the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements." *Id.* at 335.

However, the court noted in a footnote that:

> "States may show an overriding interest in imposing an appropriate bona fide residence requirement on would-be-voters. One who travels out of a State may no longer be a bona fide resident, and may not be allowed to vote in the old State. Similarly one who travels to a new State may, in some cases, not establish bona fide residence and may be ineligible to vote in the new State. Nothing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements." *Id.* at 342 n.13.

The exact extent of the language in the case is as yet undetermined and has to be read in the context of the particular holding in the case. The Court held unconstitutional a residence requirement of one year in the state and three months in the county before a resident could vote.

have not, recently contributed to the state's economy through employment, tax payment, and expenditures within the state.[15]

The language used by the court does state a reasonable legislative purpose, i.e., to equalize costs. Applying the court's test, however, Thompson's evidence strongly suggests that he was, in fact, one of "those persons who [had] . . . recently contributed to the state's economy through employment, tax payments and expenditures within the state."[16]

The court also correctly stated that the basic requirement for establishing any sort of residency was the individual's bona fide intention to remain in the state even after finishing his education. In attempting to ascertain the individual's bona fide intention to establish residency in Nebraska, the court looked for an objective test and promulgated the following formula:

> Voting, physical presence, acquisition of housing, or payment of taxes may or may not be indicative of the establishment of a legal residence, which is primarily a question of intent. The acquisition of these various indicia, coupled with an actual residence requirement of 4 months while not attending school, obviously comes much closer to proving the bona fides of intent.[17]

The net effect of this formula, which the court found in the statutory provisions, was to create an irrebuttable presumption of nonresi-

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It appears from the case that the right to travel is fundamental whenever a traveler is somehow "penalized" as a result of his interstate movement and any statute infringing on that right is to be tested by a compelling state interest standard. Whether the Court would apply this same standard to a statute for tuition residence is open to conjecture. The Court has not yet decided that the charging of higher tuition rates is a "penalty" on interstate travel. In addition, it may be argued that under the particular circumstances of a student moving into a state for the particular purpose of attending college that a one year residence requirement is necessary to establish a bona fide residence at least for tuition purposes.

[15] 187 Neb. at 257, 188 N.W.2d at 843 (emphasis added).

[16] In addition, an argument may be made that under the recently changed tax structure in Nebraska all students whether residents or nonresidents meet this standard. Until recently, the only support for the University of Nebraska was by a property tax and it probably could be conceded that few, if any, nonresident students paid a property tax which supported the university. Consequently, there previously existed some basis for distinguishing residents and nonresidents in relation to tuition rates. However, today the tax structure which supports the University is based on a sales and income tax and every student pays sales tax on the purchases he makes in the state and those students who have jobs also pay income tax. As a result, there no longer exists any sound reason for distinguishing residents and nonresidents at least in tuition rates.

[17] 187 Neb. at 258, 188 N.W.2d at 844.

dency in relation to tuition matters. Despite all the evidence that a person could present to prove that he was a resident, unless he could prove four months continual residence while not attending school, he would be considered a nonresident for tuition purposes.

It is submitted that the court should have asked whether the irrebuttable presumption had a reasonable basis. Instead, the court held that if an original residency requirement had a reasonable basis then it would be upheld. Since it was the former and not the latter point that was contested by Thompson, it is submitted that the court decided the wrong issue.

The only judge who considered the issue presented by the plaintiff was Judge McCown who in his dissent acknowledged the problem in these words:

> There is no rational or reasonable basis on which an individual who has been a bona fide resident of and domiciled in this state for the initial time period required by statute, should be denied the right to prove that fact simply because he was in attendance at "any institution of learning in this state," whatever that term connotes.[18]

In short, the reasonable basis test should have been applied to the irrebuttable presumption which prevented Thompson from even attempting to prove his bona fide intention to reside within the state. As Judge McCown indicated, there was no reasonable basis to support the irrebuttable presumption.

The net effect of the court's analysis was that Thompson was permanently classified a nonresident for tuition purposes as long as he remained a student during continuous attendance at the University. As a result, it appears that the situation in *Thompson* was very analogous to the situation in *Carrington v. Rash*.[19] In that case the United States Supreme Court struck down a Texas constitutional provision which prohibited any member of the Armed Forces having moved to Texas during the course of his military duty from ever voting in any election in the state so long as he was a member of the Armed Forces. While the Supreme Court recognized that Texas was free to take reasonable and adequate steps to see that all applicants for the vote actually fulfilled the requirements of bona fide residence, this presumption of nonresidence went beyond constitutional limits. The Court stated that: "By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the

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[18] *Id.* at 260, 188 N.W.2d at 845.

[19] 380 U.S. 89 (1965).

Fourteenth Amendment."[20] Although, as the appellant pointed out,[21] it may be possible to distinguish *Carrington* from the situation in *Thompson* since *Carrington* involved a denial of the fundamental right to vote while theoretically at least there was no denial of a fundamental right to travel in *Thompson*,[22] *Carrington* was not discussed by the Nebraska court.

Not only did the majority opinion fail to consider the problems raised by *Carrington*, but it also totally ignored a case which decided the identical issues presented in the *Thompson* case. In *Newman v. Graham*[23] the court was faced with a challenge to a regulation of the State Board of Education of Idaho which provided: "Any person who is properly classified as a non-resident student retains that status throughout continuous regular term attendance at any institution of higher learning in Idaho."[24] The court found that the regulation as interpreted by the board was arbitrary, capricious and unreasonable and held it invalid, stating:

> Under the interpretation placed upon the foregoing quoted regulation by the Board it would necessarily follow that a student who is a non-resident of the State at the time of initial enrollment at the College would, if he attends each regular term, retain such status throughout his entire college career irrespective of the fact that he may have become a bona fide resident and domiciled more than six months in the State during the intervening time. Under such interpretation it does not afford any opportunity to show a change of residential or domiciliary status and does in effect deny equality of opportunity to persons of the same class who are similarly situated and for that reason it is an unreasonable regulation. The authority of the Board, through its authorized agency or representative, to inquire into and ascertain an applicant's residential or domicilary status is unquestioned. It is the denial to the applicant of an opportunity to be heard in the matter, within a reasonable time, that constitutes the objectionable feature of the regulation here considered.
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> It being stipulated that respondent has continuously resided and been domiciled in the State of Idaho since September, 1957, it is clear that he was improperly classified as a non-resident student upon registration for the regular term commencing in September, 1958. At that time (September, 1958) respondent had been domiciled in the State for more than six months and was entitled to be

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[20] *Id.* at 96.

[21] Reply Brief of Appellant at 5, Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

[22] *See* notes 10 and 14 and accompanying text *supra*.

[23] 82 Idaho 90, 349 P.2d 716 (1960). For a general discussion of residency requirements with respect to determining tuition fees see Annot., 83 A.L.R.2d 497 (1962).

[24] 82 Idaho at 92, 349 P.2d at 717.

> classified as other bona fide residents who had been domiciled in the State for the required six month period.[25]

It should also be noted that all but one of the tuition cases cited by the majority opinion[26] dealt with the question of the validity of original residency requirements which the Nebraska court early in its opinion[27] recognized was not at issue in the *Thompson* case. For example, it appears from a close reading of *Starns v. Malkerson*[28] that the Nebraska court's continued reliance on that case was misplaced. Although *Starns* dealt with an irrebuttable presumption of nonresidency, this presumption dealt only with the original residency requirement lasting one year. In fact, in that case the plaintiffs were allowed the lower resident tuition rate to take effect their second year of enrollment. Also, the court in *Starns* distinguished the situation in that case from the one in *Carrington* since it did not involve an absolute, permanent classification of nonresidency as long as the plaintiffs continued in school.[29]

The Nebraska court also relied on *Kirk v. Board of Regents of the University of California*[30] to support its decision in *Thompson.* The court in *Kirk* was also faced with a challenge to an original residency requirement by a plaintiff alleging that she was a California resident and therefore entitled to the benefits of the resident tuition rate. Although the court held the California provision constitutional, it noted that: "There is here unlike Newman and Carrington no arbitrary permanent class of non-residency which prohibits her from subsequently proving that she does in fact qualify for resident tuition."[31] Similarly the court in *Clarke v. Redeker*[32] upheld the original residency requirement in Iowa, but only so long as it was not interpreted to deny the plaintiff the right to prove residency merely because he continued his education.[33]

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[25] *Id.* at 95, 349 P.2d at 718-19.

[26] Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966); Kirk v. Board of Regents of University of California, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969); Landwehr v. Regents of University of Colorado, 156 Colo. 1, 396 P.2d 451 (1964).

[27] 187 Neb. at 254, 188 N.W.2d at 842.

[28] 326 F. Supp. 234 (D. Minn. 1970).

[29] *Id.* at 240.

[30] 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969).

[31] *Id.* at 443, 78 Cal. Rptr. at 269.

[32] 259 F. Supp. 117 (S.D. Iowa 1966).

[33] *Id.* at 122-23.

The court also relied on *American Commuters Association v. Levitt*[34] as supporting its result. However, in that case the plaintiffs were nonresidents of New York who commuted to New York City where they were employed. The action was brought to enjoin enforcement against the plaintiffs of a New York statute which imposed a tax on their earnings made in New York City. In the alternative the plaintiffs asked for a declaratory judgment holding unconstitutional various provisions of New York laws which afforded services and benefits to individuals who resided in New York but not to the plaintiffs who were tax paying nonresidents of New York. Among the alleged benefits denied were the rights to attend a special high school in New York and the right to attend or be eligible for a scholarship at a New York State University. Although the court denied the plaintiffs the relief sought, it must be noted that the plaintiffs acknowledged that they were nonresidents of New York entitled to resident benefits from the mere fact that they paid taxes in New York on earnings made in New York City. This is clearly distinguishable from the issues in the *Thompson* case in that Thompson alleged that he was a resident of Nebraska and was not challenging the right of the state to charge higher tuition to nonresidents.

The result in *Thompson*, however, is directly supported by *Landwehr v. Regents of the University of Colorado*.[35] In that case the regulation under attack provided:

> An emancipated minor or adult student who has registered for more than five hours per term shall not qualify for a change in his classification for tuition purposes unless he shall have completed twelve continuous months of residence while not attending an institution of higher learning in the state or while serving in the armed forces.[36]

The Colorado Supreme Court upheld the regulation as a legitimate exercise of legislative determination and also found that it did not constitute class legislation nor was it arbitrary or unreasonable. However, it should be stressed that *Landwehr* was decided before *Carrington*.

Consequently, it appears that of all the tuition cases cited by the majority, only *Landwehr* directly supports its holding and that case was decided before *Carrington*. Also while *Starns*, *Kirk* and *Clarke* each upheld the original residency requirements of that particular state, there is strong dicta in each of those decisions to suggest that

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[34] 279 F. Supp. 40 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 1148 (2d Cir. 1969).

[35] 156 Colo. 1, 396 P.2d 451 (1964).

[36] *Id.* at 4, 396 P.2d at 452.

if that court were faced with a provision similar to the one in *Thompson*, i.e., fixing a permanent classification, it would have held the provision unconstitutional. In addition, the *Levitt* case dealt with a challenge by acknowledged nonresidents rather than by one claiming to be a resident. Not only is the majority opinion to be noted for what it cites as controlling authority, but it should also be noted for the two cases which it fails to cite and discuss, *Carrington* and *Newman*, which raise many issues left unanswered by the majority.

It is submitted that the following would have been a better resolution of the issues, both from a viewpoint of judicial reasoning and from a viewpoint of the equities. First, the court should have ruled that the statute was severable and allowed the original residency requirement to stand, thus protecting the legitimate and reasonable state interest in attempting to partially equalize costs. Second, the court could still have made the question of residency one of bona fide intention but erased the irrebuttable presumption and instead placed the burden on the plaintiff to prove his intent to establish Nebraska as his residence. In this way the State is able to protect its interests, and justice is accorded the student who for various reasons was unable to wait a semester merely to meet the tuition residency requirements.

Although *Thompson* is interesting for the decision it reached regarding the right to travel, it is also interesting for what it failed to decide concerning the problem of the irrebuttable presumption. From the *Thompson* opinion one may be confident that the new statutory tuition scheme is constitutional,[37] but a closer reading of the opinion may still raise a question whether the same may be confidently said for the former statutory scheme challenged by Thompson.

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[37] However, the constitutionality of any durational residence statute may be open to question in light of *Dunn v. Blumstein*, 405 U.S. 330 (1972). *See* note 14 *supra*.

II. CRIMINAL LAW

A. Coerced Consent and Standing to Challenge Search

William Holloway was sentenced to 10 years imprisonment in the Nebraska Penal Complex following a conviction for the armed robbery of an Omaha tavern on December 13, 1968. The issues considered on appeal were whether there was sufficient probable cause to allow the issuance of a search warrant,[1] whether the defendent had standing to challenge the search and whether the consent to search the house given by the owner was coerced. The Nebraska Supreme Court found that while there was insufficient probable cause to support a search warrant, the owner gave the police her uncoerced consent to the search and the defendant lacked standing to challenge the search.[2] The issues of coerced consent and of standing will be the subject of this discussion.

In the course of their investigation of a series of robberies, Omaha police officers learned from an informant that the individuals suspected of committing these crimes were known to go to the home of the informant's sister, Christabelle Jenkins.[3] The informant gave the police this information on the day of the tavern robbery and a search warrant had already been obtained for the Jenkins residence several hours prior to that incident. Upon receiving word of the tavern robbery, six police officers converged upon the Jenkins home. The policemen showed the search warrant to a minor son of Mrs. Jenkins who allowed them to enter. The police found the defendant inside and placed him under arrest. An exhaustive search took place culminating in the discovery of various items of incriminating evidence. According to the testimony of both Mrs. Jenkins[4] and police officers,[5] the search was well under way before two policemen located Mrs. Jenkins and informed her of the search of her home.

Considering the issue of probable cause[6] and applying the stan-

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[1] For a discussion of this topic see *Nebraska Supreme Court Review*, 50 Neb. L. Rev. 468, 485-89 (1971).

[2] State v. Holloway, 187 Neb. 1, 6, 187 N.W.2d 85, 89 (1971).

[3] Brief for Appellant at 11, State v. Holloway, 187 Neb. 1, 187 N.W.2d 85 (1971).

[4] *Id.* at 6.

[5] *Id.* at 11.

[6] U.S. Const. amend. IV; Neb. Const. art. 1, § 7.

dards set forth in *State v. LeDent*[7] and *State v. Waits*[8] the Nebraska Supreme Court held the search warrant invalid because the affidavit stated nothing more than a bare conclusion, reciting neither the circumstances under which the informant drew his conclusions nor any basis for establishing the informant's credibility.[9]

The court ruled, however, that the invalidity of the search warrant did not render the seized evidence inadmissible. Relying upon *Maxwell v. Stephens*[10] for the proposition that consent freely and

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[7] State v. LeDent, 185 Neb. 380, 176 N.W.2d 21, *cert. denied,* 400 U.S. 917 (1970), *writ of habeas corpus denied,* 334 F. Supp. 64 (1971), *appeal docketed,* No. 711656, 8th Cir., Nov. 17, 1971. Here the Nebraska Supreme Court sustained the validity of a search warrant based on an informant's tip. The court held that the affidavit presented to the issuing authority must reveal (1) some of the underlying circumstances from which the informant drew his conclusions and (2) some of the underlying circumstances from which the interrogating officer or affiant concluded that the informant himself was reasonably credible. In determining the validity of the affidavit for the search warrant, the court restricted consideration only to the information actually presented to the magistrate.

[8] State v. Waits, 185 Neb. 780, 178 N.W.2d 774 (1970). Here the Nebraska Supreme Court relied on United States v. Ventresca, 380 U.S. 102, 109 (1964), in setting a standard for reviewing affidavits, and held that while sufficient recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his necessary function and not serve merely as a rubber stamp for the police, the courts should not invalidate a warrant by interpreting the affidavit in a hypertechnical, rather than commonsense manner.

[9] *See generally* Brief for Appellant at 8, 9, and 10, State v. Holloway, 187 Neb. 1, 187 N.W.2d 85 (1971), indicating that other information given by the informant concerning wholly unrelated matters to the instant case, which might have been sufficient to establish credibility, was not verified until after the search warrant was issued.

The actual affiidavit stated as "grounds for the issuance of a search warrant" only as follows: "Information received from an informant whose information has been reliable in the past." *Id.* at 29.

Chief Justice White, concurring in the result, felt that once the majority resolved the issue of defendant's lack of standing, it was unnecessary to deal with the issue of the sufficiency of the affidavit of probable cause. He said that portion of the opinion was "pure dictum" and was not binding on the court. 187 Neb. at 8, 187 N.W.2d at 91

[10] 348 F.2d 325 (8th Cir.), *cert. denied,* 382 U.S. 944 (1965). Maxwell appealed his rape conviction on grounds, *inter alia,* that police officers violated his Fourth Amendment rights when, after taking him into custody at the home of his parents, they later returned to the house and obtained permission from defendant's mother to search his room. The police seized various items of clothing worn by the defendant at the time of the crime which aided the victim in later identifying Maxwell as her assailant. The court found valid consent to the search.

intelligently given by the proper person eliminates questions otherwise existing as to the propriety of a search, the court held that Mrs. Jenkins consented to the search of her home. The court further found that Mrs. Jenkins was the only person who had sufficient interest in the place searched to give such consent. The majority felt that the status of the defendant at the time of the entry was nothing more than that of an interloper or trespasser, thus the defendant had no standing to challenge the legality of the search. Although the court asserted that the issue of consent is intertwined with the issue of standing, an attempt will be made to consider the two issues separately.

1. *Consent*

The issue of coerced consent to a search given to police by a homeowner who is not a defendant in the prosecution is not new to the Nebraska court. Such a situation was encountered in *State v. McCreary*[11] where the court sustained the validity of a search of an apartment being used by the defendant and his girlfriend. In *McCreary* a search warrant was obtained and presented to the girlfriend's father who "consented" to the search, neither questioning the warrant nor even examining it. The father informed the police that he was paying the rent on the apartment, that it was his apartment, and that the police did not need a warrant to search.[12] On appeal, the Nebraska Supreme Court held the father's consent to be valid. In a subsequent habeas corpus proceeding the Court of Appeals for the Eighth Circuit affirmed McCreary's conviction in view of the validity of the search warrant.[13] The court of appeals was nonetheless critical of the finding of the Nebraska Supreme Court, as well as the Federal District Court, that the father's consent was valid. Relying on *Bumper v. North Carolina*,[14] decided

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But in McCreary v. Sigler, 406 F.2d 1264 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969), the court of appeals found the state's reliance on the Maxwell rule misplaced as the question in *McCreary*, as it is in *Holloway*, centered around the coercive effects of a search warrant.

11 179 Neb. 589, 139 N.W.2d 362, *cert. denied*, 384 U.S. 979 (1966).

12 *Id.* at 595, 139 N.W.2d at 366.

13 McCreary v. Sigler, 406 F.2d 1264 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969).

14 391 U.S. 543 (1968). Here the Supreme Court found that the consent given by a 66-year-old Negro widow to search her isolated rural home when confronted by four white law enforcement officers who announced that they had a search warrant was not voluntarily given. The idea that coerced consent to a search is no consent appeared in several earlier decisions. In United States v. Elliot, 210 F. Supp. 357, 369 (D. Mass. 1962) the court held: "Orderly submission to law en-

subsequent to the district court decision, the court of appeals found the father's consent to be impliedly coerced and ineffectual.

The Supreme Court expressly held in *Bumper* that consent given only after the official conducting the search has asserted that he possesses a warrant is not valid when the only showing is no more than acquiescence to a claim of lawful authority.[15] A search so conducted cannot be later justified on the basis of consent if ultimately the warrant is ruled invalid.[16] The Supreme Court said, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion."[17] Applying this rationale, the *McCreary* court ruled that an officer must have a legal basis for obtaining access to private premises under the authority of the law. When the police rely on owner consent to justify a search and that consent is premised upon the fact that the police have a search warrant, it will not be effectual unless the warrant itself is valid.[18]

An examination of the testimony of Mrs. Jenkins and of the police officers would tend to indicate that her consent was given in the forbidden atmosphere contemplated by the *Bumper* and *McCreary* decisions. When the police officers confronted Mrs. Jenkins at the Workman's Club two blocks from her house, they did not ask for permission to search, but told her that they had a search warrant for her home.[19] The police advised her that a search had already revealed the proceeds of a robbery in her home and that

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forcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understanding, intentional and volutary waiver by the defendant of his fundamental rights under the Fouth Amendment." *See also* Johnson v. United States, 333 U.S. 10, 13 (1947); Amos v. United States, 255 U.S. 313, 317 (1920).

15 391 U.S. at 548-49.

16 *Id.* at 549.

17 *Id.* at 550.

18 McCreary v. Sigler, 406 F.2d 1264, 1267 (8th Cir. 1969). *See also* State v. Fourney, 181 Neb. 757, 150 N.W.2d 915 (1967), *interloctory proceedings aff'd,* 182 Neb. 802, 157 N.W.2d 405 (1968), *cert. denied,* 393 U.S. 1044 (1969), wherein this same principle, that coerced consent is no consent, was accepted by the court with respect to coerced consent obtained from the actual defendant in the prosecution.

19 Brief for Appellant at 12, State v. Holloway, 187 Neb. 1, 187 N.W.2d 85 (1971). There is some indication that Mrs. Jenkins was not informed of the search warrant until she arrived at her home in the company of the two police officers.

she had to come with them.[20] The actual warrant was neither shown nor read to her until after she agreed to the search and was taken by the police officers to her home.[21] Mrs. Jenkins further stated that she cooperated with the police because she was receiving welfare assistance and she was fearful of losing such benefits should she resist the police in their efforts.[22] Apprehension about her welfare status and an obvious fear of her own prosecution as an accomplice or as an accessory to the robbery would seem to preclude any doubt that Mrs. Jenkins' consent was given under duress and coercion. Finally, while the language of the opinion might also imply that the cooperation given by Mrs. Jenkins resulted from her life long acquaintance with one of the police officers and hence might not have been influenced by her fears, such an explanation would still find that consent the result of coercion.

2. *Standing*

Turning to the standing issue, the court accepted the criteria established in *Jones v. United States*[23] and *Mancusi v. DeForte*[24] and indicated that the issues of standing and consent are inevitably mixed. The Nebraska Supreme Court reasoned that a finding of ineffective consent on behalf of Mrs. Jenkins would demand a collateral finding that Holloway was the only individual who could consent to a search of the Jenkins home.[25] The Nebraska court declared that neither the *Mancusi* nor the *Jones* standard was intended

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[20] *Id.* at 12.

[21] *Id.* at 13.

[22] *Id.* at 7.

[23] 362 U.S. 257 (1960). While the defendant was in an apartment, which he later testified was not his but that of a friend who let him use it, the apartment was searched by federal authorities armed with a search warrant. Narcotics were found and seized, and the defendant was charged with violating federal narcotics laws. In remanding the case, the Supreme Court rejected the argument that the defendant had no standing to challenge the search due to his lack of a property interest in the premises. The Court enunciated a new test for standing recognizing that anyone legitimately on the premises where a search occurs may challenge its legality by a motion to suppress.

[24] 392 U.S. 364 (1968). State officials without a search warrant seized certain books and records of the defendant from an office that the defendant shared with several other people. The seized material was admitted into evidence at defendant's trial for conspiracy. Regarding the issue of standing, the Supreme Court found that the defendant had standing to challenge the search because the area searched was one in which he had a reasonable expectation of freedom from governmental intrusion. *Id.* at 369.

[25] 187 Neb. at 6, 187 N.W.2d at 90.

to encompass a defendant whom the court labeled a mere "trespasser."[26]

Although the issues of consent and standing present overlapping problems, they should be considered as distinct. The issue of consent focuses on the legality of the search. In contrast, the issue of standing is determined by the relationship of the defendant to the place searched and the thing seized. It is difficult to understand the Nebraska court's reasoning that a finding of ineffectual consent necessarily means that a person who has no interest in the property would be the only one who could consent. The two issues are unrelated. It would seem possible to find that there was no voluntary consent and also find that because of defendant's relationship to the Jenkins home he did or did not have standing.

The law of standing had its origins in the common law rules of trespass to real property[27] and originally applied to a relatively small class of persons.[28] It abounded with subtle technical distinctions as to the nature of defendant's status in relation to the article or premises.[29] As a general rule, it had been required that in order for one to show the requisite standing to object to evidence obtained in violation of another's Fourth Amendment rights, he must claim ownership in or right to possession of either the property seized or the premises searched.[30] Applying traditional property concepts the courts consistently held that one who sought to object on the basis of his interest in the premises must show that such an interest was greater than that of a "guest."[31] In *Jeffers v. United States*[32] the de-

[26] 187 Neb. at 7, 187 N.W.2d at 90.

[27] *See,* Edwards, *Standing to Suppress Unreasonable Seized Evidence,* 47 NW. U.L. REV. 471 (1952).

[28] If the defendant was the owner, but not the occupant, he was denied standing to challenge evidence obtained by way of an illegal search and seizure. Similiarily, employees could not object, Kelly v. United States, 61 F.2d 843 (8th Cir. 1932); nor could a bailee, Lewis v. United States, 92 F.2d 952 (10th Cir. 1937).

[29] *Compare* United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) *with* United States v. Ebeling, 146 F.2d 254 (2d Cir. 1944), where the courts struggle to determine if the defendant had "possession" of an article.

[30] *See* Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945); Kitt v. United States, 132 F.2d 920 (4th Cir. 1942); Daddio v. United States, 125 F.2d 924 (2d Cir. 1942).

[31] *E.g.,* United States v. Eversole, 209 F.2d 766 (7th Cir. 1954). In Accardo v. United States, 247 F.2d 568 (D.C. Cir. 1957), the police seized stolen property at an apartment at which defendant had been a guest. The court ruled that defendant had no standing to file a motion to suppress the stolen property as evidence.

[32] 342 U.S. 48 (1951). Here the defendant moved to exclude from evidence contraband narcotics claimed by him but which were seized on the premises of another in a warrantless search.

fendant was unable to show such a sufficient interest in the premises, but the Supreme Court held that a defendant could establish standing by a showing of ownership or possession of the article seized. The Court reasoned that, "The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both 'houses' and 'effects.' "[33]

Courts have frequently indicated that one may not claim a right under the Constitution unless he is a member of the class for whose benefit the constitutional protection was made.[34] Without a personal right in the property or premises a defendant could not be heard to complain of a search and seizure which violated the rights of another. But such a limitation on the exclusionary rule has drawn severe criticism[35] and a host of seemingly inequitable decisions.[36] Yet every federal circuit has held that the privilege to object to unreasonable searches and seizures is a personal right[37] and the

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[33] *Id.* at 51.

[34] People *ex rel* Hatch v. Reardon, 204 U.S. 152 (1907).

[35] *See* Darling, *Standing to Object to an Unlawful Search and Seizure,* 15 WYO. L.J. 218 (1961); Moffat, *Constitutional Law—Searches and Seizures—Standing to Suppress Unreasonably Seized Evidence,* 14 SW. L.J. 521 (1960); Nicholas, *Constitutional Law—Persons Entitled to Raise Constitutional Questions—Standing to Suppress Evidence Obtained in Violation of the Fourth Amendment,* 59 MICH. L. REV. 444 (1961); Note, *Judicial Control of Illegal Search and Seizure,* 58 YALE L.J. 144 (1948) (criticizing the limitation as an unwarranted emphasis on the joinder of the Fifth Amendment, which is personal, to the Fourth Amendment, which is essentially a broad grant of immunity); Smith, *Evidence—Standing to Object to Unlawful Search and Seizure,* 24 GA. B.J. 131 (1961).

[36] *See* United States v. De Vasto, 52 F.2d 26 (2d Cir.), *cert. denied,* 284 U.S. 678 (1931). Here defendants formed a corporation that leased a brewery ostensibly to produce "near beer" but secretly manufacturing genuine beer in violation of the National Prohibition Act. In a raid, government agents seized the corporation's falsified records and introduced them as evidence in the subsequent prosecution. The court denied standing to the defendants to challenge the search finding them only stockholders. Since the books were purchased by the corporation and kept by its bookkeeper, they were corporate records, and any search if illegal only violated the corporations rights and not those of the defendants. *See also* A. Guckenheimer & Bros. v. United States, 3 F.2d 786 (3d Cir.), *cert. denied,* 268 U.S. 688 (1925).

[37] Parr v. United States, 255 F.2d 86 (5th Cir. 1958); United States v. Pepe, 247 F.2d 838 (2d Cir. 1957); Accardo v. United States, 247 F.2d 568 (D.C. Cir.), *cert. denied,* 355 U.S. 898 (1957); Lovette v. United States, 230 F.2d 263 (4th Cir. 1956); Baskervill v. United States, 227 F.2d 454 (10th Cir. 1955); Wilson v. United States, 218 F.2d 754 (10th Cir. 1955); United States v. Eversole, 209 F.2d 766 (7th Cir. 1954); Brubaker v. United States, 183 F.2d 894 (6th Cir. 1950); Grainger v.

states dealing with the issue have also insisted upon an element of personal interest.[38]

Against this background, the Supreme Court in 1960 decided *Jones v. United States,*[39] the first comprehensive treatment by the Court with regard to the requisite standing needed to invoke the protection of the Fourth Amendment. In *Jones* the defendant was indicted for illegal possession of narcotics. The drugs were uncovered by a search of an apartment in which the defendant was a guests. The defendant moved to supress the evidence obtained on the grounds that the search was illegal. The prosecution challenged the standing of the defendant to make such a motion since he had alleged neither ownership nor an interest in the premises other than that of an "invitee" or "guest." In a unanimous reversal of the lower court's determination of the standing question[40] the Court noted:

> Two separate lines of thought effectively sustain defendant's standing in this case. (1) The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below.[41]

United States, 158 F.2d 236 (4th Cir. 1946); United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946); Kitt v. United States, 132 F.2d 920 (4th Cir. 1942); Ingram v. United States, 113 F.2d 966 (9th Cir. 1940); Whitcombe v. United States, 90 F.2d 290 (3d Cir.), *cert. denied,* 302 U.S. 759 (1937); Schnitzer v. United States, 77 F.2d 233 (8th Cir. 1935); Kwong How v. United States, 71 F.2d 71 (9th Cir. 1934); Gowling v. United States, 64 F.2d 796 (6th Cir. 1933); Cravens v. United States, 62 F.2d 261 (8th Cir. 1932); Mabee v. United States, 60 F.2d 209 (3d Cir. 1932); Nunes v. United States, 23 F.2d 905 (1st Cir. 1928); Klein v. United States, 14 F.2d 35 (1st Cir. 1926).

[38] *See* Annot., 50 A.L.R.2d 531, 571 (1956). California is the one exception. In People v. Martin, 45 Cal.2d 755, 290 P.2d 855 (1955), California adopted an exclusionary rule on its own initiative, relying on the deterrence of illegal police activity theory. Judge Traynor speaking for a unanimous court declared that a third party had standing to object to an illegal search and seizure whether or not it violated his particular constitutional rights.

[39] 362 U.S. 257 (1960).

[40] Mr. Justice Douglas concurred in the decision as to standing but dissented on the ground that the warrant was issued without probable cause. *Id* at 273.

[41] *Id* at 263.

The Court sought to put an end to the famous "dilemma" as articulated by Judge Learned Hand,[42] that regularly denied standing to defendants in search and seizure cases where the article seized was contraband or of a highly incriminating nature. Ordinarily, in order for the defendant in such a situation to challenge the search and seek suppression of the evidence obtained, he must first have had to admit ownership or possession of the incriminating article. Since ownership or possession was usually sufficient in itself to sustain a conviction, the defendant refusing to claim the article seized was denied standing. In rejecting the "dilemma" the Court stated that to hold otherwise would not be "consonant with the amenities . . . of the administration of criminal justice" in that it would allow the government to benefit from the contradictory positions of *denying ownership* for the purpose of depriving defendant of the exclusionary rule and *alleging ownership* for the purpose of conviction.

With regard to the second ground, the Court rejected the long line of lower court decisions that had used common law property principles to determine standing:

> We do not lightly depart from the course of decisions of lower courts. We are persuaded, however, that it is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law . . . .[43]

In place of the common law distinctions, the Court enunciated a much more liberal and practical test to determine standing: "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that *anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him.*"[44]

Jones does not purport to discard the notion that standing can be established by a showing of a possessory or proprietary interest in either the premises or the property. It merely adds an additional

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[42] Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932), wherein Judge Hand observed: "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma."

[43] 362 U.S. at 266.

[44] *Id.* at 267 (emphasis added).

element with the intent to significantly enlarge the class of people who may have standing. In arriving at the decision that the defendant was legitimately on the premises, Justice Frankfurter made reference twice to direct testimony of the defendant that the lessee gave him permission to us the apartment.[45] With few exceptions the federal courts[46] and an increasing number of state courts[47] have found standing where the defendant was on the premises with the owner's permission.

An examination of the testimony in the instant case would indicate that essentially this same type of permission was given Holloway by Mrs. Jenkins. She admitted knowing the defendant all her life, that he frequently came to her home and that he had implied permission to do so even in her absence.[48] When it ignores such testimony the Nebraska Supreme Court seems to repudiate the very basis of the expanded standing test of *Jones.*

Once having called the defendant a trespasser[49] the Nebraska court, for all practical purposes, also rejected the standard established in *Mancusi v. DeForte*[50] while attempting to formally agree with it. In *Mancusi* state officials armed with a subpoena *duces tecum,* but without a search warrant, seized certain files from an office shared by DeForte and several others. Over DeForte's objection the seized material was admitted into evidence. In determining that DeForte did have standing to challenge the search, the Supreme Court articulated a principle implied in *Katz v. United States,*[51] a telephone conversation "seizure" case, and extended it to

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[45] *Id.* at 259, 265.

[46] *See,* e.g., Garza-Fuentes v. United States, 400 F.2d 219 (5th Cir.), *cert. denied,* 394 U.S. 963 (1969); Montoya v. United States, 392 F.2d 731 (5th Cir. 1968); Villano v. United States, 310 F.2d 680 (10th Cir. 1962); United States v. Pisano, 191 F. Supp. 861 (S.D.N.Y. 1961).

[47] *See generally* State v. Allen, 9 Ariz. App. 196, 450 P.2d 708 (1969); Dean v. Fogliani, 81 Nev. 541, 407, P.2d 580 (1965); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962); Kluck v. State, 37 Wis. 2d 378, 155 N.W.2d 26 (1967).

[48] Brief for Appellant at 20, 26, State v. Holloway, 187 Neb. 1, 187 N.W.2d 85 (1971).

[49] 187 Neb. 1, 187 N.W.2d 85.

[50] 392 U.S. 364 (1968).

[51] 389 U.S. 347 (1967). Here federal agents "seized" incriminating telephone conversations through the use of electronic "bugging" devices attached to the outside of a public telephone booth. In finding that defendants' Fourth Amendment rights were violated, the U.S. Supreme Court announced the rule that that the Fourth Amendment protects people and not places, and although one may be in a place readliy accessible to the public, that which he seeks to preserve as private may be constitutionally protected.

physical seizures in *Mancusi*. The Court said that *Katz* had made it clear that the capacity to claim protection of the Fourth Amendment no longer depended solely upon a property right in the invaded place, but rather upon whether the area was one in which there was a *reasonable expectation of freedom from governmental intrusion*.

The *Mancusi* standard is another extension of standing and a number of state decisions have given the decision literal interpretation. In *State v. Matias*[52] the Supreme Court of Hawaii held that a defendant who was an overnight guest at an apartment had standing to challenge a search made with neither an arrest warrant nor a search warrant, even though the tenant had given his consent to the search. Relying on *Jones* and *Mancusi* the Hawaii court found that the consent of the tenant operated only to waive the tenant's rights under the Fourth Amendment, but the tenant's guests had standing to challenge the legality of the governmental intrusion.

In *Derby v. Cupp*[53] the judge, in referring to the concept of "reasonable expectations" noted that in both *Jones* and *Mancusi* the defendants had a continuing interest in the premises in that they were always able to return to the place to carry on business or *merely to relax*. While the concept of "reasonable expectations" is difficult to apply, it would seem that its emphasis remains on the extent of interest the defendant has in the premises. At some point he attains sufficient interest in a place to be entitled to privacy. DeForte and Jones attained such an interest via owner permission, and it would seem from the testimony in the instant case that Holloway had at least as much.

It would appear that the Nebraska court intends to narrowly interpret the Supreme Court's decisions concerning a third party's right to challenge a search and seizure and to continue to reject the more liberalized basis for standing that is the essence of the *Jones* and *Mancusi* decisions. In view of the Supreme Court's decisions concerning coerced consent to a search, the Nebraska court's analysis of the circumstances surrounding the consent given by Mrs. Jenkins may have sanctioned consent that was constitutionally suspect.

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[52] 51 Hawaii 62, 451 P.2d 257 (1969).

[53] 302 F. Supp. 686 (D. Ore. 1969).

B. PHOTOGRAPHIC IDENTIFICATION

Raymond Moss was convicted of robbery, the use of a firearm in the commission of a felony, and sodomy. All of the charges arose out of the same incident.[1] The primary basis of the defendant's appeal concerned the use of photographic identification while the defendant was in custody. The Nebraska Supreme Court held that the accused did not have a right to counsel at such an identification.[2] This note will discuss the use of photographic identification of a suspect and the effect of its misuse.

The facts indicate that the female sodomy victim was assaulted by an unknown Negro man who robbed her and then forced her to participate in the act of sodomy. While the crime was in progress, a deliveryman rang the doorbell. The assailant answered the door and robbed the tradesman.[3] That same day the sodomy victim examined a large number of photographs provided by the police. She selected one photograph of a man who resembled her assailant, but she did not make a positive identification.[4] Apparently, the victim's selection was not a photograph of the defendant Moss.[5] Two days later, in an unrelated incident, the police used tear gas to force the defendant Moss out of a house across the street from where the sodomy victim lived. The victim then observed Moss and identified him as her assailant.[6] After the defendant was taken into custody the police showed the witness five photographs. All five photographs were of Negro men, but two of the pictures were of the defendant and three were of other individuals.[7] The victim picked the two photographs of the defendant. On cross-examination concerning the photograph which she had selected on the day of the commission of the acts, the witness "acknowledged she had difficulty identifying Negro males,"[8] however, she had identified Moss at the

1 All of the charges arose out of acts alleged to have been committed by the accused on the morning of August 8, 1970. State v. Moss, 187 Neb. 391, 392, 191 N.W.2d 543, 543 (1971).

2 *Id.* at 394, 191 N.W.2d at 545.

3 The facts are set out in more complete detail in the briefs of the parties. *See* Brief for Appellant at 5-12, and Brief for Appellee at 3-5, State v. Moss, 187 Neb. 391, 191 N.W.2d 543 (1971).

4 187 Neb. at 393, 191 N.W.2d at 544.

5 *Id.* The report was not clear on this, but there was some indication that the photograph was not that of Moss.

6 *Id.*

7 *Id.*

8 *Id.* One of the major problems in pre-trial identification, in person or by photograph, is the recognized inability of members of one race to distinguish between members of another race. *See* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 122-25 (1965); 50 NEB. L. REV. 474, 478 (1970).

pre-trial hearing because he had "been in her home and that there was no doubt in her mind that he was the man."[9]

The deliveryman also made a positive in-court identification of the defendant as the man who robbed him.[10] On the day of the robbery the deliveryman had examined several photographs at the police station and picked out two which he identified as resembling the man who had robbed him.[11] Apparently, one of these two photographs was not of the defendant.[12] After the accused was in custody the deliveryman was again shown photographs by the police, and he identified two of the five shown as being photographs of his assailant.[13] The witness testified at the pre-trial hearing that his identification of the defendant was not based on the photographs.[14]

The defendant appealed his conviction on the grounds that the photographic identification was so impermissibly suggestive that it gave rise to the likelihood of irreparable misidentification and that he had been denied a constitutional right to counsel during the photographic identification because the identification was being used as a substitute for a formal line-up.[15] The trial court had held a "Wade-Gilbert-Stoval hearing"[16] to determine if the in-court eyewitness identification should be suppressed as being tainted by a suggestive photographic identification procedure. The trial court had found that the witnesses' identifications were independent of the use of the photographic identification.[17] The Nebraska Supreme Court rejected both arguments of the defendant and reiterated its holding in *State v. Randolph*,[18] saying that:

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[9] 187 Neb. at 393, 191 N.W.2d at 544.

[10] *Id.* at 394, 191 N.W.2d at 544.

[11] *Id.* at 393, 191 N.W.2d at 544.

[12] *Id.* at 393-94, 191 N.W.2d at 544. The witness had picked two photographs from the I.D.M.O. file, one a front view and one a profile view, believing them to be the same person. Brief for Appellant at 10, Brief for Appellee at 4. Also, although there was evidence that the defendant's photograph was in that file and that both witnesses examined the file, there was doubt as to whether any of the photographs examined by the two witnesses were of the defendant. Brief for Appellee at 4, State v. Moss, 187 Neb. 391, 191 N.W.2d 543 (1971).

[13] 187 Neb. at 394, 191 N.W.2d at 544. Both photographs were of the defendant and the other three were of other individuals. Brief for Appellant at 5, State v. Moss, 187 Neb. 391, 191 N.W. 2d 543 (1971).

[14] *Id.* at 394, 191 N.W.2d at 544.

[15] *Id.* at 392, 191 N.W.2d at 543-44.

[16] This refers to the cases known as the "right to counsel at a line-up triology." United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

[17] 187 Neb. at 392, 191 N.W.2d at 544.

[18] 186 Neb. 297, 183 N.W.2d 225 (1970).

> Each case must be considered on its own facts and that conviction based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.[19]

The Nebraska court then dismissed the defendant's argument for a right to counsel at such photographic identification by pointing out that the Second, Fifth, Seventh, Ninth, and Tenth Circuit Courts had rejected that proposition, and the Supreme Court had not yet held differently.[20]

This note takes the position that photographic identification is useful for apprehending the suspect but usually has no purpose after the accused has been taken into custody and is available for a line-up.[21] Further, such identification is at least as fraught with the danger of misidentification and suggestion as is a line-up. Thus, counsel should be present at the proceedings or, at least, procedures should be used which would enable counsel to determine the manner in which the identification was conducted.

An analysis of the argument that counsel is needed at the photographic identification begins with the Sixth Amendment of the Constitution which provides that the defendant in a criminal case will have the aid of counsel in his defense.[22] By virtue of the *Escobedo*[23] and *Miranda*[24] cases, the right to counsel was extended to police interrogations. Subsequently, the Supreme Court of the United

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[19] 187 Neb. at 394, 191 N.W.2d at 545. The Nebraska Supreme Court was quoting the United States Supreme Court holding in Simmons v. United States, 390 U.S. 377, 384 (1968).

[20] 187 Neb. at 394-95, 191 N.W.2d at 545. The court cited United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Bennet, 409 F.2d 888 (2d Cir. 1969). *See also* United States v. Long, 449 F.2d 288 (8th Cir. 1971); United States v. Serio, 440 F.2d 827 (6th Cir. 1971); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969); United States v. Robinson, 406 F.2d 64 (7th Cir. 1969).

[21] If the accused does not consent to a line-up then the only alternative is to use the photographic identification. The Nebraska Supreme Court met this problem in such a manner in State v. Tramble, 187 Neb. 488, 191 N.W.2d 822 (1971). However, it should be pointed out that because there is no alternative to a photographic identification is not a justification for denying counsel at such a procedure, especially when it is used as a substitute to a line-up.

[22] U.S. CONST. amend. VI.

[23] Escobedo v. Illinois, 378 U.S. 478 (1964).

[24] Miranda v. Arizona, 384 U.S. 436 (1966).

States held that the accused had a right to counsel at a police line-up used for the purpose of pre-trial identification.[25] Counsel was required so that the issue of the credibility of the identification could be effectively argued. Is is difficult to prove that the police influenced the witness[26] at the line-up if counsel is not present during the procedure.[27] However, in *Simmons v. United States*[28] the Supreme Court declined to extend the right of counsel to photographic identifications. In that case the question before the Court was whether the photographic identification procedure was too suggestive, not whether the accused had a right to counsel at such a proceeding.[29] The Court said that it would not reverse a conviction based on pre-trial photographic identification unless it was so "impermissibly suggestive as to give rise to a very substantial likelihood of misidentification."[30] The Court admitted that the improper use of photographs by the police sometimes causes witnesses to err in identifiying criminals,[31] but felt *in this case* that the photographic identification procedure was not that misleading.[32]

In *United States v. Marson*[33] the defendant had argued that the *Wade* and *Gilbert* decisions referred not just to line-ups but also to photographic identifications. Without deciding the issue the Court

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25 United States v. Wade, 388 U.S. 218 (1968). There the Court pointed out that the right to counsel could be rendered nugatory by misidentification in the absence of counsel.

26 Some of the suggestive methods used by police in line-ups and photographic identification are described in United States v. Wade, 388 U.S. 218 (1968), and P. WALL, *supra* note 8, at 53. They include such methods as having all members of the line-up known to the witness except the suspect, and having the suspect being the only Oriental in a line-up of six Caucasian men.

27 Comment, *Criminal Procedure—Photo-Identifications*, 43 N.Y.U. L. REV. 1019, 1028 (1968).

28 390 U.S. 377 (1968).

29 There the police used a photographic identification before the defendant had been taken into custody. The Court recognized that the defendant was not claiming a right of counsel at his identification, as he was not yet in custody nor his identity established, but was rather claiming the procedure was so suggestive as to taint his identification in court. *Id.* Likewise the Nebraska Supreme Court, in two cases where the photographic identification was prior to the suspect being taken into custody, has limited the question to the suggestiveness of the procedure. State v. Reed, 188 Neb. 195, 195 N.W.2d 503 (1972); State v. Evans, 187 Neb. 474, 192 N.W.2d 145 (1971).

30 390 U.S. at 384.

31 *Id.* at 383.

32 *Id.* at 385.

33 408 F.2d 644 (4th Cir. 1968).

of Appeals for the Fourth Circuit dismissed on the grounds that *Stovall v. Denno*[34] had held the *Wade* and *Gilbert* decisions to be prospective only.[35] The Third Circuit has gone farther however. In *United States v. Zeiler*[36] the court pointed out that *Wade* had recognized that suggestive pre-identification procedures used by the police were a major factor in causing mistaken identifications and that these mistakes were rarely corrected because the witness was unlikely to change his mind once he has made his identification. The court in *Zeiler* felt that the defendant was not able to effectively contest the reliability of the photographic identification procedure because neither he nor his counsel were present. The court pointed out that:

> The considerations that led the court in *Wade* to guarantee the right of counsel at line-ups apply equally to photographic identifications conducted after the defendant is in custody. The dangers of suggestion inherent in a corporal line-up identification are certainly as prevalent in a photographic identification. . . . Also the defendant himself, not being present at such a photographic identification, is even less able to reconstruct at trial what took place unless counsel was present.[37]

The *Zeiler* court held that such a procedure after the accused was in custody was a substitute for a line-up, and that therefore counsel was required.[38] The court also held that if counsel were not present, the photographic identification would not be admissible, and because of *Wade* the government would have the burden of "establishing by clear and convincing evidence"[39] that the witness was not influenced by the prior improper photographic confrontation.[40] The

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[34] 388 U.S. 293 (1967).

[35] 408 F.2d at 649.

[36] 427 F.2d 1305 (3d Cir. 1970). In this case the police showed photographs to the witnesses for the purpose of identification of the defendant after the defendant was in custody and just prior to a line-up of the defendant. For another analysis of the impact of this case see 48 N.D. L. REV. 511 (1972).

[37] 427 F.2d at 1307.

[38] *Id.* The court distinguished the Zeiler case from the Simmons case in that the Simmons case involved a photographic identification before the suspect was taken into custody, while Zeiler involved a photographic identification after the suspect was taken into custody.

[39] *Id.* at 1308.

[40] Here the court said that since three of the eight photographs shown were of the defendant and were snapshots whereas the others were mugshots, and since the defendant was the only one wearing glasses and the felon was known to wear glasses, there were suggestive influences on the witness. *Id.* The court reversed all three convictions of robbery because of the absence of counsel at the photographic iden-

court stressed that since the defendant was in custody the photographic identification was unnecessary[41] and that, moreover, "the constitutional safeguards that *Wade* guaranteed for line-ups may be completely nullified if the police are able privately to confront witnesses prior to the line-up with suggestive photographs."[42]

However the Third Circuit later re-examined its holding in *Zeiler* and overruled that portion "which denominated a pre-trial photographic identification as a critical stage requiring the presence of counsel to satisfy the Sixth Amendment."[43]

In *United States v. Ash*[44] the Court of Appeals for the District of Columbia Circuit held that the right of the accused to counsel at line-ups also applied to photographic identifications after the suspect had been taken into custody. That court felt that the considerations that required counsel at line-ups applied to photographic identifications as well. Those considerations were the possibility of suggestive methods, the difficulty of reconstructing those sugges-

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tification. The court held the in-court identification in one of the convictions was inadmissible as it was unduly suggestive and remanded the other two convictions to the trial court for determination whether they were also tainted by a suggestive photographic identification procedure. The court on a later appeal of the case held that the other eyewitness identifications were not fatally tainted as they were sufficiently independent of the suggestive photographic procedure which had been conducted without the presence of counsel. United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971).

41 427 F.2d at 1308.

42 *Id.* at 1307. The court also pointed out the dissent's fear in United States v. Marson, 408 F.2d 644 (4th Cir. 1968), that the absence of a requirement of counsel at photographic confrontations will actually encourage the police to abuse the identification process and that the use of photographs when unnecessary may well be such an abuse.

43 Reed v. Anderson, 40 U.S.L.W. 2736 (3d Cir. April 11, 1972). The majority opinion said that the Zeiler decision brought on a "collision course the public policy considerations of Wade . . . and Gilbert . . . and the equally respected consideration that evidence relevant to the truth-finding process should not be arbitrarily withheld from the fact finder." *Id.* The majority opinion stated that it was a desirable police practice to have counsel at a pre-trial photographic identification but that is was not a constitutional necessity. The dissenting opinons both maintained that the same problems that affected corporeal identification in the absence of counsel were even more involved with photographic identification in the absence of counsel, since the defendant must depend on the prosecution to relate what happened at the photographic display.

44 10 CRIM. L. REP. 1085 (D.C. Cir. 1972). This case involved the showing of five photographs to a witness on the eve of the trial, which was being held three years after the crime had occurred. The court's holding was a 5-4 decision.

tive methods and the freezing of the witness's identification under these circumstances.[45] The District of Columbia Circuit referred to the reasoning used in the *Zeiler* case, but was careful to point out that its holding was not intended to interfere with police investigations and that the right to counsel was not absolute. Apparently, if the use of counsel created a delay which endangered the effectiveness of the continuing investigation, the right to counsel could be disregarded.[46] However, a number of the other courts of appeals have declined to require counsel at such a hearing,[47] and the Supreme Court of the United States has not yet made such a requirement. It is thus clear that the weight of authority remains against requiring counsel at such proceedings.[48]

Identification of the suspect serves its most useful function during the investigative stage of the police work, i.e., before the accused is taken into custody.[49] With a photograph the police are able to get a precise description of the suspect that can easily be distributed to investigating officers to assist them in tracking down the suspect. The disadvantages of photographic identification are evident when it is compared with an in-person identification. Photographs are two dimensional rather than three dimensional, and some distinguishing features may not be as apparent as they might be in person. Also, people may tend to resemble each other in pictures while not resembling each other in person.[50] Thus when the witness sees a pic-

[45] *Id.*

[46] *Id.* at 1085-86.

[47] In the following cases the witness was shown photographs of the defendant after he was in custody and the Circuit Courts held there was not a requirement for counsel at such procedure. United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); United States v. Williams, 436 F.2d 1166 (9th Cir. 1970); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970). The Fowler court reversed conviction on the grounds that the photographic identification procedure was so impermissively suggestive when the witness was shown only two photographs, both of which were the defendant. *See also,* United States v. Long, 449 F.2d 288 (8th Cir. 1971); United States v. Serio, 440 F.2d 829 (6th Cir. 1971); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969); United States v. Bennet, 409 F.2d 888 (2d Cir. 1969); and United States v. Robinson, 406 F.2d 64 (7th Cir. 1969).

[48] *See* citations listed in People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1970), and State v. Royster, 57 N.J. 472, 273 A.2d 579 (1971).

[49] P. WALL, *supra* note 8, at 81-82. Also, the Supreme Court of the United States mentioned in Simmons v. United States, 390 U.S. 377 (1968), that despite its hazards, the use of photographs served a vital function in police preliminary investigations and that the Court would be unwilling to prohibit it.

[50] Comment, *Photographic Identification: The Hidden Persuader,* 56 IOWA L. REV. 408 (1968).

ture which resembles the person that the witness saw commit the crime, the witness's mind may then retain the picture image rather than the image of the offender's face.[51] When the subject of the photograph is brought before the witness, the witness truly believes that this individual is the person who committed the act. The argument is that the person the witness is identifying is the person in the photograph and not necessarily the person the witness saw commit the crime.[52]

Even with these disadvantages, the need for photographic identification prior to apprehension has been recognized.[53] However, in most cases photographic identification is simply unnecessary when the accused is in custody.[54] Misidentification is less likely to occur during a line-up, and therefore, when the defendant is in custody, photographic identification should not be used.[55]

In addition to the problem of a witness retaining the image of the photograph, there is the problem of the police misusing the procedure in order to insure identification of a suspect whom they believe to be the felon. As pointed out earlier, it is difficult for the defense counsel to discover suggestive procedures if he is not present during the identification. Of course, the more obvious suggestive methods can be discovered by cross-examination of the witness. These include using other photographs of non-blacks when the accused is a black or using a photograph in which the clothing of the accused or the background of the picture is notably different from the other pictures. These methods are more likely to be noticed and recalled by the witnesses. However, the witnesses are not as likely to notice such devices as placing the photographs of the accused on several pages of a "mug book," or subtle differences in the background, or the method in which the photograph is presented for viewing in relationship to the other photographs. This problem could be partially remedied by using a procedure in which the

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[51] *Id.*; P. WALL, *supra* note 8, at 66-68; Simmons v. United States, 390 U.S. 377, 383 (1968).

[52] *See* People v. Starling, 131 Ill. App. 2d 806, 266 N.E.2d 905 (1971). There the dissenting opinion pointed out that the witness who is shown a photograph before an in-court identification is made, may be identifying the person in the photograph rather than the offender.

[53] *See* note 49, *supra*.

[54] There are circumstances where a photographic identification would be necessary even when the accused is in custody, such as when the witness is physically unable to attend a regular line-up or the suspect is in custody in a distant jurisdiction. P. WALL, *supra* note 8, at 72.

[55] 50 NEB. L. REV. 474, 477 (1970); WILLIAMS & HUMMELMANN, *Identification Parades*, CRIM. L. REV. 479, 485 (1963).

photographs used in the identification are identified, the methods used to present the pictures are described, and the witnesses' responses are recorded.[56] In this way the defense counsel would be able to spot the use of a suggestive device. He would be able to examine and compare the exact photographs used[57] and the manner in which they were shown to the witnesses. As a result, he would have the information needed to cross examine the witness to discredit the identification. This type of procedure would protect the accused both before and after he is taken into custody in that the accused would be better able to expose a prejudical display to the witnesses.[58] However, even with this recording procedure the police could falsify the record if they were truly bent on incriminating the suspect. Thus counsel is necessary both as an observer and as a deterrent to any such activity by the authorities.[59]

In this case the police showed five photographs to the witnesses after the defendant was in custody, and of those five photographs, two were of the defendant.[60] This alone would seem to be so suggestive as to give rise to the strong likelihood of misidentification since arguably a witness who saw two pictures of the same man would assume that that man was the one the police thought was guilty. Also there is some question as to the similarity of the photographs. The sodomy victim did not examine the other three photographs because they did not "even vaguely" resemble her assailant.[61] There is some indication that the individuals in the five photographs were dissimilar in appearance.[62] The court stressed

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[56] Comment, *supra* note 50, suggests this type of procedure and presents a form which could be used by the police.

[57] In People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971), the court said that if the defense counsel is furnished the exact photographs used in the identification the counsel can easily discover the possibilty of prejudice. However, it should be noted that even examining the photographs used in the procedure will not show counsel the method of display or the gestures or comments used by the police.

[58] *Id.* There was apparently no recording procedure in the photographic identification of Moss. Brief for Appellee at 4.

[59] The function of counsel at line-ups is discussed in Comment, *Lawyers and Line-ups*, 77 YALE L.J. 390 (1967), and Comment, *The Right to Counsel During Pre-Trial Identification Proceedings*, 47 NEB. L. REV. 740 (1968). It can be argued that counsel should have the same function at a photographic identification.

[60] 187 Neb. at 393-94, 191 N.W.2d at 544. The police officer who showed the photographs to the witness admitted that two of the five photographs shown were of the defendant.

[61] Brief for Appellant at 7, State v. Moss, 187 Neb. 391, 191 N.W.2d 543 (1971).

[62] *Id* at 5.

that both witnesses made positive identifications at the trial,[63] perhaps suggesting that this would eliminate the problem of a suggestive photographic procedure. However, since the defendant was apparently the only black man in the court at the time of the identification, the "independence" of the in-court identification and the photographic identification is questionable.[64] In addition, the problem of the witness retaining the image of the photograph rather than the image of the felon would increase the likelihood of misidentification.[65] In this case both witnesses had misidentified at least one photograph on the day of the occurrence.[66] Since there was no reason for the use of the photographic identification because the suspect was available for a more reliable line-up, the question arises as to whether the police were using the photographs to suggest the guilt of the accused and to burn the accused's image into the minds of the witnesses so as to give a stronger in-court identification. Also the question arises whether the police were trying to avoid the requirement of counsel at a line-up by substituting a photographic identification.[67]

Witnesses will seldom be aware of certain suggestive methods that may be used in photographic identifications. Yet the Nebraska Supreme Court has bowed to the present weight of authority and has held that the police may substitute a photographic identification procedure for a line-up and thus avoid the requirement under the *Wade* doctrine that counsel must be present at a line-up. Thus the defendant must rely on what the prosecution claims to have occurred at the photographic identification with only a feeble guarantee given by the right of cross-examination, as to the truthfulness and accuracy of the prosecution's story. The meagerness of authority for requiring counsel at photographic identifications when the accused is in custody is outweighed by the necessity of counsel to insure protection from suggestiveness by the police and to protect the fundamental right of a party to have counsel present at any time when the determination of his guilt is materially affected.

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63 187 Neb. at 394, 191 N.W.2d at 544-45.

64 *Id.* at 394, 191 N.W.2d at 545.

65 *See* note 45, *supra.*

66 187 Neb. at 393, 191 N.W.2d at 544.

67 In People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971), the dissenting opinion maintained that the use of a photographic identification after the defendant was in custody was for the conscious purpose of evading the requirement of counsel at a line-up and that "the opinion of the majority, therefore stands as an explicit sanction of that evasion and an invitation to dispose of those requirements entirely by replacing corporal line-ups with photographic line-ups."

C. PROBABLE CAUSE

Michael Waits appealed from a jury verdict finding him guilty of unlawful possession of lysergic acid diethylamide, commonly referred to as LSD,[1] and from his subsequent sentence of two years in the Nebraska State Reformatory. The validity of the affidavit of probable cause[2] supporting the search warrant and the scope of the search were the basic issues on appeal. In affirming Waits' conviction, the Nebraska Supreme Court ostensively reaffirmed the standard established in *State v. LeDent*[3] for determining the sufficiency of affidavits of probable cause. This article will compare the two affidavits in an effort to determine if the Nebraska court has further relaxed the probable cause standard which the court found to be marginally complied with in the *LeDent* affidavit.[4]

United States postal authorities alerted state narcotics officials of the existence of a package addressed to Waits which they considered "suspicious in appearance." The postal officials held the parcel until it was weighed, examined and marked for identification by a Nebraska state patrolman. The package was not opened. A search warrant was obtained and the package was sent in due course to the home of the defendant. Law enforcement officers

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1 *See generally* NEB. REV. STAT. §§ 28-451 *et seq.* (Supp. 1969).

2 For an analysis of a minimum standard for probable cause established in State v. LeDent, 185 Neb. 380, 176 N.W.2d 21 (1970), *see Nebraska Supreme Court Review*, 50 NEB. L. REV. 468, 485-89 (1971).

3 185 Neb. 380, 176 N.W.2d 21, *cert. denied*, 400 U.S. 917 (1970), *writ of habeas corpus denied*, 334 F. Supp. 64 (1971), *appeal docketed*, No. 711656, 8th Cir., Nov. 17, 1971. *See* note 2, *supra*.

4 *Id.* at 384, 176 N.W.2d at 24. The Nebraska Supreme Court found that the affidavit for the search warrant marginally complied with constitutional requirements. That affidavit read: "[T]hat the said Larry LeDent is a resident of the above address and is the son of the registered title holder; that a reliable informant related to the investigative authorities the said Larry LeDent has offered to the said reliable informant certain narcotic drugs for resale; that on Friday, November 1, 1968, the said Larry LeDent told the said reliable informant that he had fifty (50) lids of marijuana available and also a homemade brick of grass available for resale and that he knows the reliable informant knows that the narcotics are kept at the residence at 13450 Frederick Street, Omaha, Douglas County, Nebraska . . . . The reliable informant has given your affiant other information that coincides with information received from other reliable sources. Said reliable informant's information has been verified and that information received has been the truth. The said Larry LeDent is now charged under an information charging him with possession of depressant or stimulant drugs in a separate incident." Brief for Appellant at 13-14, State v. LeDent, 185 Neb. 380, 176 N.W.2d 21 (1970).

immediately set up police surveillance of the Waits home. Upon delivery of the package the officers entered the home, seized the package and arrested the defendant. The package was subsequently opened by police and found to contain LSD.

Quoting the language of the *LeDent* opinion, the court said that when an affidavit of probable cause premised upon the "tip" of an informant is brought before a magistrate that official must be satisfied that a two part test has been met before a search warrant issues. The magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.[5]

The affidavit leading to the search warrant in *Waits* read:

> Affiant has information that Michael Waits is in possession of illegal drugs, including L.S.D. Affiant has received information from Sgt. John Maley of the Omaha Police Dept. and other reliable informants that said Michael Waits is associated with known drug users and possessors of illegal drugs, particularly one Bud Medlock, one William C. Larnan and one Thomas E. Swain and one John L. Lenczowski, that illegal drugs were found in the possession of the above named associates of Michael Waits. Affiant further states that Mr. John Bullock of the Postal Inspector's office in Omaha has advised affiant that Michael Waits has received letters and packages from Hawaii and California and has sent money orders to California which affiant believes to be in connection with the receipt and possession of illegal drugs and particularly L.S.D. Affiant is further informed by the Post-office Dept. that the package addressed and directed to Michael Waits from California which is expected to contain illegal drugs is in the possession of said Michael Waits.[6]

Noting that the two sources of information specified in the affidavit were law enforcement officials, the court cited *United States v. Ventresca*[7] for the rule that observations of fellow law enforcement officers engaged in a common investigation are a reliable basis for a warrant applied for by one of their number.[8] The court seems to have implied that the status of the "informants" here compensated for the affidavit's failure to recite any criteria of credibility complying with the second half of the *LeDent* standard. It is questionable, however, whether the information given by the fellow law enforcement officers in *Waits* is of the type sanctioned by the *Ventresca* Court.

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[5] 185 Neb. at 783, 178 N.W.2d at 777.

[6] *Id.* at 782, 178 N.W.2d at 777.

[7] 380 U.S. 102 (1964).

[8] *Id.* at 111.

In *Ventresca* several federal investigators of the Alcohol and Tobacco Division of the Internal Revenue Service had conducted a lengthy investigation focusing on the defendant and a suspected illegal distillery operation in his home. After watching the home for several days one of the investigators involved in the surveillance summed up what he and other investigators had personally observed in a detailed five page affidavit. The circuit court of appeals found the affidavit insufficient to support a search warrant because it could not be determined from the affidavit which were the affiant's personal observations and which were statements based on information from other investigators.[9] The court feared that the "information from other investigators" might be impermissible "hearsay upon hearsay" passed on by the fellow investigators from unreliable, anonymous informers whose credibility was unknown. The Supreme Court sustained the sufficiency of the affidavit, emphasizing that sufficient credibility was established by affiant's statement under oath that the information in the affidavit was based either on his own personal observations or *personal observations* of investigators assigned to the investigation.[10] This element is lacking with respect to the Omaha police officer mentioned in the *Waits* affidavit. There is no basis for the statement which would negate the danger that the information from "other investigators" might be only rumor gleaned from unreliable underworld informers. There is no mention that this police officer was ever a part of a common investigation or that he obtained this information from a reliable source. There is no reason to believe that he spoke from personal observation. Considering the *Ventresca* emphasis on the manner in which the law enforcement officials obtained their information and the qualification that mere conclusions in affidavits are never sanctioned,[11] it is doubtful that *Ventresca* meant to endow a kind of "automatic credibility" upon law enforcement officials as the Nebraska Supreme Court seems to imply.

Assuming that the information supplied by the Omaha police officer stating that Waits was associated with four individuals with a history of narcotics violations came from a reliable source, it is still difficult to understand the value of such information in establishing probable cause. In *Spinelli v. United States*[12] the defendant

[9] Ventresca v. United States, 324 F.2d 864 (1st Cir. 1963).

[10] 380 U.S. at 110.

[11] "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based." 380 U.S. at 108-09.

[16] *See* note 4 *supra.*

was convicted of illegal interstate gambling activities despite his claim that the search warrant authorizing an FBI search of his home was invalid because the supporting affidavit failed to reveal probable cause. As a part of the basis for showing probable cause, the affidavit recited: "William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."[13] The Supreme Court reversed the conviction because the credibility of an informant whose information constituted the main element of the affidavit was not sufficiently verified by the law enforcement officer's own observations. In its decision the Court rejected the assertion that defendant was a "known gambler" as having any probative value to establish an independent basis for a finding of probable cause or to establish the informant's credibility regarding his statements.[14] In this light, it is hard to agree with the Nebraska Supreme Court's acceptance of the Omaha police officer's statement as a sufficient basis for a finding of probable cause, because that information is even less substantial than that rejected in *Spinelli*. Unlike the affidavit in *Spinelli*, the *Waits* affidavit does not even describe the defendant himself as a "known" user, but only his associates.[15]

The Nebraska court recited verbatim the *LeDent* language describing the first half of the probable cause test which demands a recital of the circumstances underlying the informant's belief as to the location of the narcotics, and then made a literal application to the facts in the *Waits* affidavit. Thus, the court would seem to be sanctioning an unwarranted assumption as to the initial *existence* of the illegally possessed article which does not occur in *LeDent*. It is logical to assume that when the court found a sufficient recital of circumstances forming a basis for the informant's conclusions in the *LeDent* affidavit,[16] it considered those portions of the affidavit detailing the defendant's conversations with the informant. The *LeDent* affidavit states that the defendant personally admitted to the informer that he had marijuana in his possession and detailed the description as to quantity and condition.[17] In contrast, there is

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[12] 393 U.S. 410 (1968).

[13] *Id.* at 414.

[14] *Id.* at 418-19.

[15] *See generally,* Abrahams, *Spinelli v. United States: Searching for Probable Cause,* 30 U. PITT. L. REV. 735 (1969).

[17] *See,* Mather, *The Informer's Tip as Probable Cause for Search or Arrest,* 54 CORNELL L. REV. 958 (1969). The author suggests that information given by an informant may be of such extensive detail as to be "self-verifying." *See* note 4, *supra.*

no basis for establishing the existence of narcotics, the object of the search, on the face of the *Waits* affidavit. It is doubtful that the first sentence of the affidavit provides any such basis for it is only a statement of affiant's conclusion that the defendant possessed illicit drugs.

In *Nathanson v. United States*[18] the Supreme Court declared that "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmation of belief or suspicion is not enough."[19] This rule was reinforced in *Aguilar v. Texas*[20] where police presented an affidavit to obtain a search warrant which read in part: "Affiants have received reliable information from a credible person and do believe that heroin . . . and narcotic paraphernalia are being kept at the above described premises . . . ."[21] Referring to both *Nathanson* and *Giordenello v. United States*[22] the *Aguilar* Court found that the "mere conclusion" of an informer, stating that the defendant possessed narcotics, was all the more deplorable since it was not even the conclusion of the affiant himself. The Court ruled that the search warrant should not have issued. Thus, while *Waits* leaves intact the requirement that the magistrate be informed of some of the circumstances that form the basis of the informant's conclusions, it would seem that after the *Waits* decision those circumstances need not include facts indicating how the affiant came to the conclusion that the object of his search in fact existed.

Finally, the nature of the information given by the postal inspector is subject to question with regard to its probative value in

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18 290 U.S. 41 (1933). A warrant was issued upon the sworn allegation that the affiant had cause to suspect and did believe that certain merchandise was in a specified location. The Court noted that the affidavit went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts.

19 *Id.* at 47. *See also* Giordenello v. United States, 357 U.S. 480 (1957), where the Court applied the Nathanson rule to an arrest warrant. Affiant in that case swore that petitioner "did receive, conceal, etc. narcotic drugs . . . with knowledge of unlawful importation . . . ." The Court said that if the issuing authority was to act as a neutral and detached magistrate, he must judge for himself the persuasiveness of the facts relied upon by the complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion.

20 39 U.S. 108 (1964).

21 *Id.* at 109.

22 *See* note 19 *supra.*

the establishment of probable cause. While a comprehensive definition of what constitutes sufficient probable cause has never been formulated by the Supreme Court, the Court established long ago that probable cause could be found on less evidence than would be necessary for a finding of guilt.[23] In *Draper v. United States*[24] the Court found that the terms "probable cause" and "reasonable grounds" were substantially the same and in *Brinegar v. United States*[25] the Court noted: "In dealing with probable cause . . . as the very name implies, we deal with probabilities. They are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[26] In recent decisions, however, the Court has taken more of a restrictive view. In *Beck v. Ohio*[27] two police officers arrested the defendant without a warrant and upon searching his person discovered certain gambling slips leading to his subsequent conviction for violation of state gambling laws. In reversing the conviction the Court said that a mere suspicion that the defendant was conducting illegal gambling activities based on his past record and other undisclosed "information" did not constitute sufficient probable cause for a warrantless arrest.

Another aspect of *Spinelli v. United States*[28] noted earlier, merits consideration in view of the Nebraska Supreme Court's finding of probable cause in the *Waits* affidavit. In their attempts to substantiate an informant's "tip" that the defendant was a bookmaker, federal agents stated in the affidavit that the defendant was seen on several occasions to drive his car into a parking lot behind a certain apartment building where illegal gambling activity was suspected. The affidavit further stated that the defendant was observed entering the suspect building and a particular apartment, and that the telephone company records revealed that two telephones were installed in that apartment. While acknowledging that *Ventresca* required a magistrate to render judgment based upon a common-sense reading of the entire affidavit,[29] the *Spinelli* Court nevertheless rejected the government's contentions that such apparently innocent activity taken in the totality of the circumstances amounted to probable cause.

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[23] Locke v. United States, 11 U.S. (7 Cranch) 339 (1813).

[24] 358 U.S. 307 (1959).

[25] 338 U.S. 160 (1949).

[26] *Id.* at 175.

[27] 379 U.S. 89 (1964).

[28] 393 U.S. 410 (1968).

[29] *Id.* at 415.

An analysis of the information offered by the postal inspector in the *Waits* affidavit reveals nothing more incriminating than the kind of information rejected by the *Spinelli* Court. Virtually every citizen regularly makes use of the United States mails in one manner or another. Thousands of letters, packages and money orders flow between California and Hawaii and other parts of the country each day. In view of *Spinelli*, the fact that Waits received a package from California and sent money orders on several past occasions is of doubtful significance in justifying any finding of probable cause to issue a search warrant.

While the opinion indicates that there may have been some reason for the package to arouse suspicion in the first place,[30] no such reason is presented in the affidavit. It is therefore of no consequence that law enforcement officials might have had additional grounds to present to the magistrate at the outset, for as the Supreme Court noted in *Aguilar v. Texas*.[31] "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."[32]

In conclusion, it would seem that the Nebraska Supreme Court has approved a search warrant affidavit containing less probative information than the *LeDent* affidavit which, as was noted earlier, the court found to only marginally comply with the minimum standard that it had established. It may therefore be concluded that the minimum standard of *LeDent* has in fact been further relaxed.

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[30] 185 Neb. at 781, 178 N.W.2d at 776.

[31] 378 U.S. 108 (1964).

[32] *Id.* at 109, quoting Giordenello v. United States, 357 U.S. 480 (1957).

D. WITHDRAWAL OF GUILTY PLEA

In *State v. Johnson*[1] the Nebraska Supreme Court upheld the manslaughter conviction of the defendant. On appeal, the defendant alleged that after a plea of guilty was accepted, he made a *pro se* motion at the sentencing hearing to withdraw his plea. He contended, *inter alia,* that the trial court erred in overruling this motion. The court, after reviewing the record, refused to interpret the discussion at the sentencing hearing as a motion to withdraw the plea of guilty. The court, in dicta, then noted:

> In any event, however, in a situation such as this, a motion to withdraw a plea of guilty should be sustained only if the defendant proves that withdrawal is necessary to correct a manifest injustice and defendant must establish such grounds by clear and convincing evidence.[2]

Although this standard was set out in dicta, it nevertheless is important in attempting to ascertain exactly what burden might, in the future, be placed on a defendant who wants to withdraw a plea of guilty. In that light, this review of *Johnson* will focus on the relationship of this standard to previous Nebraska cases dealing with plea withdrawal. In addition, this analysis will compare the approach in Nebraska with the federal and A.B.A. approaches to withdrawal of guilty pleas.[3]

1. *The Facts in Johnson.*

In *Johnson* the defendant was originally charged with second degree murder. After a jury was impaneled, but before trial began, Johnson advised the court that he wished to plead guilty to a charge of manslaughter pursuant to a plea bargain made with the prosecution. The prosecutor in accordance amended the information and charged the defendant with manslaughter, to which the defendant pleaded guilty. When Johnson appeared for arraignment on the amended information, he stated, "Well, I really want to try it now."[4] The court explained to the accused that if he went to trial it would be for second degree murder rather than manslaughter. The court also explained the nature of the charge against the defendant and what rights he would waive by pleading guilty. The defendant then once again pleaded guilty to manslaughter.

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1 187 Neb. 26, 187 N.W.2d 99 (1971).

2 *Id.* at 30, 187 N.W.2d at 101.

3 For a similar treatment of the law of Pennsylvania and Oklahoma see 75 DICK. L. REV. 608 (1970); *Note, Plea Withdrawal in Oklahoma,* 23 OKLA. L. REV. 472 (1970).

4 187 Neb. at 27, 187 N.W.2d at 100.

However, at the sentencing hearing another discussion took place concerning the charge against the defendant and it was during this discussion that the defendant made the alleged motion to withdraw his guilty plea.

After reviewing the record, the Nebraska Supreme Court concluded that the defendant was attempting to abuse the plea bargaining process. The court reasoned that the defendant's efforts were designed to get the second degree murder charge reduced to manslaughter and then go to trial on the lesser charge. The court also noted that prior to accepting the plea the trial court was assured by the prosecution that there was sufficient evidence to prove Johnson guilty beyond a reasonable doubt. On the basis of *Alford v. North Carolina*[5] and *State v. Turner*[6] the court found the defendant's plea was voluntarily entered. Consequently, for these reasons, the court refused to accept the defendant's contentions and affirmed the conviction.

2. *The Nebraska Approach to Withdrawal of Guilty Pleas.*

Although there are a number of states who have statutes dealing with standards for plea withdrawal,[7] Nebraska does not have such a statute and any standards for plea withdrawal have been established by the court in the context of particular cases. In Nebraska the ability of a defendant to withdraw a plea of guilty has been left to the discretion of the trial judge and if on appeal a defendant is unable to show an abuse of that discretion, the decision of the trial judge will not be reversed.[8]

In *Jurgenson v. State*[9] the Nebraska Supreme Court recognized the inherent problems in attempting to establish a general rule

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[5] 400 U.S. 25 (1970).

[6] 186 Neb. 424, 183 N.W.2d 763 (1971). In *Turner* the court established some guidelines for the acceptance of guilty pleas in Nebraska. Specifically, the court held that an item by item review of constitutional rights that are waived when a defendant pleads guilty is not required before a court can accept a plea of guilty. The criterion is whether the defendant understands the relevant factors involved in a guilty plea. The court, quoting from *Alford v. North Carolina,* noted: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 427, 183 N.W.2d at 766.

[7] *See, e.g.,* GA. CODE ANN. § 27-1404 (1953); MD. R. CRIM. P. 722; MINN. STAT. § 630.29 (1947); PA. R. CRIM P. 320.

[8] Jurgenson v. State, 166 Neb. 111, 88 N.W.2d 129 (1958); Bordeau v. State, 125 Neb. 133, 249 N.W. 291 (1933); Sandlovich v. State, 104 Neb. 169, 176 N.W. 81 (1920).

[9] 166 Neb. 111, 88 N.W.2d 129 (1958).

for determining when a trial judge should permit a defendant to withdraw a plea of guilty. The court noted, "The decision in each case must depend to a great extent on the particular attendant circumstances."[10] However, the court adopted the following broad standard to guide trial judges in deciding when to allow a withdrawal of a guilty plea:

> Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge, through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even when it was entered inadvisedly, if any reasonable ground is offered for going to the jury. If such a plea has been received by the court without observance of the precautions and solemnities required by law, the court should permit the plea to be withdrawn. On the other hand, if a defendant with full knowledge of the charge against him and of his rights and the consequences of a plea of guilty, enters such a plea understandingly and without fear or persuasion, the court may without abusing its discretion, refuse to permit to withdraw it.[11]

In *State v. Pitzel*[12] the court applied the *Jurgenson* standard and reversed the decision of a trial judge who refused to allow the defendant to withdraw a plea of guilty. Pitzel was charged with abandonment of his wife and children on or about May 17, 1965. The defendant, represented by a public defender, pleaded guilty to that charge. Subsequently, after new counsel had been retained, Pitzel made two separate motions to withdraw his plea; both motions were denied by the trial court. On appeal the court noted that from November 28, 1962, to January 20, 1966, there was a divorce proceeding pending against the defendant and that a restraining order obtained by his wife was in force against him during this period. The court recognized that under terms of the restraining order the defendant could not possibly be guilty of abandonment.[13] Consequently, the court reversed the trial court and remanded the case with directions to allow the defendant to enter a plea of not guilty, after which the case was to be dismissed. Although basing its decision on the *Jurgenson* standard, the court did not explain on which part of the standard it relied in reaching its result.

In *State v. Journey*[14] the court reversed the decision of the trial judge who refused to allow the defendant to withdraw a plea of

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[10] *Id.* at 118, 88 N.W.2d at 133.
[11] *Id.* at 119, 88 N.W.2d at 133-34.
[12] 181 Neb. 176, 147 N.W.2d 524 (1966).
[13] *Id.* at 181, 147 N.W.2d at 528.
[14] 186 Neb. 556, 184 N.W.2d 616 (1971).

guilty for failure to make child support payments. The alleged failure of payments occured in May 1966, but the complaint was not filed until June 1969. However, there was a general statute of limitations of three years.[15] The defendant requested counsel prior to sentencing but that request was denied.[16] The court quoted the *Jurgenson* standard, relied on the particular facts in the case, and concluded that the plea of guilty may have been "inadvisable."[17] The court further noted that the failure to furnish counsel prejudicially affected the right of the defendant to move for a withdrawal.

In these two cases the court allowed withdrawal of the guilty pleas when the record disclosed that the defendant was either not guilty of the charge or that because of lack of counsel, he had a valid but unused defense. Absent such a showing, however, the court has been loathe to allow withdrawal once it has been denied by the trial court. It also appears that the court will not allow a withdrawal when there is a strong probability of the defendant's guilt or the particular record of the defendant indicates a prior criminal record.

For example, in *State v. Eutzy*[18] the defendant, prior to sentencing, attempted to withdraw a plea of nolo contendere to a charge of issuing a "no-account" check with intent to defraud. He asserted that he did not understand his previous plea and had thought that he would not receive a sentence of more than six months. The court found, upon an examination of the record, that the defendant had knowingly, voluntarily and understandingly entered his plea. The court noted:

> A mere change of mind after the completion of a pre-sentence investigation does not warrant a change of procedure and a new trial at the whim of a defendant who acted with full knowledge of the import and consequences of his plea, particularly when it was done with the assistance of competent legal counsel.[19]

As for a possible standard to be followed by the trial court in allowing the withdrawal of a plea of guilty or nolo contendere the court noted in a syllabus that: "A plea of guilty or nolo contendere, made with full knowledge of the charge and consequences of the

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[15] NEB. REV. STAT. § 29-110 (Supp. 1969).

[16] In an earlier opinion of the same case, State v. Journey, 186 Neb. 416, 183 N.W.2d 494 (1971), the Nebraska Supreme Court reversed the conviction for failure to furnish counsel.

[17] 186 Neb. at 558, 184 N.W.2d at 617.

[18] 184 Neb. 755, 172 N.W.2d 94 (1969).

[19] *Id.* at 757, 172 N.W.2d at 95-96.

plea, will not be permitted to be withdrawn in the absence of fraud, mistake or other improper means used in its procurement."[20]

In its opinion the court noted that between the time Eutzy pleaded guilty and the time he attempted to withdraw his plea at the sentencing hearing, he had to forfeit his bail for failure to appear at a hearing. The reason that the defendant had failed to appear was that at the time of the previous hearing he was incarcerated under a conviction of petit larceny.

It is also worthy of note that in a short concurring opinion Judges Smith and McCown voted to affirm, without explanation, on the basis of the A.B.A. Standards Relating to Pleas of Guilty.[21]

3. *The Federal Approach.*

In contrast to Nebraska, which does not distinguish between the propriety of withdrawal of guilty pleas before or after sentencing, the federal courts do make this distinction. The Federal Rules of Criminal Procedure provide:

> A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.[22]

Although the rule states that withdrawal after sentence should be permitted only to correct a "manifest injustice," it does not establish any standard relating to withdrawal of guilty pleas prior to the imposition of the sentence. Despite this fact, many federal courts have enunciated the rule that withdrawal of a guilty plea prior to sentencing should be "freely allowed."[23]

The rationale of this distinction and of the different standards was articulated in *Kadwell v. United States:*[24]

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[20] *Id.* at 755, 172 N.W.2d at 94. In a similar case, State v. Cunningham, 185 Neb. 488, 176 N.W.2d 732 (1970), the court, citing this standard, refused to allow the defendant to withdraw a plea of guilty to automobile theft. In its decision the court noted that after the plea of guilty, but before the sentencing hearing and the motion to withdraw the plea was made, the defendant was involved in a second robbery.

[21] 184 Neb. at 757, 172 N.W.2d at 96.

[22] FED. R. CRIM. P. 32(d).

[23] *E.g.*, United States v. Young, 424 F.2d 1276 (3d Cir. 1970); United States v. Stayton, 408 F.2d 559 (3d Cir. 1969); Poole v. United States, 250 F.2d 396 (D.C. Cir. 1957).

[24] 315 F.2d 667 (9th Cir. 1963).

> This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease *after* sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.[25]

In *United States v. Stayton*[26] the court discussed the discretion of a trial judge in ruling on a motion to withdraw a plea of guilty and noted that, "The motion to withdraw a guilty plea protects the rights of an accused to trial. Therefore such requests made *before* sentencing should be construed liberally in favor of the accused by the trial courts."[27]

The court in *Stayton* also pointed out that the standard for withdrawal prior to sentence is "fairness and justice."[28] This standard was originally promulgated by way of dicta in *Kercheval v. United States*[29] and although it was decided before Rule 32(d) was adopted it continues as the current federal standard with respect to pre-sentence withdrawal of a guilty plea.[30]

Although the federal courts have held that a pre-sentence motion to withdraw a guilty plea should be considered with liberality, they have recognized that a defendant has no absolute right of withrawal. It is generally conceded that withdrawal rests with the sound discretion of the trial court.[31] One ground that the federal courts have recognized as sufficient to deny withdrawal is extreme prejudice to the state's case.[32] One writer has gone further

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[25] *Id.* at 670.

[26] 408 F.2d 559 (3d Cir. 1969).

[27] *Id.* at 560.

[28] *Id.* at 561.

[29] 274 U.S. 220 (1927). In the case the court stated:" The court in the exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." *Id.* at 224.

[30] *E.g.,* Dorton v. United States, 447 F.2d 401 (10th Cir. 1971); United States v. Young, 424 F.2d 1276 (3d Cir. 1970).

[31] *See* Dorton v. United States, 447 F.2d 401, 404 (10th Cir. 1971), and the cases cited therein.

[32] United States v. Stayton, 408 F.2d 559 (3d Cir. 1969); Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940). In *Farnsworth,* after the defendant had pleaded guilty, the government dismissed over fifty witnesses subpoenaed from throughout the country. When the defendant

and suggested that a defendant should have an absolute right to pre-sentence withdrawal absent a showing by the prosecution of substantial prejudice to its case.[33]

After sentencing, the Federal Rules indicate a motion to withdraw a plea of guilty should be allowed only upon a showing of "manifest injustice."[34] In attempting to ascertain what constitutes manifest injustice, the courts have taken various approachs. One court has stated that post sentence withdrawal is permissible only in "extraordinary cases."[35] Another court, while not expressly defining manifest injustice, noted that the concept gives the judge a greater latitude and places a lighter burden on the defendant than he must bear to demonstrate a violation of constitutional due process that is prerequisite to a successful motion to vacate pursuant to 28 U.S.C. § 2255.[36] Yet another federal court has determined that a court should allow a defendant to withdraw a plea of guilty based on the manifest injustice standard:

> [I]f it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud or official misrepresentation; was made involuntarily for any reason; or even when it was entered inadvisedly, if any reasonable ground is offered for going to the jury.[37]

4. *The A.B.A. Approach.*

In addition to the federal standards relating to withdrawal of guilty pleas, the *American Bar Association Project on Minimum*

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attempted to withdraw his plea, the government was unable to locate many of the witnesses. The court refused to allow the defendant to withdraw his plea in the face of this showing of prejudice to the government.

33 Note, *Pre-Sentence Withdrawal of Guilty Pleas in Federal Courts*, 40 N.Y.U.L. REV. 759, 769 (1965).

35 United States v. Roland, 318 F.2d 406, 409 (4th Cir. 1963).

34 FED. R. CRIM. P. 32(d).

36 Pilkington v. United States, 315 F.2d 204, 209 (4th Cir. 1963). 28 U.S.C. § 2255 (1970) is the post conviction relief statute for federal prisoners. Under the statute, a prisoner in federal custody may petition a federal court to vacate, set aside or correct the sentence imposed upon him if it was imposed in violation of the Constitution or laws of the United States, or the court was without jurisdiction to impose such sentence, or the sentence was in excess of the maximum allowed by law, or is otherwise subject to collateral attack.

37 United States v. Lias, 173 F.2d 685, 688 (4th Cir. 1949). It is interesting to note that this is the same standard for plea withdrawal that the Nebraska Supreme Court adopted in Jurgenson v. State, 166 Neb. 111, 88 N.W.2d 129 (1958). Thus, at least one federal court would agree with the *Jurgenson* standard with respect to the stricter standards for post sentence withdrawal.

Standards for Criminal Justice has formulated standards for withdrawal of guilty pleas. Although the two sets of standards are similar,[38] there are some differences. The *A.B.A. Minimum Standards* distinguish between the ability of the defendant to withdraw his plea as a matter of right[39] and as a matter of judicial discretion.[40]

In order to withdraw a plea of guilty as a matter of right the defendant must, upon a timely motion, prove that withdrawal is necessary to correct a manifest injustice.[41] A motion is "timely" if made with due diligence and is not necessarily barred if made after judgment or sentence.[42] The *A.B.A. Standards* also define manifest injustice:

> Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:
> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute or rule;
> (2) that the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
> (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed;
> (4) he did not receive the charge or sentence concession contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or
> (5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.[43]

The *A.B.A. Standards* also provide that prior to sentence the trial court in its discretion may allow withdrawal for any fair and just reason unless the state has been substantially prejudiced.[44]

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[38] *Compare*, FED. R. CRIM. P. 32(d) and A.B.A. MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 2.1 (Approved Draft 1968).

[39] A.B.A. MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY §§ 2.1(a) and (b) (Approved Draft 1968).

[40] *Id.* § 2.1(b).

[41] *Id.* § 2.1(a).

[42] *Id.* § 2.1(a)(i).

[43] *Id.* § 2.1(a)(ii). The comments to this section provide that the defendant should furnish proof of manifest injustice by clear and convincing evidence. *Compare*, § 2.1 and accompanying comments with the standard the Nebraska Supreme Court sets forth in *Johnson*. It is apparent that the court adopted its standard from the A.B.A. STANDARDS.

[44] *Id.* § 2.1(b). *But see* Farnsworth v. Sanford, 115 F.2d 375 (5th Cir. 1940).

Thus, the standard for withdrawal as a matter of right is manifest injustice while withdrawal as a matter of discretion is to be granted for any fair and just reason. After sentence is imposed the standard that the trial court is to use for both is manifest injustice.

5. *Comparison of Various Approaches.*

Reading the *Eutzy* and *Johnson* cases it seems clear that the ebraska Supreme Court is leaning toward adoption of the *A.B.A. Standards.* However, should the court adopt the *A.B.A. Standards* it should specify that it is doing so and it should specify what parts of the standards are being adopted. In addition, the court should be aware of the distinctions in the standards between withdrawal as a matter of right and withdrawal addressed to the court's discretion.

If Johnson's purported motion were interpreted as a motion for withdrawal as a matter of right, the standard the court in *Johnson* adopts in dicta is in keeping with the *A.B.A. Standards. Johnson* is not consonant with the *A.B.A. Standards* if the purported motion were interpreted as one addressed to the trial court's discretion.

In this area, there are several distinctions that have been made which relate to the burden that a defendant who wishes to withdraw his plea of guilty must meet. First, the federal courts apply different standards dependent on whether the motion was made before or after sentence was imposed. Second, the *A.B.A. Standards* would also apply different standards dependent on whether the motion was made as a matter of right or addressed to judicial discretion. Third, there is a different standard which governs a trial court in contrast to an appellate court. These distinctions and the various approaches taken are summarized in the following chart:

Standards For Withdrawal of Guilty Pleas

	Trial Court		Appellate Court
	Pre-sentence	Post-sentence	
Nebraska	Manifest Injustice	Manifest Injustice	Abuse of Discretion
Federal Courts	Fair and Just Reason	Manifest Injustice	Abuse of Discretion
A.B.A. Standards	Fair and Just Reason (At the court's discretion)	Manifest Injustice (At the court's discretion)	Abuse of Discretion

Manifest Injustice (As a matter of right)	Manifest Injustice (As a matter of right)	Abuse of Discretion

To date, the Nebraska Supreme Court has addressed itself only to this third area and recognizes that whatever standard governs the trial court, the question on review is whether the lower court abused its discretion within that standard. The court has neither addressed itself to the different standards for pre-sentence and post-sentence withdrawal nor to the different standards for withdrawal as a matter of right and withdrawal as a matter of judicial discretion.

It is impossible to tell whether the court has been aware of these distinctions and has rejected them or whether the court has not been cognizant of these distinctions. At this point all that can confidently be said is that the Nebraska Supreme Court has taken a stricter stand than many courts in allowing a defendant, prior to sentencing, to withdraw a plea of guilty.

Hopefully, in the future, the court will recognize that these distinctions exist and will address itself to the problem in order to insure that a defendant will not unnecessarily and without good reason to deprived of his right to trial.[45]

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[45] Since the decision in *Johnson*, the court has decided two other cases relating to the withdrawal of guilty pleas. In State v. Krug, 187 Neb. 554, 192 N.W.2d 163 (1971), the court refused to allow the defendant to withdraw his plea of guilty. On appeal, the defendant alleged that the prosecutor had failed to keep his part of the plea bargain. However, the court refused to accept Krug's contention and said that he had the burden to show that a bargain had been made and that it had been broken. Since Krug was unable to prove this to the court's satisfaction, his conviction was affirmed. In State v. Kimes, 188 Neb. 85, 195 N.W.2d 216 (1972), the prosecutor had promised to recommend a forty year sentence in exchange for a plea of guilty. However, he recommended a fifty year sentence and the defendant received a forty year sentence. The court reversed the conviction on the basis of Santabello v. New York, 404 U.S. 357 (1971), since the prosecutor had failed to keep his part of the bargain.

III. PROPERTY

A. Restraint on Alienation

In the case of *Cast v. National Bank of Commerce Trust and Savings Association*,[1] the Nebraska Supreme Court on rehearing reiterated the well known doctrine that any direct restraint upon the alienation of a fee simple is invalid regardless of its reasonableness.[2] Moreover, the court held that restraints which affect the marketability of property, and thus its alienability as a practical matter, are indirect restraints which are invalid regardless of the reasonableness of the restraints.[3]

A brief examination of the history of the validity of restraints upon alienation will be necessary before discussing the facts and analyzing the future impact of the *Cast* case. As the English feudal system disappeared the holder of a fee simple became able to alienate his estate.[4] And as the need to transfer land increased the concept developed that land should not be unduly controlled by a "dead hand."[5] As a result of this concept the majority of authority has held that even limited and reasonable restraints on the alienation of a fee simple are void since they are contrary to the nature of the interest.[6] However, a small number of states "departed from

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[1] 186 Neb. 385, 183 N.W.2d 485 (1971).

[2] *Id.* at 387, 183 N.W.2d at 488. This doctrine was originally set forth in Andrews v. Hall, 156 Neb. 817, 58 N.W.2d 201 (1953).

[3] The court stated that, "[a] condition attached to a fee simple estate, otherwise valid, must be reasonable and not materially affect its marketability. If it materally affects marketability adversely, it is an indirect restraint against alienation. . . . A majority of this court, including the writer, has come to the conclusion that the law is the same on direct and indirect restraints of alienation." 186 Neb. at 391, 183 N.W.2d at 489-90.

[4] L. Simes & A. Smith, The Law of Future Interests § 1134 (2d ed. 1956) [hereinafter cited as Simes & Smith].

[5] The desire to prevent dead hand controls is one of the reasons for the development of the rules voiding restraints on alienation. Some of the other reasons are the obstruction of commerce and productivity, the concentration of wealth, and the abuse of creditors. Bernhart, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 Mich. L. Rev. 1173 (1959).

[6] Murray v. Green, 64 Cal. 363, 28 P. 118 (1883); Bonnell v. McLaughlin, 173 Cal. 213, 159 P. 590 (1916). *But cf.* Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964), where a covenant in a mortgage that the property would not be sold or encumbered was held not to be an invalid restraint on alienation. *See also* Comment, *Coast Bank v. Minderhout and the Reasonable Restraint on Alienation: Creature of Commercial Ambiguity*, 12 U.C.L.A.L. Rev. 954 (1965).

the general rule by holding that such limited restraints, calling for forfeiture of the fee, are valid if they are reasonable."[7]

Prior to 1929 the Nebraska Supreme Court, although upholding restraints on alienation of interests less than a fee simple,[8] would not allow such restraints to be placed upon a fee simple.[9] At that time if a testator attempted to grant a fee simple and then attempted to attach subsequent provisions which restrained its alienability, the subsequent provision would be held not to have affected the fee. However, such provisions could be used to determine what type of fee was being devised.[10]

In 1929 the Nebraska Supreme Court in *Peters v. Northwestern Mutual Life Ins. Co.*[11] held that conditions subsequent which are attached to a fee simple are enforcible, if reasonable.[12] In that case the court felt that the advancing trend toward liberal construction of wills to meet the intent of the testator, as exemplified by "intent statutes,"[13] had relaxed the rules concerning the per-

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7 52 MICH. L. REV. 616, 617 (1954). For a discussion of the minority and majority rules see SIMES & SMITH, *supra* note 4, at §§ 1149-50; Annot., 67 A.L.R. 1319 (1930); Annot., 42 A.L.R.2d 1243 (1955); Bernhart, *supra* note 5. Bernhart states that the majority rule is simply "that all restraints on alienation are void, unless they fall into recognized exception categories." *Id.* at 1174. Some of the exceptions are spendthrift trusts, restraints of the power to partition, restraints on alienation to a small group of persons where the group classifications are not defiined by race or other social characteristics, forfeiture restraints on life or lesser estates, and restraints applied to gifts of charity. The author points out that the minority rule allowing reasonable restraints is more flexible and thus allows the court to weigh the true interests of the parties, whereas the majority rule is less flexible allowing only certain exceptions.

8 Weller v. Noffsinger, 57 Neb. 455, 77 N.W. 1075 (1899), the court held that a condition providing that property devised to the trustee for years could not be alienated or incumbered by the beneficiary during that time, was not invalid. Likewise, in Albin v. Parmele, 70 Neb. 740, 98 N.W. 29 (1904), the court upheld such a restraint upon a life estate.

9 The court said in Loosing v. Loosing, 85 Neb. 66, 122 N.W. 707 (1909), that a fee simple once devised could not be restrained by conditions subsequent in the will. And in Moffitt v. Williams, 116 Neb. 785, 219 N.W. 138 (1928), the court held that when the grantor passes the fee he loses control of it.

10 Grant v. Hover, 103 Neb. 730, 174 N.W. 317 (1919).

11 119 Neb. 161, 227 N.W. 917 (1929). This case concerned a ten year restriction against alienation which was placed upon a fee simple.

12 *Id.* at 168-69, 227 N.W. at 920.

13 NEB. COMP. STAT. § 5594 (1922) was the intent statute at that time and is similar to today's intent statute, NEB. REV. STAT. § 76-205 (Reissue 1971).

missibility of restraints on fee simples.[14] The court then allowed a ten year restraint on alienation to be valid.[15]

In 1953 the rule changed again when the court in *Andrews v. Hall*[16] said:

> We do not agree that there has been a judicial relaxation of rules governing the creation and vesting of fee simple estates. The validity or extent of one's title to real estate ought not to rest upon considerations of reasonableness in the imposing of restrictions.[17]

The court pointed out that, as the right to convey or encumber a fee simple is one of its primary incidents of ownership, a testator should not be allowed to create a fee simple estate to vest at his death and at the same time restrict its alienation by a condition subsequent.[18] With the *Andrews* decision Nebraska joined a large number of states that had voided direct restraints on alienation of a vested fee simple, regardless of whether the restraints were reasonable or whether the restraints comported with the intent of the testator.[19]

With this brief summary of the prior law on restraints against alienation of estates in fee simple in mind, the rationale of the

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[14] The court said: "There is no doubt that the ancient rule against restrictions on alienation of a fee simple title has been much relaxed by the modern trend of interpretation of wills and deeds; and under a statute such as ours, the intent of the testator is the imperative guide unless inconsistent with the rules of law." 119 Neb. at 167, 227 N.W. at 920.

[15] The court reasoned that since the restraint reflected the intent of the testator and was not unreasonable or unlimited in duration the court should give it effect. *Id.* at 169, 227 N.W. at 920.

[16] 156 Neb. 817, 58 N.W.2d 201 (1953).

[17] *Id.* at 821, 58 N.W.2d at 203. In this case Hall received a fee simple interest in some property from his father with the restriction that if an attempt at alienation was made before the death of his father's wife, the share would be forfeited. The court held that the intent statute "relates only to rules of construction and does not enlarge or limit, or in any way modify, any rule of substantive law that exisited at the time of its passage or that thereafter has been created." *Id.* at 820, 58 N.W.2d at 203. The court had previously announced this doctrine in Stuehm v. Mikulski, 139 Neb. 374, 297 N.W.2d 595 (1941).

[18] Andrews v. Hall, 156 Neb. 817, 821, 58 N.W.2d 201, 203 (1953). The court went on to say: "We do not say that a testator may not create a vested fee simple estate subject to a condition subsequent or a determinable or defeasible fee. What we do say is that a restriction against alienation of a vested fee simple estate is not any one of these, nor, since it is void, can it be used as the sole basis for the creation of any of these estates." *Id.*

[19] 52 MICH. L. REV. 616 (1954).

Cast decision and its future impact on this area of the law will be discussed.

The beneficiary, Richard Cast, brought an action against the defendant bank, executor and residuary trustee of the estate of Cast's uncle, William J. Webermeier.[20] The plaintiff sought the court's construction of the will in regard to two of its provisions. The will gave Webermeier's share in a tract of land held in cotenancy to Cast. However, the provisions in question required Cast, or a member of his family, to live upon the land for a period of twenty-five years, and within one year of the testator's death to add the name "Webermeier" to his legal name.[21] The plaintiff beneficiary claimed that these two provisions of the will were invalid as being both impossible and against the law and policy of the state regarding the alienation of fee simple estates.[22]

The trial court agreed with the beneficiary's contention and held that the provisions were void.[23] The defendant executor appealed to the Nebraska Supreme Court, which in its first opinion rejected the district court's holding that the beneficiary received a vested fee simple absolute.[24] The supreme court felt that Cast

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[20] 185 Neb. at 359, 176 N.W.2d at 32.

[21] The will gave Cast all right, title, and interest of which Webermeier was seized at the time of his death, subject to the provisions that:

"A. The said Richard Cast or one of his children shall, within a period of one year after my death, move to and occupy said farm as his or her residence and domicile, and continuously maintain the same thereon for a period of twenty-five (25) years.

"B. The member of the Richard Cast family so occupying said real estate shall, within a period of one year after my death, by appropriate legal action, add the name 'Webermeier' to his or her legal name." *Id. at* 360, 176 N.W.2d at 32. The will provided that if the conditions were not met the title would revert to the residuary legatee.

[22] *Id.* at 362, 176 N.W.2d at 33.

[23] *Id.* at 360, 176 N.W.2d at 32.

[24] The district court had held that the provision requiring the beneficiary to occupy the property for 25 years was a condition subsequent which failed because it was an impossible condition. Since the testator was a tenant in common and could not restrict the use of the property by the other tenant in common, such a provision was beyond the testator's power and therefore the beneficiary received the property free of such restraint as a fee simple absolute. The Nebraska Supreme Court held that the condition was not impossible as the will merely required Cast or a member of his family to live on the land and not to take exclusive possession of it. *Id.* at 364, 176 N.W.2d at 34.

The rights of tenants in common are discussed in 86 C.J.S., *Tenancy in Common* § 25 (1954), and Annot., 124 A.L.R. 222 (1940). The ability

had received a lesser interest.[25] Thus the *Andrews* doctrine would not be applicable since the interest could be a determinable, qualified, or base fee.[26]

Judge Carter went further in a concurring opinion distinquishing direct and indirect restraints with regard to the rule of *Andrews v. Hall*.[27] The Judge said that since these restraints were incidental to the conditions subsequent, they were indirect restraints and not subject to the *Andrews* doctrine.[28]

In the first *Cast* opinion, the Nebraska court emphasized the intent of the testator and felt that according to the "intent statute"[29] the court should interpret the will in the manner which would best express the testator's intent as shown from the will.[30] The court pointed out that a testator may dispose of his property in any way he wishes and the courts are bound to enforce that intent, provided

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of a co-tenant to restrict the alienation of the other co-tenant's share is discussed in 54 HARV. L. REV. 1081 (1941).

[25] Judge Spencer, writing for the majority in the first opinion stated that the provisions were more in the nature of a fee subject to a conditional limitation than a condition subsequent. 185 Neb. at 367, 176 N.W.2d at 35. For the distinction and rules regarding the two interests see 2 WASHBURN ON REAL PROPERTY § 1640 (6th ed. 1902).

[26] 185 Neb. at 368, 176 N.W.2d at 36. *See* Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N.W.2d 117 (1950); 28 AM. JUR. 2D *Estates* § 22 (1966). These interests were not prohibited by *Andrews v. Hall* but rather were distinquished from a vested fee simple. *See* note 17, *supra*.

[27] Judge Carter had written the opinion in Andrews v. Hall, 156 Neb. 817, 58 N.W.2d 201 (1953).

[28] 185 Neb. at 379, 176 N.W.2d at 42. The distinction between direct and indirect restraints is: "A direct restraint on alienation is a provision in a deed, will, contract, or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation. . . . An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability. . . . Ordinarily an indirect restraint does not restrict the power of alienation but only the fact of alienability." SIMES & SMITH, *supra* note 4, at § 1112.

[29] The current statute reads: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." NEB. REV. STAT. § 76-205 (Reissue 1971).

[30] 185 Neb. at 365, 176 N.W.2d at 34.

the testator does not violate public policy or a statute.[31] It stated that the validity of the addition of a name requirement had previously been approved by the court[32] and that the validity of the twenty-five year residency provision was well established.[33]

Chief Justice White dissented saying that the beneficiary, Cast, had received a fee simple subject to the *Andrews* rule.[34] Thus the provisions were "clearly void and of no effect whatsoever because it constitutes an *illegal restraint* on alienation."[35] The Chief Justice also argued that it was not important whether the restraint was direct or indirect. The proper determination was said to hinge upon the effect the restraint had upon the owner's ability to dispose of the property.[36] In addition, the dissent dismissed the intent of the testator as a factor, saying that intent was irrelevant since the Nebraska Supreme Court had "firmly committed itself to the doctrine of freedom of alienation of property when opposed to the unrestrained intent of the testator."[37]

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[31] *Id.* The court had earlier stated: "A testator had a right to dispose of of his property in any manner he sees fit and to attach any conditions to its possession and enjoyment, provided no positive rule of law or public policy is infringed; and, as before stated, it is the duty of the courts to enforce the will of the testator, under the above limitations, in accordance with his intention as expressed by the words used." In re Estate of Smith, 117 Neb. 776, 786, 223 N.W. 17, 21 (1929).

[32] Smith v. Smith, 64 Neb. 563, 90 N.W. 560 (1902), wherein a change of name provision was upheld as a reasonable restraint.

[33] "The validity of a requirement that the beneficiary must reside on certain premises is well established." 185 Neb. at 363, 176 N.W.2d at 34. The court cited Annot., 35 A.L.R.2d 387, 391 (1954): "Conditions of this type [personal occupancy] are valid when imposed upon a life estate, or a term of years, since these interests usually may be subjected to a forefeiture restraint. Where the condition of personal occupany is imposed upon a fee interest, it should be void, and this view has apparently been approved in the few cases in which the problem has arisen." 6 AMERICAN LAW OF PROPERTY, § 26.69 (1952).

[34] " 'A restraint in alienation *in the form* of a condition subsequent, forfeiting or terminating the fee simple estate, or providing for a *limitation over upon breach of the condition* is, void.' " 185 Neb. at 371, 176 N.W.2d at 38 (Emphasis by the Chief Justice). The Chief Justice was quoting from Andrews v. Hall.

[35] *Id.* at 370, 176 N.W.2d at 37.

[36] *Id.* 377, 176 N.W.2d at 40-41.

[37] *Id.* at 371, 176 N.W.2d at 37. The dissent was referring to *Andrews Hall,* where the court, while speaking of the intent statute, said: "We have held that it relates only to rules of construction and does not enlarge or limit, or an any way modify, any rule of substantive law that existed at the time of its passage or that thereafter has been created. . . . "The general rule that restrictions against alienation of real estate vested in fee simple are against public policy and void

On rehearing, the court reversed itself and held that the conditions of the will were invalid since they were restraints upon the practical alienation of the property.[38] The court held that the provisions were conditions subsequent to a fee simple title, and since they provided for a forfeiture or reverter or limitation over upon breach, they were void.[39] The court held that the residency clause was void since the provision was a restraint on alienation, because as a practical matter Cast could not transfer the land and still reside on it. Thus the court adopted the theory of the Chief Justice's dissent to the court's first opinion of the case, that is, a fee simple required the power to alienate in the practical sense rather than just in the theoretical.[40]

The court went on to invalidate the provision requiring the beneficiary to change his name. In doing so, the court overruled its former decision of *Smith v. Smith*[41] in which the court had held that a requirement to change one's name was a reasonable restraint. In overruling *Smith* the court indicated that it was opposed to giving effect to a testator's whimsy at the expense of a fee simple title.[42] The court felt that a restraint on a fee simple must not only be reasonable, but must also not affect the fee's alienability from a

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is a rule of substantive law which remains unaffected by the intent statute. 156 Neb. 817, 820, 58 N.W.2d, 201, 203 (1953).

38 186 Neb. at 391, 183 N.W.2d at 490.

39 *Id.* at 387-89, 183 N.W.2d at 488. The court pointed out that this was the general rule announced by most courts. The court also pointed out that the RESTATEMENT OF PROPERTY invalidated such forfeiture restraints on a fee simple: "Where an owner of land in fee simple absolute makes an otherwise effective devise thereof to a named devisee and his heirs but if such devisee or his heirs during a fixed term of years attempt to transfer the land by any means, the land shall go over to another, the forfeiture restraint qualified only as to time is invalid. The first devisee has an indefeasible estate in fee simple." *Id.* at 389, 183 N.W. 2d at 488, 489. *See also* RESTATEMENT OF PROPERTY § 406, Illustrations 1 and 2, at 2397-98 (1944).

40 186 Neb. at 391, 183 N.W.2d at 490.

41 64 Neb. 563, 90 N.W. 560 (1902).

42 "It seems to us that a condition attached to a fee simple title which has for its purpose the satisfaction of a whimsical obsession or an expression of testator's vanity ought not be permitted as a fettering of a fee simple title. Such a condition is unreasonable in that fee titles to real estate are not proper places for trivial conditions evidencing personal whimsy. . . . Where a grantor or testator grants or devises a fee simple title, he is not permitted to fetter the title that he created with inconsequential and unreasonable conditions otherwise valid." 185 Neb. at 390, 183 N.W.2d at 489.

practical standpoint.[43] The court held that a restraint which adversely affects the marketability of the property also restrains the alienability of the property as a practical matter, and thus, is an invalid indirect restraint.[44]

Judge Spencer dissented, stating his belief that the devise was not a fee simple and even if it was, the restraints were indirect as to alienability and thus not invalidated by *Andrews*.[45] With regard to the issue of the validity of indirect restraints, Judge Spencer was joined in dissent by Judge Boslaugh, who pointed out that as a general rule some indirect restraints are valid.[46] While *Andrews v. Hall* held that direct restraints against alienation of fee simple interests were invalid regardless of their reasonableness, it was generally accepted that indirect restraints would be allowed if reasonable and limited in duration of time so as to comply with the Rule Against Perpetuities.[47]

The importance of the *Cast* decision relates to the court's attitude toward the validity of indirect restraints.[48] Once the court had de-

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[43] "A condition attached to a fee simple estate, otherwise valid, must be reasonable and not materially affect its marketability. If it materially affects marketability adversely, it is an indirect restraint against alienation." *Id.* at 391, 183 N.W.2d at 490. The court then announced that it would adopt as the proper statement of the law that: "the expression 'restraint on alienation' refers not merely to the restriction of the legal power of alienation, but also to the restriction of alienability as a practical matter. Any provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation. . . . In brief, the law is concerned primarily with practical alienability, not with a theortical power of alienation." *Id.* at 391, 183 N.W.2d at 490. The court was quoting from SIMES & SMITH §§ 1111, 1115.

[44] *Id.*

[45] *Id.* at 394, 183 N.W.2d at 491.

[46] *Id.* at 396, 183 N.W.2d at 492. Judge Boslaugh cited as authority SIMES & SMITH, *supra* note 4, at §§ 1112, 1115, 1116.

[47] "If the restraint is direct, it may be bad regardless of the length of time it is to last. On the other hand, if the restraint is indirect, it will invariably be valid if it is to terminate within a life or lives in being and twenty-one years beyond; but if it is to last longer than that period, the indirect restraint may be bad." *Id.* at 397, 183 N.W.2d at 492, 493. *See also* SIMES & SMITH, *supra* note 4, at § 1115.

[48] The court seems to be saying restraints which are not direct restraints on alienation but operate to restrict alienation as a practical matter are indirect restraints and that indirect restraints are invalid. The question arises whether those restraints which incidently affect alienability but do not affect marketability are still indirect restraints or something else, and, if not something else, does the test of reasonableness still apply to them?

cided that the beneficiary had received a fee simple estate, it could have found the twenty-five year residency requirement invalid as a direct restraint on alienation for a fixed number of years. The court could also have held that the name addition provision was invalid as being whimsical and against public policy. Instead, using the test of the effect on marketability, the court declared the provisions to be indirect restraints. Rather than applying the test of reasonableness, the court held that indirect restraints were as invalid as direct restraints.[49]

Generally an indirect restraint is examined to determine if it violates the Rule Against Perpetuities.[50] Furthermore, the provisions must normally pass the test of reasonableness. When determining the issue of reasonableness the following questions are often asked: whether the one imposing the restraint has some interest in the land which he is seeking to protect, whether the duration of the restraint is too long, and whether the restraint accomplished a worthwhile purpose.[51] If the restraint is capricious it is an indication that the restraint is unreasonable and invalid. However:

> [E]ach case must be thoroughly examined in the light of all the circumstances to determine whether the objective sought to be accomplished by the restraint is worth attaining at the cost of interfering with the freedom of alienation or to determine whether the particular interference with alienability is so slight as not to be material.[52]

In this particular case it would be hard to search for a worthwhile objective of the two provisions. The court expresses its feeling that a provision requiring the addition of a name is pure whimsy and that such capriciousness should not interfer with the ability of the devisee to alienate the property given to him in fee simple.[53] Thus the court would not hold that the provision was for a worth-while purpose. With regard to the provision requiring occupation of the property for twenty-five years the dissent in the first

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[49] 186 Neb. at 391, 183 N.W.2d at 490.

[50] SIMES & SMITH § 1116. However, the court dismisses the relevancy of the Rule Against Perpetuities in this case by saying: "We have serious doubts if the Rule Against Perpetuities is of controlling importance in a case where a fee title has been created by a testator on his death subject to conditions subsequent which, directly or indirectly, prevent the alienability of the land constituting the subject of the devise." *Id.* at 392,, 183 N.W.2d at 490.

[51] RESTATEMENT OF PROPERTY § 406, at 2407 (1944).

[52] *Id.* at 2407-08.

[53] 186 Neb. at 390, 183 N.W.2d at 489.

opinion had pointed out that one of the reasons for rules against alienation was to prevent land being tied up.[54] To require occupation of property for twenty-five years would undoubtedly tie up the property.

The weakness of the *Cast* decision is that the court has passed over a test which would allow a judicial determination of the factors and circumstances of each case and has instead adopted a test which applies the arbitrary guidelines of marketability to an inflexible rule regarding indirect restraints.[55] An example of this weakness can be shown by comparing the reasonableness test and marketability test in two hypothetical cases. For example, B wishes to buy land from A, who wishes to insure the land will be used for a particular purpose such as drainage, diking, or ditching.[56] In applying the marketability test of the *Cast* decision the court would decide whether the condition limiting the use of the land for that purpose adversely affected the marketability and thus the alienability of the property. After making that decision the court would apply the *Cast* rule and find that the condition was an indirect restraint and thus invalid. However, by applying the more conventional test of reasonableness the court could weigh the advantages of the provisions against the threat of restraining indirectly the alienation of the property.

Consider further the case where A and B are co-tenants. Both wish to avoid the imposition of a stranger into the co-tenancy; thus they create a covenant in which they agree to first offer the property to the other co-tenant. Because of the delay due to the exercise of the option the marketability of the property is affected. With the reasonableness test the court could weigh the social value of the covenant against the amount of restraint on alienation.[57] Of

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[54] 185 Neb. at 374, 176 N.W.2d at 39.

[55] The flexibility of the reasonableness test of the validity of an indirect restraint is similar to the flexibility of the reasonableness test of the validity of a direct restraint as used in the minority rule and discussed in note 7, *supra.*

[56] *A* may fear that if the land is used for any other purpose the other land which *A* owns may be damaged while its use for drainage may improve his other property just as it will improve the property of his neighbor, *B*. Thus, *A* who otherwise would not wish to sell the property, will now sell it because he knows its use will not endanger his other property.

[57] A case where such a covenant was held void is discussed in 54 HARV. L. REV. 1081 (1941). A covenant similar to this is where a housing cooperative has a first option to buy the member's membership that carries the privilege to use the property. A case where such a covenant was held not to violate the rule against alienation is discussed in 14

course, the court may decide that these provisions are unreasonable and declare them invalid, just as they would by using the marketability test, but at least the court would be able to use a more flexible standard of analysis which takes into consideration various competing public policy issues.

At any rate, it becomes very difficult to determine if a provision is an indirect restraint on alienation under the *Cast* test due to the vagaries of the marketability test. The court said the marketability test did not apply to conditions subsequent which did not affect alienability.[58] However, it would seem that since a condition subsequent places a requirement upon the holder, it will always affect marketability to some exent. This may create a problem for the court in later cases as it will have to determine when the marketability has been adversely affected.

In conclusion, after determining that the beneficiary, Cast, had received a fee simple from the will, the court could have resolved the alienation issue in one of three ways. First, the court could have said that the provision requiring twenty-five years occupancy was in actuality a direct restraint and thus was void by virtue of the *Andrews* rule. Second, it could have held the provisions constituted indirect restraints, and then have declared them to be unreasonable and thus void. Third, the court could have, and did, decide that the provisions were indirect restraints because they affected the marketability of the property, and consequently indirect restraints upon alienation are invalid regardless of reasonableness. By choosing the third alternative the court is dangerously close to ruling that a fee simple with any condition subsequent is invalid as it may restrain alienability indirectly by affecting the marketability of the property. Essentially, the court has perhaps limited more strictly than was intended, the power of a testator to dispose of his property.

VAND. L. REV. 1535 (1961). Also a case in which a mortgage containing a covenant not to sell the property is upheld as not being an invalid restraint, is discussed in 12 U.C.L.A.L. REV. 954 (1965), *supra* note 6.

[58] The court said, "we do not go so far as to say that all conditions subsequent attached to a fee simple estate are void where alienability is not involved." 186 Neb. at 391, 183 N.W.2d at 489.

IV. SECURED INTERESTS

A. Waiver of Security Interest

The basic issue presented in *Garden City Production Credit Association v. Lannan*[1] was whether the secured party had, through implied consent or authorization, waived its security interest in certain collateral when it had prior knowledge of a sale of the collateral, failed to object or require compliance with the express terms of the agreement, and accepted and applied a portion of the proceeds of the sale to the loan. The Nebraska Supreme Court held that a secured party, having a security interest in farm products that restricted the sale of the collateral without the prior written consent of the secured party, retained a security interest in the collateral purchased by an innocent purchaser notwithstanding the secured party's knowledge of the sale.

Doris and Murlin Carter executed a security agreement in Kansas in favor of Garden City P.C.A. with regard to 161 head of cattle. The security agreement which prohibited the Carters from encumbering, removing or otherwise disposing of the collateral without the written consent of the secured party[2] was duly filed pursuant to the filing provisions of the Kansas Uniform Commercial Code. Western Cattle Company, a cattle brokerage firm in Kansas, negotiated a contract between the Carters and Augustin Brothers of Shelby, Nebraska for sale of the cattle. Western issued a sight draft on the Augustin account in a Columbus, Nebraska bank payable to Carter. Carter endorsed the draft, forwarded it to Garden City P.C.A. as partial payment on his loan, and Garden City P.C.A. accepted it as partial payment. The cattle were delivered to Augustin Brothers in Nebraska and a second sight draft was drawn on their account. As before, Carter endorsed the draft and forwarded it

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[1] 186 Neb. 668, 186 N.W.2d 99 (1970).

[2] Paragraph 7(5) of the security agreement provided: "The Debtor will care for and maintain the crops and property herein described in a good and husbandlike manner and *will not further encumber, conceal, remove, sell or otherwise dispose of the same without the written consent of the Secured Party* and, upon demand will provide additional collateral acceptable to the Secured Party." Brief for Appellee at 8, Garden City P.C.A. v. Lannan, 186 Neb. 688, 186 N.W.2d 99 (1970) (emphasis added).
It should also be noted that the Carters, before the security agreement involved in this case was executed, had sold collateral covered by other security agreements without Garden City P.C.A.'s consent, had endorsed all proceeds over to Garden City P.C.A. for application to their loans, and had never been rebuked by Garden City P.C.A for failing to secure prior written consent as was required under the terms of the agreements.

to Garden City P.C.A. Two weeks later Garden City P.C.A. was informed that the draft was being dishonored for insufficient funds.

After the sale Augustin Brothers sold the cattle to the defendant Lannan. Upon discovery that Lannan was in possession of the cattle, Garden City P.C.A. filed a financing statement with the county clerk of Platte County, Nebraska pursuant to the Nebraska Uniform Commercial Code in order to perfect its security in Nebraska. When demand was made on Lannan for the return of the collateral, he refused and suit was filed demanding return of the collateral. The district court found that because of its knowledge of the proposed sale, its failure to object to the sale and its failure to require compliance with the provisions of the agreement, Garden City P.C.A. had waived its security interest in the cattle. The Nebraska Supreme Court, in a 4-3 decision, reversed.

The majority of the supreme court was of the opinion that the Uniform Commercial Code was designed to furnish "standards which would promote the necessity of and fluidity of farm credit financing"[3] and, at the same time, to "facilitate the sale and exchange of collateral by furnishing . . . a standard which purchasers could rely on."[4] Considering the purpose of the U.C.C., the realities of financial transactions in the area of farm products, and the intent of Garden City P.C.A. and the Carters in their course of dealings, the court concluded that there was neither express nor implied intent on the part of Garden City P.C.A. to waive the security interest.

The rationale of the majority opinion may be stated as follows. The U.C.C. provides in Section 9-306(2)[5] that a security interest continues in collateral and all identifiable proceeds even after sale of the collateral, unless there is authorization for the sale in the security agreement or otherwise. Further, farm products are not included in the exemptions the U.C.C. provides relative to the termination of security interests. Section 9-307(1) provides that a buyer in ordinary course of business takes collateral free of a security interest created by his seller; however, there is in this section an exemption that does not include persons buying farm

[3] Garden City P.C.A. v. Lannan, 186 Neb. 668, 672, 186 N.W.2d 99, 102 (1970).

[4] *Id.*

[5] U.C.C. § 9-306(2) provides: "Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any indentifiable proceeds including collections received by the debtor."

products from a person engaged in farming operations.[6] Therefore, since Augustin Brothers could not take the collateral free of a security interest as a buyer in the ordinary course of business under Section 9-307(1), no one who purchased the cattle at a later point in time could take the collateral free of a security interest. In addition, the U.C.C. states in Section 1-205(4)[7] that when express terms of an agreement cannot be construed consistently with a course of dealing, the express terms control. Thus, Garden City P.C.A. did not and could not waive its contractual right unless that right was waived in writing.

In contrast, the dissent appears to disregard the applicability of the farm products exemption of Section 9-307(1) by pointing out that the exemption has been severely criticized, that it is in a state of demise and that it is contrary to the purpose of the U.C.C. in that it severly restricts the free movement of farm products in the stream of commerce. The dissent agreed with the majority that the security interest followed the collateral into the defendant's hands unless there was a waiver. The dissent, however, disagreed with the majority's reasoning that the agreement provided for written consent as a prerequisite to the waiver of the security interest and, therefore, no other type of consent or waiver would be possible. Judge Newton, the author of the dissenting opinion, reached this conclusion by relying on Section 2-209(4)[8] which pro-

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[6] U.C.C. § 9-307(1) provides: "A buyer in ordinary course of business other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."

[7] U.C.C. § 1-205(4) provides: "The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade."

[8] U.C.C. § 2-209(1), (2), (3), (4) provides:

"(1) An agreement modifying a contract within this article needs no consideration to be binding.

"(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or recinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

"(3) The requirements of the statute of frauds section of this article (section 2-201) must be satisfied if the contract as modified is within its provisions.

"(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver."

vides for modification or rescission even though the requirements of subsections (2) and (3)—the necessity that modification or rescission be in writing—are not satisfied. The dissent concluded that waiver was possible without prior written consent by virtue of Section 2-209(4) and the comment to Section 9-306(2). Therefore the law of waiver was applicable to the *Lannan* case under the terms of Section 1-103.[9] Applying the law of waiver, which states that a right is deemed waived if a party knowingly acts contrary to such a right, the conduct of Garden City P.C.A. evidenced a deliberate waiver.

The Uniform Commercial Code provides that a security interest continues in the collateral unless sale or other disposition of the goods has been authorized by the security agreement or otherwise,[10] such as through a course of dealings.[11] However, the U.C.C. protects the buyer in the ordinary course of business in order to allow the establishment of inventory financing systems. Section 9-307(1) provides that a buyer in ordinary course, that is, one "who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in ordinary course from a person in the business of selling goods of that kind"[12] takes free of a security interest created by his seller.[13] However, Section 9-307(1) will not allow a person buying farm products[14] from a person engaged in farming operations[15] to take advantage of the "buyer in the ordinary course of business" exemption. Gilmore sees this as designed to "freeze the agricultural mortgagee into the special status he has achieved under the pre-Code law."[16]

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[9] U.C.C. § 1-103 provides: "Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

[10] U.C.C. § 9-306(2).

[11] U.C.C. § 1-205(3) provides: "A course of dealing between the parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify the terms of an agreement."

[12] U.C.C. § 1-201(9).

[13] U.C.C. § 9-307(1).

[14] U.C.C. § 9-109(3), defines farm products within the meaning of the code "if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states, and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations."

[15] U.C.C. § 9-307(1).

[16] G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.11 (1965).

In *Overland National Bank v. Aurora Cooperative Elevator Co.*[17] the Nebraska Supreme Court interpreted these provisions of the U.C.C. as they relate to waiver and implied consent. In *Overland* the security agreement gave the secured party a security interest in all proceeds of the collateral, as well as the collateral itself. The defendant, the innocent purchaser, argued that the provision for a security interest in the proceeds established implied consent for the debtor to sell the collateral, that the security interest would be extinguished at the moment of sale and that therefore a secured party had no recourse against an innocent third party purchaser. The court rejected this theory and held that such a clause was "intended to protect a security holder as to third parties, [and was] not one of permission or consent to the borrower."[18]

Although the principles announced in *Overland* may be valid in the factual situation which existed in that case, a different application of the law of waiver, Section 9-306 (2) and Section 9-307 (1) is called for in *Lannan* because of the differences in the facts and the course of dealings of the parties in the two cases. In *Overland* the transactions between the two parties were quite limited; whereas in *Lannan* there were numerous transactions over a period of years. In *Overland* the secured party had no knowledge of the sale; whereas in *Lannan* the secured party had knowledge of the sale even before it occurred and yet failed to assert its contractual right to require written consent before the sale was consummated. In *Overland* none of the proceeds were applied to the debt; whereas in *Lannan* all proceeds were assigned to the secured party, and the secured party accepted them as partial payment of the loan. Such striking differences in factual situations would certainly militate against reliance on *Overland* as a criteria in determining whether there was implied consent or waiver in *Lannan.* Coupling the above differences with the fact that the court in *Overland* was only concerned with the interpretation of a security interest in the pro-

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[17] 184 Neb. 843, 172 N.W.2d 786 (1969). This case was decided after the trial court had rendered its opinion in *Lannan* but before that case went to the supreme court.

[18] *Id.* at 846. The court in Vermillion Co. P.C.A. v. Izzard, 111 Ill. App. 2d 190, 249 N.E.2d 352 (1969), in ruling on a security agreement which gave the secured party a security interest in the proceeds, arrived at the same conclusion as the court in *Overland.*
This approach seems to miss the point that if the secured party did not wish the debtor to sell the collateral it would have included a provision to that effect. The only logical inference that can be drawn from a clause providing for a security interest in the proceeds is that the secured party is not adverse to sale by the debtor and that it will look only to the debtor for relief in the event of sale.

ceeds as it related to implied consent and not with the past course of dealings as they relate to waiver, which was the concern of the court in *Lannan*, the use of *Overland* as precedent for the *Lannan* decision seems tenuous.

Although virtually all cases involving the unauthorized sale of farm products with security interests have been decided in favor of the secured party,[19] the case of *Clovis National Bank v. Thomas*[20] is contrary. In the *Thomas* case the New Mexico Supreme Court held that a secured party's failure to rebuke a debtor for past sales of collateral without prior written consent could give rise to waiver and thereby cut off a secured party's right to recover the collateral from a third party. The factual situation in *Thomas* was similar to that in *Lannan*. In *Thomas* the borrower secured his indebtedness by executing a security agreement with the plaintiff which gave the plaintiff a security interest in cattle to be purchased. The borrower later sold a number of cattle covered by the agreement and applied most of the proceeds to his loan. This was done without rebuke from the plaintiff even though the agreement contained a clause prohibiting sale without prior consent on the part of the secured party. The rest of the cattle were later consigned to the defendant for sale at public auction. Unlike the plaintiff in *Lannan*, the plaintiff in *Thomas* did not have actual knowledge of the sale and none of the proceeds from this sale were applied to the borrower's indebtedness.

The New Mexico court acknowledged that for a waiver to take place there must be an abandonment or relinquishment of a known right. Since the plaintiff had impliedly consented to prior sales by collecting the proceeds without rebuking the debtor, the court reasoned that such a course of dealings transcended the provisions

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[19] In addition to the cases cited in the text see United States v. Greenwich, 291 F. Supp. 609 (N.D. Ohio 1968); Vermillion Co. P.C.A. v. Izzard, 111 Ill. App. 2d 190, 249 N.E.2d 352 (1969).

[20] 77 N.M. 554, 425 P.2d 726 (1967). Subsequent to the decision in this case the New Mexico Legislature revised its version of Section 9-306(2) in order to make it impossible for another decision like *Thomas* to be handed down by the New Mexico Supreme Court. N.M. STAT. ANN. § 50A-9-306(2) (1971), now provides: "Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the secured party in the security agreement or otherwise, and also continues in any indentifiable proceeds including collections received by the debtor. *A security interest in farm products and the proceeds thereof shall not be considered waived by the secured party by any course of dealings between the parties or by any trade usage.*" (emphasis added).

of the security agreement. Therefore, the secured party had no recourse against a third party on the basis of the security agreement. Comparing this case with *Lannan,* waiver is more strongly suggested in *Lannan* because of the secured party's actual knowledge of the sale.

The *Lannan, Thomas* and *Overland* decisions were mainly decided by applying Section 9-306(2) which has been deemed by one court to either incorporate or codify the doctrine of waiver into the "otherwise" clause.[21] However, inherent in any consideration of security interests in farm products is the exemption of farm products from the general provisions of Section 9-307(1).

This exemption of persons buying farm products from persons engaged in farming operations has caused a great deal of debate. Numerous reasons have been set forth to defend the exemption. One of the reasons is that only merchants are considered competent to market their own products. To be a merchant demands a degree of skill and knowledge in dealing with goods which a farmer is presumed not to possess.[22] Thus, to protect not only those who lend farmers money but also the farmer, special provisions for farm products are deemed necessary.[23] It has been argued that a lender needs added security when it comes to extending loans to farmers because of the probability of a failure of a crop or the death of the livestock. Consequently, to encourage the lending of money to finance farming operations it is necessary to assure the lender that he will receive added protection against the termination of a security interest through sale to third parties.[24] Another reason set forth is that in the area of farm products there is greater difficulty in keeping track of the collateral due to commingling.[25] By allowing a continuance of the security interest, policing of the collateral on the part of the secured party is not necessary.

The validity of the reasons set forth for the farm products exemption may be tested by applying them to other areas of eco-

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21 United States v. Greenwich, 291 F. Supp. 609, 614 (N.D. Ohio 1968).

22 47 TEXAS L. REV. 309, 311 (1969).

23 *Id.*

24 From conversations with banking and loan company officials in the Lincoln, Nebraska area it appears that the existence of the exemption in Section 9-307(1) does not enter into a determination of whether a loan should be made to a farming operation. Considerations like equity in land, community reputation, feasibility of the purpose of the loan, conduct in past loan situations, etc., were the determining factors in the granting or rejecting of a loan, not the exemption of Section 9-307(1).

25 8 NAT. RES. J. 183 (1968).

nomic endeavor. For example, in the consumer goods area a great number of merchants clearly do not have adequate skill or knowledge to deal with their goods. In addition, there are many "shoestring" operations in consumer goods that would probably find it easier to obtain financial assistance if an exemption, similar to the farm products exemption of Section 9-307(1), were applicable to them. Moreover, a lender extending loans to a small retail merchant needs as much protection as the agricultural lender. The basic reason such an exemption is not applied to consumer goods is because it would severely impede the orderly flow of such goods from the retailer to the consumer. If this is true, surely it can be concluded that the effect of the exemption concerning farm products is to indirectly impede the flow of agricultural products.

The nature of farming operations today, as contrasted to that of pre-U.C.C. days, has radically changed. The farmer or rancher is "no longer a sturdy yeoman. The farmer is a businessman, and his inventory should be subject to the same rules as that of anyone else."[26] Although the latest proposed revision of Article 9 of the Uniform Commercial Code retains the exemption,[27] there have been strong arguments on the part of food processors[28] and various authors that the exemption is unfair and should be eliminated. This was the view of the committee charged with the task of revising Article 9.[29] Their suggestion, however, has not been adopted by the commissioners of the U.C.C.

The practical effect of the *Lannan* decision is to impose upon all purchasers of farm products the onerous duty of searching records and making detailed inquiries into the history of the

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[26] *A Look at the Work of the Article 9 Review Committee*, 26 BUS. LAW. 307, 314 (1970). This was a panel discussion.

[27] REVIEW COMMITTEE FOR ARTICLE 9 OF THE U.C.C. REPORT 101 (April 25, 1971).

[28] The farm products exemption is especially vexatious to food processors. Does the security interest continue all the way to the grocery shelves or does the status of a processor as a merchant place his goods in the inventory catagory (see Section 9-109(4)) and thus free them from the farm products exemption? It would appear that the farm products exemption of Section 9-307(1) would not apply to manufactured farm products such as meat and cereal since Section 9-109(3) speaks of products of crops or livestock in their unmanufactured states. However, if a court determined that the security interest did continue, interesting cases of priority of security agreements would arise if there were also a security interest in the inventory of the food processor.

[29] *Preliminary Report No. 2 of the Review Committee on Article 9 of the Uniform Commercial Code*, 25 BUS. LAW. 1069, 1081 (1970).

products involved in the sale. Such a task would be monumental, expensive and time consuming, especially in interstate transactions. Also, many transactions involving the sale of farm products, for example consignment sales, are consummated with such speed that an adequate search of records in order to determine the existence of a security interest would be virtually impossible. Because the value of farm products is based on a fluctuating market, where time is of the essence in order to effectuate an advantageous purchase, to require a purchaser to search records would deny him the benefits of a proposed sale. In most situations, out of an economic necessity imposed upon him by the market, the purchaser probably gambles that there is not a security interest involved in the goods or, that if there is an unknown security interest, the debtor will satisfy his debt by apply the proceeds of the sale to his loan. Thus the purchaser of farm products, be he a farmer or dealer in such goods, must either act irrationally in a legal sense or rationally in a legal sense but irrationally in an economic sense.

A liberal application of the doctrine of waiver to cases such as *Lannan* would somewhat alleviate the oppressive nature of the farm products exemption of Section 9-307(1), but such an application would not alleviate the oppressive operation of the exemption in the vast majority of cases that do not involve waiver but do involve good faith purchases by innocent third parties. Nor would such liberal application of waiver remove the burden the exemption imposes on the free, orderly and unrestrained flow of agricultural goods in the stream of commerce. The *Lannan* decision imposes an inequitable burden on those dealing in farm products. The *Thomas* decision, although equitable in spirit when compared to most cases in this area, neither protects the vast number of purchasers affected by the exemption nor fosters uniform application of the U.C.C. The only logical approach to this problem is the removal of the exemption from the U.C.C.

Abolition of the exemption would allow purchasers of farm products, be they farmers or merchants, to purchase without continually worrying whether there is a security interest in the goods that may later deprive them of the fruits of their purchase. Abolition would, to a degree, force lenders to more closely investigate their customers. There is the possibility that removal of the exemption would result in greater difficulty in obtaining loans to finance agricultural operations, at least until the "justifications" for the exemption are proven to be unwarranted, if in fact lenders place any weight whatsoever on the existence of the exemption in lending money to farming operations. It is this author's contention

that the existence of the exemption has little or no effect on a lender's willingness to loan money for farming operations and that therefore the exemption's removal should not affect the availability of loans or interest rates.[30]

The necessity for removal of the exemption is clear. Alleviation from the exemption's operation in cases such as *Lannan,* where there has clearly been a waiver by the secured party, through the application of the doctrines of waiver or implied consent cannot be realized without consideration of Section 9-307(1). Section 9-307(1) is the law and cannot be summarily dismissed, as the dissent in *Lannan* seemingly attempts to do. The most equitable approach while the exemption exists would be to recognize that Section 9-307(1) confers upon a secured party in the area of farm products a statutory right which allows for the continuance of the security interest in agricultural products in the normal case where there has been proper filing and proper conduct on the part of the secured party with reference to the security agreement. However, when the course of dealings between the secured party and the debtor clearly evidences the relinquishment of a contractual right, such as in *Lannan,* the contract should be deemed modified, the statutory right waived, and the law of waiver applied through the "otherwise" clause of Section 9-306(2) or through Section 1-103, thereby allowing the debtor to do what the contract previously forbade without jeopardizing the benefits of a third person's bargain with him.

Applying this rationale to the *Lannan* factual situation, Garden City P.C.A., by relinquishing, through its course of dealings, its contractual right to prior written consent before the sale of the collateral, would only be able to look to the debtor for payment. Thus the harshness of the exemption of Section 9-307(1) would be avoided in the most blatant cases of waiver. The object of abolition of the exemption in 9-307(1) would be to alleviate the exemption's harshness in the remaining farm products cases—that is, cases not involving waiver but involving good faith purchases by third parties—and to raise the farmer and his purchasers to the same status in the marketplace as sellers and purchasers of other consumer goods. All marketing, farm or otherwise, is based on inventory financing. Under inventory financing both the lender and the borrower want the products to be sold and operate on the assumption that they will be sold. Thus the inventory is expected to be converted into proceeds and the proceeds used to pay off the loan.

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[30] *See* note 24 *supra.*

To disrupt this type of financing operation, which the existence of the exemption in 9-307 (1) does, clearly impedes the free flow of agricultural products in the stream of commerce. As agriculture becomes more and more corporate in nature, the need for a uniform standard that all segments of the economic community can rely on becomes necessary. Although the eventual solution to the problem in this area lies with the legislature, the court in *Lannan* clearly missed an opportunity to afford relief when it was presented with a clear case of waiver.

V. TORTS

A. Strict Liability

In *Kohler v. Ford Motor Co.*[1] the Nebraska Supreme Court adopted strict liability in tort. A manufacturer is now strictly liable in tort if an article he has placed on the market, knowing it is to be used without inspection for defects, proves to be defective, and the defect causes injury to one who is rightfully using the product.[2] Although there were five issues to which the court had to address itself,[3] this note will only concern itself with adoption of strict liability in tort.

In her original petition the appellee, Janet J. Kohler, had alleged four causes of action: (1) negligence; (2) negligence in failing to warn the purchasers; (3) breach of express warranty; and (4) breach of implied warranty.[4] In an amended petition filed after the statute of limitations had run Miss Kohler alleged: (1) res ipsa loquitur; (2) breach of express warranty; (3) breach of implied warranty; and (4) strict liability.[5] The appellant, Ford Motor Co.,

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[1] 187 Neb. 428, 191 N.W.2d 601 (1971).

[2] *Id.* at 436, 191 N.W.2d at 606.

[3] 1. Did the trial court err in overruling a special appearance by the defendant?
2. Was the cause barred by the statute of limitations because the amended petition, filed after the statute had run, presented for the first time the "strict liability" theory?
3. Should the doctrine of strict liability in tort be adopted and held applicable under the facts of this case?
4. If strict liability in tort is to be adopted in the state of Nebraska was the evidence sufficient to submit to the jury the issues of whether the defect was in existence when the car left the defendant's hands and whether the defect was the proximate cause of the plaintiff's injuries?
5. Did the trial court err in permitting the plaintiff to introduce the testimony of a certain expert witness on rebuttal?

[4] Brief for the Appellants at 43, Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971).

[5] *Id.* Ford Motor Co. contended that the addition of "strict liability" in the amended petition constituted a new cause of action and that since the statute of limitations had run Miss Kohler was barred from alleging strict liability. The court did not share this view. To the court the general facts upon which the right to recover was based were the same as those needed to prove plaintiff's theories in the original petition. Therefore, the theory of strict liability related back to the original petition. This would not have been possible had the court not previously changed its interpretation of the relation-back rule in Abbott v. Abbott, 185 Neb. 177, 174 N.W.2d 335 (1970). The previous view was that an amendment that introduced a new theory

appealed as error the lower court's decision to submit the case to the jury on the theory of strict liability in tort.

The automobile in which Miss Kohler sustained her injuries was driven by Lois F. Poppee who was killed in the accident. There was no eyewitness testimony as to what caused the automobile to leave the highway. Miss Kohler testified that the automobile began vibrating and then swerved to the left-hand side of the road and into the ditch. The automobile operated by Miss Poppee had passed an automobile operated by Geraldine Licht who testified that after the Poppee automobile returned to its own lane "the rear end of the car wobbled like an empty pickup."[6] Mrs. Licht also testified that shortly thereafter the Poppee automobile "wobbled toward the left of the highway, back to the right, and then into the left ditch."[7] Mr. Licht's testimony was substantially the same.

Shortly after the accident, agents of Ford Motor Co. dismantled the steering mechanism of the automobile and opened the housing containing the sector gear. It was discovered that one of the teeth of the sector gear was broken and when the grease was removed from the housing two fragments of the broken tooth came out with the grease. Expert testimony revealed that during tests on the sector gear of the automobile involved in the accident, parts of the gear gave way before the teeth of the gear could be damaged, indicating defective construction.[8] Although there was testimony that the tooth of the gear broke as a result of the impact of the accident, the court was of the opinion that in determining the sufficiency of the evidence "it [the evidence] must be considered most favorably to the successful party and every controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it."[9] Thus the Nebraska Supreme Court held that:

> [A] manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human

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of recovery constituted a new cause of action. Thus, under the prior rule, if the statute of limitations had run, the new theory was barred since the statute of limitations ran until the filing of the amendment. *See also* 50 NEB. L. REV. 509 (1971).

[6] 187 Neb. at 433, 191 N.W.2d at 605.

[7] *Id.*

[8] Other tests were conducted in which a tooth of a sector gear identical to the one in the Poppee's automobile was broken and then replaced using an adhesive. The steering gear was then turned until the tooth dropped into the gear box. When the automobile was driven the steering gear locked and the car left the highway.

[9] 187 Neb. at 438-39, 191 N.W.2d at 608.

> being rightfully using that product. The effort of the manufacturer to limit its liability by rules applying to warranties is not effective here.[10]

The judges who dissented did not object to the majority's adoption of strict liability in tort, but they did object to the majority's determination that the evidence presented by Miss Kohler was sufficient to sustain the lower court's finding that the defect was the cause of the accident. Judge Boslaugh was of the opinion that the evidence was totally circumstantial and as such was "not sufficient to sustain a judgment unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that fairly and reasonably can be drawn therefrom."[11] Since the cause of the accident was not definitely known, Miss Kohler had the burden of proving that the accident was caused by the defect, and in Judge Boslaugh's opinion the facts went no further than to give equal support to two inconsistent inferences.[12] Thus the evidence was not sufficient to sustain the finding based on one of the inferences. Judge Smith was also of the opinion that the circumstantial evidence was not sufficient to sustain the finding. Judge Newton felt that even if all Miss Kohler's contentions were accepted, "the sole proximate cause of the accident was the failure to apply the brakes and stop,"[13] since there was evidence that Miss Poppee could have stopped in time.

1. *History of Products Liability*

The history of the law of products liability, culminating in the doctrine of strict liability in tort as set forth by the court in *Kohler,* began with the case of *Winterbottom v. Wright.*[14] In denying recovery on the ground of lack of privity of contract, the court established a rule that was to perplex courts and confuse the law in the area of products liability until the 1960's. The court in *Winterbottom* was of the opinion that:

> [I]f the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see not limit would ensue.[15]

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[10] *Id.* at 436, 191 N.W.2d at 606.

[11] *Id.* at 441, 191 N.W.2d at 609.

[12] *See id.* at 445, 191 N.W.2d at 611.

[13] *Id.* at 446, 191 N.W.2d at 612.

[14] 152 Eng. Rep. 402 (1842).

[15] *Id.* at 405.

Winterbottom developed the general rule that unless there was privity of contract there could be no liability. However, the all-encompassing nature of the general rule was slowly eroded by judicial recognition of certain exceptions. In 1903 the Court of Appeals for the Eighth Circuit enumerated the execptions that had developed since the decision in *Winterbottom*. The first exception included products known to be "imminently" dangerous, unless the manufacturer disclosed the danger to the buyer. Secondly, an exception existed where, irrespective of a contract, a defendant furnished a defective product on his premises for a plaintiff-invitee to use. The third exception operated where the defendant was negligent in the manufacture or sale of an "imminently" dangerous product intended to perserve, destroy or affect human life (e.g., food, beverages, firearms, explosives).[16]

Further, in *MacPherson v. Buick Motor Co.*[17] the privity rule was diluted by creating a large class of cases where the rule was not applied. In *MacPherson* the plaintiff purchased an automobile from a retailer. The automobile collapsed due to a defective wheel, and the plaintiff was injured. The court recognized that an automobile was not inherently dangerous and therefore could not fall within one of the generally recognized execptions. In contrast, the court held that "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger,"[18] and the manufacturer is liable.[19] Following the decision in *MacPherson* the liability of manufacturers was slowly extended to cover more products and situations, but the barrier of privity was an ever-present factor to be considered when attempting to hold a manufacturer liable.

On May 9, 1960 the "citadel of privity" fell.[20] On that day a New Jersey court decided *Henningsen v. Bloomfield Motor Co.*[21] In *Henningsen* the plaintiff's husband bought a car from the defendant-

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[16] Huset v. J. I. Case Threashing Co., 120 F. 865, 870-71 (8th Cir. 1903). The first exception is represented by Landridge v. Levy, 150 Eng. Rep. 863 (1937); the second exception by Coughtry v. Globe Woolen Co., 56 N.Y. 124 (1874); and the third execption by Thomas v. Winchester, 6 N.Y. 397 (1852).

[17] 217 N.Y. 382, 111 N.E. 1050 (1916).

[18] *Id.* at 1053.

[19] Professor Prosser says that the effect of *MacPherson* was to place all products, if imperfectly made, within the inherently dangerous exception. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (4th ed. 1971).

[20] *See* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

[21] 32 N.J. 358, 161 A.2d 69 (1960).

retailer under a sales contract which contained disclaimers of all express and implied warranties. While the plaintiff, whom the defendant claimed lacked privity because she was not a party to the purchase contract, was driving the car there was a loud sound from beneath the car, whereupon the steering wheel spun from her hands, the car veered sharply to the right and crashed into a brick wall.[22]

The *Henningsen* court examined modern marketing conditions and came to the conclusion that "when a manufacturer puts a new automobile into the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate consumer."[23] The court criticized the extent to which the privity barrier barred recovery by pointing out that the ordinary buyer of products does not buy them for his exclusive use and that manufacturers are well aware of this fact and market their products on that assumption. The court concluded that Mrs. Henningsen was a person who "in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile. Her lack of privity does not stand in the way of prosecution of the injury suit. . . ."[24]

Henningsen was soon followed by the California decision of *Greenman v. Yuba Power Products, Inc.*[25] in which the court imposed strict liability in tort. In *Greenman* the plaintiff's wife bought her husband a combination power tool. While operating the power tool a piece of wood flew out of the machine, due to a defective set-screw, and struck the plaintiff on the forehead. Disregarding all concepts of warranty the court held that a "manufacturer is strictly liable in tort when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[26] The court said:

> The purpose of such liability [strict liability in tort] is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather

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[22] It should be noted that the automobile involved in *Henningsen* was so badly damaged that it was impossible to determine whether there had been a defect in the steering mechanism.

[23] 32 N.J. 358, 384, 161 A.2d 69, 84 (1960).

[24] *Id.* at 413, 161 A.2d at 100.

[25] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[26] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

than by the injured persons who are powerless to protect themselves.[27]

2. *Products Liability Cases in Nebraska*

While Nebraska law does not abound with cases involving the liability of a manufacturer or vendor for physical injury relulting from the use of a product by a consumer,[28] a number of cases should be noted. In 1933 the Nebraska Supreme Court handed down its decision in *Tegler v. Farmer's Union Gas & Oil Co.*[29] Although the court denied recovery for the death of a child caused by an explosion which occurred when the mother was filling an incubator lamp with kerosene, the court did adopt the rule of *MacPherson.* The court was of the opinion that a manufacturer or vendor was responsible to the ultimate consumer for putting inherently dangerous articles on the market without adequate warning. However, the court found that kerosene was not inherently dangerous if it met statutory "flash" tests and was handled with care. Since the manufacturer in this case had used the requisite amount of care that an ordinary prudent person would have exercised by "flash" testing the kerosene, and there was no evidence that the kerosene had become more volatile or contaminated while in the manufacturer's hands, recovery was denied.

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[27] *Id.* at 63. 377 P.2d at 901, 27 Cal. Rptr. at 701. The doctrine set forth in *Greenman* was later incorporated into RESTATEMENT (SECOND) OF TORTS § 402A (1965). That section provides:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

[28] For cases in the area of products liability that did not involve physical injury to human beings but where the manufacturer was held liable for his defective product see Rose v. Buffalo Air Service, 170 Neb. 806, 104 N.W. 2d 431 (1960); Brown v. Globe Laboratories, 165 Neb. 138, 84 N.W. 2d 151 (1957); Colvin v. John Powell Co., 163 Neb. 112, 77 N.W .2d 900 (1956); Cox v. Greenlease-Liep Motor, 134 Neb. 1, 277 N.W. 819 (1938).

[29] 124 Neb. 337, 246 N.W. 721 (1933).

In 1956 the Nebraska Supreme Court ruled on a vendor's liability for injuries resulting from consumption of defective food.[30] The plaintiff was eating sherbet at the defendant's establishment when she was injured by a piece of concealed glass in the sherbet. In holding that the trial court erred in refusing to submit the issue of implied warranty to the jury, the court adopted the rule:

> [O]ne engaged in the business of serving food for immediate consumption on the premises impliedly warrants that the food is wholesome and fit for human consumption, and is liable, upon breach of such warranty, without proof of negligence, to a consumer injured by eating deleterious food.[31]

In 1961 the court decided *Asher v. Coca Cola Bottling Co.*[32] The plaintiff entered a cafe and ordered a soft drink. The bottle was uncapped and served with a straw. After drinking most of the bottle's contents through the straw he began drinking out of the bottle. He swallowed some substance, looked at the bottle and discovered the remnants of a mouse. The court held: [Privity is] no longer an element to be established in an action upon an implied warranty that food products are wholesome and fit for public consumption where they are shown to be in the same condition as when they left the control of the manufacturer.[33]

3. *Strict Liability*

As the above history demonstrates, courts have imposed strict liability in the area of products liability under two theories—strict liability in tort and strict warranty liability. The basic rationale behind the imposition of strict warranty liability "is the prevention of frustration of his [the purchaser's] expectations about the characteristics and quality of products purchased."[34] Thus, the focus is upon whether the goods conform to any express representations[35]

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[30] Zorinsky v. American Legion Post No. 1, 163 Neb. 213, 79 N.W.2d 172 (1956).

[31] *Id.* at 220, 79 N.W.2d at 176.

[32] 172 Neb. 855, 112 N.W.2d 252 (1961).

[33] *Id.* at 860, 112 N.W.2d at 255.

[34] Keeton, *Products Liability*, 50 F.R.D. 338, 340 (1970).

[35] Under § 2-313, express warranties are created by any affirmation of fact or promise made by a seller which related to the goods and becomes part of the basis of the bargain, any description of the goods which is made part of the basis of the bargain, or any sample or model which is made part of the basis of the bargain. Under this section it is not necessary that the seller use formal words such as "warrant" to create an express warranty. However, "puffing" language used by the seller during negotiations for the sale of particular goods does not constitute the creation of an express warranty.

made by the seller, and to any implied warranties of merchantability"[36] or "fitness for a particular purpose."[37] Liability results from failure to meet the contract's terms, whether express or implied.

Strict liability in tort, on the other hand, emphasizes the defective character of the product when it left the manufacturer's hands and seeks to shift the burden of the loss from the consumer to the manufacturer who placed the defective product in the stream of commerce. Under strict liability in tort, all express or implied contractual representations are disregarded. Strict liability in tort requires only that the product caused an injury, that the injury was a result of the defect in the product, and that the defect was in existence when the product left the manufacturer's hands.[38]

Although strict liability in tort has as a central aim risk distribution and relies almost exclusively upon it for its justification, the warranty approach reaches a like result in that it too shifts the loss from the consumer to one who is better able to absorb the burden, namely the seller. He in turn is able to broadly distribute the loss to his insurer or the general public.

The two theories are functionally alike insofar as they both serve to distribute the loss broadly throughout society. However, application of one of the approaches rather than the other will produce varying results. The warranty approach permits recovery not only for physical injury but also for economic loss.[39] Under the U.C.C., a seller may disclaim all warranties[40] provided the disclaimer is

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[36] Under § 2-314 "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to the goods of that kind." Goods to be merchantable must be at least such as "pass without objection in the trade under the contract description," are "fit for the ordinary purposes for which such goods are used," or "conform to the promises or affirmations of fact made on the container or label if any."

[37] Under § 2-315 "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

[38] RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See* note 27, *supra.*

[39] Unlike § 402A, the U.C.C. provides for incidental and consequential damages for breach. Section 2-715 deliniates what incidental and consequential damages include.

[40] U.C.C. § 2-316.

conspicuous[41] and not unconscionable;[42] under strict liability in tort, any attempted disclaimer is always ineffective. Under the U.C.C., a consumer must give the manufacturer notice of the breach within a "reasonable" period of time;[43] under strict liability in tort, notice is not required. Under Section 2-725(2) of the U.C.C.,[44] the cause of action accrues and the statute of limitations begins to run upon tender of delivery, irrespective of knowledge of the breach; in tort, of the cause of action begins when the tort has been committed, that is, when the injury is sustained.[45]

While it is clear that the court in *Kohler* adopted strict liability in tort, the court's citation of three cases leads to analytical confusion. The *Henningsen* decision, relied upon in *Kohler,* held a manufacturer liable for breach of an implied warranty of merchantability. In contrast, *Greenman,* also relied upon in *Kohler,* was based on strict liability in tort. To equate *Henningsen* and *Greenman* for the proposition that lack of privity under the circumstances of those cases is no problem is correct; but to equate the two cases as standing for the proposition of strict liability in tort is clearly incorrect.

The court's use of *Asher v. Coca Cola Bottling Co.*[46] is also analytically confusing. The food and beverage cases, such as *Asher,* were an exception to the privity requirement established in *Winterbottom* as a necessary prerequisite to recovery under a warranty theory. Although some of the food and beverage cases have turned on the manufacturer's negligence, the *Asher* case was an implied warranty action and the court's decision was supported by cases decided under the Uniform Sales Act.

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[41] Under § 2-316 in order to exclude or modify implied warranties of merchantability the language must mention merchantability and in the case of a writing must be conspicuous. To exclude or modify an implied warranty of fitness for a particular purpose the exclusion must be made by a writing and it too must be conspicuous.

[42] U.C.C. § 2-302.

[43] What constitutes reasonable time has not been made clear by judicial decisions. Some courts say that notice of suit is within the reasonable time limit and other courts have looked to the facts of the case to determine a reasonable time period. The parties may, in their contract, agree as to what is a reasonable time period in which to give notice of breach and this is what most contracts for sale now do.

[44] § 2-725(2) provides: "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made. . . ."

[45] *See* NEB. REV. STAT. § 25-207 (Reissue 1964).

[46] 172 Neb. 855, 112 N.W.2d 252 (1961).

The *Kohler* court's statement that there is "no rational distinction tion bewteen the soft drink cases and the case at hand"[47] is not entirely correct. They are alike in that for liability to be imposed the barrier of privity had to be surmounted; however, the method used can be important. Adoption of strict liability in tort is a simple method of avoiding privity questions completely. Under a warranty approach the extent of the warranty's protective umbrella may still be a problem to be confronted in each case.[48]

Although strict liability in tort has been judicially adopted in numerous states,[49] this development has not met with universal praise.[50] The major criticism is that judicial adoption of strict liabil-

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[47] 187 Neb. at 435, 191 N.W.2d at 606 (1971).

[48] States adopting the Uniform Commercial Code had, depending on when they adopted it, various alternatives open to them in adopting Section 2-318 of the Code:

> "Alternative A—A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."
> "Alternative B—A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."
> "Alternative C—A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."

These alternatives were drafted at different times and reflect the U.C.C.'s attempt to keep up with the rapid developments in the area of products liability. It should be noted that Nebraska adopted Alternative A.

[49] According to 1 CCH PRODUCTS LIABILITY REP., 4070, Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin have adopted strict liability in tort. The Federal courts of Colorado, New Mexico, Rhode Island, and Vermont have anticipated acceptance. The Indiana appellate court has also anticipated acceptance. Michigan and New York have inferentially accepted the doctrine.

[50] *See,* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases,* 18 STAN. L. REV. 974 (1966); Rapson, *Products Liability Under Parallel Doctrines: Contracts Between the Uniform Commercial Code and Strict Liability in Tort,* 19

ity in tort is "judicial creation of a common law doctrine of products liability which bypasses a recently enacted body of statutory law concerned with substantially the same field."[51] The criticism of judicial encroachment on the legislature's domain has substance if one views the legislature's adoption of the U.C.C. as a determination of the extent to which strict liability was to be imposed on sellers of goods. One might argue that when the legislature adopted the U.C.C. it meant to preempt the field for all matters falling within the terms of that legislation. This argument loses much of its vitality when one remembers that the U.C.C. was drafted and adopted by many states prior to the explosion of products liability cases of the 1960's and the subsequent drafting of Section 402A of the Restatement of Torts. The adoption of strict liability in tort should, however, not be looked upon as judicial usurpation but as supplementary law designed to afford relief and avoid inequity when application of the U.C.C. would clearly result in inequity.[52]

Absolving a manufacturer of strict liability for defective products may have made economic sense when American industry was in a state of infancy and in need of protection. Today, however, because the bulk of American industry can absorb and spread the loss with less hardship than the individual who has been injured, the risk of bearing the loss caused by defective products should be reallocated. Viewed in this manner the *Kohler* court's adoption of strict liability in tort might be said to be commendable. However, the

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RUTGERS L. REV. 692 (1965); Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970).

[51] Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 712 (1965).

[52] In considering the scope of strict liability in tort and the warranty provisions of the U.C.C. and the argument of judicial usurpation the case of Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145 (1965) should be noted. Chief Justice Traynor, in the majority opinion stated that the doctrine of strict liability in tort was not designed to supersede the warranty provisions of the U.C.C. adopted by the legislature but was designed to govern the distinct problem of physical injuries. Justice Traynor was of the opinion that the rules of warranty functioned well in commercial settings but frustrated rational compensation for physical injury. The court seemed to say that the scope of the warranty provisions of the U.C.C. are designed to cover commercial transactions and that the law of warranty is primarily aimed at controlling the commercial aspects of these transactions. Strict liability in tort, in Traynor's view, supplements the U.C.C. by providing a means of recovery for physical injury when the application of the U.C.C.'s warranty provisions would not adequately handle the matter, or when the matter fell outside the pale of the U.C.C.

Kohler court's failure to carefully select the cases designed to support its proposition may very well lead to problems in future cases. Because the court mixes warranty cases and strict liability in tort cases together in reaching its decision, the point at which either approach ends and the other begins or how the court views each approach's role in the area of products liability is left confused and will cause perplexing problems for the Nebraska courts in the future.[53]

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[53] It will be interesting to see how Nebraska courts apply strict liability in tort in areas which other jurisdictions have had problems, *e.g.*, design, drugs, component parts, and blood banks. These problem areas will undoubtedly come before the court in the near future, and the author suggests that the Nebraska courts will follow the lead of other jurisdictions by creating exceptions to the general rule in order to relieve parties from the harshness of the general rule's effect, in much the same manner as the courts created exceptions after the decision in *Winterbottom*.