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REPORTS OF CASES

DECIDED BETWEEN

APRIL 28, 1976 and NOVEMBER 9, 1976

IN THE

Supreme Court of Nebraska

JANUARY TERM 1976 and SEPTEMBER TERM 1976

VOLUME CXCVI

MARVIN L. GREEN

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By Marvin L. Green, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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IN MEMORIAM

HARVEY M. JOHNSEN

At the hour of nine o'clock a.m., on the tenth day of May, A. D. 1976, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of Harvey M. Johnsen, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE HARRY L. WELCH, ESQ.

May it please the Court, the Chief Justice and Associate Justices of the Supreme Court of Nebraska, members of the Judiciary, and friends of Judge Harvey M. Johnsen:

I wish to acknowledge the presence today of Judges of the United States Court of Appeals for the Eighth Circuit, Judges Donald R. Ross and Donald P. Lay; Judges of the United States District Court, Judges Albert G. Schatz and Robert V. Denney, Senior District Judge, Richard E. Robinson; Judge Samuel P. Caniglia, Judge of the District Court for the Fourth District; and Judge Herbert A. Ronin of the District Court for the Third District; and retired member of this Court, Judge Edward F. Carter.

The Committee appointed by this Honorable Court to present a Memorial Session in memory and tribute to the late Honorable Harvey M. Johnsen, for several years a Justice of this Court and later a Judge and Chief Judge of the Circuit Court of Appeals of this District, respectfully tenders this tribute to his person, his character, and his long and distinguished public service.

The record of man's short stay in this life comes down to a few lines, more or less brief according to his attainments, a few dates in the official records, but a monu-

ment in the memory of his friends. The members of the bar and bench I shall call upon at this time will relate to you these attainments, these memories, these accomplishments of a truly great jurist, a truly great man, and a truly great friend.

To the members of this Court, the Bar Association offers a Resolution in memory of Judge Johnsen that a transcript of these proceedings be included in the official record of the Court.

Before calling upon the speakers I must make one interesting reference to an opinion of this Court when Judge Johnsen was sitting on it. It was in an automobile accident case which involved the position of the car in question after the accident. There was conflicting evidence on which side of the road the car stopped. Judge Johnsen in his dissenting opinion said, "The majority by means of a judicial derrick has moved this car from one side of the road to the other."

The bench and bar alike share a deep personal loss in the death of our friend, Harvey M. Johnsen.

HONORABLE ALFRED G. ELLICK, ESQ.

MAY IT PLEASE THE COURT:

It is an honor for me to speak on behalf of the Nebraska State Bar Association at this ceremony in memory of Judge Harvey M. Johnsen. The Bar of Nebraska is proud to claim Judge Johnsen as one of its own. Harvey Johnsen was born in Hastings, Nebraska, on July 16, 1895, but he spent most of his youth in the town of Fremont where his brother John still lives. He was graduated first in his class from the University of Nebraska law school in 1919 and was admitted to the Nebraska Bar in that same year. His Ivy Day Oration at the University (and it was a distinct honor to be selected Ivy Day Orator) set a new record for brevity - exactly six minutes. He spent an additional year at the University to earn an A. B. degree in logic,

philosophy and foreign languages and was also elected to Phi Beta Kappa.

From 1920 to 1931 he practiced law in Omaha with the firm of Montgomery, Hall & Young. In 1931 he became general counsel for the Federal Land Bank in Omaha but left this position in 1934 to head the new firm of Johnsen, Gross & Crawford, predecessor to the present firm of Gross, Welch, Vinardi, Kaufman & Day.

Judge Johnsen was both liked and respected by his fellow lawyers and never failed to assume his share of bar association work. From 1928 to 1936 he was secretary of the Nebraska State Bar Association and in 1931 he was president of the Omaha Bar Association. In September, 1937, the Supreme Court of Nebraska, by court order, created the integrated (or what we now call unified) Nebraska State Bar Association. The new rules became effective on January 1, 1938. At the annual meeting of the Association in December, 1937, Judge Johnsen was elected president of the Association, thus becoming the first president of the unified bar in Nebraska. Incidentally, the State Bar dues at that time were fixed by court order at $5.00 per year.

In November, 1938, he was appointed an associate justice of this Court by Governor Cochran to fill the vacancy created by the death of Judge L. B. Day, but he delayed assuming office until his term as president of the State Bar Association expired at the end of that year. In 1940 he was appointed to the United States Court of Appeals for the Eighth Circuit by President Roosevelt. His distinguished service and accomplishments as a member of the Supreme Court of Nebraska and as a member of the United States Court of Appeals and the Judicial Conference of the United States will be commented on by others taking part in this memorial program. He maintained his residence in Omaha and retained his active membership in the Nebraska State Bar Association until his death.

Although Judge Johnsen was essentially a reserved and private person, he was extremely kind and thought-

ful and unfailingly courteous. I well remember how pleasant he was to me when I started to practice law in the early 1940's, reminding me that both he and my father had been raised in the town of Fremont and that they used to reminisce about their early years in that city.

With the death of Judge Johnsen last September the Nebraska Bar lost one of its most distinguished members and certainly one of its greatest friends and supporters.

May 10, 1976.

HONORABLE FLAVEL A. WRIGHT, ESQ.

MAY IT PLEASE THE COURT:

It is a privilege to be permitted to memorialize the great service rendered to the bar of this state and to the State of Nebraska and the United States by Harvey M. Johnsen.

His service to the law and to his community as a lawyer, as a teacher of law, as a state supreme court judge and federal circuit court judge, as a secretary of the Nebraska Bar Association and later as its president, adviser and elder statesman has been without equal or parallel.

Dedication to the cause of justice was paramount in his thinking. His reputation was made as a legal scholar and judge and yet he had wider interests which included dedicated service to his fellow lawyers and a surprising interest in Satchmo—Louis Armstrong and his music.

His passing has deprived us of one of our stalwarts. We must recognize however that we were privileged to have him with us for his allotted 4 score years. It is for us who remain to take our example from his life and dedication and to rededicate ourselves to serve the principles for which he stood and under which he served us so well.

HONORABLE KENNETH B. HOLM, ESQ.

MAY IT PLEASE THE COURT:

My association with Judge Harvey M. Johnsen had a profound effect on my whole life and I hope the Court will permit me a very personal recollection of that association. I graduated from high school in 1933—in the depths of the great depression—with a great ambition to study law but no financial means to do so. I worked instead for five years and in the fall of 1938 enrolled at the University of Nebraska in prelaw studies. It was my great good fortune to be employed then by this Court through Judge L. B. Day; it was my misfortune and loss that Judge Day died only a few months thereafter.

When Judge Johnsen was appointed to this Court in 1939 another great and good friend of mine, George H. Turner, presented my case to Judge Johnsen: for me the employment was the equivalent of my law education. Judge Johnsen did take me as his secretary and law clerk, despite all my defects of irregular working hours because of class attendance; and, not the least, the total inability to be of real assistance to him as a law clerk since I had not yet reached the studies of law. That association, and my emulation of some of his habits, has marked my entire career as a lawyer and I am enormously grateful for this wonderful, shy, extraordinary man.

Judge Johnsen always arrived very early at his office. When I started with him I felt that the very least I could do was to be there when he arrived. I pushed my arrival time up earlier and earlier—but when I got there at six thirty and found him at work, I recognized my ambition was not going to be realized. I compromised and was there by seven—and it was very rare that he was not already there.

I could not detail for this Court the innumerable kindnesses this man showed to me, his sympathetic understanding of my errors, and the unusual lengths that he

went to in assuming to himself burdens which should have been mine. I can only vouch to this Court that my friendship with him, which began then and extended the remainder of his lifetime, was cherished and respected. Judge Harvey M. Johnsen was not only a man of great and extraordinary intellectual capacity, a lawyer and a judge with few equals, but was as well a man of human compassion and sympathy who must never be forgotten.

JUDGE ROBERT VAN PELT.

When a great man dies
For years beyond our ken
The light he leaves behind him lies
Upon the paths of men

The truth of these lines as they apply to our departed friend are well shown by the remarks of those who have preceded me.

I am pleased that they have recalled with a smile the man whom we today honor.

Bruce Catton in his book *Waiting for the Morning Train* after making the point in an early chapter about the differences between youth and old age, states: "The chief difference is that youth waits for the morning limited and age waits for the night train." He concludes his book with these words:

> "Old age, as I said before, is like youth in this one respect: it finds one waiting at the railroad junction for a train that is never going to come back; and whether the arrival and possible destination of this train is awaited with the high hopes that youth entertains when it waits for its own train depends, no doubt, on the individual.
>
> But you know how it can be, waiting at the junction for the night train. You have seen all of the sights, and it is a little too dark to see any more even if you did miss some, and the waiting room is uncomfortable and the time of waiting is dreary, long-

drawn, with a wind from the cold north whipping curls of fog past the green lamps on the switch stands. Finally, far away yet not so far really, the train can be heard; the doctor (or station agent) hears it first, but finally you hear it yourself and you go to the platform to get on. And there is the headlight, shining far down the track, glinting off the steel rails that, like all parallel lines, will meet in infinity, which is after all where this train is going. And there by the steps of the sleeping car is the Pullman conductor, checking off his list. He has your reservation, and he tells you that your berth is all ready for you. And then, he adds the final assurance as you go down the aisle to the curtained bed: 'I'll call you in plenty of time in the morning.'

. . . in the morning."

Harvey Johnsen was one who had seen all of the sights and probably more clearly than many of us had heard the rumble of the night train and knew that he would soon join its passengers.

In his years, as has already been noted, he had accomplished much and had national recognition greater than as a boy he might reasonably expect.

Judge Johnsen, while a member of this court, was on October 14, 1940 appointed by President Franklin D. Roosevelt to the U. S. Court of Appeals for the Eighth Circuit and took the oath on November 18, 1940. He was the second man to go from this court to the federal judiciary. The first was Elmer S. Dundy, first United States District Judge in Nebraska and a member of the Territorial Supreme Court.

Judge Johnsen was chief judge from August 6, 1959 to July 16, 1965 and took senior judge status on August 1, 1965. His first opinion was filed February 11, 1941. His last was filed September 27, 1974, entitled *United States v. Minkin,* 504 F. 2d 350. Records are not kept by the Clerk's office in St. Louis showing the number of opinions written by any particular judge in the course

of his service. Suffice it to say that he always carried his share of the caseload. He was one of three judges appointed to hear the appeal of Judge Otto Kerner in the Court of Appeals for the Seventh Circuit when the judges of that court recused themselves. He was serving at the time of his death *In Re Cross-Florida Barge Canal Litigation,* 329 F. Supp. 543, as a district judge, having been designated by the Chief Justice of the U. S. Supreme Court.

He first sat with the Court of Appeals in December, 1940, joining in a per curiam opinion with Judges Gardner and Woodrough, filed December 26th of that year.

On February 11, 1941 he filed his first two opinions as a member of the Court of Appeals—*Yoder v. Nu Enamel Corporation,* 117 F. 2d 488, and *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corporation,* 117 F. 2d 491.

Interestingly, in the *Yoder* case, in affirming Judge Munger, he relied, as Judge Munger had done, upon an opinion of this court and a statement which it contained as to Nebraska law which was dicta. It was the only expression of the Nebraska Supreme Court on the subject. Judge Johnsen stated that whether you would depart from this expression of Nebraska law was not a proper matter for argument or speculation by the Court of Appeals. You did depart from it in November of the same year and overruled the case on which he relied in his first opinion.

His first dissent was filed February 24, 1941. Judges Sanborn and Woodrough were the majority. Judge Johnsen's dissent became the law when in January, 1942 the U. S. Supreme Court in a unanimous opinion reversed the Court of Appeals (314 U. S. 549) and adopted the position of Judge Dewey of the District Court of Iowa and Judge Johnsen.

In addition to writing his opinions and to his duties as chief judge, he served on the Committee on Supporting personnel of the Judicial Conference of the United States, the Special Subcommittee on Geographical Organization of the Courts, the Committee to Implement

the Criminal Justice Act, and as chairman of the Committee on Judicial Statistics and the Special Committee on Powers and Responsibilities of Judicial Councils.

Judge Johnsen was president of the Nebraska State Bar Association during the first year of the integrated bar. With reference to it he stated: "Anything else that comes out of the integrated bar will be the fruits of our own will and efforts. Our organization structure has been streamlined, but we are still its engineer."

In 1945 Judge Johnsen, addressing the Lawyers Association of Kansas City, on the subject *"This Thing Called Judicial Administration"*, stated:

> "A free and enlightened people, if I read the facts of history correctly, accept and obey the law, primarily because of the existence of courts, to which they are satisfied that they can turn for an impartial administration of justice, if the need arises."

This address, given at a time when the Nation was still at war, had this expression of hope for the future:

> "I am idealist and philosopher enough to believe that those principles and that institution which have been capable of solving the problem of the struggles between individuals are also capable of solving the question of war between nations. Mankind is no different in the mass than in the individual, if its impulses are controlled and directed, until they have become settled. The universal hold of this thing called judicial administration, where impartial courts exist, should sufficiently bespeak the hold which it can come to have upon the mind of the peoples of the world in national disputes, if it is given the opportunity to do so."

He closed by stating:

> "It was Voltaire who said, 'There is one thing stronger than all the armies in the world; and that is an *idea whose time has come.*' You and I, who know the quality, the strength, and the nature of the hold, that this thing called judicial administration can possess, will hope and pray that *its time*

may have come on the great international horizon."

The Honorable Donald Lay, who succeeded Judge Johnsen on the U. S. Court of Appeals, in a recent memorial service at St. Louis spoke of his devotion to the judicial system and to the law itself, and then stated:

> "This devotion generates a vision of the courtroom as a hallowed temple and the judge presiding over it as the priest offering holy unction to the people. In no other way can one describe Judge Johnsen's vigilant concern for the integrity a judge must always possess. His quest for the just result was always encompassed by his recognition of the vital need for the appearance and propriety of and fairness on the part of the judicial officer. He considered this individual responsibility to be essential if justice was to remain a viable force within our judicial process."

I cannot close these remarks, already too long, without making a personal comment. I first met Judge Johnsen in the fall of 1919 when I was initiated into Phi Delta Phi, of which he was already a member. We remained friends until his death. I can see now that he was adding to my schooling, and hopefully to my judicial stature, when he assigned me to the Southern District of Iowa for the greater portion of a year and later to the District of Columbia. He encouraged me in certain committee assignments which were offered. I see now that he was acting as a friend. I am deeply indebted to him and, like you, I mourn his passing.

He was a man of integrity, ability and industry. He was a gentleman. What more need be said.

I close as I began

> When a great man dies
> For years beyond our ken
> The light he leaves behind him lies
> Upon the paths of men.

JUDGE HALE MCCOWN.

I did not have the pleasure of meeting Harvey Johnsen in person until shortly after World War II. My first indirect contact with him, however, came some years earlier when I returned to Nebraska to continue the practice of law.

Harvey Johnsen had written a dissenting opinion about a year before, which was still the subject of frequent discussion and comment among the lawyers of Nebraska. In that opinion, Judge Johnsen, after extensive expressions of regret for the necessity of departing from his long established practice of not filing a written dissent when he disagreed with an opinion on its interpretation of the facts, proceeded with a detailed explanation of why the facts set out in the majority opinion were incorrectly interpreted, and concluded with these words: "The conclusion that 'the defendants' truck was driven upon the wrong side of the road * * * and that the Ford * * * was upon its own side of the road' can only be reached by using a judicial derrick to move the cars from the place where the photographs conclusively established them to have been." From such a quiet, gentle, scholarly man this was an unusually forceful expression of dissent. It should be noted, however, that Judge Edward F. Carter, an outspoken and outstanding judge of this court, joined in Judge Johnsen's dissent.

My personal friendship with Harvey Johnsen began more than 20 years ago and continued until his death, through our association in the American Law Institute, and in other legal and judicial organizations. Judge Johnsen was a true legal scholar, dedicated to the law and to the pursuit of excellence. Although unfailingly kind and courteous personally, his convictions and legal opinions were firm, unwavering and firmly buttressed by both logic and authority. Seldom hesitant in reaching his conclusions, he was nonetheless penetrating and exhaustive in his research. His opinions reflected the quality of his work, as well as the quality of his judicial talent.

He was a wonderful friend and social companion. Although often reserved in public, and invariably reticent, he maintained broad personal social contacts and interests. Always well informed, he was a delightful stimulating conversationalist. His humor was broad ranging and his wit was sharp. An outstanding, urbane gentleman in the true old-fashioned sense of that term, he will be sorely missed by all those who knew him.

His lasting contributions to the development of the law will continue to live in the record of his decisions, printed in the books of this Court and of the federal courts in which he served his later years. The Nation and the State of Nebraska properly pay their respects on this occasion to a great judge — capable, honest and unassuming — who served well and faithfully for these many years. His friends and associates in the law pay their respects to a quiet, warm and friendly man, who was also a great judge.

Hale McCown.

CHIEF JUSTICE PAUL W. WHITE.

There is little that I can add to what has already been said. It must be said that besides this distinguished gathering here this morning, that there is a multitude of other lawyers, judges, and citizens in this state and in all of our great country, who knew Harvey Johnsen and are of the same attitude and disposition that we are here this morning. Continuously, for over thirty-five years, Harvey Johnsen served the people of this state and the United States in a high judicial position. The length of time that he served, the personal and intellectual qualities that he demonstrated, and his dedication to the ideals of a government of law, created in him a stature that symbolized the ideals and the traditions of a great judge, both in the State of Nebraska, and in the Federal judiciary.

Justice McCown, for the Court, has aptly summarized the outstanding qualities of Harvey Johnsen as a scholar and as a person, and as a judge. I join in them.

I was fortunate in having his personal acquaintance, friendship, and interest in the latter part of his career. Because of his insight, his balance and distinguished judgment, and his willingness to share his experience and to give responsible advice, I regarded him as a father figure when I entered the line of march in the judiciary.

Besides his other traits as a scholar, and as a profound student of the law, Harvey Johnsen had a keen and subtle wit and an ability to express himself pungently. In one case during his brief career on this court, he stated that the testimony presented a problem of a medical experiment in judicial credulity and judicial speculation as to medical credibility. I also remember, with pleasant recollection, Justice Harvey Johnsen's opinion in State ex rel. Ebke v. Board of Educational Lands and Funds affirming this court's holding that required public auction of expired school land leases and holding that it did not violate the due process rights of the school land lessees. This was naturally so, because I represented the litigant Ebke.

I also remember, with pleasant recollection, his continued contact and responsible interest in the Nebraska legal system and our integrated Bar and his suggestions and concern about the quality and efficiency of judicial administration in the State of Nebraska.

Quietly and effectively, he rendered support where it counted in the move towards the integration of the Bar, the Merit System, and the improvements in our judicial system, such as the Pattern Jury Instructions and the development of a Uniform Evidence Code.

Great though Harvey Johnsen's judicial qualities were, all of us here today remember him as a fine, human, and humble person. I do not hesitate to say that we not only sorely miss him, but we feel his loss is almost irreplaceable. Harvey Johnsen was a real physician of applied liberty.

With intellect, dispassionate temperament, and a courageous resolution, he spelled out in his record a clear

concept of the law and of the judicial power. His Hallmark was the same as Cokes, "that when the case should be, he would do that which should be fit for a judge to do."

The resolutions offered this morning are adopted by the Court. The resolutions, together with the statements of counsel, will be extended at length on the journal and printed in the official reports of this Court. The members of his family will be advised of the high regard of the Bench and the Bar for Judge Harvey Johnsen, and of the expressions of sympathy made this day. Copies of the resolutions and statements of counsel will be sent to them. The Court stands adjourned.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1976

FOXLEY CATTLE COMPANY, A NEBRASKA PARTNERSHIP, APPELLEE, V. BANK OF MEAD, A NEBRASKA BANKING CORPORATION, APPELLANT.

241 N. W. 2d 495

Filed April 28, 1976. No. 40227.

1. **Fraud.** A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth. The fact that plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof and did not rely wholly upon the veracity of defendant.
2. ———. Where ordinary prudence would prevent deception, an action for fraud perpetrated by deception will not lie, but this rule has no application where the defects are latent.
3. **Fraud: Brands and Marks.** The purpose of section 54-116, R. S. Supp., 1969, was to afford protection to the owners of brands and not to protect those who make fraudulent misrepresentations.
4. **Interest: Judgments.** Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right.

Appeal from the District Court for Saunders County: HOWARD V. KANOUFF and DONALD J. HAMILTON, Judges. Affirmed.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

John R. Douglas of Cassem, Tierney, Adams & Gotch, for appellee.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and MURPHY and COADY, District Judges.

COADY, District Judge.

The plaintiff, Foxley Cattle Company, a partnership and cattle feeding operation, sued the defendant, Bank of Mead, a banking corporation, on the theory that the president of the Bank of Mead made misleading statements, or misrepresented facts, and plaintiff obtained a jury verdict for damages in the sum of $227,850.71. The trial judge, after hearing and the taking of evidence, awarded prejudgment interest in the sum of $95,808.43. We affirm the total judgment of $323,659.14.

The evidence is summarized in this and the following five paragraphs. The United States National Bank of Omaha, Nebraska, notified the Bank of Mead on November 30, 1970, that Agri-Land & Beef, Inc., a corporation, cattle feeding operation and customer of the Bank of Mead, was overdrawn on its checking account in the approximate sum of $700,000. The effect thereof was that the Bank of Mead owed that amount to the United States National Bank. Mr. Schuette, president of the Bank of Mead, visited late that evening and on the morning of December 1, 1970, with Mr. Richter, president of Agri-Land & Beef, Inc. Mr. Schuette was told that Agri-Land would sell some cattle and he directed Mr. Richter to take the check to the United States National Bank.

During the morning of December 1, 1970, Mr. Richter went to the offices of plaintiff and met with the partnership's chief executive and buyer, Mr. Foxley. On prior occasions, Mr. Foxley had purchased cattle from Mr. Richter and Mr. Richter had custom fed cattle for Mr.

Foxley. On this date, the two entered into an agreement wherein plaintiff was to purchase 1,802 head of cattle located on the Nygren farm for $326,353.20. A handwritten memo was made by Mr. Richter which identified the cattle by purchase date, number, weight, and as steers. During the negotiations, Mr. Foxley communicated by telephone with Mr. Holstein who was the president of the South Omaha Production Credit Association. The testimony of Mr. Foxley and Mr. Holstein was in severe conflict as to whether Mr. Foxley was warned or put on notice that there might not be cattle free and available for purchase. Sometime during the morning, Mr. Foxley had a general discussion about the sale with Mr. Vervaecke, one of the owners of cattle also located on the Nygren farm.

About 12:30 o'clock p.m., Mr. Foxley called Mr. Holzafpel, plaintiff's office manager, to join Mr. Foxley and Mr. Richter. Mr. Foxley instructed Mr. Holzafpel to investigate the matter and to issue a check if everything was all right. Mr. Holzafpel placed a telephone call for Mr. Holstein, did not get him and then called Mr. Schuette at the Bank of Mead. Concerning that conversation, the testimony of these two witnesses was in severe conflict. By Mr. Holzafpel's account, Mr. Schuette suggested that Agri-Land owned cattle located on the Nygren farm, that he had been there that morning, that he had seen them, that title documents were at the United States National Bank, and that the cattle were free and clear of liens. By Mr. Schuette's account, Mr. Holzafpel was told that Mr. Schuette had driven by the Nygren farm that morning, that he saw cattle there, that the bank had no title documents, and that the bank had no liens on cattle there.

That same afternoon, Mr. Holzafpel did speak to Mr. Holstein by telephone. Again, these two witnesses severely disagreed. The two witnesses did agree that Mr. Holstein suggested that they go the next morning and count the cattle on the Nygren farm. Neither Mr.

Foxley nor Mr. Holzafpel made any additional investigation and a check for $326,353.20, drawn on the Omaha National Bank and made payable to the "Bank of Mead and Agri Land & Beef, Inc.," was given to Mr. Richter.

At 4 o'clock p.m., Mr. Schuette arrived at the United States National Bank, endorsed the check for the Bank of Mead, and the Bank of Mead's account was credited by the United States National Bank. Sometime during that afternoon, a vice president of the Omaha National Bank called Mr. Holzafpel to ask if the check should be honored and was instructed to cash the same.

The 1,802 head of cattle were never delivered to plaintiff. Plaintiff did recover $98,502.49 from Agri-Land which reduced plaintiff's claim for damages to $227,850.71.

The defendant's argument for reversal consists of four general areas: (1) That a rule of an ordinary and prudent cattle purchaser should apply to these facts and which it raised by three proposed instructions not given to the jury; (2) that the evidence was insufficient to prove that defendant made a material representation; (3) that the trial judge should not have awarded prejudgment interest; and (4) that defendant's objection to certain admission testimony should have been sustained. The issues will be discussed in that order.

A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth. The fact that plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof and did not rely wholly upon the veracity of defendant. Foley v. Holtry, 43 Neb. 133, 61 N. W. 120 (1894); Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139 (1951). It is generally held that fraud may be predicated on false repre-

sentations although the truth could have been ascertained by an examination of public records. Linch v. Carlson, 156 Neb. 308, 56 N. W. 2d 101 (1952).

The defendant argues that its proposed instruction No. III should have been given by the trial judge. Its proposed instruction is based on the language of Nathan v. McKernan, 170 Neb. 1, 101 N. W. 2d 756 (1960), which states: "Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry. . . . A defrauded party must be diligent and prudent in his effort to detect the fraud and means of knowledge are equivalent to knowledge." We have reviewed that case, and its antecessors, and find that such language has been applied to holdings on facts establishing theories of waiver or estoppel by reason of a statute of limitations and the doctrine of laches. Swanson Petroleum Corp. v. Cumberland, 184 Neb. 323, 167 N. W. 2d 391 (1969), repeats some of that language and the facts establish some elements of waiver or laches, but the holding is consistent with theories discussed in the following paragraphs. We decline to apply Nathan v. McKernan, *supra,* to the facts of this case.

In regard to defendant's proposed instruction No. IV, it urges us to insist that the jury should have been instructed that "where ordinary prudence would have prevented a deception an action for fraud perpetrated by such deception will not lie." Similar language has been used in numerous opinions published by this court and a proper analysis of the fact situations therein will develop two separate and distinct propositions.

Such an instruction may be proper in those cases where a person who relies on a misrepresentation does not need to make any additional investigation to discover a patent defect or the patent truth of the matter. Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204 (1972); Swanson Petroleum Corp. v. Cumberland, *supra*; Dyck v. Snygg, 138 Neb. 121, 292 N. W. 119 (1940); Osborne v. Missouri P. Ry. Co., 71 Neb. 180, 98 N. W. 685 (1904). The ordi-

nary prudence rule does not apply where the defects are latent. Maser v. Lind, 181 Neb. 365, 148 N. W. 2d 831 (1967); Falkner v. Sacks Bros., 149 Neb. 121, 30 N. W. 2d 572 (1948). A reading of other opinions concerning facts of latent defect will clearly demonstrate that we have consistently held that an unknowing person who relies on a material representation does not need to make an investigation, or additional investigation, to discover the truth. Mid-States Equipment Co. v. Evans, 191 Neb. 230, 214 N. W. 2d 496 (1974); Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131 (1955); Linch v. Carlson, *supra*; Pasko v. Trela, *supra*; Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275 (1942); Foley v. Holtry, *supra*.

The trial judge instructed the jury that a person is justified in relying upon a representation where an investigation would be required to discover the truth. The main complaint of the defendant is that this instruction "is but one side of the coin." It is noted that the proposed instruction and the given instruction are subject to the same criticism. While we find it possible that some judge, some day, may write a more detailed instruction, it is our finding that the instruction was sufficient for the facts at hand.

The following facts of record, we think, are uncontested on the part of defendant: That Mr. Foxley and Mr. Holzafpel were told by Mr. Richter that he had 1,802 head of cattle for sale and located on the Nygren farm; that Mr. Foxley was told by Mr. Vervaecke that he was sure the cattle were clear; that Mr. Holzafpel had a conversation with Mr. Schuette; that Mr. Foxley and Mr. Holzafpel were told by Mr. Holstein that there might not be enough cattle on the Nygren farm, that he had liens on some cattle located there, and that they were owned by various persons; and that, in fact, there actually were hundreds, if not thousands, of cattle located on the Nygren farm. It would be fair to say that a mere trip to the Nygren farm would not have solved the problem. The cattle would have to have been count-

ed, identified, or separated according to the various owners. The nature and extent of liens would have to have been determined and the subject cattle identified. The jury did not and we do not find that the record discloses, in any way, a set of circumstances suggesting a patent defect or that the truth of the matter was at hand.

The defendant offered proposed instruction No. V which was drawn from sections 54-116 and 54-118, R. S. Supp., 1969, which were in effect on December 1, 1970. The language of the first section rather clearly talks about branded livestock and applies to purchasers. Although it is less clear that the language of the second section indicates it was intended as a brand law, this court has long ago said that these statutes were enacted for the protection of the owners of brands and were not intended to prohibit private sales or trades between individuals. Bendfeldt v. Lewis, 149 Neb. 107, 30 N. W. 2d 293 (1948). We note these sections were amended in 1971 and do not comment upon the effect thereof. We now hold that the purpose of section 54-116, R. S. Supp., 1969, was to afford protection to the owners of brands and not to protect those who make fraudulent misrepresentations.

As we understand defendant's argument, it asserts that the evidence was insufficient for the jury to find that Mr. Schuette represented to Mr. Holzafpel that Agri-Land owned the cattle about which Mr. Holzafpel inquired. The record contains evidence that Mr. Holzafpel had the memo written by Mr. Richter. Mr. Holzafpel testified, in summary, that in response to his inquiry, Mr. Schuette said he had seen the cattle that morning, they were there, documents were at the United States National Bank and they were free and clear of liens. The jury believed Mr. Holzafpel.

The award of prejudgment interest by the trial court was proper. Edquist v. Commercial Sav. & Loan Assn., 191 Neb. 618, 217 N. W. 2d 82 (1974); Schmidt v. Knox,

191 Neb. 302, 215 N. W. 2d 77 (1974); Abbott v. Abbott, *supra.*

William J. Brennan, an attorney representing plaintiff, called on Mr. Schuette at the Bank of Mead on December 4, 1970. He testified that he said, "You realize, Mr. Schuette, Foxley released a check for $325,000 based upon your conversation with Mr. Holzafpel?" and that Mr. Schuette answered, "Yes, I understand that." Defendant immediately objected thereto. Having the advantage of ample time to reflect upon the matter, we feel that the admission is largely meaningless and doubt that the opinion was helpful to the jury. We do not find the receipt of the testimony to be prejudicial as defendant's counsel, by cross-examination, ably and clearly established that neither Mr. Brennan nor Mr. Schuette were aware of enough of the uncontested facts herein to ask and answer such a question.

The judgment is affirmed.

AFFIRMED.

PHILIP M. DAVIS, BY STEVEN PAUL DAVIS, HIS FATHER AND NEXT FRIEND, APPELLANT AND CROSS-APPELLEE, V. IVAN CUNNINGHAM, APPELLEE AND CROSS-APPELLANT.

241 N. W. 2d 343

Filed April 28, 1976. No. 40258.

1. **Property: Infants: Negligence: Trespass.** It is generally conceded that the liability of a possessor of land for injuries to infants is the same whether or not the child is a trespasser.
2. **Property: Infants: Negligence: Nuisances.** The attractive nuisance doctrine requires that the condition resulting in injury must be one that involves an unreasonable risk of death or serious bodily harm to a child, and one which should be foreseen.
3. **Property: Infants: Negligence: Trespass: Nuisances.** A property owner is not an insurer of the safety of persons who may come upon his land as invitees, licensees, or trespassers, nor is he under a duty to make his land child-proof.

4. **Property: Infants: Trespass: Nuisances.** The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years.

5. **Property: Infants: Negligance: Nuisances.** In its application the principles of the attractive nuisance doctrine should not be extended.

Appeal from the District Court for Nance County: C. THOMAS WHITE, Judge. Reversed and remanded with directions to dismiss.

Philip T. Morgan, for appellant.

James A. Beltzer of Luebs, Tracy, Dowding, Beltzer & Leininger, for appellee.

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

NEWTON, J.

In this action recovery is sought for personal injuries sustained by Philip M. Davis, a 3-year-old boy, on his grandfather's farm. Verdict and judgment were for plaintiff for $1,800. Plaintiff has appealed on the ground the verdict was inadequate and the defendant grandfather has cross-appealed on the ground that negligence does not appear. The judgment is reversed and the cause dismissed.

Defendant's daughter Lana, with her new baby and son Philip, were visiting in defendant's farm home. Also in the farm home were Lana's brothers and sisters, including Julie 12 years of age and Matt who was 8. Lana gave permission for the three children to go out and play in the sprinkler with the understanding that Julie and Matt would supervise Philip. Julie and Matt knew of the potential dangers in playing with farm machinery. On the farm lot adjacent to the lawn was a machine referred to as an irrigation ditcher. It was constructed on two small wheels with a tongue at the front end and

a V-shaped blade at the rear. It was evidently more or less balanced on the two wheels as the tongue was down on the ground but Philip managed to pull the blade portion down and the tongue up. The ditcher weighed about 800 pounds and was heavier in the rear or blade portion. Philip's father, who is not a farmer, had observed the machine as it was sitting the day before the accident but thought nothing of it. Philip ran over, swung on a cross rod between the V-shaped blades, and pulled it down on himself. Julie and Matt lifted the machine off Philip. Philip was injured and removal of a kidney was necessary.

The judgment is obviously inadequate in view of the injuries Philip received, but the primary question is that of liability. It is generally conceded that the liability of a possessor of land for injuries to infants is the same whether or not the child is a trespasser. The rule generally followed is that found in Restatement, Torts 2d, § 339, p. 197. It was followed in Gubalke v. Estate of Anthes, 189 Neb. 385, 202 N. W. 2d 836. The rule is as follows: " 'A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

" '(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

" '(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

" '(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

" '(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

" '(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.' "

For liability to attach, *all* phases of the rule must be present. The condition must be one which involves "*an unreasonable risk of death or serious bodily harm*" to a child, and one which should be foreseen. (Emphasis supplied.)

The condition or instrumentality in question must be one that is inherently or unusually dangerous to children. As was stated in Gubalke v. Estate of Anthes, *supra*: "The question we must answer is whether the condition was one which offered an unreasonable danger of serious bodily injury to children and a danger which was reasonably to be anticipated by the defendants. If not, then there is no jury question and no liability."

In the present instance we are dealing with an ordinary, stationary, and innocuous farm implement. It obviously is not an inherently or unusually dangerous object. The same is true of an ordinary farm tractor although a child may climb up on it, fall off, and break his neck. As was stated in Gubalke v. Estate of Anthes, *supra*, quoting Prosser, Law of Torts (4th Ed.), § 59, p. 369: " 'The stress here is upon "unreasonable." There is virtually no condition upon any land with which a child may not possibly get himself into trouble. He may choke to death upon a green apple, pick up a stick and poke it into his eye, or have his skull fractured by a rock found and thrown by his companion. Unless the possessor is to shoulder the impossible burden of making his land completely "child-proof," which might mean razing it to the bare earth, something more is called for than the general possibility of somehow coming to some harm which follows the child everywhere throughout his daily existence.' " "Owner of real property is not an insurer of safety of persons who may come upon his land as invitees, licensees or trespassers, nor is he under a

duty to make his lawn 'child-proof.'" Martinelli v. Peters, 413 Pa. 472, 198 A. 2d 530.

We said in Haden v. Hockenberger & Chambers Co., 193 Neb. 713, 228 N. W. 2d 883: "The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years."

It is said that the ditch digger was dangerous because the heavier end was left tilted in the air. Children might well have pulled it down many times without sustaining a serious injury. For that matter, the older children playing on the premises might well have tilted the other end up had it been left with the tongue up and the heavier blade down. Had that occurred, could it still be said that the defendant should have foreseen the likelihood of an accident? Foreseeability is an essential element of the rule. Unless the situation presents an abnormal or unusual danger, the ordinary reasonable person would not sense nor foresee any danger.

The attractive nuisance doctrine is an aberration or abnormality in the law of negligence and departs from the usual rules. As a result it is considered that it should not be extended in its application although this has occurred in a number of jurisdictions. As stated in 65 C. J. S., Negligence, § 63 (73), p. 810: "The tendency of the courts is to limit rather than to extend the attractive nuisance doctrine." See, also, Brown v. Reliable Iron Foundry, Inc., 174 Cal. App. 2d 294, 344 P. 2d 633; Appling v. Stuck (Iowa), 164 N. W. 2d 810; Hanners v. City of Ashland (Ky. App.), 331 S. W. 2d 729; Beasley v. Guerriero (La. App.), 123 So. 2d 774.

Under the circumstances of this case, it is difficult to believe that a reasonable person would have foreseen or anticipated danger to the child or an accident involving "serious bodily harm." Ordinarily under such circumstances the child either would not be injured or would suffer nothing worse than a minor bruise. Neither

the child's grandfather nor father foresaw any danger of injury to the child from the static ditcher.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BRODKEY, J., concurring.

I concur in the result reached in the majority opinion in this case, and in the discussion therein so far as it pertains to the application of the attractive nuisance doctrine. However, I think it should be made clear that liability for injuries to children is not restricted to the application of the attractive nuisance doctrine, but may also arise, under appropriate circumstances, under ordinary rules of negligence. It is not a condition precedent to liability that the particular machine or instrumentality involved be a dangerous instrumentality. Even a completely safe machine may be used in a negligent manner, with resulting liability for tortious injuries to children.

CLINTON, J., dissenting.

I respectfully dissent for the reason that I believe the evidence justified submission to the jury of the issue of the defendant's negligence and would therefore affirm the jury finding on liability, but, because the damage award was clearly inadequate, I would remand for a new trial on the issue of damages only.

At the expense of some repetition of facts contained in the majority opinion, I state my view as follows:

The evidence shows that Philip and his parents were guests at the farm home of the defendant. The family had begun their visit the day before the accident. On the day of the incident, the plaintiff was permitted by his parents to play with the sprinkler on the lawn adjacent to the farm residence. Philip was at that time placed in the charge of his aunt, age 12, and his uncle, age 8, who were playing with him.

At that time in the farmyard and immediately adjacent to the lawn, there was located an irrigation ditcher

belonging to the defendant. It had been placed in that location the day preceding the accident by a neighbor who had returned the ditcher after borrowing it. The ditcher might be described as a two-wheel sulky consisting of the two wheels, a rectangular inverted U axle with a single bar frame clamped to and crossing the axle at right angles. Attached at the rear of the single-bar frame is the ditcher, a large V-shaped, two-bladed plow. Between and connecting the two blades of the plow and near the lower edge thereof are two steel bars, the evident purpose of which is to strengthen the plow and to assure that the two blades maintain their relative positions. At the front end of the frame is a straight cantilever hitch. The evidence shows that when the ditcher is not in use, it may stand either with the plow in the air and the hitch end on the ground, or vice versa. The evidence further shows that the weight distribution of the machine is such that if the blades are in the air only a "very little" pressure would be required to bring the blades to the ground. On the other hand, if the blades are resting on the ground it would take "a considerable amount of pressure" on the hitch end of the frame to put the blades in the air. The machine itself weighs about 800 pounds and the bulk of the weight is in the blades. When the blades are in the air, the strengthening bars are within the reach of a small child.

Shortly before the accident the defendant observed the children playing in the yard and noted the location and position of the ditcher. He then left to take a load of corn to the elevator. During his absence the accident occurred in the following fashion. Philip ran over to the ditcher, grabbed one of the strengthening bars, and started swinging. The ditcher came down and pinned him to the ground. Philip's 8-year-old uncle, who had followed Philip to the machine, attempted to lift it but could not. The 12-year-old aunt, who had been watering

a tree nearby, then came and the two children were able to lift the plow from Philip.

The record shows that after the accident the defendant stated to his daughter, Philip's mother, that the accident was "senseless," that the machine should not have been where it was, and that all that it would have taken to prevent it would have been to, in the words of Philip's mother, "flip" the plow to the ground.

The defendant asserts that the evidence was insufficient as a matter of law to establish any negligence on his part and therefore there was no jury question. He cites and relies upon Haden v. Hockenberger & Chambers Co., 193 Neb. 713, 228 N. W. 2d 883; and upon the contention that the accident was not reasonably foreseeable. In the cited case the defendant had parked a dragline adjacent to a lake or pond on land owned by it, and the plaintiff, a 17-year-old boy, was injured when he used the dragline as a diving platform. We there affirmed a directed verdict for the defendants and said that machinery in a static condition is not inherently dangerous. That case was properly decided and clearly stated the correct principles. But we are here confronted with a completely different set of evidentiary facts which distinguish this case from that relied upon by the defendant. These are: (1) The defendant's actual knowledge of the presence of the child and of the child's tender age. (2) The extremely unstable character of the ditcher's position. (3) The defendant's knowledge of the machine's characteristics and its proximity to the area where the child was playing. (4) The inviting (to a small child) character of the strengthening bars when the blades were in the elevated position. (5) The relative lack of utility in positioning the blades in the elevated position and the ease with which the position could be changed to a relatively safe one.

An examination of the holdings of numerous courts that have had occasion to define the duty to a child of a possessor of a chattel that is likely to tip or fall in-

dicates that key factors to be considered are the tender age of the child, the unstable characteristic of the chattel, and the known presence or the likelihood of the presence of children and their inability to appreciate the hazard because of tender age. See the following authorities: Kopplekom v. Colorado Cement Pipe Co., 16 Colo. App. 274, 64 P. 1047 (top-heavy cement pipe standing on side); Morse v. Douglas, 107 Cal. App. 196, 290 P. 465 (two-wheeled iron tar vat easily tipped); American Ry. Express Co. v. Crabtree, 271 F. 287 (heavy iron wheel leaning precariously); Jorgenson v. Crane, 86 Wash. 273, 150 P. 419 (mobile two-wheel scraper on school grounds); Reichvalder v. Borough of Taylor, 322 Pa. 72, 185 A. 270 (mobile four-wheel scraper near playground); Allen v. Silverman, 355 Pa. 471, 50 A. 2d 275 (heavy metalic cylinder movable by the slightest jar, located on slope); Bergman v. Feitelowitz, 278 N. Y. 620, 16 N. E. 2d 127 (heavy, not fastened down, stone pot).

It is my view that reasonable minds might draw different inferences as to whether the defendant ought to have foreseen the possibility of accident and injury under the evidence in this case. Where reasonable minds may draw different conclusions from the evidence, it is within the province of the jury to decide the issues of fact and on review the Supreme Court may not set aside the verdict in such a situation. Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 205 N. W. 2d 523.

SPENCER and MCCOWN, JJ., join in this dissent.

JULIA KOLC, APPELLANT, V. ANN KRYSTYNIAK ET AL., APPELLEES.

241 N. W. 2d 348

Filed April 28, 1976. No. 40311.

1. **Gifts.** To make a valid and effective gift inter vivos, there must

be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.

2. **Gifts: Fraud: Undue Influence.** The undue influence which will void a deed (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.

3. **Equity: Appeal and Error: Evidence.** In an appeal in an equity action, the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to the findings of the District Court. However, if there is an irreconcilable conflict in a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

J. Michael Fitzgerald of Matthews, Kelley, Cannon & Carpenter, for appellant.

Alfred A. Fiedler of Fiedler & Fiedler, for appellee Krystyniak.

Heard before SPENCER, BOSLAUGH, and MCCOWN, JJ., and COLWELL and KELLY, District Judges.

KELLY, District Judge.

This action was commenced in the District Court for Douglas County, Nebraska, on the 23rd day of August 1973. The plaintiff prayed for an accounting for funds held in joint tenancy with her daughter, one of the defendants herein. The plaintiff further prayed that the funds held in trust for her by defendant be returned to the plaintiff. The defendant in answering the petition of the plaintiff herein, admitted the receipt of certain funds and savings accounts on behalf of the plaintiff. The defendant argues a gift, made to her, of a portion of the funds and that she paid the balance of the funds to an escrow agent, pending the trial herein.

There is little dispute over the facts as surrounding this case. The facts show that the plaintiff was 79 years of age on the date of trial. She was the mother of 7 children. The plaintiff's husband died in 1958, and from that time until 1973, a period of 15 years, the plaintiff lived with a married daughter, Ann Krystyniak and her family. At the time of death of the plaintiff's husband, she became the sole owner of three savings accounts which had been held in the name of her husband and herself as joint tenants with rights of survivorship. Immediately after the death of plaintiff's husband, a second name was added to the savings accounts as a joint tenant, that being Jerry Kolc, a son. At the insistence of Jerry Kolc, the defendant's name was substituted as a joint tenant with the plaintiff on the three savings accounts.

On August 19, 1971, the funds of one savings account, having a balance of $12,301.71, was transferred to a separate account owned by defendant and her husband. Although there were withdrawals from the other accounts, these sums were later placed in escrow and the only amount in controversy in this law suit was the aforementioned account, transferred to the defendant and her husband.

This action was brought in the name of the plaintiff. However, the plaintiff was not mentally competent to testify at the time of trial and could not remember many things which transpired. The defendant claimed the above account as a gift from her mother to her. The intention to make this gift was corroborated by testimony of a daughter of the defendant and the defendant's husband.

During the 15 years that the plaintiff lived in the home of the defendant, the defendant and her family provided not only a home, food, and clothing, but most of the love and affection that plaintiff received. Plaintiff received a small Social Security check and a very small pension check, which her husband had earned during

his lifetime. The trial court found the amount in controversy was a valid gift to the defendant; rendered judgment in that amount for the defendant; and ordered the balance of the money held be paid to a conservator for the plaintiff. Plaintiff appeals.

This court has previously held that to make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee. Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814; Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797. The testimony presented in this case was to the effect that the plaintiff made statements in the presence of the defendant's family that she wanted to make a gift to the defendant of approximately $12,000 because the defendant had taken such good care of her. The plaintiff accompanied the defendant to the savings institution to obtain the account in dispute at the time that it was transferred to the name of the defendant and her husband. There was considerable testimony that for a period of 15 years the defendant and her family had taken care of all the wants and needs of the plaintiff; that they had taken her on vacations; that they took her to church each and every week; and, generally, saw to all her wants and needs. There was no testimony indicating that the plaintiff lacked mental capacity to make a gift at the time the gift was made. There was no testimony that any undue influence was ever exerted by the defendant to obtain the gift from the plaintiff.

This court previously held in the case of Conry v. Langdon, 181 Neb. 53, 146 N. W. 2d 782, that undue influence which will void a deed (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.

In the present case no such undue influence was shown in the testimony of any witnesses.

The above-cited cases also hold that this being an appeal in equity, the statute requires this court, in determining questions of fact, to reach an independent conclusion without reference to findings of the District Court. However, if there is irreconcilable conflict in a material issue, this court will, in determining the weight of evidence of witnesses who appeared in the trial court to testify, consider the fact that the trial court observed them and their manner of testifying. The importance of this rule of law can be found by quoting from the order issued by the trial court. The trial court stated as a part of its findings as follows: "Thereafter, Jerry left the household and eventually arrangements were made for Anne to succeed Jerry as joint tenant, with the same understanding. The accounts remained in that form until the transfers were made which are in issue herein. Some time before the date of those transfers, Julia determined that she was obligated to Anne and her family, and expressed a desire to satisfy that obligation financially, to prefer Anne over her other brothers and sisters. Discussions were had concerning that desire within the household, and Julia and Anne went together to the depositories where Anne made the necessary withdrawals and deposits.

"With regard to those transfers this Court finds that there was no fraud or undue influence exercised by Anne, that the transfers were made pursuant to and in accordance with the independant wishes and desires of Julia, and solely to satisfy Julia's own personal purposes, to make a gift of the $12,301.17 transferred to Anne and her husband, and to continue the remaining funds as before. The Court is satisfied that a lawful and effective gift was in fact made, and that the funds so transferred are not subject to this litigation. It is a parent's right to prefer one child over another, and particularly when, as in this case, there is a factual and rea-

sonable basis for such a preference, the courts ought not interfere unless fraud or undue influence were involved.

"While during the course of the trial the Court concluded that Julia did not fully, or even adequately, comprehend what was transpiring, and was then unable to accurately recall what she had done or intended in the past, there was no evidence to indicate her incompetency at the time of the transfers, her interests were adequately represented and protected during the course of the trial, and the appointment of a conservator resolves any future problems."

It is the finding of this court that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

FRANK B. SVOBODA, APPELLANT AND CROSS-APPELLEE, V. RAYMOND HAHN ET AL., APPELLEES AND CROSS-APPELLEES, KEITH COUNTY BANK AND TRUST COMPANY, A CORPORATION, INTERVENER-APPELLEE AND CROSS-APPELLANT.

241 N. W. 2d 499

Filed April 28, 1976. No. 40324.

1. **Taxation.** In the absence of statute, taxes voluntarily paid cannot be recovered back.
2. ———. Generally, a tax is paid voluntarily when it is paid not under compulsion or without threat of seizure or sale of the property of the taxpayer to satisfy the tax in question.
3. ———. The payment of a tax before it becomes delinquent and its collection can be enforced by compulsory process is generally held to be voluntary.
4. ———. Before a taxpayer can recover taxes under a statutory procedure he must substantially comply with the requirements of the statute.
5. **Taxation: Public Officers and Employees: Administrative Law.** In passing on claims for a refund of taxes, a county board acts quasi-judicially.
6. **Taxation.** A written claim for refund timely filed is a prerequisite to a refund of taxes under section 77-1735 or 77-1734.01, R. R. S. 1943.

7. **Declaratory Judgments.** The granting of declaratory relief is discretionary with the trial court.

Appeal from the District Court for Keith County: KEITH WINDRUM, Judge. Affirmed.

Frank B. Svoboda and Firmin Q. Feltz, for appellant.

Patrick Hayes, for appellees.

Milton R. Larson and Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for intervener-appellee.

Heard before WHITE, C. J., BOSLAUGH, NEWTON, and CLINTON, JJ., and REAGAN, District Judge.

BOSLAUGH, J.

This is an action for a declaratory judgment to determine the validity of a resolution of the county board of Keith County, Nebraska, relating to a refund of taxes. The plaintiff is a citizen and taxpayer of Keith County, Nebraska, and is the former county attorney. The defendants are the members of the county board and the county treasurer. The intervener is the taxpayer which was seeking a refund of intangible taxes it had paid in 1965.

The controversy arose as a result of a provision in section 77-710, R. S. Supp., 1963, a part of the intangible tax law that has since been repealed. Section 77-710 provided in part: "For the purposes of assessment it shall not be permissible to deduct from the amount of capital stock the value of any United States government securities owned by such bank, * * *." For the year 1965, the intervener filed a return dated February 5, 1965, declaring the value of its capital stock to be $201,343.99, and paid an intangible tax in the amount of $805.38. If the intervener had deducted the value of United States government securities owned by it, its capital stock would have had a negative value for intangible tax purposes and there would have been no tax due.

On April 30, 1965, the Tax Commissioner advised all county assessors that the Attorney General had ruled that the provision in section 77-710, R. S. Supp., 1963, prohibiting banks from deducting governmental securities for tax purposes was unconstitutional. The intervener did not attempt to amend or change its return and paid the tax in full to the county treasurer on November 1, 1965. There was some conversation between Mel Adams, the president of the intervener, and an assistant county assessor concerning whether the intervener would be able to obtain a refund. Adams testified that he was assured the intervener would be able to obtain a refund. The intervener claims the tax was paid under protest.

After some time had elapsed and the tax had not been refunded, Adams talked to several of the county officials, including the plaintiff who was then the county attorney. Adams testified the plaintiff advised him that only the county commissioners could refund the tax. Adams then met with the county board and the board voted to refund the tax. According to Adams, the plaintiff then advised the commissioners they could not refund the tax so no record was made of the action of the board.

On July 2, 1971, the county board adopted the resolution which is the subject of this action. The resolution provides as follows: "*RESOLUTION*

"BE IT RESOLVED:

"That whereas Keith County, Nebraska, unlawfully assessed intangible personal property tax against the assets of the Keith County Bank and Trust Company of Ogallala, Nebraska, in the year 1965 in the amount of $805.00, and

"Whereas said $805.00 assessed in that year has not been returned or paid back to the said Keith County Bank and Trust Company of Ogallala, Nebraska, after request made in 1965, and

"Whereas the County Board of Commissioners of Keith County, Nebraska, desire to resolve this matter.

"Now therefore be it resolved:

"That the Keith County Bank and Trust Company of Ogallala, Nebraska, be allowed as a credit against their current and future personal property tax liability to Keith County, Nebraska, the sum of $805.00 plus interest or the aggregate sum of $1,187.29, PROVIDED, however, that the said Keith County Bank and Trust Company of Ogallala, Nebraska, shall pay up to a current status any and all personal property taxes due and owing to Keith County, Nebraska, in the event said amount allowed as a credit does not pay for same, and that if the $1,187.29 should be in excess of the tax liability of the said Keith County Bank and Trust Company of Ogallala, Nebraska, to Keith County, Nebraska, for personal property taxes, then they should be allowed as a credit against their future personal property tax or real estate tax the amount, if any, by which the $1,187.29 exceeds their current personal property tax liability to Keith County, Nebraska.

"SO RESOLVED."

The plaintiff contends the resolution is illegal and void because it releases, discharges, and commutes taxes in violation of section 77-1737, R. R. S. 1943.

The authority of public officials to refund taxes is very limited. The Constitution of Nebraska prohibits the Legislature from enacting any law releasing or discharging any individual, corporation, or property from taxes levied for state or municipal purposes. Art. VIII, § 4, Constitution of Nebraska; State ex rel. Meyer v. Story, 173 Neb. 741, 114 N. W. 2d 769. Section 77-1737, R. R. S. 1943, provides no county board shall have the power to release, discharge, remit, or commute any portion of the taxes assessed or levied against any person or property within its jurisdiction for any reason whatever.

The right of a taxpayer to recover taxes that have

been paid is also very limited. In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority. Misle v. Miller, 176 Neb. 113, 125 N. W. 2d 512; Monteith v. Alpha High School Dist., 125 Neb. 665, 251 N. W. 661.

Generally, a tax is paid voluntarily when it is paid not under compulsion or without threat of seizure or sale of the property of the taxpayer to satisfy the tax in question. Monteith v. Alpha High School Dist., *supra*; Dixon County v. Beardshear, 38 Neb. 389, 56 N. W. 990. Mere protest alone is not enough to make the payment involuntary. 72 Am. Jur. 2d, State and Local Taxation, § 1082, p. 343. It is payment under compulsion or duress that makes the payment involuntary.

The payment of a tax before it becomes delinquent and its collection can be enforced by compulsory process is generally held to be voluntary. 72 Am. Jur. 2d, State and Local Taxation, § 1089, p. 350. In this case the intervener paid the tax on November 1, 1965, the day that it became due, and before any part of the tax was delinquent. The payment was clearly voluntary as a matter of law and the intervener had no right to recover the tax independent of the remedies provided by statute.

The Legislature has provided at least two remedies that the intervener could have pursued in this case. Section 77-1735, R. R. S. 1943, permits a taxpayer who claims a tax, or any part thereof, to be invalid for any reason to demand the same in writing from the county treasurer within 30 days after payment. If not refunded within 90 days thereafter the taxpayer may sue the county treasurer for the amount demanded.

Section 77-1734.01, R. R. S. 1943, permits a taxpayer to file with the county treasurer within 9 months after payment of the tax a written claim for refund of any

taxes paid as a result of a clerical error on the part of the taxpayer or the taxing officials.

Before a taxpayer can recover taxes under a statutory procedure he must substantially comply with the requirements of the statute. Monteith v. Alpha High School Dist., *supra.*

Both sections 77-1735 and 77-1734.01, R. R. S. 1943, require a written claim to be filed within the time specified after the tax has been paid. The trial court found the plaintiff had failed to prove the intervener had not filed a written claim with the county treasurer and, therefore, the resolution was not subject to collateral attack. The trial court found generally for the defendants and the intervener and dismissed the petition of the plaintiff.

The evidence does not show affirmatively whether a written claim was filed or not filed within the time required by statute. Adams testified that a written claim was not filed at the time the return was filed or at the time the tax was paid. The resolution itself recites only that the intervener made a request for a refund in 1965.

In passing on claims for a refund of taxes, a county board acts quasi-judicially. School Dist. of Minatare v. County of Scotts Bluff, 189 Neb. 395, 202 N. W. 2d 825. Although the resolution may have been irregular in form, in that it granted a credit against future taxes rather than approving a refund of the amount due the intervener, if the county board had jurisdiction the resolution is not now subject to collateral attack.

The plaintiff's entire case-in-chief consisted of the amended petition and a copy of the resolution attached to the petition as an exhibit. After offering the amended petition and the resolution the plaintiff rested. The plaintiff made no attempt to prove what the fact was in regard to whether the county board had before it a written claim for refund timely filed at the time the resolution was adopted.

A trial court has some discretion in deciding whether

to grant declaratory relief in a particular case. Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257; Custer P. P. Dist. v. Loup River P. P. Dist., 162 Neb. 300, 75 N. W. 2d 619. There is no absolute mandate that compels the District Court to exercise its jurisdiction to grant such relief.

In view of the state of the record in this case we believe it was within the discretion of the District Court to refuse declaratory relief. Where the party seeking declaratory relief chooses not to develop the full factual situation for the benefit of the trial court, the trial court may refuse to exercise its jurisdiction to grant declaratory relief.

The judgment of the District Court is affirmed.

AFFIRMED.

HOWARD POOL ET AL., APPELLEES, V. DONALD E. DENBECK ET AL., APPELLANTS.

241 N. W. 2d 503

Filed April 28, 1976. No. 40342.

1. **Injunction: Covenants.** Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants.
2. **Injunction: Covenants: Waiver.** While the right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation thereof, such right is not lost if the violations acquiesced in are trivial and do not materially affect those acquiescing. The right to enforce such covenants remains where the violation is in close proximity to the land of those seeking enforcement thereof and is especially and directly injurious to them.

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

Arlen D. Magnuson of Magnuson & Magnuson, for appellants.

Michael O. Johanns and Edward E. Hannon of Cronin & Hannon, and William G. Blackburn of Cunningham, Blackburn, Von Seggern & Livingston, for appellees.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and WARREN and RIST, District Judges.

RIST, District Judge.

This is an action for injunctive relief brought by plaintiffs who are the owners and occupants of residential properties in Country Club Estates Addition, a platted subdivision near the city of O'Neill, Nebraska, against defendants, who have moved an older house into said subdivision and constructed additional apartment units in connection therewith. Plaintiffs alleged the acts of defendants were in violation of restrictive covenants contained in the plat and dedication of said subdivision, which limit the kind and usage of structures therein, and prayed for injunctive relief restraining defendants from further developing said structure and to remove all or any portion thereof as violates the covenants. After trial, which included an inspection by the trial judge of the entire subdivision and the structure of defendants complained of, the trial court found defendants to be in violation of the covenants and entered its decree directing defendants to remove the entire structure or so much thereof that the portion remaining would comply with the covenants, and ordered the issuance of a mandatory injunction directing such action. Defendants have perfected their appeal to this court.

An action for injunctive relief is an equitable action and is considered de novo in this court. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

The record reflects that on September 14, 1970, the owners of certain lands proceeded to plat thereon the subdivision known as Country Club Estates and to dedi-

cate the same. The subdivision is near but not within the corporate limits of the city of O'Neill, Nebraska. The dedication of the plat contained 11 restrictive covenants which are to be in effect for 25 years and which run with the land, among which are the following: No. 4. Not more than one residence and attached garage shall be erected or constructed upon any lot shown upon the annexed plat. No. 5. No building of any kind whatsoever shall be erected or maintained on said land except a private dwelling house and attached garage. No. 6. All lots in the tract shall be known and described as residential lots. No structures shall be erected, altered, placed, or permitted to remain on any building plot other than one detached single dwelling not to exceed two stories in height and a private attached garage for not more than three cars. No. 12. No previously constructed building may be moved onto any of the said lots.

In 1973 and 1974 the plaintiffs purchased or built their respective residences in the southeast portion of the subdivision. These houses are valued generally in the area of $50,000, face the O'Neill Country Club Golf Course, and without dispute are regarded as being among the more desirable and expensive homes in the area.

The deeds to plaintiffs (except plaintiff Pool) recite the conveyances are subject to the restrictive covenants of the plat.

By deed dated October 22, 1974, and recorded November 19, 1974, the defendant Debra Denbeck acquired title to Lot 8, Block 3, Country Club Estates Addition from one of the parties initially dedicating the subdivision. Debra is the 20-year-old daughter of defendants Donald and Darlene Denbeck and a university student. This conveyance recites it is subject to the restrictive covenants in the recorded plat. This lot is north and west of those owned and occupied by the plaintiffs.

On or about November 1, 1974, defendants moved a house estimated to be 30 years or more old onto Lot 8.

Defendant Donald Denbeck had purchased the house for $2,250 at its original location near Atkinson, Nebraska. The house is two-and-a-half stories high. Additionally, defendants immediately commenced the construction of two two-bedroom apartments, one story high, and attached to the old house. Donald is a building contractor who has built a number of the houses in this addition including those of the plaintiffs. He and his wife, Darlene, owned a number of the lots in the subdivision upon which they have constructed houses and then sold them. Donald applied for and obtained a building permit for the work done on Lot 8 and has carried out the remodeling of the old house and the construction of the new apartments. Donald and Darlene are without question the principal parties in moving in the old house and carrying on the new construction on their daughter's lot.

Defendants first challenge the sufficiency of plaintiff's petition to state a cause of action, claiming that it pleads only conclusions respecting plaintiffs' damages and a lack of an adequate remedy at law. The amended petition, after pleading plaintiffs' ownership of their lots, the plat and dedication of the subdivision including the restrictive covenants, and defendants' actions, further pleads that defendants intend to continue to allow the buildings on Lot 8 to remain, in violation of the covenants, which would be to the permanent damage of plaintiffs' new homes and that they have no adequate remedy at law.

We believe the petition is sufficient. As stated in Reed v. Williamson, 164 Neb. 99, 82 N. W. 2d 18: "Injunction is in this class of cases (violation of a restrictive covenant) an appropriate if not the only adequate remedy. * * * 'A remedy at law would be inadequate and would lead to a multiplicity of actions and the subversion of this * * * scheme of improvement and development would still remain. * * *.'" Defendants claim

that the amended petition is insufficient is without merit.

The issue then to be resolved is whether the acts of the defendants violate the restrictive covenants of the plat. Defendants contend the covenants are vague and ambiguous and that by any reasonable construction of them they are not in violation.

Covenant No. 6 limiting the height of structures to two stories is not ambiguous and the house defendants moved into the subdivision clearly violates it.

With respect to whether an apartment house violates the covenants, defendants contend the words "dwelling house," "dwelling," and "one residence" as used in the covenants do not prevent the use of such structures for apartments, citing cases from other jurisdictions in support of such interpretation. As pointed out in plaintiffs' brief, the operative words in covenant No. 4 are "one residence," in covenant No. 5 "private dwelling house," and covenant No. 6 "one detached single dwelling."

From a review of the cases we believe that, in considering the covenants as a whole, they limit the use of the lots in this subdivision to a dwelling house to be used by one family. The Supreme Court of Michigan construed the words "private dwelling house" to mean a single dwelling to be used by one family. Seeley v. Phi Sigma Delta House Corp., 245 Mich. 252, 222 N. W. 180. We agree with this interpretation. This court, in the case of Hogue v. Dreeszen, 161 Neb. 268, 73 N. W. 2d 159, held that where there was a general plan for a development of an area or district for residential purposes, the purposes as stated in the covenants should control. This court went on to hold that such covenants apply to use as well as the character of the building. Defendants' stated purpose was to use at least a portion of their structure as apartment units and they were built accordingly. We conclude that such construction and use is in violation of the covenants noted above.

Finally, covenant No. 12 provides that no previously

constructed building may be moved onto any lot in the subdivision. Defendants have clearly done this and are in violation of this covenant.

We next consider whether or not defendants are excused in their actions and the covenants rendered unenforcible as to them because of other circumstances.

Defendants assert that plaintiffs are guilty of laches in instituting their action and that by the time plaintiffs filed their petition defendants had expended a substantial amount of money in their efforts.

The record reflects that on or about November 1, 1974, defendants moved the old house on their lot and were constructing the apartment units; that a telephone protest by one of the plaintiffs was made to defendants on or about that date; that defendants sought to placate some of the plaintiffs at or about that time with photographs of what they intended to do; and that plaintiffs' attorney was first contacted November 11, 1974, and suit filed and service had in approximately 3 weeks after November 1, 1974. We conclude plaintiffs acted in a timely manner.

The record justifies the conclusion that defendants acted with deliberate haste in getting their house moved in and proceeding with the construction of the apartment units knowing of the dissatisfaction and protest of other homeowners in the subdivision. Whatever their investment, defendants elected to proceed in the light of this knowledge and in light of both constructive and actual notice of the covenants, and are in no position to assert laches.

Defendants next contend that plaintiffs have acquiesced in and condoned other violations of covenants by other homeowners in the subdivision and thereby have abandoned them, thus rendering the convenants unenforcible.

The evidence reflects the following: In the northwest corner of the subdivision, at a considerable distance from the plaintiffs, there are several modular homes

which were either moved in as a unit or in sections, one of them with a basement apartment under it. A double-width trailerhouse was placed on a foundation and is also located in this area. A golf driving range with a small building lies some distance west of plaintiffs' homes. For a time, one of plaintiffs had a doghouse or kennel in his backyard and one of plaintiffs' homes may be several feet too close to the side lot line.

The record further shows that some of the modular homes were in place when plaintiffs, or some of them, purchased their homes and that some, but not all plaintiffs, had no objection to them. It is not clear if plaintiffs had notice of the apartment under one of such homes. There is evidence that the development of this addition to date of trial had been the erection of the more expensive homes in the area of plaintiffs in the southeast portion of the addition and the so-called modular homes in the north and west portion thereof, with considerable vacant area between such homes and plaintiffs. Defendants' structure is in the north central part of the addition and in clear view from plaintiffs' homes. The modular homes are not so visible from there.

Defendants argue that the modular and trailer homes violate the covenant on moving preconstructed buildings into the subdivision, and since plaintiffs have knowingly accepted them without protest, covenant No. 12 must be considered abandoned by them. Likewise since plaintiffs made no protest of the apartment in one of the modular homes, the defendants argue that if such use is in violation, plaintiffs have condoned and acquiesced in it and, accordingly, covenants Nos. 4, 5, and 6 are unenforcible.

It is well settled in most jurisdictions that the right to enforce restrictive covenants may be lost by waiver or acquiescence of violation of the same. See generally 20 Am. Jur. 2d, Covenants, Conditions, Etc., § 273, p. 832. Whether there has been such a waiver or acquiescence depends upon the circumstances of each case.

The criteria for determining this includes whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations are temporary or permanent in nature; and the amount of investment involved.

"As a rule, nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant by injunction, and acquiescence in violations * * * which are immaterial and do not affect or injure one will not preclude him from restraining violations thereof which would so operate as to cause him to be damaged. Thus, a lot owner's failure to object to violations * * * on lots remotely situated from his lot does not deprive him of the right to enforce the restriction for a violation on lots in close proximity to his lot which would be especially and directly injurious to him." 20 Am. Jur. 2d, Covenants, Conditions, etc., § 274, p. 835.

" 'Plaintiffs are not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions.' " Hogue v. Dreeszen, *supra*.

In light of the rules set forth above and in considering the evidence, we conclude that if the modular and trailer homes violate covenant No. 12, they were nonetheless at a considerable distance from plaintiffs' homes and would not constitute a violation materially affecting plaintiffs. While the apartment in the one modular home is in violation of the covenants, it too is at a great distance from plaintiffs and had no material effect upon them. As previously indicated it is not clear whether plaintiffs even had knowledge of the same. The driving range for all practical purposes involves no structure of any significance and it too is a considerable distance from

plaintiffs' homes. The other violations noted are of no significance for the purposes of this case.

We further note that defendants' structure, which is in clear violation of the covenants, is in closer proximity to plaintiffs' homes, is in clear view of them, and by its appearance and proposed use can be fairly said to materially detract from the residential values plaintiffs seek to protect by enforcement of the covenants.

We are therefore of the opinion that plaintiffs have not so acquiesced in the violation of the covenants by other owners in the subdivision that they are estopped or barred from seeking injunctive relief against defendants for what may be fairly described as a clear and flagrant violation by defendants of the covenants noted and which materially affect plaintiffs.

That plaintiffs have a right to seek enforcement of the covenants is clear, the dedication declaring them to run with the land and being for the mutual benefit of all owners in the subdivision as well as being noted in the deeds of the parties.

Defendants have assigned a number of other alleged errors by the trial court which assignments are not sustained by the record and require no further action by this court.

The judgment and decree of the trial court is therefore affirmed and the cause remanded with directions to issue a mandatory injunction in accordance with the trial court's decree, directing defendants within 60 days from the issuance of the writ either to remove the entire structure located on Lot 8, Block 3, Country Club Estates, or so much thereof that the remaining structure as appropriately modified will be in full compliance with the restrictive covenants of the plat of said subdivision.

Costs herein are taxed to defendants.

AFFIRMED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND E. DIRGO, APPELLANT.

241 N. W. 2d 351

Filed April 28, 1976. No. 40356.

1. **Criminal Law: Guilty Verdict: Evidence.** This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Criminal Law: Aiders and Abettors.** Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed.
3. **Criminal Law: Aiders and Abettors: Evidence: Intent.** A common purpose or criminal intent among two or more persons to commit a crime need not be shown by direct evidence, but may be proved by the circumstances surrounding the act.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

John A. Rickerson and Neal Stenberg, for appellant.

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

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

CLINTON, J.

Defendant Raymond E. Dirgo was found guilty by a jury of the crime of robbery and was sentenced to a term of 3 years in the Nebraska Penal and Correctional Complex. He has appealed, making the following assignments of error: (1) The evidence was insufficient as a matter of law to support the verdict and hence his

motion for a directed verdict should have been granted. (2) The court erred in giving an instruction which permitted the jury to consider whether the defendant was guilty by reason of being an aider and abettor. (3) The foundation for admission into evidence of a television set and bottles of liquor, the subject of the theft, was insufficient and the court therefore erred in admitting such evidence.

A recital of the import of the State's evidence disposes of all the assignments adversely to the defendant's contentions. The robbery itself was established by direct testimony of the victim. Collaboration of third parties and identity of stolen property are in part circumstantial.

The evidence would permit the jury to find as follows. On the evening of March 2, 1975, at about the hour of 6 o'clock p.m., the victim, Paul Ronk, went to the Kentucky Tavern in Omaha where he consumed 10 or 12 bottles of beer. At about 11 or 11:30 p.m. he left the tavern alone and drove his car to downtown Omaha with the intention of going to a restaurant. However, he decided to have a drink and went to the Diamond Bar. There he met the defendant Dirgo with whom he was not previously acquainted. He struck up a conversation with Dirgo. The two drank together until the tavern closed about 1:15 a.m. Then they went in Ronk's car to Ronk's apartment at 4424 North 28th Street. There Ronk had a drink and Dirgo may have also had one. At that time Ronk arose to fix himself another drink. Only Ronk and Dirgo were in the apartment. As Ronk turned his back Dirgo hit him in the head, knocking him to the floor. Dirgo then continued to beat him. During this beating Ronk heard his apartment door open and "a couple of other people come in." Ronk did not see the other persons nor hear their voices, but heard Dirgo giving directions which included instructions to tear the phone from the wall and also to take the bottles of liquor. Ronk testified that the robbers

took the liquor, a television set, and $35 in cash from his billfold after they first removed it from his pocket while he was on the floor. The billfold was later found in the yard of 4424 North 28th Street.

At the time the robbery was taking place, two Omaha police department cruiser officers, Dutton and Dunning, were driving east on Ames Avenue toward 28th Street. (Ronk's apartment was in a building located at the southwest corner of the intersection of 28th Street and Ames Avenue.) As the officers passed the intersection they noticed an automobile with headlights on, parked on the east side of 28th Street about 100 feet south of Ames Avenue. It was parked between two other automobiles, one of which was later shown to be that of Ronk. The officers observed two persons in the car. Because the car was one which the officers had not seen in the neighborhood previously, they drove east 1 block and circled the block, coming back by the parked car. Just as they approached the car a Caucasion male, later identified as Mitchell, ran from the porch of 4424 North 28th Street, crossed in front of the cruiser, and ran between the car which had its lights on and one of the other parked cars. As the man reached a fence on the east side of 28th Street he dropped bottles of liquor he was carrying and fled between two houses. The officers turned the car east on Ames Avenue. Then Dutton got out, pursued Mitchell, and apprehended him when Mitchell doubled back toward the parked car. That car had departed in the meantime. Ronk by this time had revived, gone outside where he saw the police car, and yelled to the officers that he had been robbed. The officers then took his story. They observed he had been badly beaten.

Dunning had earlier seen the parked auto go to Ames Avenue and turn left. He gave, by police radio, a description of the car, a 1966 blue Oldsmobile or Chevrolet, and requested a pickup. Another cruiser officer, Lynch, heard the broadcast while he was at 30th Street and

Ames Avenue. He began a search and at 42nd Street and Grand Avenue came upon a car matching the description given by Dunning. He changed course to follow that car and when he did so the car fled at high speed. Lynch gave chase and about 20 blocks later the car crashed into two parked automobiles. One of the occupants of the car got out and ran. Lynch did not see his face and could not identify him, but described him as being about 6 foot 1 inch or 6 foot 2 inches and wearing long, dark hair. The other occupant of the car, one Lutz, had suffered a broken arm in the collision and did not run. Lynch handcuffed him to the steering wheel of the car and then sought the man who had fled, but was unable to find him. Lynch then checked the auto registration and found it was registered to one Raymond Dirgo of a Florence Boulevard address located 4 or 5 blocks from the accident scene. Lynch found in the back seat of the Dirgo car a television set, apparently damaged in the collision, but which matched the description of that taken in the Ronk robbery. At trial the television set was received into evidence on the basis of Ronk's testimony that it was the same kind as the one taken from his apartment and on the officer's testimony that the television set was the one found in the car.

After Lynch' futile attempt to find the second man, he then drove to the Florence Boulevard address and there talked to one Raymond Dirgo, father of the defendant. The father told the officer that the defendant had previously lived at that address but had moved out about a week earlier. The State at trial offered no direct evidence to show that the automobile in which Lutz was apprehended was the property of the defendant, Raymond E. Dirgo, rather than the property of the father, Raymond Dirgo. This was left to circumstantial inference.

Prior to talking to the father, Lynch had Lutz taken to the hospital. There officer Dunning, who was at the

hospital with Ronk and Mitchell, observed Lutz and recognized him as one of the two occupants of the car that had been parked opposite Ronk's apartment.

Dutton and Dunning, who had seen Mitchell drop the liquor bottles, had, during their investigation following the incident, called a police department identification technician who took pictures of the bottles, one of which was broken. Later an identification technician lifted fingerprints from one of the bottles and these, by comparison with exemplar prints taken from the defendant, were found to be the fingerprints of the defendant. At trial Ronk testified that at the time of the robbery he had in his apartment three bottles of liquor of the kind and brand found and that they were missing after the robbery. The bottles and the pictures taken by the technician were received in evidence.

This summary of the evidence demonstrates that it was sufficient to permit the jury to find that Dirgo was a participant in the robbery and collaborated with Mitchell and Lutz therein even though the means by which the collaboration was arranged can only be inferred.

The applicable rules are: "This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt." State v. Monroe, 188 Neb. 100, 195 N. W. 2d 159.

"Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. . . . Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed." State v. Alvarez, 189 Neb. 276, 202 N. W. 2d 600.

A common purpose or criminal intent among two or more persons to commit a crime need not be shown by direct evidence, but may be proved by the circumstances surrounding the act. State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167. The circumstantial foundation for the admission of the bottles and the television set was clearly sufficient. See State v. Huerta, 191 Neb. 280, 214 N. W. 2d 613.

AFFIRMED.

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

241 N. W. 2d 354

Filed April 28, 1976. No. 40361.

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

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

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

NEWTON, J.

The defendant entered a plea of nolo contendere to a charge of entering a dwelling house in the nighttime and attempting to kill, disfigure, or maim a young girl. He received the minimum sentence of 3 years in the Nebraska Penal and Correctional Complex and has appealed on the grounds that the sentence is excessive and that he should have been placed on probation.

The defendant became intoxicated and late at night broke into the house of a stranger by forcing entry

through a basement window, picked up a metal tennis racket, entered the bedroom of a young girl, and proceeded to viciously beat her with the tennis racket. The girl's screams aroused her father who subdued the defendant.

The defendant appears to have borne a good reputation prior to the commission of this offense and had not previously been convicted of a felony. The present offense, however, is one of violence and represents the type of crime for which probation is rarely granted. Under the circumstances, we cannot conclude that there was an abuse of discretion on the part of the trial judge and the judgment of the District Court must be affirmed. See State v. Swails, 195 Neb. 406, 238 N. W. 2d 246.

AFFIRMED.

RONALD OBERHELMAN, APPELLANT, V. LOYAL I. BLOUNT, APPELLEE.

241 N. W. 2d 355

Filed April 28, 1976. No. 40366.

1. **Negligence: Pleadings: Trial: Evidence.** If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense.
2. ———: ———: ———: ———. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.
3. **Negligence: Trial: Instructions.** Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
4. **Pleadings: Trial: Evidence: Instructions.** It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings but which have not been supported by any evidence.

5. **Damages.** It is just as essential that the value of future pain and suffering be reduced to its present worth as it is that the value of loss or impairment of future earnings be reduced to its present worth.
6. **Damages: Evidence: Trial.** Life expectancy tables are not conclusive, but may be considered in connection with other evidence bearing on the probable life expectancy of the plaintiff, such as health, habits, occupation, and other activities.

Appeal from the District Court for Cass County: BETTY PETERSON SHARP, Judge. Reversed and remanded with directions.

Warren C. Schrempp, Richard J. Dinsmore, and Richard E. Shugrue of Schrempp, Dinsmore & McQuade, and Richard J. Spethman, for appellant.

Richard P. Jeffries of Gross, Welch, Vinardi, Kauffman & Day, and Dwight Griffiths, for appellee.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and WARREN and RIST, District Judges.

WARREN, District Judge.

This is an action for damages arising out of a collision between an automobile being driven by plaintiff Ronald Oberhelman and a farm grain truck being operated by defendant Loyal I. Blount. Plaintiff suffered a knee injury involving a fracture of the lateral plateau of the left tibia, from which he claims a permanent disability.

The collision took place on October 20, 1971, on U. S. Highway Nos. 73-75 approximately 3 miles north of Plattsmouth, Nebraska. The highway in that area is a four-lane divided highway, with the eastern two lanes northbound and the western two lanes southbound. Separating the north and southbound lanes is a wide center median wherein is located a state weigh station. For northbound trucks, there is an entrance road to the south of the weigh station and north of the weigh station is an exit road back onto the two northbound lanes of highway Nos. 73-75. Approximately 1,000 to 1,500 feet

separates the entrance and the exit to the weigh station access road. At the point of exit there is a stop sign facing west controlling vehicles about to enter highway Nos. 73-75.

At 7 a.m., when it was still dark, the defendant Blount drove his truck out of the weigh station north on the exit road, turned east, and stopped 8 to 10 feet back of the stop sign. He looked to the south, saw headlights about 900 feet away, and entered the highway. He traveled northeasterly about 20 feet at not over 5 miles per hour, saw plaintiff's automobile 20 to 30 feet away, and struck the plaintiff's automobile at the left front door with the extreme right front corner of his truck. Plaintiff claims that the impact took place in the left lane and that was where "he hit me." Blount admits that he did not look again to the south after starting up from the stop sign. The plaintiff Oberhelman, as he traveled north, came over a viaduct some 2,500 to 3,000 feet from the accident scene and observed a semi-trailer truck just entering highway Nos. 73-75 from the weigh station exit, so he changed to the left lane to be prepared to pass the slow moving vehicle. He was traveling 50 to 55 miles per hour. The posted speed limit was 60 miles per hour. When Oberhelman was about 150 feet south of the weigh station exit he saw Blount pull onto the highway. He swerved to the right and applied his brakes, but the truck kept coming and the collision resulted.

Clarence Tom Frudiker, then deputy sheriff of Cass County, testified that he found the accident debris in the right lane approximately 3 feet east of the dividing line between the two lanes. When Frudiker asked Blount why he had failed to yield the right-of-way, Blount stated that he had stopped at the stop sign, observed a vehicle coming from the south, but thought he had time to get across the highway before the vehicle reached him. Oberhelman claimed medical specials of $747.93 and total loss of his automobile valued at

$925. Blount cross-petitioned for his truck damage of $179.08.

The court submitted the case on plaintiff's petition, the defense of contributory negligence, comparative negligence, and the defendant's counterclaim. The jury returned a verdict for the plaintiff on his petition and assessed damages of $4,327 against Blount, and further found for plaintiff on the defendant's counterclaim. Plaintiff filed his motion for new trial on the issue of damages only, and appeals from the order overruling the same.

Plaintiff's principal assignment of error is that the court erred in submitting and instructing on alleged contributory negligence of the plaintiff and comparative negligence, thus giving the jury the opportunity to reduce the damages awarded by use of the comparative negligence doctrine while finding for plaintiff on liability. The defendant alleged that Oberhelman was negligent in six respects: He failed to keep a proper lookout; he failed to keep his vehicle under proper control; he drove at a high and dangerous rate of speed that was not commensurate for the conditions of the roadway and the condition of the traffic at that time existing; he failed to yield to defendant his half portion of highway Nos. 73-75; he failed to yield the right-of-way to the defendant; and he failed to slow down, stop, or swerve his vehicle or take other means at hand to avoid the collision. The court instructed the jury on each of these six allegations of plaintiff's contributory negligence, verbatim.

"If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense." Giebelman v. Vap, 176 Neb. 452, 126 N. W. 2d 673 (1964).

"Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence."

Spath v. Coon, 189 Neb. 822, 205 N. W. 2d 541 (1973). See, also, Arnold v. Lance, 166 Neb. 834, 90 N. W. 2d 814 (1958).

"Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury." Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534 (1962).

"It is reversible error for the court to include, in its instructions to the jury, allegations of fact found in the pleadings but which have not been supported by any evidence." Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139 (1955).

We examine the specifications of contributory negligence in the light of the foregoing rules. The first allegation was that Oberhelman failed to keep a proper lookout. Plaintiff was traveling on a favored arterial highway protected by a stop sign and he had a right to assume that other users of the highway would use the highway in a lawful manner unless or until he had warning, notice, or knowledge to the contrary. See Gross v. Johnson, *supra*. The first such warning or notice which Oberhelman had was when he was 150 feet away and Blount pulled onto the highway and into the lane in which plaintiff was traveling. Plaintiff testified that he was sure he had earlier noticed the Blount truck sitting there at the stop sign, but took no special notice of it until it pulled out in front of him. Defendant's contention that Oberhelman's observation was grevously tardy is without basis in fact. There is literally no evidence that plaintiff failed to keep a proper lookout and the jury should not have been allowed to consider that specification.

The second specification of contributory negligence concerned an alleged failure of Oberhelman to keep his

vehicle under proper control. The term as used in the standard instruction is "reasonable control," and that is the term which should have been used both by the court and counsel. (NJI No. 7.03.) Disregarding that misnomer, we find nothing in the evidence to even suggest that plaintiff ever lost control, or failed to have full, complete, and reasonable control of his automobile. He immediately applied his brakes and swerved when Blount suddenly entered the highway. This specification of negligence has no support in the evidence.

Thirdly, the jury was instructed with reference to a high and dangerous rate of speed not commensurate with the conditions of the roadway and the traffic. Again it is noted that court and counsel disregarded the plain language of the two applicable statutes then in force which prohibit speed greater than is reasonable and proper (§ 39-723, R. S. Supp., 1971), and speed greater than is reasonable and prudent (§ 39-7,108, R. R. S. 1943, Reissue of 1968), and instead coined the nebulous and misleading phrase "high and dangerous rate of speed." Building upon plaintiff's testimony that he knew the weigh station was an area of "some vehicle activity," defendant's counsel has argued extensively that plaintiff had the duty to reduce speed in coming to what he now terms an area of "high traffic density," of "known high traffic," and "high vehicular activity." The evidence was that the accident scene was an area of some vehicle activity. The same could be said of each and every vehicle accident scene. The condition of highway Nos. 73-75 at this point was normal. Plaintiff testified he was driving 50 to 55 miles per hour. Defendant did not testify as to plaintiff's speed. The traffic was normal. There was no unusual or dangerous condition, except for that created by defendant himself. Defendant's evidence did not meet the burden necessary to make a jury question on speed, and this specification should not have been submitted to the jury.

In the fourth and fifth specifications of contributory negligence, the court submitted failure to yield in two particulars: (1) Failure to yield the defendant Blount his half of highway Nos. 73-75; and (2) failure to yield the right-of-way to defendant. It should be abundantly clear in this fact circumstance that there was no defendant's half of the highway, and no right-of-way in defendant. On the contrary, defendant Blount had the positive duty to yield the right-of-way to all vehicles on the protected highway which were at such a distance and traveling at such a speed that it would be imprudent for him to enter the highway. There is simply no basis whatever for the submission of these two specifications of contributory negligence.

Lastly, the court submitted the allegation that plaintiff failed to slow down, stop, or swerve his vehicle or take other means at hand to avoid the collision. Such allegations are in the nature of general allegations of negligence, and should be cautiously given. However, it is sufficient to say that the uncontradicted evidence shows that the plaintiff did apply his brakes and swerve to the right lane in an attempt to avoid a collision the moment the danger became apparent. This was not a proper specification of contributory negligence.

Having concluded that there was insufficient evidence to sustain an affirmative finding of contributory negligence on any one of the six specifications upon which the court instructed the jury, we find that the submission of plaintiff's contributory negligence and comparative negligence was error, which was not cured by the verdict for the plaintiff because the jury was thereby allowed to compare negligence and thus reduce the damages due plaintiff. Such error is therefore prejudicial.

The finding of negligence on the part of defendant which proximately caused the collision is abundantly supported by the record.

The necessity of a new trial on the question of damages makes it unnecessary to consider plaintiff's assign-

ments of error involving the court's failure to sustain plaintiff's motion for directed verdict on the question of liability, and the inadequacy of the verdict.

Because a new trial is directed, two additional assignments of error should be discussed briefly.

Plaintiff contends that the court erred in instructing the jury that any award for future pain and suffering should be reduced to its present value. Plaintiff cites Chicago & N. W. Ry. Co. v. Candler, 283 F. 881 (Neb., 1922), as holding that damages for future pain and suffering should not be reduced to present value because: "In the matter of pain, suffering, or inconvenience, no books are kept, no inventories made, no balances struck." The position of this court has been stated in Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109 (1957), as follows: "We think it just as essential that the value of future pain and suffering be reduced to its present worth as it is that the value of loss or impairment of future earnings be reduced to its present worth." That position has been restated by our approval of the pattern jury instructions (NJI No. 4.13) which were properly given by the trial court in this instance. Juries in Nebraska have been "striking a balance" on future pain and suffering by reducing it to its present worth for many years. We see no reason to depart from that rule. This assignment of error is without merit.

The trial court allowed to be read in evidence on the issue of future damages the life expectancy tables for plaintiff's age (29) from three separate sources: Actuaries - 35.15 years; American - 36.03 years; and 1958 Commissioner's - 42.16 years. Plaintiff assigns as error the use of any except the 1958 Commissioner's Table. The court properly instructed the jury that life expectancy tables are not conclusive, but may be considered in connection with other evidence bearing on the probable life expectancy of the plaintiff, such as health, habits, occupation, and other activities. (NJI No. 4.12.) We see no prejudicial error in giving the jury all three

tables since that constituted giving the jury all available information on the subject. So long as the Revisor of Statutes sees fit to include all three tables in the Appendix to Volume 2A of Reissue Revised Statutes of Nebraska, 1943, we see no error in giving the jury that information.

The judgment of the District Court is reversed and the cause remanded with instructions to enter judgment for the plaintiff on the issue of liability and grant a new trial on the issue of damages.

REVERSED AND REMANDED WITH DIRECTIONS.

FAYE TINNIN BARNES, APPELLEE, V. HARLAND S. MILLIGAN, APPELLANT, IMPLEADED WITH GLAIDETH FRANK ET AL., APPELLEES.

241 N. W. 2d 508

Filed April 28, 1976. No. 40384.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law.
2. ———. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.
3. ———. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Reversed and remanded for further proceedings.

Michael V. Smith of Smith & King, for appellant.

Edmund Hollstein, for appellee Barnes.

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

MCCOWN, J.

This is an action involving title to and possession of

certain ranch land lying between the boundary line described in conveyances, and a boundary fence erected and maintained for more than 10 years.

The plaintiff's original petition was an action for willful trespass and damages. The defendant Milligan's counterclaim asserted adverse possession of the disputed tract and prayed that title be quieted in him. Plaintiff's amended petition sought damages and delivery of possession. Both parties filed motions for summary judgment. The court overruled defendant's motion for summary judgment, granted plaintiff's motion, directed a survey to establish the legal boundary, ordered plaintiff to erect a fence along that boundary at her own expense, and dismissed defendant's counterclaim. The defendant Milligan has appealed.

The disputed land here, together with land to the east and west of it, had been a part of the Tinnin ranch in Sheridan County at one time. Another large ranch, known as the Modisett ranch, adjoined the Tinnin ranch on the east. The Modisett ranch was owned by Stansbie and Engel Company, a corporation formed by Chris and LeRoy Abbott. In 1944, Stansbie and Engel acquired a one-third interest in the Tinnin ranch. The plaintiff in this action, who owned a two-thirds interest in the Tinnin ranch then, filed a partition action in federal court. On June 5, 1951, that partition action was settled by agreement approved by the court, and the Tinnin ranch was divided so that the plaintiff received the western part of the Tinnin ranch and Stansbie and Engel Company received the eastern part of the ranch, which adjoined the Modisett ranch. The agreement was confirmed by deeds executed by the former joint owners to each other.

Chris Abbott and the plaintiff could not agree on the fencing of the new common border, which was not surveyed or fenced. Sometime thereafter prior to his death in 1954, Chris Abbott arbitrarily installed a fence on the northerly portion of the west side of the disputed

area. That fence connected to the north end of an existing fence which extended for some distance along the west boundary of Sections 15 and 22. At about the same time an employee of plaintiff installed a fence from the south end of the old fence in Section 22 and thence southeasterly to a point just east of the center of Section 27, where it tied into an existing east-west fence. The critical fence, including the portions erected by plaintiff and defendant's predecessors with the old fence in the middle, covered a distance of about 2½ miles and has remained in that exact location ever since the middle 1950's. There was no fence along the actual boundary line, and the disputed area includes approximately 1,000 acres.

In sustaining plaintiff's motion for summary judgment the court relied upon documents, admissions, and answers to interrogatories, together with depositions of various witnesses. In its memorandum opinion the District Court specifically found that the defendant and his predecessors in title had been in exclusive continuous possession of the land since the mid-1950's, and during all that time had used the land for the purposes for which it was suited. However, the court found that the defendant had not proved that such exclusive possession and use was "under a claim of ownership.". The court determined that the possession and use was not under a claim of ownership on the basis of a statement in one of the depositions that at the time Chris Abbott commenced construction of the northern portion of the fence he stated to the witness that he was going to build the fence over to the school section land and "I can pay that old lady rent on this land just like anybody else." The court accepted the witness' statement in the deposition as an established uncontradicted fact. There was, however, evidence in a deposition from another witness that the fence was a temporary fence, and that Mr. Abbott at no time said anything to him about leasing the land from the plaintiff. There is no evidence that

plaintiff ever leased the land to defendant's predecessors, nor even discussed it. There is no evidence that she ever gave them permission to use any of her land, nor that they ever asked it.

Not only was there a genuine issue as to a material fact or facts in this case, but the ultimate inferences to be drawn from uncontradicted facts were neither clear nor without dispute. The basic factual issue here was whether the defendant's possession was hostile and therefore adverse, or whether it was permissive. The evidence on that issue is clearly contradictory.

In Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152, we said: "The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law." In that case we held that even though there were no conflicting evidentiary facts, where the ultimate inferences to be drawn from the facts are not clear, the inferences are not conclusively established, and it cannot be determined whether the defendant is entitled to judgment as a matter of law.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Hiram Scott College v. Insurance Co. of North America, 187 Neb. 290, 188 N. W. 2d 688.

The memorandum opinion establishes that the District Court found that the possession by the defendant and his predecessors was actual, continuous, open, exclusive, and notorious, but that it was not hostile or adverse. In Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404, this court discussed the issues of intention and hostility in determining whether possession was adverse. See,

also, III American Law of Property, § 15.4a, p. 772. Other authorities also reflect the view that adverse possession and use is simply the opposite of permissive possession and use. Where the use is not with the permission of the owner, it may be regarded as adverse.

The District Court in weighing the evidence placed the burden on the defendant of establishing that his exclusive possession and use was under a "claim of ownership." 3 Am. Jur. 2d, Adverse Possession, § 96, p. 177, states: "Terms such as 'claim of right,' 'claim of title,' and 'claim of ownership,' when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. * * * Thus, 'claim of right' means no more than 'hostile' and if possession is hostile it is 'under a claim of right.' "

In Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331, this court said: "Adverse possession is founded upon the intent with which the occupant has held possession and this intent can best be determined by his acts in relation thereto. * * * The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may within the period of limitation take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete."

Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Johnson v.

Metropolitan Utilities Dist., 176 Neb. 276, 125 N. W. 2d 708. On the basis of the record here, substantial material facts are in dispute and the ultimate inferences to be drawn from uncontroverted facts are not clear and conclusive. The record fails to establish the plaintiff's right to judgment as a matter of law and the facts and inferences are not subject to determination upon a motion for summary judgment. The judgment is reversed and the cause remanded to the District Court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. FRANKLIN L. THOMPSON, APPELLANT.

241 N. W. 2d 511

Filed April 28, 1976. No. 40391.

1. **Criminal Law: Arrest: Misdemeanors: Probable Cause.** A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe the person has committed a misdemeanor in his presence, or has committed a misdemeanor and the officer has reasonable cause to believe the person will not be apprehended unless immediately arrested or may destroy or conceal evidence of the commission of the misdemeanor.
2. **Criminal Law: Arrest.** The use of binoculars by police as an aid in performing surveillance is not unlawful.

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

T. Clement Gaughan and Dennis G. Carlson, for appellant.

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

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and FAHRNBRUCH and GRANT, District Judges.

BOSLAUGH, J.

The defendant was convicted in county court of unlawful possession of marijuana. Upon appeal to the District Court the finding of guilty was affirmed and a fine of $100 imposed. The defendant has appealed to this court and contends the judgment should be reversed because he was convicted upon evidence which should have been suppressed because it had been obtained by an unlawful search and seizure.

The record shows the defendant was arrested in a residence at 1535 North 15th Street in Lincoln, Nebraska. This property had been under surveillance for about a month because the police suspected that controlled substances were being sold or delivered from the property.

On March 14, 1975, at about 9:15 p.m., two police officers were stationed in the alley behind the property. From the alley they could see through a rear window into the house and observe what was happening in the living room. There was a sheer curtain across the window but the drapes had been pulled back. Using binoculars, Officer Bullock saw a man, later identified as Whitney, smoking a cigarette that was being held in a pair of scissors. After taking the cigarette up to his mouth and smoking from it Whitney would pass it to his right. A short time later the cigarette would be returned to Whitney and he would smoke from it again.

The officers then went to the front of the house and knocked on the front door. Whitney opened the door and the officers walked into the living room. They displayed their badges and stated they were police officers. The defendant was sitting on a couch along the north wall to the right of where Whitney had been seated. The defendant had a pair of scissors in his hand and there was a hand-rolled cigarette and a package of cigarette papers to his left. There was a fairly strong odor of marijuana inside the residence.

The officers announced those present were under arrest for being in a place where a controlled substance was

being used and for unlawful possession of marijuana.

The defendant contends his motion to suppress the evidence seized at the time of the arrest should have been sustained because it was obtained by an unlawful search and seizure. The State claims the search and seizure was incident to a lawful arrest.

The evidence shows the officers observed a marijuana party in progress and then arrested the participants. The officers had a right to be in the alley and there was nothing unlawful in their use of binoculars. See, United States v. Lee, 274 U. S. 559, 47 S. Ct. 746, 71 L. Ed. 1202; Johnson v. State, 2 Md. App. 300, 234 A. 2d 464; Commonwealth v. Hernley, 216 Pa. Super. 177, 263 A. 2d 904; United States v. Minton, 488 F. 2d 37; Fullbright v. United States, 392 F. 2d 432; Annotation, 48 A. L. R. 3d 1178; On Lee v. United States, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe the person has committed a misdemeanor in his presence, or has committed a misdemeanor and the officer has reasonable cause to believe the person will not be apprehended unless immediately arrested or may destroy or conceal evidence of the commission of the misdemeanor. § 29-404.02, R. S. Supp., 1974.

The arrest in this case was justified under the statute. The search and seizure was incident to a lawful arrest and was, therefore, not unlawful.

The judgment of the District Court is affirmed.

AFFIRMED.

GRANT, District Judge, dissenting.

I recognize that the Fourth Amendment protects people, not places, and its reach cannot turn on the presence or absence of physical intrusion into any given enclosure; and that what a person knowingly exposes to the public, even in his own home, is not a subject of Fourth Amendment protection. See Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576. Defendant, in this case, was seated in the living room of

his home with the drapes in that room drawn and was so situated that he was not visible from outside. A guest in the home could be seen, with the aid of binoculars, from a little-used alley behind the home, through a fully sheer-curtained window in an adjoining room which window was also partially covered by drapes drawn back and by potted plants placed in front of it. I feel that defendant has brought himself within the general rule referred to by Mr. Justice Harlan concurring in Katz v. United States, *supra,* to the effect that in order to avail himself of Fourth Amendment protection, a defendant must "have exhibited an actual (subjective) expectation of privacy, and * * * that the expectation be one that society is prepared to recognize as 'reasonable'." The conduct of the police in this case in peering through what amounts to a crack in the wall of defendant's home infringes on defendant's constitutionally protected right to be free of warrantless governmental intrusion into his home. I feel the motion to suppress should have been sustained in toto. I respectfully dissent.

CLINTON, J., dissenting.

I dissent. Because the reasons for my position are different from those given by Grant, D.J., I must separately state them. The case authority recited in the majority opinion does support the proposition that factual information obtained by the use of binoculars to penetrate a premises without physical trespass may be used to show probable cause. I do not quarrel with that proposition. However, the cases in question do not support the warrantless entry and search of a residence absent probable cause and exigent circumstances.

The majority opinion also relies, unjustifiably I believe, upon the provisions of section 29-404.02, R. S. Supp., 1974, to support a warrantless search of a residence. Because there is no analysis relating the evidentiary facts to the statute on which the court relies, it is difficult to determine the rationale of the majority.

I do not believe the statute was intended to authorize the warrantless entry and search of a home, absent probable cause and exigent circumstances, or other recognized exceptions to the warrant requirements. Nor do I think the Legislature ever contemplated that the statute means that a misdemeanor committed in one's home is committed in the presence of the officer when the officer is neither in the home nor on the premises. The facts in this case do not demonstrate exigent circumstances even if we assume probable cause.

The record indicates that the investigating officers observed through binoculars an individual, not the defendant, smoking a cigarette and passing it to another person who could not be observed. For reasons which are not disclosed by the record, these officers believed that the cigarette contained marijuana. They then went to the front door of the residence. One of the officers drew his gun. The other officer knocked on the door. When the door was opened, the officers apparently identified themselves as police officers and then, without invitation, entered. Only one of the officers testified at the suppression hearing. He stated that he saw the defendant seated in a chair and beside him on a table was a cigarette later determined to be marijuana. He apparently did not, however, see the cigarette until he entered. This officer further testified that he had at no time any reason to believe the defendant was about to leave the house or the city. He testified to no facts leading to a conclusion that evidence was about to be destroyed. It might, of course, be inferred that the cigarette being smoked would be consumed in the process.

It is my view that a search warrant was required under the circumstances before the officers were entitled to enter the home to seize and search.

I now discuss the authorities on which the majority opinion relies. In Johnson v. State, 2 Md. App. 300, 234 A. 2d 464, the court held only that binocular observa-

tions were proper to show probable cause for issuance of a search warrant. That case is not authority for a warrantless search of a residence. In Commonwealth v. Hernley, 216 Pa. Super. 177, 263 A. 2d 904, again the long-range observations by binoculars were used to obtain a warrant for search of a print shop for evidence of illegal gambling. United States v. Lee, 274 U. S. 559, 47 S. Ct. 746, 71 L. Ed. 1202, involved the search of a boat on the high seas after searchlight observation. The charge in that case was smuggling. In On Lee v. United States, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270, the issue involved use of admissions obtained through a bugged informer. The place involved was a place of business which the public was entitled to enter. It has no application here. In Fullbright v. United States, 392 F. 2d 432, the search (of a shed, not a residence) was made with a warrant obtained on the basis of information obtained in part by observations made through binoculars. All the above cases involved felonies. In United States v. Minton, 488 F. 2d 37, the officers made observations of a van being unloaded at a warehouse. They then approached, observed, and smelled illegal liquor being unloaded. A felony was being committed in their actual presence. No warrant was required. None of the above cases is authority for the warrantless search of a residence.

This court, up until this time, has insisted upon the necessity of a warrant for a search of a home absent one of the recognized exceptions for warrantless search. No exigencies existed here. For circumstances which justify warrantless entry and search, see State v. Patterson, 192 Neb. 308, 220 N. W. 2d 235.

I do not deny that there are cases (although the majority opinion does not cite them) which hold that a misdemeanor is committed in an officer's presence when he observes its commission through a window and may thus enter without warrant even without the existence of exigent circumstances. Griffin v. State, 200 Md. 569,

92 A. 2d 743, cert. den. 345 U. S. 907, 73 S. Ct. 647, 97 L. Ed. 1343; United States ex rel. Wright v. Woods, 432 F. 2d 1143, cert. den. 401 U. S. 966, 91 S. Ct. 983, 28 L. Ed. 2d 248. However, I believe that the history of warrantless arrests for misdemeanors supports the view that warrantless entry of a home to arrest for a misdemeanor or to search for evidence of such misdemeanor absent exigent circumstances is unreasonable in the constitutional sense. See Commonwealth v. Krubeck, 23 Pa. Co. 35, 8 Pa. Dist. 521 (1899).

At common law, an officer could arrest a party for a misdemeanor without a warrant only if the misdemeanor was committed in his presence *and* a breach of peace was involved. Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543; United States v. Coplon, 185 F. 2d 629, cert. den. 342 U. S. 920, 72 S. Ct. 362, 96 L. Ed. 688. In marked contrast, the common law doctrine in this state is that an officer may make a warrantless arrest of a party for a felony even though the felony is not committed in his presence. United States v. Coplon, *supra*; State v. Russ, 193 Neb. 308, 226 N. W. 2d 775. The policy reason for severely curtailing warrantless arrests for misdemeanors while at the same time expanding the right to make such an arrest for a felony was stated by the United States Supreme Court in Carroll v. United States, *supra*: "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, 1 Stephen, History of Criminal Law, 193, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant." See, also, State v. Mobley, 240 N. C. 476, 83 S. E. 2d 100; Comment, "Arrest With and Without a Warrant," 75 U. Pa. L. Rev. 485. Because of the overriding public interest in apprehension of felons, the United States Supreme Court has indicated that there is no require-

ment of exigent circumstances before a warrantless arrest can be made. Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663, reversed in part on other grounds in United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653; also Dailey v. United States, 261 F. 2d 870, cert. den. 359 U. S. 969, 79 S. Ct. 881, 3 L. Ed. 2d 836; and Smith v. United States, 254 F. 2d 751, cert. den. 357 U. S. 937, 78 S. Ct. 1388, 2 L. Ed. 2d 1552.

The question then is whether an officer should be allowed to enter a residence without warrant and arrest a party for a misdemeanor under section 29-404.02, R. S. Supp., 1974, absent an exigent circumstance for doing so. I think not. In reaching that conclusion I would weigh the interest of society in the apprehension of a misdemeanant against the interest of a person in the constitutional privacy of his home as guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States.

Nebraska's interest in the apprehension of a misdemeanant has been expressed both judicially and legislatively. In a case in which the warrantless arrest occurred prior to the effective date of section 29-404.02, R. S. Supp., 1974, this court held that a "police officer may arrest for a misdemeanor committed or attempted in his presence" without a warrant. State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753. The Reeder position was adopted by the Legislature at section 29-404.02, R. S. Supp., 1974, which states in part that a "peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person . . . (2) . . . (d) has committed a misdemeanor in the presence of the officer." Both the Reeder case and the statute depart from the common law to the extent that there is no requirement that the misdemeanor must involve a breach of the peace. However, this modification cannot be read to mean that the Legislature intended that the police may enter a home to make a

warrantless arrest for a misdemeanor absent an exigent circumstance. If, for example, a police officer should observe through a window a man beating a woman he ought to be able to enter. On the other hand, an officer should not be permitted to enter a residence to make a warrantless arrest for a misdemeanor (not involving a breach of the peace or other exigent circumstance) where the Legislature has seen fit to punish such activity only with a small fine or jail sentence. The Legislature, in defining the punishment, has indicated that the harm generated by the offense is not of great detriment to the public. In comparison, a person's right to privacy in his residence is a constitutional guarantee flowing from the Fourth Amendment. This guarantee is reduced to an intolerable minimum if officers may at will enter a house without a warrant to arrest a person for a misdemeanor.

RANDY S. KNIGHT, APPELLEE, V. THERESA J. KNIGHT, APPELLANT.

241 N. W. 2d 360

Filed April 28, 1976. No. 40467.

1. **Divorce: Parent and Child: Time: Infants.** When the custody of a minor child is placed in the court, the court at a subsequent hearing may consider predivorce activities of the parties unknown to the court at the time the decree was entered.
2. **Divorce: Parent and Child: Infants.** As we interpret our present divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other.
3. ———: ———: ———. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child.
4. ———: ———: ———. The discretion of the trial court on the granting or changing of custody of minor children is

subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Phillips & Murphy, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Alan L. Plessman, for appellee.

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

SPENCER, J.

Theresa J. Knight appeals from an order of the District Court placing the legal custody of the minor child of the parties with the juvenile probation office of Lancaster County, and awarding the physical custody to Randy S. Knight.

Appellant's assignments of error are three in number. (1) The court erred in awarding physical custody of the minor child to the father and legal custody to the juvenile probation office. (2) The court erred with respect to the admissibility of evidence and in personally questioning a witness about appellant's moral conduct prior to the original trial, as well as in striking evidence adduced by her concerning the moral conduct of her former husband. (3) The District Court erred in imposing an incorrect burden of proof on the appellant. We affirm.

In the divorce decree of October 28, 1974, the court retained legal custody of the minor child, who was born January 31, 1973. It placed his physical custody with his father, Randy S. Knight, subject to the right of his mother to visit and have physical custody of said minor child during 2 successive days and nights of each week. The decree also provided for a review of the custody and visitation provisions in a year.

Theresa's application for custody and child support, and Randy's answer and cross-petition for modification, were heard on October 21, 1975. Theresa alleged there have been many changes in her circumstances during the preceding year. She has matured and is gainfully employed. She now is able to provide the child with the proper environment, as well as care and affection. She alleged her arrangement would be more conducive to the child's best interests than his present situation.

The father and the child are living with the father's parents in Omaha, Nebraska. The father is gainfully employed. During the hours of his employment the child is in the custody of the father's mother or grandmother. When the father is off work the record would indicate he spends 80 to 90 percent of his time with his son. The trial court specifically found the minor child is happy and healthy and has been provided proper care, treatment, and supervision since the decree of October 28, 1974.

Theresa is employed 8 hours a day. She has made arrangements for a baby sitter to supervise the child during the hours of her employment. She has a separate home available for said child which she contrasts with the present necessity of living in the home of his paternal grandparents. She will personally assume the day-to-day responsibility of taking care of said child so as to provide him with the proper environment and care. Particularly, her testimony is directed to the conclusion she could give him the attention of a loving mother in contrast to his present care by strangers.

We first consider assignments (2) and (3). As to Theresa's second assignment, the case is heard de novo in this court. The evidence received and excluded is in the record and before this court. It will only be considered if we find it relevant and admissible regardless of any rulings by the trial court.

As to appellant's assignment (3), we agree with appellant's counsel on the proper burden of proof in this

case. When the custody of a minor child is placed in the court, the court at a subsequent hearing may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Bartlett v. Bartlett (1975), 193 Neb. 76, 225 N. W. 2d 413. We review the record in the light of the above rule.

Theresa's first assignment is the real point at issue. Her counsel makes an eloquent presentation as to the pyschological benefit a small child receives in the arms of its mother. He quotes at length from previous holdings of this court epitomizing the thought that the love, solicitude, and devotion of a mother cannot be replaced by another and is worth more to a child of tender years than all other things combined.

Essentially, appellant is urging us to read subsection (2) of section 42-364, R. S. Supp., 1974, out of the statute. This we decline to do. This subsection provides preference shall not be given to either parent based on the sex of the parent, and no presumption shall exist that either parent is more fit to have the custody of the child than the other. The presumption at most would be only one element of the many considerations involved in child custody cases. We adhere to what we said in Kockrow v. Kockrow (1974), 191 Neb. 657, 217 N. W. 2d 89: "As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other."

Our law is well established, in determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Kockrow v. Kockrow, *supra.*

The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of

discretion or it is clearly against the weight of the evidence.

This case is triable de novo in this court. However, the judgment of the trial judge, who heard the testimony and observed the parties, is entitled to great weight in determining the best interests of the child in this custody proceeding. We are not about to substitute the eloquent argument of appellate counsel for the judgment of the trial court. The trial judge found the child is happy and healthy and is being provided proper care, treatment, and supervision. There is nothing in the record to indicate otherwise.

The court has given the mother generous visitation rights. On the record we cannot say the best interests and welfare of the child will not be served by the present order. He has been in the home of his paternal grandparents most of his life. We find no abuse of discretion. The judgment is affirmed.

AFFIRMED.

CRANE CO., A CORPORATION, APPELLEE, V. ROBERTS SUPPLY COMPANY, A CORPORATION, APPELLANT.

241 N. W. 2d 516

Filed May 5, 1976. No. 40274.

1. **Trial: Judgments.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong.
2. **Uniform Commercial Code: Contracts: Sales.** Section 2-204(1), U. C. C., provides that a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
3. **Uniform Commercial Code: Contracts: Words and Phrases: Customs and Usages.** "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage

of trade or course of performance as provided in the Uniform Commercial Code.

4. **Uniform Commercial Code: Contracts: Sales: Time: Customs and Usages.** An agreement as to a definite time for shipment or delivery may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Alfred A. Fiedler, for appellant.

Edward G. Garvey and James R. McGreevy, for appellee.

Heard before WHITE, C. J., NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

This is an action brought by the plaintiff, Crane Co. (hereinafter referred to as Crane), against the defendant, Roberts Supply Company (hereinafter referred to as Roberts), alleging that Roberts was indebted to Crane in the amount of $29,828.85, for termination charges on valves which were either completed or partially completed pursuant to two purchase orders placed by Roberts with Crane. Roberts claimed it was justified in terminating these orders due to Crane's failure to deliver on the dates specified in their agreement. Roberts also filed a cross-petition, claiming that as a result of Crane's delay in delivery on these two orders, Roberts lost other government contracts and resulting profits.

The case was tried to the court which found for Crane in the amount of $29,828.25 with interest of $9,704.11, for a total of $39,532.36, plus costs of $195.60. Roberts' cross-petition was dismissed. Roberts filed a motion for a new trial which was overruled. This appeal followed. We affirm the judgment of the District Court.

The record reveals the following transaction. On June 11, 1968, Crane mailed Roberts a price quotation on

80 ¼″, 64 ¾″, and 70 1″ GS globe valves. On June 19, 1968, Roberts offered to furnish these valves to the Defense Supply Agency (hereinafter referred to as DSA). On September 12, 1968, the DSA awarded Roberts contract No. DSA 700-69-C-2241 for the above valves. According to the contract the valves were to be shipped to Columbus, Ohio, within 350 days from the date of the award, or by August 25, 1969.

On October 31, 1968, Roberts offered to furnish the DSA with 38 ¾″, and 39¼″ GS globe valves. On November 1, 1968, Crane mailed Roberts its price quotation on these valves. On December 17, 1968, the DSA awarded Roberts contract No. DSA 700-69-C-6451 for these valves. According to the contract these valves were to be shipped to Columbus, Ohio, and Oakland, California, within 350 days from the date of the award, or by November 30, 1969.

On February 11, 1969, Crane received Roberts' purchase order G-3795, for 80 ¼″, 64 ¾″, and 70 1″ GS globe valves. Enclosed with this order was a copy of DSA contract No. 700-69-C-2241, and a copy of the notice of award. The order specified the delivery date as "before August 25, 1969," the same as Roberts' delivery date under DSA contract No. 700-69-C2241. Roberts did not place its order with Crane for the valves required under this government contract until almost 5 months had elapsed from the date the contract was awarded. Robert Swartz, chairman of the board of Roberts at the time, testified the delay was caused by Roberts' unsuccessful attempt to get the government to accept a valve from a different manufacturer.

On the same date, Crane also received Roberts' purchase order G-3796, for 38 ¾″ and 49 ¼″ GS globe valves. Enclosed with this order was a copy of DSA contract No. 700-69-C-6451, and a copy of the notice of award. This order specified the delivery date as "before November 30, 1969," which was the same as Roberts' delivery date under DSA contract No. 700-69-C-6451.

This order was not placed until almost 2 months after the date of the award.

On February 12, 1969, Cornelius Ausema, Navy and Marine government sales manager of Crane, wrote to Morris Karpen, sales manager of Roberts, acknowledging receipt of the orders, but refusing to accept the delivery dates specified by Roberts. Ausema wrote: "Due to the late receipt of these orders it will be impossible to meet due dates measured from dates of contracts. We will, of course, be committed to deliver valves within the forecasts named in our proposals measured from date of receipt, namely February 11, 1969. The valves on Order G-3794 and G-3795 will be due on January 27, 1970 (350 days from February 11, 1969). Valves on Order G-3796, will be scheduled for shipment on/or before February 6, 1970 (360 days from February 11, 1969).

"As already stated verbally we cannot agree to accept penalties or price considerations for delayed deliveries, i.e., deliveries measured from dates of award. We need your acknowledgment of this agreement."

Swartz testified that when Roberts received Ausema's letter dated February 12, 1969, it became concerned and wanted the delivery dates on the orders clarified. He testified that Karpen called Crane in Chicago, and as a result Mr. Peter Pagratis of Crane came to Roberts' Omaha office in mid-February. During their meetings, Swartz testified, Pagratis called someone in Chicago, and thereafter assured Roberts that Crane would make delivery on the dates specified in Roberts' purchase orders or sooner. George Shafer, vice president of Roberts, testified that he saw Pagratis in Roberts' offices in mid-February, in the presence of Karpen and Swartz, and that Pagratis stated he could improve upon the deliveries and would do everything in his power to expedite shipment. Don Foy, a Roberts' employee at this time, testified he heard Pagratis say Crane would come close to, if not meet, the required government delivery dates on the two orders. Pagratis, a Crane employee at this

time, after refreshing his recollection with weekly travel expense reports, testified that he was not in Omaha at any time between February 2, 1969, and April 26, 1969.

On March 3, 1969, Karpen wrote back to Ausema: "We acknowledge receipt of your letter of February 12, 1969 and ask that you please exert every effort to conform to the delivery date which we have specified. In the event that it is through our fault that any penalties are incurred, we will stand these."

Karpen's letter made no mention of Pagratis' alleged visit or of any of the representations Pagratis was alleged to have made at this time.

On March 18, 1969, Crane advised Roberts concerning order G-3795, that it could furnish an additional 34 ¾″ GS globe valves at the same price each as in the original order, but advised: "It is important, however, that the additional order be in our hands within ten (10) days to permit simultaneous manufacture."

On April 11, 1969, Crane received Roberts' purchase order G-3795 ADD, adding 34 ¾″ valves to its order, G-3795. Roberts wrote: "We are enclosing herewith our Purchase Order # G-3795-ADD and a copy of the Government Modification adding 34 valves to our original order. Will you please do all you can to expedite shipment."

On August 4, 1969, Karpen wrote W. J. Seebauer of Crane, concerning order G-3795: "The government requests that we do all we can do to expedite shipment of the valves required on the Basic Contract and we are to advise them as soon as possible regarding this.

"We note that this is scheduled for shipment January 2nd. Will you please see if you can accelerate shipment and let us know by return mail."

In mid-October, Roberts made a telephone appeal to E. Dykhuis of Crane for improved delivery on orders G-3795 and G-3795 ADD. In mid-July 1969, and on November 5, 1969, Roberts contacted Crane urging improved delivery on order G-3796.

On November 21, 1969, Roberts wired Crane advising that purchase order G-3795 had been terminated by the government, and that Crane should stop all production on order G-3795, which Crane did. In this wire, Roberts further advised, "We are trying to have all the above orders re-instated." As of this date, the status of order G-3795 was as follows: 80 ¼″ valves - 100 percent complete; 64 ¾″ valves, 95 percent complete; and 70 1″ valves 100 percent complete, a total of 46 valves on the order had been shipped as of November 17, 1969. The status of order G-3795 ADD on this date was as follows: 34 ¾″ valves 35 percent complete.

On December 16, 1969, Roberts again wired Crane, this time advising that its purchase order G-3796 had been terminated by the government and advising Crane to stop all production on order G-3796, which Crane did. As of this date, the status of order G-3796 was as follows: 16 ¾″ valves 100 percent complete; 22 ¾″ valves 85 percent complete, and 39 ¼″ valves 85 percent complete.

Roberts' contracts were terminated by the DSA for failure to meet the delivery dates specified in those contracts.

After termination, Roberts attempted to get the contracts reinstated. On January 15, 1970, Foy of Roberts wrote Crane advising that it would greatly benefit Roberts in either the settlement or the reinstatement of the contracts if Roberts could show a delay in purchase material from Crane's sources as the cause of the failure to meet the government's delivery dates. Crane was asked to see if any such delays existed. On January 19, 1970, Ausema of Crane responded, stating that the reason for the delay was Roberts' delay in placing the orders with Crane. On February 2, 1970, Foy wrote two identical letters to Crane concerning orders G-3795 and G-3796. These stated: "Negotiations are being conducted with the Defense Supply Agency on the above contract.

"Pending final decision, it is suggested that all material be retained in order that rapid completion can be accomplished as soon as approval is received.

"We will keep you posted on developments." The contracts were never reinstated by the DSA.

On January 22, 1970, Crane sent Roberts its invoice in the amount of $32,211.75, less credits of $12,278.35, for a net of $19,933.40, representing termination charges for the completed or partially completed valves on order G-3795. On November 30, 1970, Crane sent Roberts its invoice in the amount of $9,895.45, representing termination charges for completed or partially completed valves on order G-3796. Neither of these has been paid.

On appeal, Roberts contends that the judgment of the District Court was not supported by the evidence. Roberts' defense was that it was justified in terminating its orders with Crane because Crane failed to meet the required delivery dates under their agreement. This also is the basis of Roberts' cross-petition.

This transaction is governed by the Uniform Commercial Code. Section 1-105, U. C. C., provides that absent a contrary agreement between the parties (and none is alleged in this case) the act applies to transactions bearing an appropriate relation to this state. Roberts is a Nebraska corporation, located in Omaha, Nebraska. The products which were the subject of the orders, valves to be used in nuclear submarines, are "goods" within the definition of section 2-105, U. C. C. Consequently, by virtue of section 2-102, U. C. C., which reads: "Unless the context otherwise requires, this article applies to transactions in goods * * *."

Section 2-204 (1), U. C. C., provides: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

Section 1-201 (3), U. C. C., defines "agreement" as follows: " 'Agreement' means the bargain of the parties in fact as found in their language or by implication

from other circumstances including course of dealing or usage of trade or course of performance as provided in this act * * *."

Comment 1 to section 2-309, U. C. C., states that: "Agreement as to a definite time [for shipment or delivery] * * * may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term."

While the District Court made no specific findings of fact, implicit in its judgment for Crane is a determination that Crane's delivery dates on orders G-3795 and G-3796 were *not August 25 and November 30, 1969*, respectively (the same delivery dates required of Roberts under its contract with the DSA) and that consequently Crane had not breached its contractual agreement with Roberts, and therefore Roberts' termination was not justified.

The record shows that Roberts requested delivery dates of August 25 and November 30, 1969, when it placed the orders with Crane. Crane clearly and unequivocally rejected these delivery dates in its letter on February 12, 1969, to Roberts, and instead promised delivery dates 5 months later on order G-3795 and 2 months later on order G-3796. Despite this, and despite the alleged visit of Crane's Mr. Pagratis to Roberts' Omaha office, where he allegedly promised to meet or improve upon the delivery dates originally requested of Crane, Roberts' sole response to Crane was its letter dated March 3, 1969, where Roberts wrote: "We acknowledge receipt of your letter of February 12, 1969 and ask that you please exert every effort to conform to the delivery date which we have specified." On August 4, 1969, Mr. Karpen of Roberts wrote Mr. Seebauer of Crane concerning order G-3795, "We note that this is scheduled for shipment January 2nd. Will you please see if you can accelerate shipment." The record is devoid of any notice or mention to Crane from Roberts that it had breached the contract by failing to meet

the required delivery dates. As late as October 1969, Roberts was still appealing to Crane to expedite shipment on order G-3795.

The case below was tried to the court. "Under such circumstances, the judgment has the effect of the verdict by a jury and will not be set aside unless clearly wrong." Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply Inc., 195 Neb. 292, 237 N. W. 2d 645 (1976). See, also, Siefford v. Housing Authority of City of Humboldt, 192 Neb. 643, 223 N. W. 2d 816 (1974); American Standard Ins. Co. v. Tournor, 186 Neb. 585, 185 N. W. 2d 267 (1971).

There is sufficient evidence in the record to support the District Court's implicit determination that Crane's delivery dates on Roberts' orders G-3795 and G-3796 were not the same as Roberts' required delivery dates under its DSA contracts, August 25 and November 30, 1969, respectively. Consequently there is no merit to Roberts' contention that it was justified in terminating these orders. Roberts' cross-petition must likewise fail.

There is also sufficient evidence in the record to support the amount of the judgment. These valves were specially ordered. Testimony was given that it would be highly unusual to find another placement for the kind of parts involved here. Crane was able to dispose of some of the material and Roberts was given full credit for these amounts.

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

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLANT, V. JAMES E. ADKINS, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V. DANIEL J. SUTHERLAND, APPELLEE.

241 N. W. 2d 655

Filed May 5, 1976. Nos. 40309, 40310.

1. **Criminal Law: Controlled Substances: Constitutional Law: Statutes.** Section 28-4,127, R. S. Supp., 1974, which provides that "(1) It shall be unlawful for any person: * * * (g) To visit or be in any room, dwelling house, vehicle, or place where any controlled substance is being used contrary to the provisions of sections 28-459 and 28-4,115 to 28-4,142, if the person has knowledge that such activity is occurring; * * *" is unconstitutionally vague and overbroad.
2. **Criminal Law: Constitutional Law: Due Process: Statutes.** It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture.
3. ———: ———: ———: ———. The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts, and (2) the dividing line between what is lawful and what is unlawful cannot be left to conjecture.
4. ———: ———: ———: ———. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.
5. **Courts: Legislature: Statutes.** It is not the court's duty, nor within its province, especially in the absence of any evidence of legislative intent, to read a meaning into a statute that is not warranted by the legislative language.

Appeals from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Raymond E. Baker and Douglas R. Milbourn, for appellant.

R. Steven Geshell of Roback & Geshell, Mark M. Sipple of Walker, Luckey, Whitehead & Sipple, and Charles H. Rogers, for appellees.

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

BRODKEY, J.

The county attorney of Platte County has brought consolidated error proceedings pursuant to sections 29-2315.01 to 29-2316, R. R. S. 1943, to test the constitutionality of subsection (1)(g) of section 28-4,127, R. S. Supp., 1974, as contained in the Nebraska Controlled Substances Act. That portion of the statute reads as follows: "(1) It shall be unlawful for any person: * * * (g) To visit or to be in any room, dwelling house, vehicle, or place where any controlled substance is being used contrary to the provisions of sections 28-459 and 28-4,115 to 28-4,142, if the person has knowledge that such activity is occurring; * * *." The numbered sections referred to in subsection (1)(g) constitute the entire Nebraska Controlled Substances Act, and a violation of subsection (1)(g) is a misdemeanor.

Neither subsection (1)(g), above quoted, nor any equivalent thereof, appears in the Uniform Controlled Substances Act which was approved by the National Conference of Commissioners on Uniform State Laws in 1970. See 9 Uniform Laws Annotated (Master Ed.), 145, and particularly section 402, pp. 298, 299, and 301. Nor does that language, or its equivalent, appear in the present federal Drug Abuse Prevention and Control laws. Title 21 U.S.C.A., § 801, et. seq. A review of the legislative history of Laws 1971, L.B. 326, the Nebraska Controlled Substances Act, is of no assistance in determining the reason for the Nebraska Legislature including the language contained in subsection (1)(g), as there is no

discussion of that particular subsection in the record of the committee hearings or of the floor debates. Therefore, our decision as to the constitutionality of subsection (1)(g) will be determined strictly upon the merits of the statute itself, and not upon the intention of the Legislature in enacting the provision.

The factual background of these cases, as reflected by the record, is meager. Appellees, James E. Adkins and Daniel J. Sutherland, were each charged in the county court of Platte County, in separate cases, with being present where controlled substances were being used, in violation of section 28-4,127 (1) (g). The separate complaints charged that on or about February 20, 1975, in Platte County, Nebraska, each of them was unlawfully present in the same 1968 Chevrolet automobile in which controlled substances were being used, each of them knowing full well that such activity was occurring. It appears that both individuals, and certain casual acquaintances, were present in the same automobile at the same time and occasion, and under the same circumstances.

Prior to trial, counsel for each appellee moved for a dismissal of the charges, claiming that the statute was unconstitutionally vague and overbroad on its face in contravention of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and sections 1, 3, and 5 of Article I of the Nebraska Constitution. The county court sustained each motion, quashed the complaints, and dismissed the actions. The Platte County attorney appealed to the District Court for Platte County, which affirmed the ruling of the county court and held that section 28-4,127 (1)(g) was unconstitutionally vague and overbroad on its face. The cases were consolidated for purposes of appeal, and the Platte County attorney brought error proceedings to this court from the District Court's order dismissing and quashing the complaints and affirming the county court's ruling. The appellees

had not been in jeopardy. We affirm the judgment of the District Court.

The crux of appellees' argument that the statute under consideration is unconstitutionally vague and overbroad is that it encompasses within its express language what may essentially be innocent conduct.

Under the express terms of section 28-4,127 (1)(g) only three things are necessary to constitute a crime. A person need only (1) be in a place, (2) where a violation of the Controlled Substances Act is being committed, and (3) with knowledge that such activity is occurring. It is evident that the statute as written is broad enough to encompass entirely innocent behavior. Individuals may find themselves in situations such as at parties, theaters, dance halls, hotel lobbies, buses, apartments, taxis, or even in private automobiles, where their conduct has no relation to the acts of others who may be disposed to use controlled drugs. In such situations, must they either immediately leave because of fear of prosecution under the statute under consideration; or perhaps force the others to discontinue the use of the controlled substance; or perhaps have the others arrested. Must a host expel his guest if he discovers the guest is in possession of or using a controlled substance?

Could a college student be convicted under the statute if he merely continued to reside with a roommate whom he knew illegally possessed marijuana? What action would a passenger in a car take when he learns that others in the car have drugs on their persons although they are not at that time using the drugs? Must the passenger demand that he be let out of the car or that the others dispose of anything illegal in their pockets? How about the status of relatives, priests, or doctors attempting to discourage continued violations? What if a person were engaged in a constitutionally protected activity, such as attending a public meeting or voting, when he inadvertently discovers that another person at

the meeting or at the polls is in possession of a controlled substance? All the above situations would appear to be covered by the express language of the statute itself, and would result in the imposition of criminal liability upon a person merely because of his or her presence at the scene of the offense with knowledge that such illegal activity was taking place. We do not believe the Legislature intended to make such innocent conduct criminal, and yet by virtue of the overbreadth of the language used, as commonly understood, criminal liability might well result.

There are certain well-established rules for the interpretation of criminal statutes which are applicable in the present case. The general rule as to vagueness is well summarized in State v. Adams, 180 Neb. 542, 143 N. W. 2d 920 (1966), where this court stated: "It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. Markham v. Brainard, 178 Neb. 544, 134 N. W. 2d 84. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678. The dividing line between what is lawful and unlawful cannot be left to conjecture."

A penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Any statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law. State v. Adams, *supra*, citing Connally v. General Constr. Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322; State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678; State v. Pocras, 166 Neb. 642, 90 N. W. 2d 263; State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607. Other cases stating the same rule, with minor variations, are Markham v.

Brainard, 178 Neb. 544, 134 N. W. 2d 84 (1965); Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772 (1967).

In State ex rel. English v. Ruback, *supra,* the court quoted from Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 10, indicating the invalidity of overbroad criminal statutes, stating: "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught." See, also, State v. Pocras, *supra.*

In Markham v. Brainard, *supra,* the court ruled that a penal law which makes criminal an act which the utmost care and circumspection would not enable one to avoid is invalid. In Heywood v. Brainard, *supra,* this court declared unconstitutional a Nebraska statute making it unlawful for the operator of a motor vehicle to flee in the vehicle in an effort to avoid arrest for violating *any* law of this state and further stating that the operation of such vehicle in an *otherwise lawful manner* shall not constitute fleeing to avoid arrest. In pointing out the ambiguity inherent in that statute the court stated: "Does the statute mean that the operator fleeing to avoid arrest must have violated some traffic regulation such as speeding or running a stop sign or some similar violation previous to the pursuit? The Revisor of Statutes may have placed this interpretation on it in the catch line phrase 'operating motor vehicle in violation of law.' This may be a plausible interpretation, but the statute does not appear to be so restricted. The statute says 'for violating any law of this state.' It does not say for violating a law while operating a motor vehicle. Does the statute mean that if a law has been violated and the operator in fleeing from arrest does not violate any traffic regulation, the statute does not apply? This might raise a question as to whether it is possible to operate a vehicle in a lawful manner while fleeing to avoid arrest. There are many other questions that

might be raised as to the meaning of the statute, but these are sufficient to point up the problem."

In declaring that statute unconstitutional, the court cited the test quoted from State v. Adams, *supra*. The court concluded that the phrase: "Operation of such motor vehicle in an otherwise lawful manner shall not constitute fleeing to avoid arrest makes section 60-430.02, R. S. Supp., 1965, vague and uncertain and requires men of ordinary intelligence to speculate on its meaning."

Our court, has laid down guidelines to assist in determining whether a statute defining an offense is void for uncertainty. In State ex rel. English v. Ruback, *supra*, the rule is quoted as follows: " 'The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. (Citing case.) (2) The dividing line between what is lawful and what is unlawful cannot be left to conjecture.' " See, also, Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322; Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

In our opinion, the statute under consideration contains both of the above flaws, and is also vulnerable to attack on the ground that the language employed therein is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal. Section 28-4,127 (1)(g) offers no guidance as to how one can avoid violating the law and is not sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the statute.

Appellant points out, however, that three jurisdictions,

Massachusetts, California, and Florida, have interpreted similar statutes to avoid the problems inherent in subsection (1)(g). They have, in effect, done this by the expedient of providing through interpretation exceptions to the application of the statute. See, for example, Commonwealth v. Tirella, 356 Mass. 271, 249 N. E. 2d 573 (1969); People v. Brim, 257 Cal. App. 2d 839, 65 Cal. Rptr. 265 (1968); People v. Cressey, 2 Cal. 3d 836, 471 P. 2d 19, 87 Cal. Rptr. 699 (1970); Jolley v. City of Jacksonville, 281 S. 2d 901 (Fla. App., 1973). Generally speaking, they have done this by interjecting these additional requirements or some combination thereof: (1) Control of the premises or automobile by the person charged; (2) aiding and abetting the illegal activity; (3) acquiescence or fellowship on the part of the accused, including the failure to leave or take other action, within a reasonable time after becoming aware of such illegal activities; and, on occasion, (4) other acts of the accused constituting violations of the Controlled Substances Act.

We point out, however, that these decisions have themselves resulted in further questions of interpretation of their respective statutes. For example, in In re Elizabeth H, 20 Cal. App. 3d 323, 97 Cal. Rptr. 565 (1971), the court decried the "legal quagmire" created by People v. Cressey, *supra,* and expressed the hope that subsequent decisions would remove some of the uncertainty from the application of the statute. In the opinion of that court, the only thing really clear at the time of that decision was that mere knowledge and presence were not sufficient to constitute a violation. The problems created by the Cressey case in California are illustrated in a law review article entitled "No Place for 'Being in a Place': The Vanishing of Health and Safety Code Section 11,556," 23 Stan. L. Rev. 1009 (1971). See, also, Commonwealth v. Flaherty, 358 Mass. 817, 266 N. E. 2d 875 (1971).

It is not the court's duty, nor is it within its province,

to read a meaning into a statute that is not warranted by the legislative language. Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476 (1944). This is especially true in the absence of any evidence of legislative intent. In State v. Adams, *supra,* the court had before it the Nebraska statute providing that: "Any person or persons who shall operate a vehicle upon any highway in such a manner as to (1) endanger the safety of others or (2) cause immoderate wear or damage to any highway, shall be deemed guilty of a misdemeanor * * *." In holding the statute unconstitutional and void, the court stated: "As pointed out by the defendant, in a broad sense the mere operation of a motor vehicle endangers the safety of others to some extent. Although it is unlikely that the Legislature intended such a broad application, there is no language in the statute which limits it to a more specific application." We are faced with the same situation in this case. Even assuming that subsection (1)(g) was intended to accomplish a socially desirable objective, if drastic surgery is necessary to preserve it, the surgery should, in our opinion, be performed by the Legislature and not by the court.

We conclude that section 28-4,127 (1)(g), R. S. Supp., 1974, as presently constituted is vague and overbroad and in contravention of the United States and Nebraska Constitutions and we affirm the judgment of the District Court.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent for the reason that all the courts which have heretofore construed this particular statute have found it to be constitutional. I feel it is our duty to find a statute to be constitutional, if, by a proper construction we can reasonably do so. California, Florida, and Massachusetts have done so with this specific statute.

As the United States Supreme Court said in Rose v. Locke (1975), 423 U. S. 48, 96 S. Ct. 243, 46 L. Ed. 2d

185: (The) "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for 'in most English words and phrases there lurk uncertainties.' "

In United States v. Powell (Dec. 2, 1975), 423 U. S. 87, 96 S. Ct. 316, 46 L. Ed. 2d 228, the Supreme Court of the United States held: "That Congress might have chosen 'clearer and more precise language' equally capable of achieving its objective does not mean that the statute is unconstitutionally vague." Further, "While doubts as to the applicability of the language in marginal fact situations may be conceived, we think that the statute gave respondent adequate warning * * *. Even as to more doubtful cases than that of respondent, we have said that 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.' "

CLINTON, J., responding to the dissent of SPENCER, J.

The dissent of Spencer, J., calls for a brief response on two points. First, the primary constitutional deficiency of the provision of the statute in question is that it is overbroad, not that it is vague. The majority opinion amply demonstrates this overbreadth. Second, the Massachusetts, California, and Florida cases upon which the dissent relies completely disregard proper judicial functions and simply rewrite the statute. If we are to do that then we violate the principle of separation of powers of our own Constitution by a completely unwarranted intrusion into the legislative domain. We have said many times in somewhat varying language that: "A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes . . . ." Bessey v. Board of Educational Lands & Funds, 185 Neb. 801, 178 N. W. 2d 794.

It is far more important that we adhere to our own

salutary principles of statutory construction, which are a recognition of the fundamental constitutional doctrine of separation of powers, than that we defend the police power of the state by arbitrarily restricting the operation of the general words of our present statute.

We cannot remedy the overbreadth short of rewriting the statute. If we can do that in this case, we can do it in any other. That is beyond our constitutional power as a court.

GOOSIC CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. CITY NATIONAL BANK OF CRETE, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

241 N. W. 2d 521

Filed May 5, 1976. No. 40312.

1. **Uniform Commercial Code: Sales: Delivery: Words and Phrases.** "Delivery" is the voluntary transfer of possession.
2. **Uniform Commercial Code: Sales: Tender: Words and Phrases.** "Tender of delivery" occurs whenever a seller does everything necessary to put conforming goods completely and unconditionally at buyer's disposal.
3. **Uniform Commercial Code: Sales: Tender: Delivery.** For a delivery, or tender of delivery, to be effective, a buyer or his agent must be able to take possession of conforming goods in a peaceful manner, without interference from third parties.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Jack L. Craven, for appellant.

Michael R. Johnson of Barney & Carter, for appellee.

Heard before WHITE, C. J., BOSLAUGH, NEWTON, and CLINTON, JJ., and REAGAN, District Judge.

REAGAN, District Judge.

This is an action on a contract for sale of personal property.

Appellant, hereafter referred to as City National, agreed to sell and deliver to appellee, hereafter called Goosic, a set of simplex concrete forms for the sum of $200, which Goosic paid. The forms had been repossessed at an earlier time by City National and were stored at another location. City National expressly warranted the simplex forms were free from encumbrance, and it would warrant and defend against claims of others.

When Goosic arrived at the storage location to receive the forms, a Mr. Roberts claimed a storage lien and refused to allow Goosic to take possession. Goosic notified City National of the situation. City National attempted, unsuccessfully, to secure a release from Roberts of his claimed lien. City National offered to rescind and return the purchase price to Goosic. Goosic refused. Roberts and the forms apparently disappeared, and this action for damages followed. Jury was waived, and the trial resulted in verdict and judgment of $1,320.45 in favor of Goosic. Appeals followed.

City National contends the risk of loss passed to Goosic at the time the bill of sale was delivered, and cites sections 2-401(3) (a) and 2-509(3), U. C. C. The rules announced in section 2-401, U. C. C., apply only to situations not covered elsewhere in the article. The provisions of section 2-509, U. C. C., apply only when there has been no breach. Neither section is applicable to this case.

No issue is raised as to Goosic's performance under the contract and the code. The question is whether City National performed its obligations. The contract and the code calls for the seller (City National) to transfer and deliver the forms. § 2-301, U. C. C. Place of delivery was to be the storage location, since both parties knew and contemplated Goosic would pick them up there. § 2-308(b), U. C. C. "Delivery" is the voluntary transfer of possession. § 1-201(14), U. C. C. Delivery may also be defined as an act by which a seller parts with possession, and a buyer acquires possession. Public Service Commission v. Kolb's Bakery & Dairy,

Inc., 176 Md. 191, 4 A. 2d 130 (1939). Delivery occurs whenever a seller does everything necessary to put goods *completely and unconditionally* at buyer's disposal. Fox v. Young (Tex. Civ. App.), 91 S. W. 2d 857 (1936). "Tender of delivery" requires the seller to put and hold conforming goods at buyer's disposition. § 2-503(1), U. C. C.

The evidence supports a finding City National neither tendered a delivery, nor delivered, the forms to Goosic.

For a delivery, or tender, to be effective, it must enable the buyer or his agents to take possession of the goods in a peaceful manner and without interference. Fox v. Young, *supra.*

The contract in this case also contained express warranties by City National that the forms were free from encumbrance, and it would warrant and defend against the demands of all other persons. § 2-313, U. C. C. Upon being advised by Goosic, City National attempted to secure a release of Roberts' claimed storage lien. After an unsuccessful attempt, City National offered to return the purchase price to Goosic. The evidence is sufficient to sustain a finding City National breached either, or both, of the above expressed warranties. Appellant's other assignments of error are without merit.

Goosic has cross-appealed, contending the judgment is contrary to law and not sustained by sufficient evidence in that the assessment of recovery is too small. Testimony as to value of the forms varied. Although Goosic correctly cites applicable provisions dealing with recoverable damages, the verdict was well within the range of permissible awards. Findings of a trial court, having the same effect as a jury verdict, are not to be disturbed on appeal unless clearly wrong.

The judgment of the District Court is affirmed.

AFFIRMED.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, APPELLEE, V. COUNTY OF LANCASTER, NEBRASKA, DIVISION OF PUBLIC WELFARE, APPELLANT.

241 N. W. 2d 523

Filed May 5, 1976. No. 40316.

Collective Bargaining: Public Administrative Bodies: Labor and Labor Relations. Collective bargaining by County of Lancaster, Nebraska, Division of Public Welfare, is not possible without the inclusion of the State Department of Public Welfare because the activities of the county are jointly controlled by and interrelated with the state department.

Appeal from the Court of Industrial Relations. Reversed and remanded with directions.

Ronald D. Lahners, Michael G. Heavican, and William A. Harding of Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

Robert E. O'Connor, Robert E. O'Connor, Jr., and Zwerdling, Maurer, Diggs & Papp, for appellee.

Thomas F. Dowd and John J. Reefe, Jr., for amicus curiae.

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

SPENCER, J.

County of Lancaster, Division of Public Welfare, hereinafter referred to as county, appeals from an order of the Court of Industrial Relations finding county to be the sole employer concerned herein and in ordering an election for the selection of a bargaining agent. The issue involved is whether county is so inextricably tied to the State Department of Public Welfare, hereinafter referred to as state, by statute and regulation that the two must be considered a functionally integrated unit for purposes of collective bargaining. We reverse.

The American Federation of State, County and Munic-

ipal Employees, AFL-CIO, hereinafter referred to as appellee, filed a representation petition with the Court of Industrial Relations to represent certain employees of County of Lancaster, Nebraska, Division of Public Welfare. County, among other defenses set forth in its answer, requested the court to notify the State of Nebraska, Department of Public Welfare, of the pendency of this proceeding. It requested that said government entity be required to appear at the hearing in this case in order to allow for a full and complete development of all facts relating to the joint employer issue involved.

The bargaining unit herein consists of various clerical and administrative positions in the Lancaster County Division of Public Welfare. The employees in the unit are responsible for the administration of such federally funded assistance programs as Aid to the Blind, Aid to the Disabled, Aid to Families with Dependent Children, and Aid to the Aged. Excluded from the bargaining unit are those employees of the division classified as supervisory, professional, or confidential. State provides county with 98 percent of the funding necessary to pay salaries at the county level.

The question raised is one of first impression in this jurisdiction. The review in this court is in the manner provided by law for disposition of equity cases. § 48-812, R. R. S. 1943. There are no disputed questions of fact. It is the conclusion to be drawn from the facts which frames the issue herein.

County seeks to apply the concept of joint employer found in cases arising under the National Labor Relations Board (NLRB). In City of Grand Island v. American Federation of S., C. & M. Employees (1971), 186 Neb. 711, 185 N. W. 2d 860, we said: "In reaching its decision the Court of Industrial Relations found that decisions under the National Labor Relations Act were helpful but not controlling upon the court. We think this is a correct statement as to the consideration to be given to the decisions under the federal law."

NLRB precedent is especially helpful in the instant case. We find no Nebraska precedent pertinent to a joint-employer type situation. In the private sector, under the joint-employer concept, successor organizations are held to the terms of labor contracts signed by their predecessors. There are many NLRB cases on that issue. In Radio Union v. Broadcast Service of Mobile, Inc. (1965), 380 U. S. 255, 85 S. Ct. 876, 13 L. Ed. 2d 789, the Supreme Court stated: "* * * in determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, * * *. The controlling criteria, set out and elaborated in Board decisions, are interrelations of operations, common management, centralized control of labor relations, and common ownership." These elements, indicative of joint employer status in the private sector, are still recognized by the National Labor Relations Board. Graphic Arts International Union Local 262 (1973), 208 NLRB No. 28 at p. 37; Wayland Distributing Co., Inc. (1973), 206 NLRB No. 57 at p. 493.

It is obvious that common ownership, although relevant in the private sector, is irrelevant in the public sector with which we are here involved. We concern ourselves, therefore, with the other three criteria.

The county argues that the regulations of the state welfare department and the hearing testimony of county's welfare director show conclusively the joint nature of the activities of county and state.

Section 68-704, R. R. S. 1943, establishes the county division. It reads as follows: "There is hereby established in each county of the state a county division of public welfare which shall be governed by the county board, hereinafter known as the county board of public welfare, a county director of public welfare, and such additional employees as may be necessary for an efficient performance of the welfare duties of the county."

Section 68-706, R. R. S. 1943, provides that the county

board of public welfare: "(1) Shall have general supervision over all the duties and responsibilities assigned to the county division of public welfare and shall make necessary policies and regulations as to effect an efficient administration, which policies and regulations shall be in conformity with the statutes of Nebraska and the policies of the Department of Public Welfare insofar as they relate to categorical assistance and child welfare services; * * * (4) Shall meet not less than once each month to review the operations of the county division of public welfare and to take such action as may be necessary in conformance with Department of Public Welfare regulations and the statutes of Nebraska."

Section 68-709, R. R. S. 1943, directs the county director of public welfare to: "(3) Cooperate with other welfare agencies and coordinate the public welfare operations in the county with such services provided by the Department of Public Welfare; * * *."

The State Department of Public Welfare is also established in Chapter 68, article 7, R. R. S. 1943. The Director of Public Welfare, head of that department, is empowered by section 68-703, R. S. Supp., 1975: "(2) To determine the general principles and outline the operation of public assistance, child welfare, and related activities; (3) To establish rules and regulations for efficiently administering the department and performing the duties assigned to it; * * * (10) To provide such supervisory services as may be required to determine that county departments of public welfare are fulfilling their administrative duties in compliance with the statutes of Nebraska and state regulation."

The state regulations mentioned in the statutes are those regulations which, when compiled, form the State Plan and Manual, the guidebook for state and local welfare employees. They are voluminous. The regulations contained in the State Plan and Manual are designed to meet Federal Health, Education, and Welfare (H.E.W.) requirements. These must be satisfied in order for the

state to qualify for matching federal funds. Counsel for county have pointed out several examples within these regulations which indicate the nature of state involvement in the county welfare operation.

The common management and interrelated operations of the state department and the county division are indicated by the State Plan and Manual. § V-9211.03 (relating to accrued vacation leave where county division employees are transferred to the state department and vice versa); § VII-2000 et seq. (statistical reports from county divisions to the state department); § VII-4210 (time accounting reports from the county divisions to the state department); § VI-1720 (county division expenditure reports to the state); § VI-2720 (state authorization for capital expenditures over $50.00); § VI-2920 (state approval for organizational memberships of the agency or agency individuals); § V-9260.01 (state approval of county division staff attendance at out-of-state meetings and conferences); and § VI-1730 (state audit of county division administrative expenses, collections, and recoveries).

While common management and interrelations of operation are important, the crucial test for the purposes of labor-management relations herein must be the extent to which labor relations are under centralized control. Under this test, the statutory and regulatory scheme clearly shows the necessity for the state's presence as an employer at the bargaining table. Section 68-708, R. R. S 1943, provides: "The county director of public welfare with the approval of the county board of public welfare shall employ such additional personnel as may be necessary for the efficient performance of the welfare services of the county and, insofar as such employees relate to assistance and child welfare, they shall comply with the provisions of the state merit system."

This requirement, compliance with the State Joint Merit System, effectively takes from the county division much of the prerogative it has with respect to personnel

management. The State Joint Merit System is a comprehensive personnel scheme to assure the "efficient and economical administration" of the functions of many state and local agencies. The county boards of public welfare and the State Department of Public Welfare *together* are treated as one agency under the merit system regulations. See Rule 1 (2) (d) Joint Merit System Rules and Regulations.

The merit system regulations are incorporated into the State Plan and Manual. Under Rule 3 of those regulations, each agency is directed to formally adopt its own comprehensive classification plan for its positions. This the state department has done for itself and for the counties in Part V of the State Plan and Manual, wherein job descriptions are provided for both state department and county division employees.

Rules 4 (1) (a) i and ii read as follows: "i. Any County Board of Public Welfare may recommend to the State Board of Public Welfare a county compensation plan that may differ from the State-wide compensation plan adopted by the State Board of Public Welfare, and such county plan shall be effective on approval by the State Board of Public Welfare. The State Board of Public Welfare shall establish standards including consideration of relevant factors which shall serve as the basis upon which approval of such county compensation plan may be given.

"ii. The State-wide compensation plan shall be effective in all county public welfare departments in absence of an approved county compensation plan."

The above rules require state department approval for compensation schedule changes at the county division level.

Other merit system rules governing the county division include those relating to application and examination; job appointments; promotions; transfers and demotions; separation, tenure, and reinstatement; and appeals and

grievances. The State department is responsible, under the merit system, for the control of these facets of personnel management.

Of particular importance in the labor relations context is Rule 13, dealing with appeals and grievances, an important provision of any labor contract agreement. Appeal to the Joint Merit System Council, a state-level council, is allowed from such actions as examination rejection, removal from the register, dismissal, suspension, demotion, or discrimination. Each agency is directed to provide grievance procedures for its employees for those situations where appeal to the state merit council is not allowed. Here, the agency directed to provide grievance procedures is the State Department of Public Welfare.

It appears that under the state merit system, the state department is empowered to control most of the important facets of labor management relations. The state's involvement in the areas traditionally subject to collective bargaining is apparent. Since the state and the counties are treated as one unit for personnel management purposes by the statute and applicable regulations, it follows that the two must be considered a functionally integrated unit for the purpose of collective bargaining with the plaintiff.

As the Court of Industrial Relations found, the evidence is overwhelming, both documentary and oral, that the state interferes in all the minutiae of the operations of the county division of public welfare. It prescribes exact and exacting standards which must be met under penalty of nonreimbursement for the funds erroneously expended. The state even goes so far as to keep one person on the premises at all times to maintain surveillance on the processing of welfare applications. Yet, the Court of Industrial Relations found that in spite of this manipulation of the tiniest detail of the county's handling of the program by the state, it is irrelevant

to the determination of joint employers or the determination of a proper bargaining unit. We cannot disagree more.

Considering the statutorily required participation of the merit system council, it would seem that the state must be a party to any contract negotiated between county and the union. The experience of Douglas County, detailed in its brief as amicus curiae, points up the absurd result which would follow if the position of the Court of Industrial Relations were sustained. The county would have no control over and would be unable to bargain collectively on most of the issues traditionally considered to be at the heart of collective bargaining.

The state practically controls grievance procedures under the state merit system. Salary matters under the state pay plan are effectively under its control. The employees of county public welfare are paid according to the state merit plan, with funds provided by the state. Section 68-708, R. R. S. 1943, mandates compliance with the state merit system on matters relevant to personnel policies. This includes holidays, sick leave, and other fringe benefits.

To hold on this record that county is the sole employer of the employees concerned is to ignore reality. County actually has no effective control over the areas usually embraced in labor agreements. To force it into bargaining as the sole employer will be either a futile or a disastrous act.

On the basis of the record, we determine that county is in no position to effectively bargain with any bargaining agent as the sole employer of county welfare employees. Collective bargaining is not possible without the inclusion of the State Department of Public Welfare, because the activities of the Lancaster County Board of Public Welfare are jointly controlled by and interrelated with the State Department of Public Welfare. The application of the county should have been sustained.

The orders of July 17 and 25, 1975, are reversed. The

election to determine a bargaining agent held herein, pursuant to the order of the Court of Industrial Relations, is hereby set aside and held for naught. This case is remanded to the Court of Industrial Relations with directions to dismiss the proceeding herein. All costs are taxed to the appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

JO ANNE E. ABBOTT, APPELLANT, V. JAMES F. ABBOTT, APPELLEE.

241 N. W. 2d 527

Filed May 5, 1976. No. 40326.

1. **Divorce: Property.** This court is not inclined to disturb the division of property made by a trial court unless it is patently unfair on the record.
2. **Divorce: Trial: Appeal and Error.** In a trial de novo on the issues presented on appeal, this court in reaching its own findings will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
3. **Divorce: Alimony.** The fixing of alimony rests in each case within the sound discretion of the trial court.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

David Herzog, for appellant.

Jeffrey L. Stoehr of McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin, for appellee.

Heard before SPENCER, BOSLAUGH, and MCCOWN, JJ., and COLWELL and KELLY, District Judges.

KELLY, District Judge.

The petitioner filed an action in the District Court for Douglas County, Nebraska, on the 30th day of August 1973, praying that the court decree a legal separation; a division of the property accumulated by the parties; care, custody, and control of the three minor

children born the issue of the parties; and temporary and permanent support for herself and the three minor children. The respondent answered this petition and filed a cross-petition alleging the marriage was irretrievably broken and praying the court enter a decree dissolving the marriage; that the court make an equitable distribution of real and personal property of the parties; and that the court grant petitioner care, custody, and control of the minor children. Trial of the matter was not heard until February 18, 1975.

The testimony showed that the parties hereto had accumulated equity in a home in Omaha, Nebraska, of the value of some $12,000. They had further accumulated a 1960 Chevrolet automobile, free and clear; a 1971 Honda motorcycle; a 1973 Chevrolet, 4-wheel-drive vehicle; a travel trailer; household goods and furniture; and other personal property and debts. In addition, three children were born the issue of this marriage and at the time of trial they were 9, 6, and 5 years of age. The parties were married on December 28, 1963, and at the time of commencement of this action, the petitioner wife was 34 years of age and the respondent husband was 28 years of age. The husband was employed as a policeman by the City of Omaha, and the wife was a homemaker. The wife had not been employed for approximately 11 years prior to the time of trial, however, she had previously been employed as a laboratory technician, having had some training as a registered nurse. The net earnings per month of the husband was some $550, however, a loan was being deducted from his salary, which by this time has been paid and the net earnings have increased to $716 per month.

The court found that the marriage was irretrievably broken and entered a decree dissolving the marriage. The court granted custody of the minor children to the petitioner and ordered the respondent to pay the sum of $60 per child, per month, until the further order of the court. The court granted title to the 1960 Chevrolet to

the petitioner, free and clear, as well as the household goods and equipment in the residence. The court granted the respondent the 1973 Chevrolet automobile, the camper trailer, and the 1971 Honda motorcycle, all subject to the encumbrances. The court further ordered that the motorcycle be sold and the proceeds thereof be applied upon certain outstanding debts. The court further decreed that the respondent provide health and accident insurance coverage for the minor children of the parties, and further decreed the respondent pay the sum of $500 attorney's fee to the attorney for the petitioner.

The court provided that the petitioner and the three minor children be permitted to reside in the home owned by the parties and that the respondent pay the mortgage and tax payments in the sum of $221.44 per month. The court further provided that the property be sold upon the mutual agreement of the parties and the proceeds evenly divided after payment of necessary expenses and costs of sale, or the home be sold when the youngest child shall have become emancipated and no longer dependent, or that the home be sold within 6 months from the date of remarriage of the petitioner, and like distribution of the property be made.

The petitioner appeals, assigning as error that the trial court failed to recognize and make adequate provisions for the minor children through adequate child support and did not equitably divide the property of the parties. We affirm the decision of the trial court.

This court recently answered the questions presently on appeal in this case, in the case of Fanning v. Fanning, 194 Neb. 821, 235 N. W. 2d 878, wherein this court held: "This court has heretofore said that it is not inclined to disturb the division of property made by a trial court unless it is patently unfair on the record. Tavlin v. Tavlin (1975), ante p. 98, 230 N. W. 2d 108. This case does not meet that criteria. While this action is to be tried de novo on the issues presented on appeal, this court, in reaching its own findings, will give weight to

the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Seybold v. Seybold (1974), 191 Neb. 480, 216 N. W. 2d 179. We have repeatedly held that the fixing of alimony rests in each case within the sound discretion of the trial court. Young v. Young (1974), 192 Neb. 735, 224 N. W. 2d 361. On this record we determine that the trial court did not abuse his discretion."

The judgment of the District Court is affirmed, the appellant is allowed no fee for the services of her attorney in this court.

AFFIRMED.

ORVILL J. KLECAN, APPELLEE, V. MARY E. SCHMAL ET AL., APPELLEES, IMPLEADED WITH J. D. LOFING EL AL., APPELLANTS.

241 N. W. 2d 529

Filed May 5, 1976. No. 40354.

1. **Schools and School Districts: Statutes.** In making its determination whether a requested transfer of land is for the best educative interest of the petitioner or petitioners under section 79-403(1), R. R. S. 1943, the court may consider significant differences in the class, accreditation, leadership, management, curricula and/or efficiency of the schools involved, as well as other relevant factors, but need not afford equal weight and significance to each of the various factors considered.
2. ———: ———. In making a determination to transfer land under section 79-403(1), R. R. S. 1943, it is proper for the court to take into consideration the benefits which may accrue from the continuity of schooling and curriculum, as well as the faculty and student associations resulting from continued attendance in the same school, where such children have previously been attending school in the district to which the transfer is sought.
3. **Schools and School Districts: Appeal and Error.** The action of the board under section 79-403, R. R. S. 1943, is an exercise

of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo and also upon appeal from District Court to this court, it is triable de novo as in any other equitable action.

4. **Schools and School Districts: Trial: Appeal and Error.** Even when a case is triable de novo, the superior position of the original trier of fact is to be respected and accorded great weight.

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

Ralph J. Fischer of Everson, Noble, Wullschleger, Sutter & Fischer, for appellants.

C. E. Danley, for appellee Klecan.

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

BRODKEY, J.

J. D. Lofing and Richard Weers, referred to in the record of this case and also in this opinion as "objectors," are residents, landowners, freeholders, and taxpayers in School District No. 103J, known and referred to as the Diller District, in Jefferson County, Nebraska. They appeal to this court from a judgment entered by the District Court for Gage County on August 13, 1975, granting and approving a freeholder's petition filed by Orvill J. Klecan under the provisions of section 79-403(1), R. R. S. 1943, to transfer approximately 200 acres of land owned by Klecan from Diller School District No. 103J, to Odell School District No. 74, in Gage County. The matter was originally heard before a statutory board consisting of the county superintendent, clerk, and treasurer of each county. The six-member board was unable to reach a decision, the vote being 3 to 3. A timely appeal was then taken to the District Court for Gage County, as provided by statute.

During the course of the appeal, objectors filed formal objections to the transfer of Klecan's land from the

Diller district to the Odell district and prayed that Klecan's petition be denied. Following a hearing at which evidence was taken, the court entered its judgment previously referred to, ordering that as of August 13, 1975, the northeast quarter and the southeast quarter of the northwest quarter, all in Township 1 North, Range 5 East of the 6 P.M. Gage County, Nebraska, the legal description of Klecan's property involved in this transfer proceeding, "be and is hereby transferred from School District No. 103 of Jefferson County, Nebraska, and set over into and made a part of School District No. 74 of Gage County, Nebraska." Objectors' motion for new trial was overruled, and they then perfected their appeal to this court. We affirm.

There is little question that Klecan met the basic, statutory requirements as set out in section 79-403(1). Even objectors admit in their answer filed in District Court that the property, as legally described in Klecan's petition, is: "a) Owned and in possession of the petitioner; b) Located in School District No. 103J, a class II school district, Jefferson County, Nebraska, being a district that adjoins School District No. 74, a class III school district, Gage County, Nebraska, the district to which such land is proposed to be attached; and c) Has children of school age who reside thereon with their parents." The record clearly supports objectors' admissions, as well as additional facts. The evidence clearly shows that petitioner owns two quarter sections of land located in District 74; and, in fact, pays taxes to both school districts to support both schools. The seven Klecan children attended the Odell district school during the 1973-1974 school year and also the 1974-1975 school year, and at present he has six children ranging in ages from 6 to 17 years enrolled in the Odell district. He has paid tuition for his children for 2 consecutive years in the Odell district. The 200 acres owned by Klecan and involved in this proceeding were purchased by him in 1973, approximately 2½ years prior to the

trial in District Court. That property had been a part of the Odell district until it was transferred to the Diller district in 1954. It was part of the Diller district when Klecan purchased it and moved there with his children.

The Diller district is a Class II school, and the Odell district is a Class III school. The classification of school districts in this state is set out and defined in section 79-102, R. R. S. 1943, which states in part: "(2) Class II shall include any school district embracing territory having a population of one thousand inhabitants or less that maintains both elementary and high school grades under the direction of a single school board; (3) Class III shall include any school district embracing territory having a population of more than one thousand and less than fifty thousand inhabitants that maintains both elementary and high school grades under the direction of a single board of education; * * *."

Although objectors allege numerous assignments of error which they claim require a reversal of the decision of the District Court and a denial of the transfer of the property, they concede that the primary specific issues are whether Klecan sustained his burden of proof with respect to establishing compliance with the mandatory requirements of section 79-403(1), particularly as to whether he sustained his burden of showing that the transfer is in the best "educative" interests of petitioner and his children.

The case law with reference to section 79-403(1) has recently been synthesized and explained by this court in Friesen v. Clark, 192 Neb. 227, 220 N. W. 2d 12 (1974); and both objectors and Klecan cited and discussed this case extensively in their briefs and in oral arguments. In Friesen we held that under section 79-403, "the best interest of the petitioner or petitioners" meant the best "educative" interest, and not the best "noneducative" interest. We held that the Legislature did not intend to enact a statute concerned with schools, distances, and

education of pupils for the sole purpose of making convenient allocations of land to school districts based upon individual preferences or secular business reasons of owners having nothing to do with educational efficiency. In that case, as is true in the instant case, evidence was adduced and received with reference to certain matters which were clearly not connected with the educative interest of the petitioner. We did not consider such evidence in that case and shall not do so in this case.

In laying down guidelines, we stated in Friesen as follows: "It appears therefore that so far as we are given any help or guidance by the cases referred to above, a freeholder's petition under section 79-403, R. R. S. 1943, must be supported by an adequate showing that the purposed transfer of land is justified in relation to the controlling educational factors regarding the convenience, necessity, or welfare of the pupil or pupils involved. Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved. Other factors such as the size of the schools involved or minor differences in extracurricular activities offered, although they may properly be considered in ruling on such a petition, are not alone enough to justify a transfer of land under that statute."

Objectors contend that the use of the word "must" in the sentence: "Such a showing must include a demonstration of significant differences in the class, accreditation, leadership, management, curricula, and/or efficiency of the schools involved" makes it mandatory that the court consider all the above listed elements in making its determination, although they concede that use of the term "and/or" introduces an element of ambiguity in their argument. We do not agree with objectors' contention; nor do we believe it is necessary that the court, in making its final determination, afford equal weight and significance to each of the listed items.

Significantly, the court also stated that other factors may properly be considered in ruling on such a petition, but are not *alone* enough to justify a transfer of land under that statute.

While it is true that in the construction of statutes, the use of the word "must" generally indicates a mandatory duty, this is not always the case. In Jones v. First Minneapolis Trust Co., 202 Minn. 187, 277 N. W. 899 (1938), the court stated: "Provisions which are mandatory in form are often held to be directory, and those which are directory in form are often held to be mandatory because such words as 'may,' 'shall,' 'must,' and 'will' are often used without discrimination. All of them are elastic and frequently treated as interchangeable." See, also, Arkansas State Highway Commission v. Mabry, 229 Ark. 261, 315 S. W. 2d 900 (1948); Tosti v. Sbano, 11 N. Y. Supp. 2d 321, 170 Misc. 828 (1939). In the instant case, we believe the word "must" should be interpreted as "may" to indicate that the listed items are some of the matters which may be considered by the court in making its on-balance determination of what is for the best educative interest of the petitioner or his children.

With reference to the use of the phrase "and/or," we have stated in connection with the drafting of statutes that the use of the phrase is not to be recommended as it leads to uncertainty, ambiguity, and multiplicity. Drummond v. City of Columbus, 136 Neb. 87, 285 N. W. 109 (1939). Nevertheless the phrase is still frequently, though perhaps not advisedly, used in the preparation of contracts, negotiable instruments, and similar documents. Where so used, the commonly accepted meaning is that "and/or" means either "and" or "or," or both. Poucher v. State, 46 Ala. Cr. App. 272, 240 S. 2d 694, 695 (1970); Longacre v. Knowles, 333 S. W. 2d 67 (Mo., 1960); Oman Constr. Co., Inc. v. Tennessee Cent. Ry. Co., 212 Tenn. 556, 370 S. W. 2d 563 (1963); Thomas v. Penn Mut. Fire Ins. Co., 244 S. C. 581, 137 S. E. 2d 856

(1964). Applying this generally accepted interpretation to the language from Friesen, above quoted, it is clear that the items listed in the portion of the opinion quoted above may be considered either conjunctively or disjunctively.

With the above as a background, let us now examine the record in this case to make a comparison of the two school districts involved. The Diller district, in which the land is presently located, is a Class II district; while the Odell District, to which a transfer is requested, is a Class III district, normally indicating a larger population. Both districts are accredited K-12 schools, which means that education is provided from kindergarten through the twelfth grade. However, in the Diller district only two out of eighteen teachers (11.1 percent) have Masters degrees or higher, with three additional teachers (a possible total of 27.7 percent) working on higher degrees. By comparison, in the Odell district, five out of twenty-two teachers (22.7 percent) have higher degrees, with five additional teachers (a possible total of 45.4 percent) working on higher degrees. In the Diller district the teacher-student ratio is 1/10.6, meaning that there is one teacher for every 10.6 students. The District Judge found that in the Odell district the teacher-student ratio was 1/7.36, although figures contained in exhibit 1 received in evidence indicate that the court may possibly have erred in the school census figures it employed to reach its conclusion, and that the ratio may have been as high as 1/11.36. With regard to the management of the schools, the superintendent of the Diller district has 4 years experience at Diller, while the superintendent of the Odell district has 3 years experience at Odell. With regard to school facilities and debts, the record reflects that Diller has a grade school building, a high school building, a voc-ag shop, an art and math building, and a music building. Only the music building is not yet paid for. The record does not reflect what the facilities or outstanding indebtedness

of the Odell district are, and hence it is not possible to make a comparison on those items. With reference to the curriculum, the superintendents of both schools testified that the curricula were comparable. However, it does appear that the Diller district offers voc-agricultural, or future farmers of America courses. The Odell district does not have such courses. There is evidence in the record that 34 percent of the graduates of the Diller district go on to college. There is no comparable evidence submitted with reference to the Odell district. Finally, there is evidence with respect to transportation to and accessibility of the two schools. It appears that buses to both schools run by the Klecan residence. The Diller school is from 3 3/4 to 4 miles from his residence, whereas the Odell district is 7½ miles distant.

In his judgment entry of August 13, 1975, the District Judge found that while both districts maintain accredited K-12 schools and have substantially similar curricula the educative conditions in the Odell district (No. 74) were superior to those in the Diller district in two respects. First, that the Odell district, having 162 pupils and 22 teachers, has a teacher-pupil ratio of 7.36; while the Diller district, having 191 pupils and 18 teachers, has a teacher-pupil ratio of 10.6. The lower ratio indicates fewer pupils per teacher, and a corresponding capacity of the faculty to devote more time per pupil. As previously indicated, the court may have erred in determining his teacher-pupil ratio using as its basis of computation 162 pupils. According to the school census, exhibit I, this appears to be the total number of pupils attending the Odell district within the ages of 7 through 15 years. The same census shows 250 students in attendance, in the category of 5 through 18 years. Secondly, the court found that the educational qualifications of the faculty of the Odell district are significantly greater than those of the Diller district because of the much higher percentage of the teachers that both have and are working toward advanced degrees.

Finally, the court found that, while not a controlling consideration, petitioner Klecan's children have attended school in District No. 74 prior to his purchase of the farmland involved and his moving thereon; and that subsequently the children have been attending District No. 74 on a tuition basis. The court also found that continuing such children in District No. 74 will preserve for them such benefits as may accrue from continued schooling in the same overall curriculum and the consistencies inherent therein, with the continuing student and faculty associations resulting from continued attendance in the same system. On the basis of those educative interests, the court concluded that the transfer of petitioner's property from School District No. 103J to School District No. 74 should be permitted, and so ordered.

While the case is concededly a close one, we believe the finding and conclusions of the trial court are valid and meritorious. We agree that in significant respects, the Odell school, on balance, is superior to the Diller school, and that the transfer would be in the best educative interests of the petitioner and his children. In reaching this conclusion, we are mindful of the scope of review in appeals in cases such as this. We have held that the action of the board under section 79-403, R. R. S. 1943, is an exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. Friesen v. Clark, *supra*; McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480 (1964); Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119 (1957); § 25-1925, R. R. S. 1943. This does not mean, however, that we are powerless to examine the conclusions of fact in the trial court. This court has held many times that even when the case is triable de novo, the superior position

of the original trier of fact is to be respected and accorded great weight. Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N. W. 2d 752 (1975). We do so in this case.

The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

J. PAUL MCINTOSH ET AL., APPELLANTS, V. OTTO J. BORCHERS ET AL., APPELLEES.

241 N. W. 2d 534

Filed May 5, 1976. No. 40382.

1. **Contracts: Homesteads: Acknowledgments: Statutes.** A contract to convey the homestead of a married person is invalid and unenforceable unless voluntarily executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943.
2. **Homesteads: Abandonment.** Once established, a homestead is not abandoned until there is both an intent to abandon and actual abandonment.
3. **Contracts: Homesteads: Acknowledgments: Statutes: Specific Performance.** Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property.
4. **Contracts: Homesteads: Specific Performance.** Where such a contract is not severable as between homestead and nonhomestead property, this court will not ordinarily attempt to make a new contract for the parties; nor impose new conditions; nor will it require specific performance of a contract which does not contain the substance of the agreement made.

Appeal from the District Court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed. Remanded for further proceedings.

William E. Holland of Kutak, Rock, Cohen, Campbell, Garfinkle & Woodward, for appellants.

Vincent J. Kirby of Kirby, Duggan & McConnell, for appellees.

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

MCCOWN, J.

This action seeks specific performance of an agreement to sell real estate, together with a temporary injunction to prevent farming it pending determination of the issues. In the alternative the plaintiffs sought restitution and damages. The District Court denied the injunction, granted partial summary judgment to the extent of denying specific performance, and granted plaintiffs time to file an amended petition as to all other matters except the validity of the agreement.

The defendants, Otto J. Borchers and Edna W. Borchers, owned a quarter section of land in Madison County, Nebraska. They had lived on the property and farmed it since 1941. After an accident to Mr. Borchers in 1970, the Borchers decided that he was unable to continue active farming. In January of 1974, the plaintiffs, J. Paul McIntosh and Eleanor McIntosh, made a written offer to purchase the quarter section for $48,000 and gave the Borchers a check for $5,000 downpayment. The offer provided for an additional payment of $3,000 on October 1, 1974. The balance was to draw 7 percent simple interest. The Borchers decided that they wanted to continue to live on the farm and did not want to pay rent and they took the $5,000 check back to McIntosh. McIntosh then agreed to let the Borchers live on the property rent free, and the following language was added to the offer: "J. Paul McIntosh agrees to pay principal and interest in 10 equal installments beginning Jan. 1, 1975. Buyer further agrees to allow Sellers to live on & control the building site until

contract is paid in full or Sellers move from the house. Seller agrees to keep buildings insured & maintain buildings & site in satisfactory manner, and to pay taxes on buildings & site until possession of buildings & site is given to Buyers. Buyer agrees not to charge rent to Sellers while Sellers live in house." The Borchers accepted the offer with that addition on February 2, 1974, and both signed the acceptance but it was not acknowledged by either of them.

McIntosh took possession of the farmland, had some trees removed, leveled some of the land, spread fertilizer, installed a center pivot irrigation system, sunk a well, and put in a natural gas pipeline to operate the pump and irrigation system. He cultivated the land in 1974, and raised a corn crop. The Borchers continued to live in the house and maintained possession and control of the residence and buildings on the building site.

The $3,000 payment due on October 1, 1974, was paid October 12th. On January 2, 1975, Borchers went to McIntosh to see about the payment due on January 1st. McIntosh wanted to draw up a more formal agreement as they had discussed previously. The two men went to a realtor's office and gave the information to one of the men there. McIntosh left the January 1, 1975, payment with the broker to hold until the new contract was drawn. Apparently no new contract was ever drawn.

Borchers waited about 2 weeks and then attempted to contact McIntosh. He was advised that McIntosh was out of town and would not be back until early February. The Borchers then consulted an attorney who advised them that the agreement was invalid because it involved their homestead and had not been acknowledged. The Borchers then made a contract with defendants Freudenburg and Reeves to sell them the quarter section, excepting the 12 acres where the residence and buildings were located. The purchase price was $48,000. The agreement was signed and acknowl-

edged on February 12, 1975, and the new purchasers took possession of the farmland and planted corn in the spring of 1975. The plaintiffs filed this action on May 9, 1975.

The quarter section of land which was described in the McIntosh offer was the homestead of the Borchers within the statutory definitions at the time they signed the acceptance. The critical issue here is whether that purchase offer accepted by the Borchers on February 2, 1974, was valid and enforceable by specific performance in the absence of acknowledgment.

Section 40-101, R. R. S. 1943, defines a homestead as "* * * the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land * * *." Section 40-104, R. R. S. 1943, provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife * * *."

This court has consistently held that the statute applies to contracts for sale as well as to conveyances or encumbrances, and that a contract to convey the homestead of a married person is invalid and unenforceable unless voluntarily executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. See Struempler v. Peterson, 190 Neb. 133, 206 N. W. 2d 629.

The plaintiffs contend that the Borchers intended to and did abandon their homestead rights insofar as the farmland was concerned and retained the homestead rights in the building site only. While an abandonment of a homestead interest removes the restrictions of section 40-104, R. R. S. 1943, we have consistently held that once established, a homestead is not abandoned until there is both an intent to abandon and actual abandonment. See Struempler v. Peterson, *supra*.

In this case the evidence establishes that even if there

was an intent to abandon, there was no actual abandonment of the farmland, at least until plaintiffs were given possession sometime after the execution of the critical document. Unless it can be said that the document itself constituted an abandonment, the Borchers' quarter section constituted their homestead at the time of the execution of the agreement here. The only land described in the agreement was the "NE ¼ of Section 17-23-2, Madison County, State of Nebr." The agreement does not reveal any basis for allocation of the purchase price to anything except the entire tract. Plaintiffs argue that the building site can properly be excluded and separated from the description as the homestead reserved by the Borchers. The provisions of the agreement "allow Sellers to live on & control the building site until contract is paid in full or Sellers move from the house." Under its terms the contract is payable in full in less than 10 years and the purchasers would then be entitled to a deed to the entire quarter section, including the building site. The agreement here does not have any legal description which can be applied to the building site alone, nor even an approximate number of acres.

Even if it be assumed that the contract included both homestead and nonhomestead property, the difficulties here are not resolved. In Struempler v. Peterson, *supra,* this court said: "Where a contract for the purchase and sale of real estate includes both homestead and nonhomestead property but is not executed and acknowledged as required by section 40-104, R. R. S. 1943, specific performance may be obtained as to the nonhomestead land with an abatement of the total purchase price, where the contract under its provisions is clearly severable as to the nonhomestead property.

"Where such a contract is not severable as between homestead and nonhomestead property, this court will not ordinarily attempt to make a new contract for the parties; nor impose new conditions; nor will it require

specific performance of a contract which does not contain the substance of the agreement made."

Plaintiffs finally contend that defendants, by their conduct, are estopped from asserting their statutory homestead rights as against a claim for specific performance. The cases already referred to answer this contention. While the Borchers' conduct may be insufficient to constitute estoppel as against a claim for specific performance, those actions may well be material and sufficient in connection with the alternative claim for restitution and damages. Those issues, however, have been reserved by the District Court and may be appropriately considered upon remand to the District Court.

The judgment of the District Court in denying the temporary injunction and granting partial summary judgment by denying specific performance is affirmed, and the cause is remanded to the District Court for further proceedings.

AFFIRMED. REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

RAYMOND GROETEKE, APPELLEE, V. STEVE STUBBS, APPELLANT.

241 N. W. 2d 538

Filed May 5, 1976. No. 40415.

Contracts: Damages. Where there has been substantial performance of a construction contract but the owner has been damaged by defective material or workmanship, the measure of damage is the cost of remedying the defects.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded for a new trial on the issue of damages.

Daniel A. Martin of Kerrigan, Line, Martin & Hanson, for appellant.

Yost, Schafersman, Yost & Lamme, for appellee.

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

BOSLAUGH, J.

This is an action for damages arising out of the construction of a trench silo on the property of the plaintiff. The county judge found that the plaintiff was entitled to recover $4,999 from the defendant. This judgment was affirmed by the District Court. The defendant has appealed and contends the evidence does not support the judgment.

The plaintiff is a farmer and cattle feeder in Dodge County, Nebraska. In 1970, the plaintiff and his son looked at several trench silos that had been built on other farms and decided to have one constructed on the plaintiff's farm. They obtained the defendant's name at one of the farms where a trench silo had been built. The plaintiff's son, Tom Groeteke, called the defendant who lived in Iowa and made arrangements for the defendant to come to the plaintiff's farm in the fall.

There was no written contract and the evidence is in conflict as to the nature of the agreement between the plaintiff and the defendant. The plaintiff alleged the oral contract called for the defendant to design and construct the silo. The defendant alleged he was employed solely to excavate a trench for the walls and denied that he had designed or constructed the silo.

In determining the sufficiency of the evidence to support the judgment it must be considered in the light most favorable to the plaintiff, all conflicts in the evidence must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be deduced from the evidence.

The silo as constructed was approximately 18 feet wide and 200 feet long. The walls were constructed by digging a U-shaped trench 6 inches wide and 12 feet deep into a hill and then filling the trench with rein-

forced concrete. After the walls had cured the dirt between the walls was removed and a concrete floor was poured. The walls had concrete anchors extending to the side and located at intervals of 50 to 70 feet. The anchors were constructed by pouring concrete into holes approximately 18 inches in diameter and 8 inches deep, located about 2 feet from the wall. The anchors were connected to the wall by a strip of reinforced concrete.

The plaintiff's son testified that the defendant advised them to employ a dirt contractor to grade the area and to purchase the reinforcing steel and concrete that was to be used in constructing the walls. The plaintiff also employed two high school boys to assist the defendant, and employed another person to install a metal strip along the edge of the walls to be used to hold a plastic cover over the silo and protect the grain or silage stored in the silo.

After the dirt contractor had completed the grading and preparation at the site, the defendant brought a trenching machine to the farm and dug the trench for the walls. The reinforcing steel had been wired together by the plaintiff in accordance with instructions from the defendant so that the bars formed 12-foot grids with the bars 16 inches apart. As the concrete arrived, the reinforcing steel was placed in the trench and the concrete poured into the trench. The defendant assisted the high school boys in placing the steel and concrete in the trench.

Approximately 2 weeks later, the dirt was excavated from between the walls and the floor was constructed by the plaintiff. The metal strip was then placed along the edge of the walls. The defendant was paid $1.60 per foot for 420 feet of trenching, a total of $672. The other expense, amounting to $4,187.23, was paid directly to the other workmen and suppliers by the plaintiff.

In the fall of 1970 the silo was filled with 40,000 bushels of ground high moisture corn. The corn was fed during the winter and the silo was empty by March

or April 1971. The silo was filled again in the fall of 1971 and was empty by the spring of 1972. During the summer of 1972 about 60 feet of the north wall near the east end, which was the closed end, collapsed and fell into the silo. The plaintiff requested the defendant to repair the silo but he refused to do so. The plaintiff stored about 30,000 bushels of grain in the silo that winter.

Sometime during the winter of 1972-73 approximately 60 feet of the south wall near the east end collapsed and fell into the silo. Approximately 500 bushels of corn then in storage with a value of approximately $500 was destroyed at the time the part of the south wall collapsed.

The plaintiff has made some repairs and improvements to stabilize the walls that are still standing. Bridge planks have been laid across the top of the silo to brace the walls and additional anchors have been constructed along the south wall. The north wall has not been reinforced because the plaintiff plans to remove the north wall and then extend the floor over to the wall of another silo which is nearby.

The plaintiff produced the testimony of another farmer who had employed the defendant to construct a similar silo on his farm. This witness testified that it had been necessary to construct additional anchors or "dead men" to stabilize the walls of his silo but his silo was now safe to use.

A licensed engineer testified that he had inspected the silo on the plaintiff's farm and that the walls were inadequate to withstand the thrust of the earth. He also testified that the concrete was defective because it had not been vibrated at the time the walls were poured. The concrete was "honeycombed" with air pockets and the aggregate had become segregated during the construction of the wall. He further testified the reinforcing in the wall was inadequate. This witness did not testify what would be required to reinforce the

existing walls but testified an adequate wall would have a 24-inch footing 7 feet wide with a wall 22 inches wide at the base tapering to 8 inches wide at the top.

It is apparent in this case that the plaintiff did not contemplate the construction of a silo having walls similar to the wall described by the engineer as an adequate wall. The plaintiff had looked at other silos and contemplated a silo constructed in the manner in which the silo was actually constructed.

The defendant was not a general contractor and did not agree to construct the silo for an agreed amount. The plaintiff's agreement with the defendant called for the defendant to excavate 420 feet of trench at an agreed price of $1.60 per lineal foot. The plaintiff was billed on this basis and the defendant was paid on that basis. All the other workmen and suppliers were paid directly by the plaintiff.

The defendant, however, did nore than excavate the trench. He advised the plaintiff concerning the reinforcing and helped place the concrete in the trench. The two high school boys employed by the plaintiff worked under his direction.

The defendant testified he had been engaged in the construction of 300 silos and the plaintiff was entitled to rely on the defendant's knowledge and experience in the construction of silos. To the extent the collapse of the walls was due to defective workmanship and inadequate reinforcing and anchoring of the walls the evidence sustains a finding of liability against the defendant. The defendant is also liable for the cost of additional anchoring and reinforcing of the walls still standing to the extent the additional work is necessary because of defective workmanship and inadequate reinforcing.

The plaintiff's evidence shows that a part of the silo may still be used. The plaintiff himself testified it was not a complete loss. The evidence does not sustain a finding that the entire silo is useless so that the plain-

tiff could recover the entire cost of construction. The applicable measure of damages is the cost of remedying the defects. Stillinger & Napier v. Central States Grain Co., Inc., 164 Neb. 458, 82 N. W. 2d 637; Jones v. Elliott, 172 Neb. 96, 108 N. W. 2d 742.

The evidence does not show what the cost will be to reconstruct the walls which have collapsed. The judgment is therefore reversed and the cause remanded for a new trial on the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

VALENTINE PRODUCTION CREDIT ASSOCIATION, APPELLEE, v. SPENCER FOODS, INC., A DELAWARE CORPORATION, APPELLANT.

241 N. W. 2d 541

Filed May 5, 1976. No. 40420.

1. **Trial: Judgments: Records.** No judgment is rendered until the pronouncement thereof is noted on the trial docket.
2. **Trial: Summary Judgments.** The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.

Appeal from the District Court for Colfax County: C. THOMAS WHITE, Judge. Reversed and remanded.

William K. Schaphorst of Swarr, May, Smith & Andersen, for appellant.

James T. Gleason of Collins & Gleason, for appellee.

Heard before SPENCER, NEWTON, and BRODKEY, JJ., and COLWELL and BLUE, District Judges.

COLWELL, District Judge.

This is an appeal from summary judgment. Suit was brought for conversion of 63 head of cattle subject to a

security agreement in favor of plaintiff, Valentine Production Credit Association. The owner of the cattle, Fud Ferris, Jr., sold them to defendant, Spencer Foods, Inc., a meat packer, on April 1, 1971, for $19,839.51. Plaintiff claims the proceeds of that sale were not applied to its security debt and it now has an interest in the proceeds. Ferris is insolvent. Plaintiff's petition was filed March 27, 1974. Defendant's answer alleges payment; waiver; irregular, unlawful, and negligent conduct of plaintiff and its employees; fraud; laches; and unreasonable delay. Summary judgment was entered in favor of plaintiff for $19,839.51. Defendant appeals.

Fud Ferris, Jr., Valentine, Nebraska, secured credit from plaintiff beginning March 1970, for a cattle feeding operation that contemplated buying and selling cattle at irregular times. Ferris gave a financial statement showing a net worth of $240,650. The recorded security agreement, dated May 8, 1970, recited that the security was for 900 head of steers and heifers covering a $150,000 debt. The agreement included an after acquired property clause and, in part, recited that "the Secured Party claims and has a security interest in the proceeds of the collateral if, under the Uniform Commercial Code of the State of Nebraska, a buyer in the ordinary course of business (other than a person buying farm products from a person engaged in farming operations) may purchase the collateral herein described free of this security interest. Except for this latter provision of the Uniform Commercial Code, the Debtor is not otherwise authorized to sell, exchange, or otherwise dispose of the collateral." There were 15 separate advancements of funds, the last made 40 days after the sale being $40,000 on May 12, 1971, for a gross total loan of $296,764.71. Thirty-one repayments were made on the loan up to October 1971, including $72,000 repaid after the sale to defendant. There is no evidence identifying or explaining the source of the repaid funds. As

a business custom plaintiff permitted Ferris and other borrowers to sell secured cattle, however, the proceeds of sales were to be repaid to plaintiff. Plaintiff discovered on June 12, 1972, that all its Ferris collateral was gone and he was insolvent.

Ferris conducted all his loan business with Don Fisher, plaintiff's manager. Plaintiff admits many negligent and improper acts of Fisher in advancing funds to Ferris contrary to his authority and its established office practices, failing to verify the existence of the cattle designated as security, and Fisher borrowed $2,500 from Ferris contrary to plaintiff's regulations. Fisher died May 9, 1972.

The business records of plaintiff are incomplete, illegible, and unexplained. The testimony of Ferris has not been secured.

Plaintiff (appellee) contends that defendant failed to file a timely motion for new trial. Section 25-1143, R. R. S. 1943, provides: "The application for a new trial must be made, within ten days, * * * after the verdict, report or decision was *rendered* * * *." (Emphasis supplied.) Section 25-1301, R. R. S. 1943, provides in part: "(1) A judgment is the *final determination* of the rights of the parties in an action. (2) *Rendition* of a judgment is the act of the court, or a judge thereof, in *pronouncing judgment*, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the *relief granted or denied* in an action." (Emphasis supplied.)

"No judgment is rendered until the pronouncement thereof is noted on the trial docket." Fritch v. Fritch, 191 Neb. 29, 213 N. W. 2d 445.

Both parties filed motions for summary judgment which were heard on August 29, 1975. On September 24, 1975, the trial judge issued a memorandum finding that the plaintiff's motion for summary judgment should be granted without stating the relief granted and directing the plaintiff to prepare a journal entry. The

record is silent whether or not a notation was made on the trial docket. A formal judgment was signed by the trial judge and filed October 1, 1975, granting judgment for plaintiff against defendant for $19,839.51, and denying defendant's motion for summary judgment. Defendant filed its motion for new trial on October 9, 1975.

Plaintiff's objection is without merit. The memorandum of the trial court did not state the relief granted, and the record fails to show that there was a notation made on the trial docket of the relief granted that was later entered by the former judgment filed October 1, 1975. Defendant's motion for new trial was timely filed.

The procedure in summary judgment is found in sections 25-1330 to 25-1336, R. R. S. 1943. "The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits." Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244.

Plaintiff and the trial court rely on Garden City Production Credit Assn. v. Lannan, 186 Neb. 668, 186 N. W. 2d 99, as authority for the judgment. In Garden, the borrower made periodic sales without obtaining the required written consent and paid the proceeds to Garden; the sale there involved a middleman whose draft endorsed to Garden was dishonored and not paid; Garden did not object to the sale when the draft was presented; and Lannan was an ultimate purchaser in due course claiming waiver. The trial court held that the evidence of the prior conduct of the parties and the

failure of Garden to object to the sale of the collateral was not an implied waiver. We there said: "It is difficult to see, *either considering the purpose of the code, or examining the intent of P.C.A. and Carter in their course of their dealing, that there was any intention, either express or implied on the part of P.C.A. to waive its security interest* up to the point of acceptance and actual application of the proceeds of the sale. * * * section 1-205, U. C. C., provides that a course of dealing which by previous conduct between the parties, may alter an agreement by fact recognition. But, as we have said, we fail to see how a failure to rebuke or object contemporaneous with a delivery by the debtor and acceptance of the proceeds to which the security agreement attaches, can be construed as a voluntary and intelligent waiver by the lender of its right under a perfected security agreement against a third party purchaser, and this is particularly true when the security agreement itself provides a specific means for obtaining such waiver. * * * Our decision herein is in harmony with the general rule that in order to establish a waiver of legal right there must be a clear, unequivocal and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part. 28 Am. Jur. 2d, Estoppel and Waiver, § 158, P. 842; Jessen v. Blackard, 159 Neb. 103, 65 N. W. 2d 345." (Emphasis supplied.)

The Garden case does not control here for three reasons: (1) This is an appeal from a summary judgment where the limited issue is whether or not there is a genuine issue of fact remaining for trial; (2) there are different and broader material fact questions, both before and after the sale, relating to the ultimate fact of a voluntary and intentional relinquishment or abandonment of a known existing legal right; and (3) there are other issues and material fact questions presented by the pleadings and the record such as payment, estoppel, fraud, and delay all as contemplated by sections 1-103

and 9-306(2), U. C. C., that require presentation and determination by the trial process.

From an examination of the record and for the reasons stated we conclude that there are genuine issues of material fact to be determined on trial. The summary judgment is set aside and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ROBERT B. BAIRD, APPELLEE, V. PAULINE M. BAIRD, APPELLANT.

241 N. W. 2d 543

Filed May 5, 1976. No. 40486.

Divorce: Alimony. In determining whether alimony should be awarded, the ultimate test is one of reasonableness.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Philip M. Kneifl and Charles O. Forrest of Kneifl, Kneifl & Forrest, for appellant.

William J. Brennan Jr., for Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage and divided the property of the parties. The respondent wife has appealed and contends the trial court erred in failing to award alimony to her.

The parties were married in 1941 and have one child who is 30 years of age and self-supporting. The petitioner is a linoleum mechanic, 57 years of age. His income is approximately $12,000 per year. The re-

spondent is 55 years of age and has been employed by a division of the Stanley Tool Company for 26 years. Her gross income per year is now slightly less than $12,000, although she has earned as high as $18,000 per year. Both parties have some health problems.

The trial court valued the property of the parties at approximately $48,300. The respondent received over $27,000 in the division of the property including the residence which was valued at $20,000. The petitioner received approximately $21,000. The respondent makes no complaint concerning the property division.

The respondent cites Albrecht v. Albrecht, 190 Neb. 392, 208 N. W. 2d 669, and Mathias v. Mathias, 194 Neb. 598, 234 N. W. 2d 212, in support of her contention that she should have received an award of alimony. In the Albrecht case the wife was prevented from working because of her health. In the Mathias case the wife suffered from a chronic lung infection and had not worked during most of the marriage.

One of the factors to be considered in determining whether an award of alimony should be made is the ability of the supported party to engage in gainful employment. § 42-365, R. S. Supp., 1974. The record in this case indicates the respondent is able to work and in the past she has demonstrated a greater earning capacity than the petitioner.

The respondent did not want the residence sold. The residence was awarded to the respondent and, as a consequence, the petitioner received a greater share of the liquid assets. During a part of the time while the action was pending the respondent was able to allocate $60 per week from her salary to a savings account.

In determining whether alimony should be awarded, the ultimate test is one of reasonableness. Mathias v. Mathias, *supra*. As we view the record, the facts in this case do not support the respondent's contention that she was entitled to an award of alimony in addition to the share of the marital property she received.

The judgment of the District Court is affirmed. No additional allowance is made for the fees of the respondent's attorney in this court.

AFFIRMED.

CLINTON, J., participating on briefs.

BOB STUNGIS, DOING BUSINESS AS BOB'S KUSTOM BODY SHOP, APPELLEE, V. UNION PACKING COMPANY OF OMAHA, INC., A NEBRASKA CORPORATION, APPELLANT.

241 N. W. 2d 660

Filed May 12, 1976. No. 40297.

1. **Appeal and Error.** Only those assignments of error which are argued and discussed will be considered by this court on appeal.
2. **Contracts: Damages.** The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which fulfillment of the contract would have prevented or the breach of it has entailed.
3. ———: ———. Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects.
4. **Pleadings: Trial.** Under section 25-852, R. R. S. 1943, a pleading may be amended in the furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense.

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

D. C. Bradford, III, and John B. Ashford of Bradford, Bloch & Coenen, for appellant.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellee.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and MURPHY and COADY, District Judges.

BRODKEY, J.

This case comes to this court on an appeal by the de-

fendant, Union Packing Company, Inc., from a jury verdict and judgment entered thereon in favor of the plaintiff, Bob Stungis, doing business as Bob's Kustom Body Shop, in the amount of $18,000, representing damages allegedly sustained by plaintiff as a result of defendant's breach of contract. We affirm.

Plaintiff, Stungis, owned an industrial tract in Omaha, part of which was the site of his auto repair shop and part of which was vacant. Plaintiff's land, on its north and west sides, was adjacent to land owned by defendant, Union Packing Company, on which defendant's packing house was located. In 1969, Union Packing Company made plans to construct a new building on its property, which would extend close to the boundary line between its property and plaintiff's property to the south thereof. For that purpose, it sought plaintiff's permission to excavate part of plaintiff's land near the boundary line between the two properties, and, on or about December 3, 1969, plaintiff and defendant entered into a written agreement under the terms of which defendant was given permission to use the north 15 feet of plaintiff's lot for the purpose of excavation and storing dirt. As part of that agreement, defendant specifically agreed to restore plaintiff's land to its original condition upon completion of the construction work on defendant's own land. During the negotiations between the parties, Stungis made it clear that he wanted the land restored to its original condition as he planned to build an addition to his auto shop, and defendant and its agents were aware of that fact. Between 1969 and 1972, defendant was engaged in the construction of the addition to its plant, and during that period removed soil from plaintiff's property and stored it in a vacant lot near the construction site. During the course of the excavation, defendant excavated to depths as great as 30 feet below the original surface of plaintiff's land. Upon completion of its construction work, defendant refilled the hole it had excavated on plaintiff's property.

Later, when Stungis was preparing to build his new body shop, he was informed that soil tests revealed the defendant had backfilled his property with uncompacted debris and that the soil was not uniform enough in the area involved to support a concrete slab floor building, and that it would be necessary to reexcavate and refill the hole to restore the land to its original condition. He then filed suit against the defendant, alleging a breach of contract to restore the property to its original condition and alleging that as a result of defendant's failure to refill the excavation with clean and compacted fill, the value of the property was reduced from $65,000 to $45,000; and he prayed for damages in the amount of $20,000. He subsequently filed an amended petition and a second amended petition, modifying the allegations of before-and-after value of the property, but leaving the prayer for $20,000 damages unaltered. In its amended answer, defendant admitted the execution of the written contract on or about December 3, 1969, but alleged that it had performed all the conditions of the written agreement which it was required to perform, and denied the other allegations contained in plaintiff's second amended petition.

Trial was had to a jury on June 12 and 13, 1975. During the trial, plaintiff did not introduce evidence with respect to the diminution of the value of the property; but rather, over the objection of the defendant, he was permitted by the court to introduce evidence concerning the cost of repair of the property. An expert witness for plaintiff testified that the cost of restoring the property to its original condition would be $18,000.

Defendant's principal defense to the action on the matter of damages was that plaintiff had suffered no damages; and to support this proposition it adduced evidence from James Casperson, an architect for Union Packing Company, who testified that, in his opinion, the soil at the filled site was two and one-half times stronger than that on the original ground before the excavation.

The only other evidence on damages adduced by defendant during trial was the testimony of one witness that there were some bricks in the soil at the northwest part of the property and that it would take $1,900 to clean the soil in that area.

At the close of the evidence, plaintiff moved the court for leave to amend his petition to conform to the proof, in the manner set out in his requested instruction No. 1. Part of that requested instruction states as follows: "The plaintiff alleges that the reasonable cost of restoring the land to it prior condition of usefulness is $18,000.00." Counsel for defendant objected generally to the amendment requested, without specifically stating his reasons for his objection at that time. The court granted plaintiff's request for the amendment. The purpose of the requested amendment was to permit the court to instruct the jury on damages based on the evidence in the record, which was limited to testimony of the cost of repair, and not the before-and-after value of the property as alleged in plaintiff's second amended petition. In its instructions, the court first told the jury that if it decided the plaintiff should recover, it would be its duty to award any damages as would fairly and reasonably, but not excessively, compensate for the injury or loss which had been sustained as a direct and proximate result of the breach of contract; and in the next instruction added: "If plaintiff's land was damaged and can at reasonable cost be restored to substantially its condition immediately before the damage occurred, plaintiff is entitled to recover the cost of making such changes necessary to restore the property to substantially its condition immediately before the soil was excavated." The jury brought back a verdict of $18,000, and the court entered judgment on the verdict. Motion for a new trial having been overruled, defendant perfected its appeal to this court.

In its brief on appeal, defendant sets out 18 assignments of error, only a few of which are discussed in its

brief. Rule 8a2(3) of the Revised Rules of the Supreme Court, 1974, provides that consideration of the cause by this court will be limited "to errors assigned and *discussed*." (Emphasis supplied.) See, also, State v. Hoffmeyer, 187 Neb. 701, 193 N. W. 2d 760 (1972). In accordance with the foregoing rule, we shall consider only those assignments argued or discussed by defendant.

The principal assignment of error discussed by defendant in its brief was that the court erred in sustaining plaintiff's motion to amend his petition to conform with the proof on the last day of the trial. Union Packing Company claims that it was unfairly surprised by the amendment and was prejudiced by it. Intertwined with this assignment is the defendant's claim that the testimony relative to the cost of restoration of the property given by plaintiff's expert witness was improperly admitted over objection, and could not serve as a basis for the amendment. Defendant also assigns as error and argues that the court erred in sustaining plaintiff's objection to questions propounded to Stungis by defendant about the original purchase price of the subject property, and as to offers to sell or purchase his property.

It is clear from the status of the pleadings as of the commencement of the trial that plaintiff worded his prayer for damages in terms of diminution of value, but that the evidence adduced by him during the trial was on cost of repair, although, by stipulation, it was agreed that plaintiff's property had a value of $45,000 before it was damaged. Putting aside for the moment the fact that the court before instructing the jury permitted plaintiff to amend his petition as to damages to conform with the proof that the cost of repair was $18,000, we first address ourselves to the question of the proper measure of damages to be applied under the facts of this case.

It is important to note that plaintiff brought his action in this case on the basis or theory of defendant's breach of contract, and not upon any theory of tort liability.

The law is well established that the measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. Numon v. Stevens, 162 Neb. 339, 76 N. W. 2d 232 (1956); Wendt v. Yant Constr. Co., 125 Neb. 277, 249 N. W. 599 (1933); Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245 (1953); Koyen v. Citizens Nat. Bank, 107 Neb. 274, 185 N. W. 413 (1921). Numon v. Stevens, *supra,* involved a contract to move a house, which was subsequently damaged during the moving process. The court held that the fair and reasonable value of the cost of repair required to restore the house to the same condition it was in prior to being moved was the proper measure of damages. The rule is well settled that where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Henggeler v. Jindra, 191 Neb. 317, 214 N. W. 2d 925 (1974); Jones v. Elliott, 172 Neb. 96, 108 N. W. 2d 742 (1961). While there may possibly be some question as to whether the contract in the case under consideration is a construction contract, we believe it is at least analogous to a construction contract. We conclude, therefore, that the proper measure of damages in the present case, which is based upon the theory of a breach of contract, was the reasonable cost of repairs to restore the property to its original condition.

We have held that where the facts stated in a petition show that the plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be measured. Dill v. Farmers Co-operative Co., 132 Neb. 256, 271 N. W. 692 (1937); Rothery v. Pounds, 150 Neb. 25, 33 N. W. 2d 347 (1948). This being so, the court did not commit error in permitting plaintiff to amend his petition to conform with the proof at the conclusion of the

evidence. We believe that such an amendment was not only permitted, but required, to inform the jury of the correct measure of damages. The applicable statutory section is section 25-852, R. R. S. 1943, which provides as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." Under that section, the right to amend pleadings rests within the sound discretion of the trial court and the allowing of the amendment will not be error unless prejudice resulted. State Securities Co. v. Corkle, 191 Neb. 578, 216 N. W. 2d 879 (1974); McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512 (1962). We conclude that the amendment did not change plaintiff's cause of action, which was based on breach of contract both before and after the amendment, nor did it change the quantum of proof; also, it did not change defendant's defense, as defendant's theory throughout the trial was that plaintiff suffered no damages because of the fact that the soil after compaction was better and stronger than it was in its natural state.

Defendant claims it was surprised by the change in the measure of damages sustained by plaintiff. Defendant was aware of the plaintiff's introduction of restoration cost evidence during the 2-day trial. After the allowance of the amendment by the court, its counsel did not ask to submit any evidence of his own on the cost of restoration, nor did he ask for a continuance. He contented himself with his prior exception to the ruling of

the court. See Folken v. Union Pacific R.R. Co., 122 Neb. 193, 239 N. W. 831 (1932). In arguing plaintiff's motion for a directed verdict on the amount of damages, defendant's counsel in his counterargument did not raise the absence of evidence of before-and-after damages, or claim that was the only correct measure of damages. Finally, and significantly, the record reveals that the court held a conference in chambers to consider its proposed instructions to the jury, at which conference counsel for both parties were present. The proposed instructions presumably included the court's instructions to the jury relative to damages, previously quoted, in which the court clearly instructed on the cost of repair as the measure of damages in the event the jury found for the plaintiff on the issue of liability. The attorneys were obviously provided with copies of the court's proposed instructions prior to the hearing, as counsel for defendant during the hearing referred to one of the instructions proposed by the court, which, however, did not deal with damages. At that hearing, counsel for the defendant voiced no objections to the court's proposed instructions relative to damages, nor to the theory on which the instructions were framed; nor, in fact, did he object to any of the court's instructions. His failure to object to the instruction on damages suggests that he did not consider the change in the measure of damages to be prejudicial. We do not believe that the defendant was either surprised or prejudiced by the action of the court in permitting plaintiff to amend his petition to conform to the proof adduced during the trial; and that the court acted in furtherance of justice in permitting the amendment.

We have considered defendant's contentions that it should have been permitted to introduce evidence of Stungis' purchase price of his property, and also as to offers from others to buy his property, and whether he had ever listed it for sale. We find that the action of the court in excluding the answers to the questions pro-

pounded was not prejudicial, particularly in view of the amendment permitted by the court as to the applicable measure of damages, and that the contentions of the defendant are without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

MURPHY, District Judge, concurring in the result.

I do not disagree with the result reached here, but I am unable to agree with much of what is said in arriving at the result, and I am concerned about inferences which might be drawn from the opinion.

The general rule regarding damages to soil of the nature involved herein is that their proper measure is any difference between the before-and-after values. Hunt v. Chicago, B. & Q. R.R. Co., 180 Neb. 375, 143 N. W. 2d 263; Beveridge v. Miller-Binder, Inc., 177 Neb. 734, 131 N. W. 2d 155; Applegate v. Platte Valley P. P. & Irr. Dist., 136 Neb. 280, 285 N. W. 585. I do not agree that the petition alleges a cause of action ex contractu rather than ex delicto is necessarily material. Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417. This case is distinguishable, however, from Beveridge v. Miller-Binder, Inc., *supra,* by virtue of the substance of the contract herein involved, as hereinafter discussed.

Here the jury was instructed that, before plaintiff could recover, he was required to prove: "That the parties entered into a valid agreement by the terms of which the defendant was to refill the excavated area on plaintiff's property with clean, well-compacted soil *and thereby to restore the land to its original condition.*" (Emphasis added.) It is important to note also that the contract involved did not contemplate any improvement to or upon plaintiff's land, but constituted only the grant of a temporary license or easement to defendant. The instruction defining the measure of damages was consistent with that burden of proof. Plaintiff was entitled

to recover for the loss of his bargain, rather than simply the damages done to his real estate.

I fear the opinion is subject, at least by reasonable implication, to extension to fact situations far beyond those here. A measure of damages based upon the redoing of all that was done is, I submit, inconsistent with substantial performance doctrines or theories. I am not inclined to believe that, in an ordinary "construction contract" case, evidence of damages similar to that adduced by the plaintiff in this case would warrant submission of the case to the jury, regardless of what may have occurred during the course of an instructions conference.

In my view of the case plaintiff must be considered to have met his burden of pleading and proving an appropriate and reasonable measure of reasonable damages only in light of the somewhat peculiar nature of the case and the favorable jury verdict. Any disparity between the difference between the before-and-after value and the cost of restoration would have been material to the reasonableness of the measure of damages. Evidence of an offer to sell real estate is not, however, sufficient evidence of the value of the real estate to raise that factual issue.

IRENE PAGE ET AL., APPELLANTS, V. LLOYD BUCHFINCK, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF ELIZABETH K. EVANS, DECEASED, ET AL., APPELLEES.

242 N. W. 2d 610

Filed May 12, 1976. No. 40315.

Quieting Title: Partition: Jurisdiction. The District Court of the county wherein real estate is situated is not without jurisdiction to hear and determine proceedings brought to quiet title to, or obtain partition of, that real estate.

Appeal from the District Court for Brown County: HENRY F. REIMER, Judge. Reversed and remanded.

John S. Mingus of Mingus & Mingus, for appellants.

C. Kenneth Spady and William P. Mueller of McGinley, Lane, Mueller, Shanahan, McQuillan & Gale, H. Alan Curtiss, William J. Hotz, Jr., Andrew J. McMullen, and Byron J. Casey, for appellees.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and MURPHY and COADY, District Judges.

MURPHY, District Judge.

Alven Evans died in 1940, survived by his widow, Elizabeth, and five children, Emerson, Darwin, Alta, Tyndell, and Zena. The widow, Elizabeth, died August 6, 1972. Plaintiffs-appellants are the children of Zena, who predeceased her mother. Named defendants-appellees are the administrator c.t.a. of the estate of Elizabeth, surviving children of Alven and Elizabeth, children of deceased children of Alven and Elizabeth, and their respective spouses. Also joined as defendants are all persons having or claiming any interest in the estates of Alven, Elizabeth, their deceased children, or the real estate, as well as the real estate itself. Alven owned both real and personal property in Grant County, Nebraska, where his will was admitted to probate and the administration of his estate was concluded many years ago. The estate of Elizabeth is also being administered in Grant County, Nebraska, where she resided at the time of her death. She died owning both real and personal property, the real estate being allegedly all located in Brown County, Nebraska. The location of the personal property is not disclosed in the pleadings, but inferentially, at least, some portion of it was also in Brown County.

The petition, filed in the District Court for Brown County on April 17, 1973, sets forth two causes of action, both of which the briefs indicate follow a trust theory

which apparently is that Alven left real and personal property in Grant County to Elizabeth for life for her own use and benefit with the remainder to their children and the children of any of their children who should predecease Elizabeth, and that Elizabeth used the profits of her life estate to procure the real and personal property which is the subject of the litigation including the Brown County real estate. The first cause of action seeks to impress a trust upon all personal property inventoried in the estate of Elizabeth. The second cause of action seeks to quiet title in one-fifth of the Brown County real estate in plaintiffs, and to partition that real estate. Both causes of action seek, additionally, a construction of portions of the will of Alven, and include allegations concerning Elizabeth's will which relate to the claims of some of the named defendants.

Some of the named defendants filed motions seeking a dismissal of plaintiffs' petition, claiming that the county court of Grant County has exclusive original jurisdiction to construe the will of Elizabeth or to construe the will of Alven, and that plaintiffs are not real parties in interest in that they have no interest in the real estate described and therefore are not entitled to seek partition thereof. The trial court, on August 9, 1973, found that the case should be dismissed "as the District Court of Brown County, Nebraska, does not have jurisdiction as prayed for in the petition," and dismissed the case. A motion for a new trial was filed, but appears to have been allowed to pend while a somewhat related case, Avery v. Evans, 193 Neb. 437, 227 N. W. 2d 603 (1975), was finally decided. The motion for new trial was overruled July 15, 1975. There is other litigation pending between the parties in Grant County. We take the ruling of the trial court to relate to subject matter rather than parties.

The foregoing description of the background of this appeal is necessarily drawn from the briefs of the parties as well as the transcript and bill of exceptions. In view

of the posture of the case it ought not be taken as conclusive as to any of the facts therein related, particularly since no evidentiary hearing has yet been held.

A myriad of issues are presented in the briefs or suggested by an examination of the transcript and bill of exceptions (which in the case is only a recitation of what transpired at the hearing on the motion for new trial on June 17, 1975, and a ruling thereon made July 15, 1975). It is considered, however, that a discussion of any issues beyond that which follows here would be either premature or inappropriate, or both. The present factually unclear state of this record, and the pendency of other litigation between the parties, persuade this court that it ought not render any advisory opinion or even appear to suggest to the parties what their next step might be. We note, however, the procedure followed in Roberts v. Snow Redfern Memorial Foundation, *post* p. 139, 242 N. W. 2d 612.

As indicated above, a part of the relief sought by plaintiffs is the quieting of title to, and the partition of, real estate in Brown County. At least at this stage it does not appear that any real estate, in Grant County or elsewhere, is the subject matter of any dispute among the parties. That being so, it is clear that the District Court for Brown County was not without jurisdiction, and at least to that limited extent is the only court possessed of jurisdiction. §§ 25-401 and 25-402, R. R. S. 1943; Johnson v. Samuelson, 82 Neb. 201, 117 N. W. 470; Rakow v. Tate, 93 Neb. 198, 140 N. W. 162; Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658.

For the reason stated, the order of dismissal by the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IN RE ESTATE OF VIOLET B. WILLIAMS, DECEASED. WESLEY W. ROBERTS ET AL., APPELLEES, V. SNOW REDFERN MEMORIAL FOUNDATION ET AL., APPELLANTS.

242 N. W. 2d 612

Filed May 12, 1976. No. 40318.

1. **Wills.** In construing a will, the cardinal rule is that the court should give effect to the intent of the testator as that intent may be properly shown. That principal may confine, as well as direct, the court. Rules of construction in will cases are devices adopted to serve that cardinal principle.
2. **Wills: Attorney and Client.** Rules applicable to wills drawn with the assistance of counsel may not be applicable to wills not drawn with such assistance.
3. **Wills.** Generally, in the construction of wills, courts ought to be reluctant to add to, or enlarge upon, the language used.
4. **Wills: Property: Crops.** A testamentary direction to an executor to sell farmland and pay the proceeds, after payment of debts and administrative expenses, over to named beneficiaries in shares, does not constitute a disposition of landlord's share of crops growing thereon, absent any indication of such a testamentary intent.
5. **Wills: Property.** A special bequest of property may operate to take that property out of a more general testamentary direction to sell and distribute proceeds of the sale.
6. **Probate and Administration: Estates: Attorneys at Law: Fees.** The taxation of attorney's fees and expenses of a party other than the executor or administrator of the estate may be appropriate in a particular case, either against the estate generally or against the executor or administrator personally.
7. **Probate and Administration: Estates: Executors and Administrators.** Generally, an executor or administrator has an obligation to make known to the court controversies which exist between the parties, and to obtain directions of the court as to his responsibilities in that regard, and no more.
8. ———: ———: ———. In a situation, reasonably subject to controversy, an executor or administrator has no obligation to adopt or pursue, at his risk or at the risk of the estate, that position which may ultimately prevail.
9. ———: ———: ———. In appropriate circumstances, an executor or administrator may have discretion, or perhaps even an obligation, to adopt a position, although generally no such discretion or obligation will exist, other participating parties having an obligation to pursue their own interests.

10. ———: ———: ———. Conduct by a party other than the executor or administrator may operate to relieve the executor or administrator of whatever obligation he might otherwise have.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Clark G. Nichols, for appellants.

William Grossman of Johnston, Grossman & Johnston, for appellees.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and MURPHY and COADY, District Judges.

MURPHY, District Judge.

Violet B. Williams died testate August 19, 1972, owning a residence in Scottsbluff, Nebraska, a parcel of farmland in Scotts Bluff County, Nebraska, and various items of personal property. Her will, executed in 1968, consisted of a rather large number of unnumbered paragraphs, pertinent portions of which are, in substance, as follows:

"I direct the First State Bank of Scottsbluff, Nebraska be appointed Executor of the will, and as such Executor it collect and convey into money all of my real estate property and as such Executor it shall have full power and authority to sell and convey all of such property. It is to use its own judgment as to the price to be obtained for said property, the terms upon which it is to be sold, and the time of the sale when the property shall be sold for a fair price.

"I direct that out of the proceeds of the property sale, the First State Bank of Scottsbluff, Nebraska pay all debts and claims against the estate, expense and costs of administration, after said payments are made, the balance money then remaining is to be divided as follows.

"From the northwest corner of (the farm parcel) I give, device, and bequeath to the following.

"One half part to the Snow Redfern Boys Ranch * * *
"One eighth part to the Nebraska Childrens Home * * *
"One eighth part * * * (to the) Nebraska Wesleyan University * * *
"One eighth part to my nephew Wesley Roberts * * *
"One eighth part to the Dumb Friends League of Denver, Colorado * * *
"(Certain jointly held stock not to be considered part of her estate)
"(Other jointly held stock not to be considered part of her estate)
"I give, devise and bequeath to my nephew Wesley Roberts * * * the real property, described as (the residence)
"(Several paragraphs, each containing specific bequests of personal property)
"A savings account in the First State Bank of Scottsbluff is held for my funeral expenses.
"(Several additional paragraphs containing specific bequests of personal property)
"My nephew Wesley W. Roberts and his wife Rosie are given full charge of all personal property not designated in this will. They may keep it or divide it as they deem best."

The parties are agreed that the last-quoted paragraph constitutes appellees residuary beneficiaries of personal property in the estate not otherwise disposed of. The form of the will operates to eliminate whatever assistance in its construction might have been furnished had the various paragraphs been numbered or otherwise segregated or interrelated.

At the time of her death the farmland was leased under a crop-sharing arrangement, the decedent's interest in the growing crops then having an inventoried value of $4,420. The farm was sold, less the growing crops, by the executor, the downpayment being received November 29, 1972. The growing crops were sold sep-

arately but with the tenant's share, before and after that date, with the estate ultimately realizing therefrom the sum of approximately $10,462. Their inheritance tax was computed as though the appellees took that amount as a part of the residuary.

Thereafter, appellees, by motion filed in the county court estate proceedings, presented the issues which are now before this court. From an adverse determination there they appealed to the District Court, where they received a favorable ruling. Appellants, Snow Redfern Memorial Foundation and Nebraska Children's Home Society now bring those issues here. They are: (1) Are the proceeds of the sale of the growing crops to be distributed to the appellants and others as part of the proceeds of the property sale referred to early in the will, or to appellees as residuary beneficiaries of the personal property? (2) Is the devise to Wesley W. Roberts of the residence to be diminished proportionately for debts or claims against the estate and expenses of administration? (3) May attorneys' fees and expenses of appellees be taxed as costs to the executor?

The first issue can be said to be a matter of first impression in Nebraska. Appellants rely principally upon that line of cases commencing with In re Estate of Andersen, 83 Neb. 8, 118 N. W. 1108, wherein we held that, until a crop is severed from the land upon which it is grown, it is such part of the real estate as will pass by a devise of the land unless there is evidence contained in the will of the testator that the devisee of the land should not be entitled to the crop, whether or not the crop has matured at the date of the testator's death. Appellees, on the other hand, rely upon that line of cases commencing with Aldrich v. Bank of Ohiowa, 64 Neb. 276, 89 N. W. 772, wherein we held that growing crops, being generally considered to be personal property, do not pass to the purchaser of the land at a judicial sale. Stalder v. Stalder, 105 Neb. 367, 180 N. W. 566, cited by both parties, is not conclusive.

The parties are agreed that the testamentary requirement that the executor sell real estate worked an equitable conversion so that the real estate is to be treated as personalty. We feel, however, that that equitable device is not of much assistance here, for clearly the gift to appellants (and appellee Wesley W. Roberts) was a sum of money and not an interest in the real estate.

The real question is simply whether or not a testamentary direction to an executor to sell farmland and pay the proceeds, after payment of debts and administration expenses, over to named beneficiaries in shares, ought to be considered to constitute a disposition of crops growing thereon, absent any indication within the will of the testatrix' intent in that regard, where the will contains a residuary clause disposing of personal property.

During her lifetime the testatrix was empowered to sell the real estate herself, reserving, or not, her share of the growing crops as she should determine. Her interest therein constituted personal property. To extend her direction to the executor to sell the farmland to include a direction to sell the crops growing thereon would appear to constitute the imposition of this court's judgment upon the mind of the testatrix, and nothing more. We see no more authority for implying that direction than we see for implying a direction to include pastured animals or farm machinery. Here the testatrix did not devise the farm to appellants; she only bequeathed to them a sum of money, the amount of which depended upon the sale price of the farm. The case is clearly distinguishable from those wherein we have considered pure sales. The effect of appellants' position would be to make the amount of the gift to them depend upon the accident of the date of the testatrix' death or the date of sale determined by the executor.

The will, although the fact is not discussed in the briefs, appears not to have been drawn with the as-

sistance of counsel. Rules of construction useful in cases involving wills clearly drawn by attorneys are not necessarily applicable here. In any event, those rules which result in adding to, or enlarging upon, a will ought to be cautiously applied. The cardinal principle is that a court, in construing a will, should give effect to the true intent of the testator. Rules of construction are to be applied only to the extent they satisfy that principle. The principle may, as here, function to confine, as well as to direct, a court in the construction of a will.

As to the second issue, much of which has been said above is again applicable. Rules of construction which, on their face, appear to apply under the terms of the will, a special bequest takes priority over a general one, later instructions in a will take precedence over earlier ones, etc., are only generally to be followed within the principle that the result reached must justify itself as being consistent with the intent of the testator as it is discoverable. Generally then, it can be said that a specific devise of real estate takes that real estate out of a general testamentary direction for the sale of all the testatrix' real property and for the application or distribution of the proceeds of such sale.

We conclude, therefore, that the District Court was correct in its disposition of the first two issues. Upon the third issue, however, the assessment of attorneys' fees, we are persuaded that error was committed.

Assuredly there are instances, usually where additional property is brought into the estate, where attorneys' fees of a party other than the executor or administrator may properly be taxed as an expense of administration. Beyond that instance, if a party supplies services which ought to have been supplied by the executor or administrator, then, to that extent, costs or expenses incurred by the party may properly be taxed to the estate. Or if an executor or administrator violates the trust or abuses the authority of the office, then such executor or

administrator may become personally liable for resultant costs or expenses.

Generally, an executor or administrator has an obligation to make known to the court controversies which exist between the parties, and to obtain directions of the court as to his responsibilities in that regard, and no more. He is absolved of that obligation where the parties themselves present the controversy, as was done here. He may, in appropriate circumstances, adopt a position, although we suspect that such circumstances will not often be present. In this case they do not appear to have been present. What has been said carries with it the obligations, and fees, of the attorney for the executor or administrator.

A review of the record here discloses no cause or basis for the taxation to the executor of attorneys' fees for appellees' counsel and expenses incurred (other than taxable costs) by appellees in both the District Court and county court. No fund was accumulated. Appellees did, themselves, present the controversy to the court, as the executor might well have done. It does not appear, however, that appellees presented the executor with a demand, or even a suggestion, that it take the initiative. Although it may well be argued in this case that the executor, at times, abused its authority in adopting a position, it does not appear that that conduct caused, or contributed to, the attorneys' fees and expenses incurred by appellees. With the appellants taking an active and adversary position, appellees' fees and expenses are no greater than they would have been had the executor done nothing. An executor or administrator does not have an obligation to adopt and pursue, at his risk or at that of the estate, that position which may ultimately prevail in a situation reasonably subject to controversy.

The judgment of the District Court is reversed insofar as it taxes expenses and attorneys' fees incurred by appellees, other than regularly taxable court costs, to the executor. In all other respects it is affirmed. The cause

is remanded to the District Court with instructions to remand it to the county court for further proceedings in accordance herewith.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CAROL MILLER, APPELLEE, V. DARRELL MILLER, APPELLANT.

241 N. W. 2d 666

Filed May 12, 1976. No. 40340.

1. **Divorce: Parent and Child: Infants.** Minor children are entitled to stable home conditions. They are not chattels and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being.
2. ———: ———: ———. The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the rights of fit, proper, and suitable parents.
3. ———: ———: ———. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right.
4. **Divorce: Parent and Child: Infants: Judgments.** A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.

Appeal from the District Court for Antelope County: MERRITT C. WARREN, Judge. Affirmed.

H. Jeanne Thorough of Wood, Kelley, Thorough & Wolfe, for appellant.

Brogan & Stafford, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

NEWTON, J.

The issue here relates to the custody of two minor children. The parties were divorced by decree entered January 24, 1969. Custody of a son born in 1964 and a daughter in 1966 was awarded to their mother, appellee herein, and hereinafter referred to as Carol, pursuant to a stipulation. It was also stipulated that the father, appellant herein, and hereinafter referred to as Darrell, should pay $75 per month for child support. In 1972 Darrell sought custody of the children and it was again stipulated that Carol should have custody. In 1974 Carol commenced a proceeding in contempt for failure to pay child support and requesting an increase in the amount of child support. Darrell again requested a change of custody. Both applications were denied. We affirm the judgment of the District Court.

In his appeal Darrell contends that the judgment is not sustained by the evidence in several particulars; that there were errors in evidentiary rulings; and that the court erred in referring to his private file on the case.

Darrell resides with his parents on a farm. He is an artifical insemination technician and does some farming. He owns farm tracts of 120 and 33 acres subject to mortgages of about $13,000. He also owed a bank $14,000 borrowed for a pickup truck, cattle, and farm expenses, and has about 50 head of stock cattle, including calves. He has $5,000 in bonds owned jointly with the children.

Carol is a bookkeeper and accountant who also does income tax work. She worked for business firms in her local and surrounding communities. One month after the 1972 hearing in this case she married John Rossow who has three children from a previous marriage. They have purchased a steakhouse in Tilden, Nebraska, which John operates and in which Carol assists to a limited extent. She still carries on her private accounting business. After their marriage the Rossows moved to Tilden from Clearwater, Nebraska. The children finished the school

year in Clearwater. The Rossows now have a large modern home which they are purchasing. They are indebted for the home and the steakhouse. No other changes in circumstances are reflected in the record. The marriage of Carol and John Rossow was contemplated and known to the children at the time of the 1972 hearing.

The evidence reflects that the children's father is deeply interested in them and has had them about 27 percent of the time. As so aptly remarked by the trial court, "it is easier to be Santa Claus, a real fine fellow on four days a month and two months in the summer than it is to do it everyday of the week." This situation has resulted in the children expressing a desire to live with their father although both display a strong attachment to their mother. The children, at the time the hearing was held, were 11 and 9 years of age. "While the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling." Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445.

The children have been with their mother for the past 7 years and their father has twice stipulated that she should have their custody. It is apparent that Darrell has felt that they would be well cared for in their mother's custody. The present record verifies that they have been well cared for and are happy, stable, intelligent, and normal children. There is nothing in this record to indicate any abuse or lack of care for the welfare and interests of the children. Minor children are entitled to stable home conditions. They are not chattels and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being. See Goodman v. Goodman, *supra*: "The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of

the child, with due regard for the superior rights of fit, proper, and suitable parents. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right."

It is also the rule that: "A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children." Youngberg v. Youngberg, 193 Neb. 394, 227 N. W. 2d 396.

In the present instance there has not been a change of circumstances such that a change in custody is required in the best interests of the children nor does the record reveal that Carol has become an unfit mother.

Darrell assigns as error certain restrictions on cross-examination and in the introduction of evidence as well as reference by the court to notes made at previous hearings. We find these assignments to be without merit.

The judgment of the District Court is affirmed and appellee's attorney is allowed a fee of $500 for his services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN F. ADEN, APPELLANT.
241 N. W. 2d 669

Filed May 12, 1976. No. 40367.

1. **Searches and Seizures: Probable Cause: Criminal Law.** Probable cause to justify search and seizure without a warrant exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

2. ———: ———: ———. It is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts. However, in that case there must have been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

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

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

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

CLINTON, J.

The defendant, John F. Aden, was charged with the possession of a controlled substance, to wit, marijuana, with intent to deliver. The defendant pled not guilty, waived a trial by jury, and submitted to a trial before the District Judge upon a stipulation as to what the State's testimony would be if witnesses were called. The stipulation preserved objection to the competency of the testimony. The foundation for the objection was that the evidence was obtained as a result of an unlawful arrest and search and seizure of the defendant and his motor vehicle in violation of the Fourth Amendment to the Constitution of the United States and Article I, section 7, of the Nebraska Constitution. The stipulation also provided that in ruling at trial upon the objection to the evidence offered by the State, the court could consider the record of the testimony at an earlier hearing on a motion to suppress made upon the same and other grounds.

The defendant was found guilty and fined the sum of $500. He now appeals to this court and the sole issue

before us whether the objection should have been sustained because the evidence admitted was seized in violation of the defendant's constitutional right to be "secure" in his person "and effects against unreasonable searches and seizures," and must therefore be suppressed under the exclusionary rule of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933; and Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726. We reverse and remand.

The stipulation was to the effect that if the State produced witnesses they would testify as follows: That on March 4, 1974, Lancaster County deputy sheriff Harry Stewart stopped, without search or arrest warrant, a blue 1974 pickup with camper shell at a certain location on a public highway in rural Lancaster County; that the defendant Aden was the driver of the vehicle and was the registered owner thereof; that after stopping the vehicle the officer, without warrant, forcibly entered the locked camper shell and found, among other items not relevant or material, "several brown paper grocery bags"; that within two of these bags were found a total of six individually wrapped packages of vegetable material; and that if a certain state chemist were called he would testify that he was a qualified chemist for the State of Nebraska, that he had analyzed samples of the vegetable material previously mentioned, that in his opinion the material was Cannabis Sativa L, and that it weighed approximately 12 pounds. The remainder of the stipulation we set forth verbatim: "IT IS FURTHER STIPULATED that for purposes of the trial of this matter, defendant objects to the introduction of any evidence or testimony on behalf of plaintiff which relates to information obtained or evidence seized pursuant to the stopping of said 1974 Ford pickup on March 4, 1974, and renews his motion to suppress the same as evidence for the alleged reasons that both the seizure of said vehicle and its occupants, and the subsequent search of said vehicle and seizure of evidence

was made without probable cause and therefore violated defendant's right to be free from unreasonable searches and seizures of as guaranteed to him by the Fourth Amendment to the Constitution of the United States of America.

"FURTHER, it is stipulated that the transcript of the suppression hearings together with the exhibits received at said hearings held in this cause on the 8th day of January, 1975, and the 5th day of February, 1975, now a part of the record in this cause, may be considered by the Court in ruling upon the foregoing objection and motion made by defendant."

Under this state of the record the sole question before us is whether the record establishes that there was probable cause to justify the search and seizure without warrant. We first state the applicable rules of law. Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595; State v. Dussault, 193 Neb. 122, 225 N. W. 2d 558; Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790. It is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts. However, in that case there must have been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure. United States v. Wixom, 460 F. 2d 206; United States v. Canieso, 470 F. 2d 1224; United States v. Nieto, 510 F. 2d 1118; United States v. Del Porte, 357 F. Supp. 969, affirmed 483 F. 2d 1399.

At the suppression hearing the State introduced no evidence. The defendant called two witnesses, a passen-

ger in the pickup at the time it was detained by the police and an officer involved in the subsequent search and seizure.

The passenger witness testified as follows: That he, Aden, and another companion were driving to the rural home of a friend, one Douglas Torrence; that as they approached the residence of the friend on a public road they noted several sheriff's department vehicles in the farmyard. Seeing this they slowed down and continued on at slow speed, about 20 miles per hour. They encountered another sheriff's vehicle which put a spotlight on the pickup. Aden then stopped his pickup. In a short time a person (apparently deputy Stewart) and at least one other officer approached the pickup. They asked the defendant and his companions for identification. This they furnished. They were also told to empty their pockets and place the contents on the truck. This they did. The identifications were in order and no contraband was found. They were not at that time formally told that they were under arrest, but they were told they could not leave. About 20 minutes later one of the officers forced open the rear door of the locked camper shell. No consent for the entry was given by the defendant or his companions. The officer had first asked for a key to the camper. The defendant told him that he had no key. Before making entry the officer looked into the camper with the aid of a flashlight. After the officer forced open the camper and made some examination of material therein, the occupants of the car, including the defendant, were told they were under arrest. The witness testified that he had no knowledge of marijuana being in the camper.

Deputy Cox testified that he and deputy Stewart were in charge of the police operation at the Torrence farm. His testimony generally confirmed that of the previous witness. In addition he stated that after the pickup was stopped, the officers checked, apparently by radio, to see if there were any arrest warrants for the occupants of

the truck and they determined that there were none. Neither he nor any of the other officers knew the defendant or his companions nor had any information about them. He stated that the occupants were patted down and nothing was found. He did not know whether the cab of the truck had been searched. Deputy Cox further testified that he was not one of the officers who made the initial stop of the vehicle. Twenty minutes elapsed before the occupants of the pickup truck were placed under arrest. As to grounds for the search he testified: "Well, the circumstances of the parties arriving at this location that we were conducting a search warrant on; the information that we prior had that there was involved in this same series of transactions, drug transactions, with the occupants of the residence involved a pickup truck from Omaha; the fact that there was a large dog in the back of this truck, and the Defendant and the other occupants claimed that they had no way of getting the dog out, and when we inquired about how they were going to let the dog out to relieve himself, they said they just planned on letting him wait until they got back to Omaha; the fact that we could see in the back of the truck under the camper shell grocery sacks that contained or appeared to contain rectangular objects; and just the general demeanor of the subjects." Deputy Cox also stated that he was the officer who, prior to breaking into the truck, wiped some of the dirt from the window of the camper after which he looked in with a flashlight and observed the contents of the camper. Those included sleeping bags, a large dog, camping equipment, and two or three brown paper sacks. Near the top of one of the sacks he saw a very small portion of some plastic or opaque material. He thought he could detect through the sides of the sack a rectangular shape and with reference thereto he later said: "There is nothing distinctive about it that would make it necessarily a brick of marijuana more than anything else." He further stated that in

his experience vans and campers, more than other vehicles, are used to transport controlled substances.

In support of its claim that the evidence shows probable cause for the search, the State relies upon Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889; Carroll v. United States, *supra*; and State v. Romonto, 190 Neb. 825, 212 N. W. 2d 641. None of the cited authorities support the State's position and we can find none that do. Terry v. Ohio, *supra,* authorizes a limited search in the form of a patdown to determine whether a person whose actions are suspect is armed. This limited search is for the purpose of the officer's protection in a "stop and frisk" situation. In such a case when arms are found, then, of course, an arrest is warranted. That case goes no further. When, in the case now before us, the officers completed their patdown, they had no more information than that with which they had started, namely, a mere suspicion. Carroll v. United States, *supra,* was the first case in which the United States Supreme Court had occasion to consider the search of a motor vehicle. It held that, because of the mobility of a motor vehicle, no warrant was required if the officers had probable cause to search. The court said: "It would be intolerable and unreasonable if a[n] . . . agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. . . . The meas-

ure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . therein which is being illegally transported." In Carroll, the officers knew or had convincing evidence that the Carroll brothers, suspected of transporting illegal liquor, were bootleggers and were plying that trade in Grand Rapids, Michigan. They also had information indicating that the source of the illegal liquor supply was in Detroit which was 152 miles from Grand Rapids. The officers also knew that the car in question (the year was prior to 1923) was traveling from Detroit to Grand Rapids and, as stated in the opinion of the court: "The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers which was thus identified as part of the firm equipment." The court held there was probable cause.

State v. Romonto, *supra,* was a "plain sight" doctrine case. The auto in that case was stopped for driver's license and registration check and because one of the license plates was not visible. During this check the officer saw on the front seat of the car a brown ball which from experience he believed to be "temple ball hashish." The officer then requested and received permission to examine and search a jacket which was on the seat of the car. He found therein two odd pipes which had been used for smoking marijuana. There was also a strong odor of marijuana in the car. We held there was probable cause.

What does the record here show as to claimed facts and circumstances within the officers' knowledge or of which they had reasonable trustworthy information which would justify a man of reasonable caution in the belief that an offense had been or was being committed?

The first claimed circumstance was the arrival of the pickup truck in the proximity of the location at which

the officers were conducting a search. The record is devoid of any information as to what, if anything, the officers found in their search of the Torrence residence for which they had a warrant; there is nothing in the record, as for example the affidavit on which the warrant was issued, to show probable cause for that particular search; and there is nothing whatever to show that there were any illegal controlled substance activities being carried on at the premises. A couple of illustrations may make our point. If a person seeks entry at a bootlegging establishment, it is, no doubt, some ground for believing he may be there to patronize the bootlegger, or perhaps to make a wholesale delivery. If a person seeks entry to a house of prostitution, it may be reasonable to infer that, depending upon sex, the person is either a patron or an inmate. However, before such inferences have any foundation, it first must be shown by some evidence what the nature of the establishment is. In the record here there is no factual information whatever to show that any illegal activities, drug or otherwise, were being carried on at the farmstead and that the officers had knowledge thereof. Presumably the State introduced no such information because it had none.

The next matter for consideration in determining whether there was probable cause to stop and search the pickup is the statement by deputy Cox to the effect he had information that a pickup truck from Omaha was involved in some unspecified drug operations. No source, reliable or otherwise, is given for this claim of knowledge. The next item is the fact that Aden stated he had no key to the camper and that the dog would have to stay in the camper until they returned to Omaha. What these facts show is at most a refusal to permit a search. If a refusal, for whatever reason, to permit search constitutes reasonable ground for search, then it is plain enough that we write off the Fourth Amendment to the Constitution of the United States and the

comparable provisions of our own Consitution. Next, even if we assume that wiping the camper window and looking in the camper with the use of a flashlight and seeing grocery sacks with some ill-defined rectangular shape therein comes within the perview of the plain view doctrine, we still have no fact which supports a warrantless search. The officer himself said about the shape: "There is nothing distinctive about it that would make it necessarily a brick of marijuana more than anything else." The same may be said for the fact that he saw some brown plastic near the top of the sack.

Next is the claim of the officer that vans and campers are used more than other vehicles for transportation of controlled substances. This may be true, but it is also true that there are tens of thousands of such vehicles that are not used for such purposes. We can hardly say that each and every camper van may be searched. There is no way we can remove the owners and operators of all such vehicles from the protection of the Fourth Amendment. The nature of the vehicle alone surely is not enough, if, in fact, it is at all significant.

The record of information known to the officers in this case does not meet the probable cause requirements of the Constitutions of the United States and of this state. The evidence should have been suppressed.

REVERSED AND REMANDED.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, A CORPORATION, APPELLANT, V. PETER KIEWIT SONS' CO., A CORPORATION, ET AL., APPELLEES.

241 N. W. 2d 674

Filed May 12, 1976. No. 40370.

1. **Insurance: Pleadings: Actions.** An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured.

2. **Insurance: Contracts: Indemnity.** In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at the time of making the contract.
3. **Judgments: Estoppel: Actions.** The estoppel created by the first judgment may not be extended beyond the issues necessarily determined by it. Where it does not appear that evidence showing the liability of the third person was necessarily involved in the determination of the original action and passed upon by the court in rendering judgment, such judgment is not conclusive as to the liability of the defendant in the second action to the defendant in the first action.
4. **Judgments: Issue Preclusion.** The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly.
5. **Judgments: Time.** A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. The exercise of the authority is a matter of legal discretion.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

David A. Johnson and Ronald H. Stave of Emil F. Sodoro Law Offices, for appellant.

T. J. Stouffer of Cassem, Tierney, Adams & Gotch, for appellees.

Heard before SPENCER, BOSLAUGH, and MCCOWN, JJ., and COLWELL and KELLY, District Judges.

COLWELL, District Judge.

This is a suit for damages, costs, and attorneys' fees for breach of a construction contract, indemnity agreements, and contract of insurance. Trial was had to the court, judgment was first entered for plaintiff, Woodmen of the World Life Insurance Society, a corporation, hereafter called WOW against defendant Peter Kiewit Sons' Company, a corporation, hereafter called Kiewit, for $74,607.75. That judgment was vacated by the trial

court, and judgment entered in favor of Kiewit and defendant Aetna Casualty & Surety Company, hereafter called Aetna, against plaintiff. Plaintiff appeals. We affirm.

This case is a sequel to Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc., 189 Neb. 30, 199 N. W. 2d 729 (1972), hereafter referred to as the "prior case."

On August 24, 1966, WOW contracted with Kiewit in accordance with architectural specifications and drawings for the construction of a 30-story office building and adjacent utility tunnel in downtown Omaha. Included was a special condition: "The Contractor shall procure for the Owner and Contractor through insurance carriers approved by the Owner and shall deliver the same to the Architect policies for workmen's compensation insurance in amounts as required by law and shall procure, through approved insurance carriers, public liability and property damage insurance insuring the Owner and Contractor * * * for bodily injury or death * * * and * * * property damage. * * * The contractor shall furnish such other insurance as is deemed necessary by the Owner through the Architect. Copies of all such policies shall be delivered to the Owner. The Contractor agrees to *save and hold the Owner harmless from and against all suits, claims, and demands based upon any property damage or alleged* injury to persons (including death) which *may occur or be alleged to have occurred by or on account of any act or omission on the part of the said Contractor, its subcontractors, or any of their servants or agents.* The Contractor shall maintain watchmen, all lights, guards, temporary passages, and all other safety devices and provisions necessary to safely carry on the work, protect the property, and meet the requirements of city or other governmental regulations." (Emphasis supplied.)

For the intended purpose to reduce construction costs the same parties renegotiated the contract on April 13,

1967, by executing a management contract (cost plus basis) which included the following: "16. *Insurance.* The contractor shall insure his operations by procuring and maintaining policies of workmen's compensation, employer's liability and general liability insurance, including any liability arising from the operation of any motor vehicles and any contractual assumption of liability. The workmen's compensation policy shall provide full statutory benefits. The liability policies shall contain those limits normally carried by the Contractor * * *. The owner and his authorized representative shall be additional named insureds under these policies. * * * 18. *Indemnification.* The Contractor agrees to save and hold the Owner and any authorized representative designated in accordance with the provisions of paragraph 2 (b) *harmless from and against all suits, claims, and demands based upon any alleged damage to property or upon any alleged* injury to persons (including death) *which may occur or be alleged to have occurred by or on account of any act or omission on the part of said Contractor, its subcontractors, or any of their servants or agents.* The Contractor shall maintain watchmen, all lights, guards, temporary passages, and all other safety devices and provisions necessary to safely carry on the work, protect the property, and meet the requirements of city or other governmental regulations." (Emphasis supplied.)

Prior to August 24, 1966, WOW had contracted with Omaha Public Power District, hereafter called OPPD, and Northwestern Bell Telephone Company, hereafter called Bell, for the use of a utility tunnel for the storage and maintenance of wires, conduits, and transmission equipment, the contract included an indemnity agreement which was the subject of the "prior case," and is not set out here. No notice of this contract and indemnity was given to either defendant.

As required in the contract Kiewit obtained from Aetna a comprehensive and automobile liability policy cov-

ering Kiewit and several of its listed subsidiaries as additional insureds. The policy was limited to the area of the contract construction. Endorsed thereon, "It is further agreed that the following are additional named insureds as respects the above job only: Woodmen of the World Life Insurance Society and Carl A. Morse, Inc." Thereafter Aetna issued to plaintiff a certificate of insurance. "This policy has been endorsed to provide: 1. Coverage for any liability which Peter Kiewit Sons' Co. has assumed by contract. 2. Insofar as work under this contract is concerned, Woodmen of the World Life Insurance Society is an additional insured."

During construction on May 7, 1968, a fire occurred in the tunnel causing damage to the property of OPPD and Bell, which was the basis for the judgment in the "prior case." That judgment was paid by WOW and it now brings suit to recover for that judgment, attorneys' fees, and costs incurred in its defense and for attorneys' fees from defendant Aetna pursuant to section 44-359, R. R. S. 1943.

In substance, plaintiff's petition alleges two causes of action: (1) A claim against Kiewit based on the contracts and indemnity agreements to recover for the fire loss that it paid in the "prior case," that Kiewit had a duty to defend, hold harmless, and indemnify, and it was liable for that judgment and accrued costs in the total sum of $86,682.29. (2) Plaintiff was an additional insured with Kiewit; and that Aetna had a duty to defend in the "prior case" and is liable for that judgment and costs. There are no allegations of an act or omission of Kiewit as cause of loss. Plaintiff prays for recovery of the judgment as paid in the "prior case," costs, attorneys' fees, and for additional attorneys' fees from Aetna pursuant to section 44-359, R. R. S. 1943.

At the conclusion of the evidence, defendants moved to dismiss for failure of proof, and they renewed demurrers previously made.

On July 7, 1975, judgment was entered for plaintiff

against Kiewit for $74,607.75. Kiewit filed a motion, couched in the language of section 25-1315.02, R. R. S. 1943, for judgment notwithstanding the court's judgment, and in accordance with its prior motions to dismiss. Plaintiff filed a motion for new trial. On September 2, 1975, judgment was entered by the trial court denying plaintiff's motion for new trial, vacating its judgment of July 7, 1975, and entering judgment for both defendants against plaintiff. Plaintiff appeals.

Plaintiff contends that the court was without authority to set aside its original judgment, claiming that defendant Kiewit's motion was improper in a jury-waived case for the reason that its procedure was a motion for new trial.

Section 25-1142, R. R. S. 1943, provides in part: "A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court."

Section 25-1128, R. R. S. 1943, provides: "The provisions of this Chapter respecting trials by jury, apply, so far as they are in their nature applicable, to trials by the court."

Section 25-1315.02, R. R. S. 1943, is a special statute intended to save time and expense in jury trial situations. The trial court considers the record made on the trial and decides as a matter of law whether the evidence already in the record justifies the submission of the case to the jury, or whether the court on the trial should have sustained a motion for a directed verdict. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533.

"A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. * * * The exercise of the authority * * * is a matter of legal discretion." County of Scotts Bluff v. Bristol, 159 Neb. 634, 68 N. W. 2d 197. See, also, Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197.

The judgment entered September 2, 1975, was entered during the same term of court as the original judgment; the court made a finding that at the time the original judgment was entered, it misunderstood plaintiff's theory of the case and it also considered evidence which was not a part of the record, further, that justice required the original judgment be set aside.

Without deciding the posture of defendant Kiewit's motions, we hold that the trial court acted within its inherent authority to vacate its own judgment, and there was no abuse of its discretion and authority.

The main issues in this case are threefold: (1) Were defendants obligated to defend in the "prior case," (2) were they precluded from defending and raising the issue of Kiewit's liability under its agreements with WOW, and (3) were they bound by the findings, decision, and judgment in the "prior case"? We consider them together.

The record reveals that before trial of that case both defendants had been put on notice of the pendency and substance of the case, together with a request that they defend and they were granted full power to direct the defense. Both defendants declined to defend.

Plaintiff contends that the terms of the contracts, indemnity agreements, and the insurance contracts required the defendants to defend in the "prior case," and in addition they were required to defend by reason of the following allegations contained in Bell's petition: "A. By failing to construct, provide and maintain an enclosed, reinforced concrete tunnel to house the plaintiff's and A. T. & T.'s telephone facilities; B. By failing to provide adequate protection to plaintiff's and A. T. & T.'s telephone facilities."

"An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured." Hartford Acc. & Ind. Co. v. Olson Bros., Inc., 187 Neb. 179, 188 N. W. 2d 699.

"In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at the time of making the contract." Currency Services, Inc. v. Passer, 178 Neb. 286, 133 N. W. 2d 19. See, also, 41 Am. Jur. 2d, Indemnity, § 13, p. 697.

"The estoppel created by the first judgment may not be extended beyond the issues necessarily determined by it. Where it does not appear that evidence showing the liability of the third person was necessarily involved in the determination of the original action and passed upon by the court in rendering judgment, such judgment is not conclusive as to the liability of the defendant in the second action to the defendant in the first action; it is not conclusive as to the issue whether the relation or obligation exists which gives a remedy over, or whether the injury was caused by a wrongful act for which the defendant in the second action is primarily liable. The judgment will not preclude the party responsible over from setting up any defenses which, from the nature of the action or the pleadings, he could not have interposed in the first action had he been a formal party to it." 46 Am. Jur. 2d, Judgments, § 561, p. 723. See, also, City of Lincoln v. First Nat. Bank of Lincoln, 67 Neb. 401, 93 N. W. 698; State ex rel. Weasmer v. Manpower of Omaha, 163 Neb. 529, 80 N. W. 2d 580.

Plaintiff urges the application of the rule in Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N. W. 2d 471: "Where a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit against the person to whom he is liable over, and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud, collusion, or bad faith, will be conclusive against him, whether he appeared or not." This

general rule has limitations as discussed in Barber-Greene Co. v. Bruning Co., 357 F. 2d 31 (Neb., 1966). In that case Bruning manufactured a coupling for Barber-Greene that was included as a part in an asphalt machine that it manufactured. In the use of that machine one Grace was injured. Grace sued Barber-Greene alleging negligent and careless design, manufacture, and construction of the machine. The allegations were not directed to the Bruning coupling alone. Bruning refused to defend, although due notice was given. Barber-Greene sued to recover for the judgment it paid Grace. The court held: "Bruning thus was placed in a position where demand was made upon it to defend the Grace action on the broadest possible base and one not at all restricted to the area of its coupling responsibility. * * * Under these circumstances, Bruning had no obligation to defend the * * * action and is free to defend itself in the indemnity action against any claim of negligence on its part."

"The doctrine of issue preclusion or collateral estoppel recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly." Vincent v. Peter Pan Bakers, Inc., 182 Neb. 206, 153 N. W. 2d 849.

The trial court found and we agree that the contracts and indemnity agreements between WOW and Kiewit and the contract of insurance issued by Aetna limited the obligation of the defendants to defend only had there been some allegation of some act or omission on the part of, or attributable to, Kiewit causing the damage complained of, and the agreements between plaintiff and defendants were not so broad as to require defendants to defend in the "prior case." Defendants were not precluded from defending on the issue of Kiewit's denial of liability.

Plaintiff claims that defendants were bound by the findings of fact and judgment in the "prior case," on the theory that the second contract between WOW and Kie-

wit included a right of indemnity regardless of who or what caused the fire. Plaintiff places emphasis on that part of this court's decision in the "prior case": "The fire was extensively investigated and the probable cause as testified to by the investigators was a spark from a cutting torch which dropped through the openings at the top of the tunnel or the dropping of a lighted cigarette or cigar at the point of the fire. The evidence discloses no other possible cause or causes." That part of the decision reflects only the record there before the court, and it does not relate to an act or omission of Kiewit. That decision was not properly before the trial court as it so found in its final judgment.

"When a law action is tried without a jury to the court, the findings of the court have the effect of a verdict of a jury, and the judgment thereon will not be disturbed unless clearly wrong." Mathiesen v. Bloomfield, 184 Neb. 873, 173 N. W. 2d 29.

The trial court could find from the evidence, the record, and after examining the contracts, indemnity agreements, and contracts of insurance, that the plaintiff had a cause of action and right of indemnity from Kiewit against loss and damage that occurred or was alleged to have occurred by, or on account of, any act or omission of Kiewit, its subcontractors, agents, or servants; further that the precise question of Kiewit's liability was neither raised or determined in the "prior case," that the same evidence would not sustain the two suits; and that there was no proof that the fire and resultant damage to the utilities was caused by an act or omission of Kiewit in violation of its contract and indemnity agreement.

This case then is reduced to the proposition that plaintiff failed to either allege or prove a cause of action against either defendant. We cannot say that the judgment dismissing plaintiff's petition was clearly wrong.

AFFIRMED.

YOUNKER BROTHERS, INC., APPELLEE, V. WESTROADS, INC., APPELLANT.

241 N. W. 2d 679

Filed May 12, 1976. No. 40373.

1. **Contracts.** A cardinal principle of construction of written instruments is that an interpretation shall be made which will reflect the true intention of the parties.
2. **Contracts: Evidence.** In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

John W. Delehant of Delehant, Croker & Huck, for appellant.

Joseph Polack of Morsman, Fike, Davis & Polack, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

CLINTON, J.

This action, insofar as is pertinent on the appeal to this court, is for a declaratory judgment to construe certain provisions of a shopping center lease defining the obligations of the tenant-appellee, Younker Brothers, Inc., to pay to landlord-appellant, Westroads, Inc., the costs of heating, ventilating, and air conditioning the "demised premises," and the tenant's pro rata share of the same costs for the "common areas," such as an enclosed mall. The costs above mentioned will hereafter be referred to as HVAC and, where necessary to distinguish between those applicable to the demised premises and those applicable to common areas, will be modified by the terms "in-store" and "common area," re-

spectively. The specific question involved here is whether, under the terms of the lease, there was to be included in the HVAC costs or charges elements for depreciation of a central heating and air conditioning plant and for interest on the equity or borrowed capital invested in that central plant. The trial court found that these elements were not includable. Westroads, Inc., appeals. We affirm.

The lease in question was executed by the parties on May 20, 1963. At that time the shopping center had not been constructed and the plans for it had not yet been developed. The lessor, Westroads, Inc., had previously been incorporated by John A. Wiebe for the purpose of developing the shopping center. Pursuant to solicitation by Wiebe, Younkers became a party to the financing of the center by lending the equity capital and also became a key tenant by execution of the lease.

Among many other detailed provisions, the lease covered the following: It demised "A completed store unit having at least one hundred fifty thousand (150,000) gross square feet to be constructed by Landlord at Landlord's cost and expense as hereinafter provided in the location designated 'K' on the leasing plans . . . attached to this lease and made a part hereof." It provided that the store unit "hereinafter referred to as the 'demised premises' is to be part of a shopping center development to be known as WESTROADS." The lease, of course, prescribed the term of the lease, the rent to be paid, and a means for determining the beginning of the term. It also provided that the landlord would construct parking, drives, walking, and service areas.

The lease contained the following provisions relating to common area HVAC: "6. Common areas shall be operated and maintained as follows: . . . ." It then defined common areas in general terms and provided: "As used herein 'common area costs' shall refer to the actual and reasonable cost of operating and maintaining the common areas as hereinafter more particularly pro-

vided." It further provided that, unless relieved under paragraph (F), the landlord should be responsible for operating and maintaining the common areas "subject to payment by Tenant (in addition to rent) of a proportionate share of the common area costs. Tenant's proportionate share of these costs shall be based on the relation that the total floor area of Tenant's store unit bears to the total rented floor area of all buildings in the shopping center. Tenant shall pay its proportionate share of common area costs within thirty days after receiving a statement thereof certified by Landlord to be true and correct but Landlord shall not render such statements to Tenant more often than once a month." The lease then went on to describe in specific and general terms common area costs, and specified certain exclusions therefrom. It then contained an exclusion from the exclusions as follows: ". . . provided that this subparagraph (3) shall not apply with respect to heating or cooling of nonrentable mall space should the shopping center common area include a mall." It also provided: "(E) Notwithstanding the foregoing, responsibility for operation and maintenance of common areas shall be solely that of Landlord (or of the merchants association should an agreement be reached as permitted under paragraph (F) below) and neither Tenant's agreement to contribute to the cost thereof, as hereinbefore provided in this section, nor any other provision of this lease shall be construed to constitute Tenant as in any way a principal, agent, partner or joint venturer in connection with the operation or maintenance of the common areas.

"(F) A merchants association, if formed, shall have the option to take over the operation of the common areas of the shopping center and relieve Landlord of responsibility therefor if and when such association submits to Landlord an enforceable agreement for a term of not less than five years between the merchants association and the individual tenants in said shopping center adequate, in the opinions of Landlord and Ten-

ant, to enforce collection of the expenses of the operation thereof."

Provisions related to in-store HVAC were as follows: "15. Landlord shall furnish necessary mains and conduits, as set forth in the Plans, in order that hot and cold water, electricity, gas, telephone service and heat may be furnished to the demised premises. Tenant shall pay for all water, electricity, gas, telephone, and heat used in the demised premises. Although Landlord shall provide the air conditioning equipment specified in the Plans, Tenant shall pay for this service on a time clock or metered basis."

Section 13 of the lease defined the respective duties of the landlord and tenant with respect to repairs and maintenance of the "demised premises." We will note details of this provision as necessary later in the opinion.

Incorporated in the lease were certain schedules. In one of these, under the subheading of "Basic Building," was included the following: "6. The following utilities will be installed and measured or metered to the individual tenants: (a) Heat. (b) Electric current. (c) Cold water. (d) Air conditioning." In another incorporated schedule, under the heading "Interior Work," was the following: "5. Air Conditioning: (a) A system to suit the normal operation requirements of Tenant shall be provided." Then under subsection (b) were described certain performance criteria which the air conditioning system must meet.

The lease provided that the landlord should from time to time consult with the tenant as to details of construction as they affected suitability of the building for tenant's use, that working drawings would be submitted for suggestions by the tenant, and that careful consideration should be given to the tenant's suggestions. The paragraph containing these provisions also provided: "All said construction shall be solely at Landlord's cost and expense, except only as in said schedules Tenant specifically assumes responsibility for some expense; it

being intended that, except for items as to which Tenant so specifically assumes responsibility, Landlord shall deliver a 'turn key' building job ready for occupancy and use by Tenant without expense to Tenant with respect to building."

Plans were presented to the tenant and approved by it on March 16, 1967, by letter in the following form: "In the original lease between Westroads, Inc., Landlord, and Younker Brothers, Inc., Tenant, dated May 20, 1963, on page 3 it is stated:

" 'All said construction shall be at Landlord's cost and expense, except only as in said schedules Tenant specifically assumes responsibility for some expense; it being intended that, except for items to which Tenant so specifically assumes responsibility, Landlord shall deliver a 'turn key' building job ready for occupancy and use by Tenant with respect to building.'

"As plans were developed, certain items of expense were specifically assumed by Tenant such as changes in air conditioning due to including a Beauty Salon in the Kilpatrick store, and increasing the width of the escalators. In addition, some expense relating to electrical work was also agreed to by Tenant. We are assuming that all items where there were changes from the original plans have now been resolved.

"Therefore, we are approving the building plans for Kilpatrick's at Westroads on the condition that Kilpatrick's will not pay for any items of building improvements or construction other than those to which we have already agreed."

The plans which were approved indicated that heat and air conditioning were to be provided by fan-coil units. One familiar with such matters would know that such units are not self-contained and that to be usable a central plant of some kind would be required to heat and chill water and to pump the water through the systems in their respective pipes and coils. No central plant was shown on the plans of the demised premises.

When the first bill for HVAC costs was submitted by Westroads to Younkers for payment on April 11, 1968, it included depreciation and interest on the central energy plant which had been constructed. Later, on July 3, 1968, the elements of cost were specifically broken down on a schedule furnished to Younkers. Younkers refused to pay the parts of cost attributable to depreciation and interest and that issue became part of the present litigation.

The parties have presented their positions to this court in concise and lucid briefs and we state their respective positions in part by quoting therefrom. Westroads, Inc., states: "Schedule III (3) and (5) of the lease require that the heating, ventilating and cooling system (HVAC herein) should, when energized, be capable of meeting certain performance specifications. Westroads could have satisfied those specs by installing package furnaces and coolers wholly in-house. These package units would be energized by gas and electricity, in which case Younkers would have paid the full costs of energy to the local utility companies. Included in these gas and electric rates are charges for depreciation and return on invested capital (or interest). In addition, Younkers would have been obliged to repair and replace these package units which have an average useful life of only six years.

"Instead of the in-store package units, Westroads installed eleven fan coil heating and cooling units in the Younkers space. Each fan coil unit has a large fan which is energized by electricity, and each unit also has two large coils, one energized by hot water and the other by cold water to produce heating or cooling instantly upon thermostat demand. Younkers purchases the electric energy to run the fans from Omaha Public Power District and thus pays OPPD a rate which includes depreciation of OPPD's central plant and interest or return on capital. Younkers purchases the hot and cold energy (i.e. the heated and chilled water) from the

Westroads central utility plant but refuses to pay a rate which includes the expenses of depreciation and interest or return on the capital invested in the central plant. And that is the nub of this law suit."

It concludes that, since all the expert witnesses testified that in determining cost of utility service "depreciation and interest" are included, therefore the undisputed evidence requires that Westroads' position be adopted. In effect it argues that, since the lease does not specifically provide how cost is to be determined, a reasonable rate is to be paid and that undisputably includes depreciation and interest.

Younkers, on the other hand, argues: "Westroads specifically undertook to provide, at its sole cost and expense, the very items of heating and air conditioning equipment for which it now seeks to be repaid, under the guise of 'depreciation and interest.'" It points to the various lease provisions that we have previously quoted or summarized, in particular that part which provides: "All said construction shall be solely at Landlord's cost and expense, excepting only as" the tenant has assumed responsibility, and "Landlord shall deliver a 'turn key' building job ready for occupancy and use by Tenant without expense to Tenant with respect to building."

The principal question before us is one of law in construing the lease to determine from all its pertinent provisions the intention of the parties with reference to the disputed issue. The only important conflict in the evidence relates to the extent to which the parties had, subsequent to execution of the lease, discussed the components to be included in the utility costs. On that matter we accept what would seem to be the apparent findings of the trial court. The applicable rules of law we must consider are these: A cardinal principle of construction of written instruments is that an interpretation shall be made which will reflect the true intention of the parties. Ely Constr. Co. v. S & S Corp., 184 Neb.

59, 165 N. W. 2d 562. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. McBride v. Fort Kearney Hotel, Inc., 185 Neb. 518, 176 N. W. 2d 911.

Both parties seem to argue that the lease is perfectly clear and that these clear provisions support their respective positions. Yet, Westroads, Inc., relying upon a utility rate analogy, introduced parol evidence for the purpose of showing that the undefined term "actual cost of operating" as commonly understood includes depreciation and return on investment. Younkers argues that even if the lease is ambiguous it must be interpreted in accordance with the provisions of section 25-1217, R. R. S. 1943, which provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it," and to make the rules applicable relies upon the history of the negotiations between the parties.

We believe the lease is somewhat ambiguous in the following respects: (1) The elements of the cost in question are not precisely defined in the lease. (2) A latent ambiguity arises when one seeks to apply the concept of "demised premises," i.e., 150,000 square feet of store area, to include HVAC equipment which is partly within and partly without the store area. This is a condition for which the parties did not specifically provide when the lease was drafted.

That the lease requires the landlord to furnish at its cost the HVAC equipment is perfectly clear. It leaves to the discretion of the landlord the particular type of equipment to be furnished so long as it meets the performance criteria prescribed in the lease. The fan-coil units which the landlord elected to install in the demised

premises are not self-contained and complete equipment, that is, they will not function merely by application of an energy source. In order for them to function there must also exist the water heating and chilling equipment and the pumps and appurtenances which circulate and control the flow of hot and cold water. Under the provisions of section 13 of the lease it would appear that the tenant is required, after the expiration of the warranty period, to repair and replace HVAC equipment as necessary. We conclude that under the terms of the lease the portion of the central plant serving the functions above described is part of the HVAC equipment to be furnished at the landlord's cost. With these preliminary observations and conclusions we adopt as our own the analysis of the trial court as set forth in its findings.

The trial judge found as follows: "When the lease was drawn, no final decision had yet been made as to whether or not the HVAC equipment would be installed 'in-house' or in a central plant, or in some combination, nor had any final decision yet been made as to whether or not the building would contain a mall. Those matters were subject to the discretion of the defendant, so long as it met, with regard to HVAC, the in-house specifications of the lease, and so long as the result conformed to the provisions of the lease with regard to assessment and amount of costs, and most particularly paragraph 1 of the lease.

"As the defendant points out, it had an option to install all HVAC equipment in-house, and had it done so, plaintiff would then have been financially responsible for the cost of energy to operate such a system as well as the cost of operating expenses, repair, maintenance, and necessary replacement of operating units within such a system (subject only to the one-year guarantee provision). In such a situation, however, it is clear that defendant could not have recovered back from plaintiff, by metering or measuring, its cost of acquiring the nec-

essary equipment or any additional building costs incurred as a result of the placement of such equipment. And it is even more clear, in light of the lease language 'solely at its cost and expense' that the defendant would not then have been entitled to recover back interest charges incurred by it in connection with the installation of such in-house equipment. Defendant did not have an option of paying cash, or financing and recovering back its financing expense.

"The foregoing discussion appears, on its face at least, to be pointless since the defendant did, in fact, ultimately install a central plant system. (It is noteworthy here to consider that, while a central plant is of substantially greater utility, the defendant was, in reaching this decision, concerned with its relationships with other existing or future tenants.) It is not pointless, however, in view of the provisions of paragraph 1 of the lease which provide that: (a) the basic building should provide for heat and air conditioning, (b) that that heat and air conditioning should meet certain standards, (c) that substantial variations from the standards and specifications should be subject to plaintiff's written approval, (d) that plaintiff's authority to recommend was limited by a prohibition against materially increased structure costs, (e) that the cost and expense of providing in-house HVAC equipment was to be solely that of the defendant except only as the plaintiff might assume some expense (as it did with regard to the sprinkler equipment), and (f) that subject to that exception the premises should ultimately be delivered to plaintiff without expense for building.

"It must be kept in mind that the relationship involved herein is that of landlord and tenant, with the furnishing of HVAC by defendant being only incidental to that relationship. It is generally to be expected that a landlord will recover its costs and obtain its profits from the rent received, whereas a utility will recover them from the rate charged. The phrase 'on a time clock or metered

basis' in paragraph 15 of the lease lends nothing to the solution of assistance to defendant, for a time clock or meter provides only a measure of the volume of operation, any variance being in the rate to be applied. Defendant does not, in the central plant, manufacture or produce, but only changes the form of, energy.

"The court concludes, therefore, that the express provisions of the lease require that, with regard to in-house HVAC charges to be paid defendant by plaintiff, nothing is to be included on account of initial acquisition charges incurred by defendant in connection with HVAC equipment or the central plant building, whether construction costs, purchase price, interest, depreciation, or otherwise. What plaintiff is to be charged, and is required to pay, is its proportion of reasonable and necessary costs as incurred for operation, maintenance, repair and replacement (whether or not a particular replacement cost would ordinarily be considered a capital expenditure) of HVAC equipment, to include the central plant building. . . .

"A similar conclusion is reached with regard to common-area HVAC charges, though the reasons therefor are even more compelling.

"The lease provides that 'common area costs shall refer to the actual and reasonable cost of operating and maintaining the common areas'. The insertion of the word 'actual' indicates, at least, an intent to exclude acquisition costs. While 'cost of operation' may, in some contexts, include acquisition costs, it is doubtful if 'actual cost of operating' can be so construed. If 'cost of operating' were intended to include acquisition costs, then the words 'and maintaining' become useless surplusage; for if cost of operating includes one, then it likewise includes the other. Construction, operation, and maintenance are a trilogy in normal usage. The use of the term operation to include construction, is not, at least in the context of this case, to be inferred.

"Subparagraph 12(F) of the lease contemplates the

possibility of a merchants association with an option to take over the operation of the common area and to enforce collection of the expenses of operation thereof. Obviously, the parties did not intend that such an association should collect from the various tenants the defendant's acquisition costs, else there would be a provision for turning such funds over to the defendant.

"If common-area costs were intended to include HVAC acquisition costs, then it would logically follow that they were intended to include all common-area acquisition costs, but that is clearly not the case.

"Finally, one might reasonably expect that, had the parties not intended to apply similar charges for in-house and common-area HVAC they would have used language clearly indicative of such an intent. Thus the conclusion with regard to common-area charges supports that reached with regard to in-house charges."

We should take note of one further argument made by Westroads, Inc. In its brief it says: "Younkers will argue that the rent it pays should somehow be construed to cover the cost of the utility plant, but the rent is defined as 'rent for said premises' (Sec. 5 of lease) and said 'premises' are defined as the demised premises, to wit: 'a completed store unit having at least 150,000 gross square feet to be constructed by Landlord at Landlord's cost and expenses . . . hereinafter referred to as the demised premises. . . .' (Page 1 of lease) The central plant is not even in close proximity to the Younkers store and could not be considered part of the 'demised premises.' " It is clear that the plaintiff concedes that if self-contained in-house and common area HVAC equipment had been supplied the landlord's return thereon would have been obtained through rent. Even though common areas are not part of the "demised premises," the rent paid by the lessee provided the lessor's return on its investment in those areas. Obviously the rent paid for more than just the "demised premises." The record indicates that the landlord had a substantial part

in drafting the final lease. It was likewise clear that it controlled the alternatives as to the type of HVAC equipment which it would furnish. If the construction of a central plant required some reimbursement and return to the landlord over and above rent, this possibility could have been provided for by appropriate language in the lease.

AFFIRMED.

FARMERS COOPERATIVE ASSOCIATION, A CORPORATION, OF FARNAM, NEBRASKA, APPELLANT, V. RAY L. KLEIN, APPELLEE.

FARMERS COOPERATIVE ASSOCIATION, A CORPORATION, OF FARNAM, NEBRASKA, APPELLANT, V. ROSS KLEIN, APPELLEE.

241 N. W. 2d 686

Filed May 12, 1976. Nos. 40469, 40470.

1. **Equity: Trial: Juries.** Where a trial judge, in the exercise of equity jurisdiction, may submit questions of fact to a jury, its finding is purely advisory and not binding on the trial court.
2. **Contracts: Reformation of Instruments: Evidence.** To decree reformation of a written instrument for a mutual mistake, equity insists that the evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception.
3. **Contracts: Reformation of Instruments: Evidence: Trial.** In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory, and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.

Appeals from the District Court for Frontier County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Steve Windrum and Bernard B. Smith, for appellant.

Padley & Dudden, for appellees.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

SPENCER, J.

These two actions, while filed separately, were consolidated for trial and for purposes of appeal. Plaintiff sued defendant brothers, Ray L. and Ross Klein, for partial failure to deliver corn on certain contracts. Defendants pled mutual mistake and prayed for reformation of the contracts. The trial court submitted all issues, including the one for reformation, to a jury. The jury returned verdicts in favor of the defendants, on which the court entered judgment. Plaintiff prosecutes these appeals. We reverse.

Defendants are engaged in the farming and ranching business near Farnam, Nebraska. They will hereinafter be referred to by their given names, or as defendants. These actions involve three contracts executed by defendants for the delivery of corn by them and their late father to the plaintiff. The contracts are dated April 27, 1973. On that date defendants discussed the sale of corn with plaintiff's manager, Henry Sturgeon.

Sturgeon testified that Virginia Norby, plaintiff's bookkeeper, was present at the time. Both defendants testified she was not. There is also a dispute as to exactly what was said at the meeting of April 27. Plaintiff's evidence is to the effect that the defendants and their father agreed to sell 90,000 bushels of corn to the plaintiff. Three separate contracts were prepared, specifying the amount to be delivered by each of the parties. The contract with Ross was for 44,000 bushels, with Ray for 25,000 bushels, and with the father for 21,000 bushels. This corn was to be delivered during June, July, and August 1973, for $1.41 per bushel.

Plaintiff's evidence also indicates defendants did not want to be held "right down to the very kernel" on the

amount specified in the contract, so the letters "APP." were typed in front of the bushel amounts in each contract. The parties agree that "APP." in the contracts means "approximately." Sturgeon testified that "approximately" in the trade means within 2 percent either up or down.

Defendants have a somewhat different version of the discussions leading to the signing of the contracts. They testified they told Sturgeon they did not know how much corn they had, but were selling all the corn in their bins. The allegations in their respective answers is that they were selling all their 1972 corn crop. Actually, however, Ross delivered 17,782 bushels of 1971 corn. Ray testified that he was selling his 1972 corn, all he had, but on direct examination he does not testify that he told Sturgeon so. On cross-examination, however, when he was asked why he did not insist on "1972" being put in the contract, he said, "We had told him it was the 1972 corn that we had on the farm that we wanted to sell."

Ross testified he intended to sell all the corn he had; he did not intend to restrict it to the 1972 crop, but to sell the 1972 and the 1971 corn. He actually delivered 40,010.45 bushels. Ray delivered 14,969.55 bushels. On the father's contract for 21,000, 22,332.86 bushels were delivered. It was Ray's testimony that some of the corn credited to his father's contract was his. In that event, the overage, or 1,332.86 bushels, should be applied on Ray's contract.

Defendants testified Sturgeon told them all he needed was some figure to put in the contract. It is undisputed that the figures from the Agricultural Stabilization Conservation Service indicate it had sealed over 90,000 bushels of corn for the Kleins. The exact figure mortgaged to the A.S.C.S. was 95,032 bushels.

Virginia Norby testified she was present during the discussion of the sale. She specifically recalls a discussion about the word "approximate" being included in

the contract. She was confident no discussion was had as to the contract being limited to any particular year or years' corn crop, nor was it limited in any way to the bins where the corn might be stored. Sturgeon testified that no such statements were ever made to him. It was Mrs. Norby's testimony that the defendants decided to use the 90,000 bushel figure to be safe. The defendants themselves apportioned the 90,000 to the three contracts.

The Kleins testified all their corn had been delivered to the plaintiff by August 20, 1973. The contract price for the corn was $1.41 per bushel. Price of corn on August 20, 1973, was $2.48 per bushel.

While other issues are raised, the only one we consider herein is whether it was error to submit the issue of reformation to the jury. This issue is an equitable one. While a trial judge, in the exercise of equity jurisdiction, may submit questions of fact to a jury, its finding is purely advisory and not binding on the trial court. See Central Granaries Co. v. Nebraska L. M. Mut. Ins. Assn. (1921), 106 Neb. 80, 182 N. W. 582.

We are concerned here, however, with plaintiff's contention the evidence does not support the verdicts. To decree reformation of a written instrument for a mutual mistake, equity insists that the evidence of the true intent of the parties must be clear, convincing, and satisfactory, and the evidence must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception. See Du Teau Co., Inc. v. New Hampshire Fire Ins. Co. (1953), 156 Neb. 690, 57 N. W. 2d 663.

In Westhaven Properties, Inc. v. Pahl (1968), 183 Neb. 355, 160 N. W. 2d 168, quoting Williston on Contracts, we said: "Equity insists 'that the parties shall have come to a complete mutual understanding of all the essential terms of their bargain, for, otherwise, there would be no standard by which the writing could be reformed.'" In the same case we further said: "In order to warrant reformation of a written instrument

for mistake, the evidence must be clear and convincing." We are not persuaded that the defendants' evidence meets this test.

The evidence of the parties cannot be reconciled. Plaintiff produced as a witness the manager of the Farmland Service Cooperative Elevator who testified that Ray had offered to sell him 90,000 bushels of corn 4 weeks before the present transaction for $1.39 per bushel. On April 27, 1973, Ray called him again and asked the price he expected to pay if corn was delivered. The manager told Ray the price he had agreed to pay March 30. Ray then said there would be no corn delivered. This would be some evidence in support of plaintiff's contention it was buying approximately 90,000 bushels of corn.

Our review of the record convinces us that defendants have not met their burden of proving a mutual mistake by clear, convincing, and satisfactory evidence. As we said in DuTeau Co., Inc. v. New Hampshire Fire Ins. Co., *supra*: "In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties."

The judgments should have been directed for the plaintiff. We reverse the judgments in both cases and remand them to the trial court with directions to enter judgments thereon for the plaintiff. The overage of corn delivered on the father's contract of 1,332.86 bushels is to be applied on the Ray Klein contract. Costs in each case are taxed to the respective defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON CONCRETE COMPANY, APPELLEE AND CROSS-APPELLANT, V. A. S. BATTIATO CONSTRUCTION CO., APPELLANT AND CROSS-APPELLEE.

241 N. W. 2d 819

Filed May 19, 1976. No. 40269.

1. **Contracts: Damages.** Where defects in a building being constructed under a building contract are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements.
2. **Contracts: Damages: Interest.** If the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed as modified.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellant.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn & Meusey, for appellee.

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

KORTUM, District Judge.

This is an action by the plaintiff, a fabricator of precast construction materials, upon a written contract to recover the balance due under said contract.

The plaintiff manufactured and erected for the defendant general contractor certain concrete double tee slabs used in the construction of a commercial apartment complex. The total contract price was $31,000 and the defendant made a payment of $15,000, leaving a remaining balance due of $16,000.

The defendant acknowleged the contract but in its answer and counterclaim alleged that the double tee

slabs were defective and were not manufactured in accordance with the plans and specifications of the contract. The defendant asserted it had been damaged by the breach of warranty and also that it had incurred expenses to overcome and correct the defects in the double tee slabs.

The trial judge determined as a matter of law that there had been substantial performance on the written contract by the plaintiff and that the defendant had breached the contract by its refusal to pay the balance due.

The jury found that the plaintiff had breached the written contract by failing to provide double tee slabs which were free from defects and deficiencies. The jury further found that the defendant had incurred expenses of $1,972 in correcting the deficiencies and deducted that amount from the $16,000 claimed due by the plaintiff.

Upon the plaintiff's motion for an award of interest, the trial court apparently found that the defendant had received 75 percent of the value of the double tee slabs delivered with a value of $23,250. After giving the defendant credit for the payment of $15,000, the court found that of the $14,028 jury verdict, $8,250 was liquidated and therefore awarded interest at 8 percent on $8,250 from and after September 18, 1972, for a total judgment of $15,816.33.

The defendant's first assignment of error relates to the refusal of the trial court to admit evidence offered by the defendant as to the fair and reasonable market value of the double tee slabs at the time they were delivered and erected by the plaintiff.

The answer and counterclaim of the defendant set forth the defects claimed and further alleged that the defendant had been required to incur additional expense in order to repair and overcome such defects.

The evidence at trial clearly showed that the problems which arose because of the defective condition of the

double tee slabs had been corrected. The tees as delivered and corrected served the structural function for which they were intended and evidence showed the building to be structurally safe.

Where defects in a building being constructed under a building contract are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. Jones v. Elliot, 172 Neb. 96, 108 N. W. 2d 742. See, also, Graham v. Anderson, 121 Neb. 733, 238 N. W. 362.

The value of the double tee slabs delivered to the construction site was not placed in issue by the pleadings. The right to introduce evidence depends upon there being an issue of fact raised by the pleadings to which the evidence is relevant. See Midland-Ross Corp. v. Swartz, 185 Neb. 484, 176 N. W. 2d 735.

At the time the testimony of Anthony S. Battiato was offered to show the fair and reasonable value of the double tee slabs at the time of delivery and erection by the defendant, there was no showing by the defendant that the defects alleged were not remediable without substantial injury or reconstruction of the building. As this court recently held in Ritzau v. Wiebe Constr. Co., 191 Neb. 92, 214 N. W. 2d 244, it is the duty of the trial court to rule upon the admissibility of evidentiary facts when they are offered in evidence. Their relevancy should then appear or the court should be informed as to the connection in which they will become relevant.

The trial court later in the trial allowed the defendant to introduce testimony of Roland Waite, president of the defendant corporation, on the value of the tees at the time of their delivery and erection. Nothing appears in the record to indicate that Anthony S. Battiato could not have been recalled or that other similar testimony was refused admittance. No prejudicial error occurred as assigned by the defendant.

The defendant next assigns as error the action of the trial court in allowing prejudgment interest on $8,250 which apparently represented the $23,250 or 75 percent of the contract price minus the $15,000 payment made by the defendant.

The crucial determination to be made here is whether or not the amount claimed due under the contract at the time of substantial completion was a liquidated sum.

The rule has been firmly established in Nebraska that where the amount due under a contract or claim is subject to reasonable controversy and is incapable of being fixed by computation, recovery of interest may be had only from the date of the determination of the right of recovery and the amount thereof. Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913.

Both parties cite and rely upon Socony Mobile Oil Co., Inc. v. Klapal (Neb., 1962), 205 F. Supp. 388. In that case plaintiff brought an action to recover $11,201.46 of which $8,384.11 was undisputedly due and owing. The balance of $2,817.35 was disputed and in fact the defendant counterclaimed and alleged delivery of defective fuel which comprised the $2,817.35 and claimed damages resulting from such defects. That court decided that the plaintiff was entitled to interest on its judgment of $8,384.11 because such amount was liquidated and more importantly because the counterclaim did not relate to defects in the products represented by the $8,384.11. The holding seems to indicate that the total claim of the plaintiff was separable into a portion liquidated and not disputed and a portion which was allegedly defective and disputed, and this is clearly distinguishable from the present case.

In determining whether a claim is liquidated and undisputed it becomes difficult if not impossible to color match different factual situations to cover every controversy and we do not attempt to do so here. While it is true that the contract price was fixed, the counterclaim of the defendant and the evidence adduced there-

under was not capable of being definitely ascertained by mere computation as of September 18, 1972. It would not have been possible on that date to make a determination of the balance due, if any, under the contract.

A substantial dispute existed between the parties as to the amount due and owing under the contract because of the alleged defects. The amounts due, if any, between the parties were ascertainable only by a trial of the issues and were properly determined by the verdict of the jury in this case.

We conclude that the recent case of Hays v. County of Douglas, 192 Neb. 580, 223 N. W. 2d 143, is controlling here. In that case we held that if the right to damages for breach of contract is a matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation, but by suit, interest may not be allowed for the time precedent to the settlement of the right to a recovery and the ascertainment of the amount.

We therefore modify the judgment of the District Court and hold that interest on the judgment of $14,028 be allowed at 8 percent from date of entry of the judgment. In all other respects the judgment of the District Court is affirmed.

The issues raised by the plaintiff in its cross-appeal having been determined herein, plaintiff's cross-appeal is dismissed.

AFFIRMED AS MODIFIED.

MARJORIE MCDANIEL, BY HER GUARDIAN, EVERETT MCDANIEL, APPELLANT, V. MCNEIL LABORATORIES, INC., A PENNSYLVANIA CORPORATION, APPELLEE, CONSOLIDATED WITH EVERETT D. MCDANIEL, APPELLANT, V. MCNEIL LABORATORIES, INC., A PENNSYLVANIA CORPORATION, APPELLEE.

241 N. W. 2d 822

Filed May 19, 1976. No. 40270.

1. **Strict Liability: Torts: Drugs.** Under the doctrine of strict liability, an unavoidably unsafe product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous.
2. **Strict Liability: Drugs: Sales: Torts.** A drug, properly tested, labeled with appropriate directions and warnings, approved by the United States Food and Drug Administration, and marketed properly under federal regulation, is presumptively a reasonably safe product, in the absence of clear and convincing evidence to the contrary.
3. ———: ———: ———: ———. An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared and distributed, and accompanied by appropriate directions and warnings, is not defective nor unreasonably dangerous, as a matter of law, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions or extensions thereof.
4. ———: ———: ———: ———. Where there are appropriate directions and warnings, a manufacturer of a properly prepared drug may not be held liable either on a breach of warranty theory or a strict liability in tort theory.
5. **Negligence: Drugs: Torts.** The standard of reasonable care never varies but the degree of care required varies with the danger involved in the act and is proportionate to it.
6. **Negligence: Torts.** If an act involves a risk of death or serious bodily harm and is capable of causing such results to a number of persons, the highest attention and caution are required, even if the act has a very considerable utility.
7. **Trial: Instructions.** It is not error to refuse a requested instruction if the legal principles announced therein are either incorrectly stated or inapplicable to the issues involved.

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

Warren C. Schrempp, Richard I. Dinsmore, and Richard E. Shugrue of Schrempp, Dinsmore & McQuade, and Joseph N. Lindquist, for appellant.

Charles F. Gotch and Terry J. Grennan of Cassem, Tierney, Adams & Gotch, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and KUNS, Retired District Judge.

MCCOWN, J .

This case involves consolidated causes of action by the plaintiff, Everett D. McDaniel, on his own behalf and as guardian of his wife, Marjorie McDaniel. The actions seek recovery for injuries and damages resulting from a surgical operation performed on Marjorie McDaniel on February 2, 1971, at an Omaha hospital.

Five defendants were named in the actions: McNeil Laboratories, Inc.; the hospital; the operating surgeon; the anesthesiologist; and the head of the anesthesiology department of the hospital. The hospital and the operating surgeon were dismissed prior to trial. The active anesthesiologist and the head of the anesthesiology department, by settlement and agreement, were dismissed on the third day of trial, and the case continued against the sole remaining defendant, McNeil Laboratories, Inc. The issue of whether that defendant was or was not negligent was submitted to the jury. The jury returned its verdict for the defendant and the plaintiffs have appealed.

Although only the liability of the defendant, McNeil Laboratories, Inc., is involved in this appeal, it is necessary to detail many of the facts involved to furnish the appropriate background for consideration of the issues involving the defendant, McNeil. The actions, duties, and responsibilities of the various defendants are intermingled and interrelated.

The plaintiff, Marjorie McDaniel, was admitted to the hospital on January 31, 1971, for what was expected to be a routine hemorrhoidectomy. Mrs. McDaniel was 47 years old and the mother of three children. She was examined and rated as one of the class considered to be the best risks for surgery. At about 8 a.m. on the morning of February 2, 1971, she was given 100 mg. of nembutal, a barbiturate. At 8:30 a.m., she was given 75 mg. of demerol, and .3 mg. of scopolamine as preoperative medication. She was taken into surgery around 9 a.m. Shortly after Mrs. McDaniel arrived in the operating room, the attending anesthesiologist decided that Mrs. McDaniel was not satisfactorily sedated and gave her ½ cc of the drug Innovar, and a few minutes later another ½ cc of Innovar. The next drug administered was the main anesthetic, Xylocaine, which was administered as a caudal block. A 5-cc test amount was injected in the spine and then a 17-cc dose was injected at 9:40. The surgery began shortly after 9:45 a.m., and until about 10 a.m., the operation was apparently proceeding normally. Shortly before 10 a.m., Mrs. McDaniel unemotionally told the anesthesiologist that she could still feel "what they are doing." The anesthesiologist then gave her 2 cc's of Innovar through the I.V. Almost immediately, shortly after 10 a.m., there was a dramatic drop in her blood pressure and pulse. The anesthesiologist thereafter inserted a plastic airway in her mouth and began administering oxygen through a mask. The circulating nurse noticed her color was very blue some minutes before the operation was over. She found no pulse in the patient's wrist. She asked the anesthesiologist about it and was told that the patient was all right and that he had a temporal pulse. The operating surgeon reported on two occasions that the blood was very black and inquired about the patient's condition but the anesthesiologist responded that it was all right to go ahead and finish. Just before the operation was finished, the anesthesiologist reported that he

could not get a pulse. Mrs. McDaniel was then turned over onto her back and was found to be in cardiac arrest. At that point emergency procedures of several kinds were instituted. Mrs. McDaniel's life was saved but because of the severe brain damage, she has never regained consciousness. She is comatose. Her organs continue to function, but she is unconscious and completely unable to respond to stimuli or move any part of her body. She has a tracheotomy which facilitates breathing. She is fed by a tube into her stomach and there is a catheter to the bladder. The damage is permanent and there is no expectation of recovery.

The drug involved here is manufactured by the defendant, McNeil Laboratories, Inc. It is called Innovar. It is used as an anesthetic. Its pharmacologic action produces analgesia and sedation. It contains two drugs, both of which are also marketed separately by McNeil. These drugs are fentanyl, a synthetic narcotic analgesic, and droperidol, a major sedative tranquilizer. These two drugs are combined in a fixed ratio of 50 parts of droperidol to 1 part of fentanyl to produce Innovar.

Fentanyl is a synthetic narcotic which is 100 to 150 times more powerful than morphine. It takes effect almost immediately when used intravenously, reaches maximal analgesic effect in a very few minutes, and is then effective for a period of 30 to 60 minutes. Fentanyl may cause respiratory depression and, in turn, carbon dioxide is not adequately disposed of and adequate oxygen is not taken in. Fentanyl can also cause muscle rigidity, particularly of the chest walls, which then interferes with breathing. Respiratory depression occurs with all narcotics, as does muscle rigidity if enough is given.

Droperidol is a major tranquilizer which takes effect within 5 to 10 minutes when given intravenously and continues to be effective anywhere from 4 to 12 hours, and on occasion, even longer. Droperidol may cause hypotension, a decrease in blood pressure. The lowered

blood pressure may lead to hypoxia, which means that insufficient oxygen is delivered to the tissues and damage may result. Brain tissues are the most sensitive to lack of oxygen. Most tranquilizers, if enough is given, can cause low blood pressure and impaired circulation.

McNeil Laboratories, Inc., began its studies and clinical investigations of the drug Innovar in the United States in 1963, sometime after Innovar had been introduced for clinical use in Germany and the Netherlands. An investigative new drug application was filed by McNeil with the United States Food and Drug Administration in 1963. A new drug application was filed in May of 1964, and amended in May of 1966. During these years, clinical investigation was conducted by several hundred investigators. The information collected and filed with the FDA covered approximately 5,800 patients. Innovar was approved by the FDA on January 31, 1968. There have been no changes in composition since that time. Fentanyl was approved for marketing on February 19, 1968, and the distribution of Innovar and fentanyl was started in March 1968. Droperidol was approved by the FDA for marketing on June 11, 1970, and marketed shortly thereafter.

Printed package inserts containing pharmacological information, safety evaluations, recommended dosages and administration, and warnings as to adverse reactions and control measures to be taken in such event, are included in the approval by the Food and Drug Administration. This approved printed material is distributed with the drug as a package insert. The package insert at the time of the operation in this case was printed March 19, 1968, and used thereafter until it was revised September 14, 1973. Primarily the revised material emphasized the severity of adverse reactions and was more specific with recommendations as to precautions and control measures available.

No new adverse reactions have been discovered since the approval of Innovar by the FDA, and there is evi-

dence that there was nothing known at the time of trial about the nature of adverse reactions which was not known at the time the application was submitted to and approved by the Food and Drug Administration. There is also specific evidence that all material which McNeil received in connection with reported adverse reactions, both before and after February 2, 1971, has been forwarded to the FDA. Both 1968 and 1973 package inserts contain warnings that respiratory depression, muscular rigidity, and hypotension were common adverse reactions.

There is no question about the purity or effectiveness of the Innovar used here. It did not contain anything it should not have contained, nor was there anything omitted which should have been included. It was the drug it purported to be and was manufactured, packaged, and distributed in the form approved by the Food and Drug Administration.

The doctor who administered the Innovar to Mrs. McDaniel was a specialist in anesthesiology who received his medical degree in 1966. During his senior year in medical school, the head of the department of anesthesiology was one of the individuals who was carrying out clinical research on Innovar before it was marketed. During this period of testing of Innovar, the anesthesiologist in this case was in operating rooms where it was being used and attended seminars where it was discussed. He had special studies as to the adverse reactions of Innovar and appropriate control measures. During his residency in anesthesiology after Innovar was approved for use by the Food and Drug Administration, the anesthesiologist used Innovar and saw it used frequently. He was fully aware of the fact that Innovar contained two components with different lengths of effectiveness and that he could use or transfer to either one of the components alone under many circumstances. The anesthesiologist testified that there was nothing in the 1973 package insert which he did not know at the time of

Mrs. McDaniel's surgery in 1971. He also testified that he had read the complete Innovar basic manual.

The 2 cc's of Innovar which the anesthesiologist administered to Mrs. McDaniel at 10 o'clock was double the maximum dosage recommended for maintenance. There was substantial other evidence which would have supported a finding that his departures from reasonable standards of care were the proximate cause of the brain damage which Mrs. McDaniel suffered.

After settlement and dismissal of the anesthesiologist, the case against McNeil Laboratories, Inc., was submitted to the jury only on the theory of negligence. The plaintiffs had pleaded four separate theories of liability and their basic assignments of error rest on the failure of the court to submit the case to the jury on the theory of strict liability, express warranty, and implied warranty, in addition to the theory of negligence on which it was actually submitted.

Plaintiffs contend that the defendant, McNeil Laboratories, Inc., is strictly liable for physical harm caused to any ultimate user or consumer of the drug Innovar under the rule of strict liability set out in Restatement, Torts 2d, section 402 A, page 347. 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."

This court has previously adopted the doctrine of strict liability for products. See Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601.

Portions of several of the comments to section 402 A are appropriate and pertinent here. Comment h, page 351, states in part: "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, * * * or from abnormal preparation for use, * * * or from abnormal consumption, * * * the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition.

"The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed."

Comment i, page 352, provides in part: "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. * * * The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

Comment j, page 353, provides in part: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. * * *

"Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product

bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

Comment k, page 353, to section 402 A, is peculiarly appropriate and directly applicable here. It is therefore quoted in full. "Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."

The comments to section 402 A make it clear that the

liability stated in the section does not rest upon negligence. It is strict liability and the rule stated in the section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller.

Plaintiff's assertion that Innovar is defective and unreasonably dangerous rests on the testimony of certain expert witnesses who testified that in their opinion the combination of fentanyl and droperidol in the fixed ratio of 1 to 50 made Innovar defective and unreasonably dangerous. Those expert witnesses generally agreed that there was nothing wrong with using droperidol and fentanyl separately or even together where the ratio of the combination was controlled by the anesthesiologist. The combination of the two in a fixed ratio in Innovar is the foundation upon which the plaintiffs rest their opinion that Innovar is defective and unreasonably dangerous. In essence, it might be said that plaintiffs contend that a fixed ratio combination of two drugs is improper drug design and is therefore unreasonably dangerous.

There is also an expression of opinion by plaintiffs' expert witnesses that the warnings in the original package insert were incomplete or inadequate. These opinions directly conflict with the opinions expressed by the various expert witnesses called by the defendant, and they also raise the issue of the effect of the approval of Innovar, and its package inserts, by the Food and Drug Administration. There is no evidence in this case that Innovar had been or was improperly manufactured, nor that the harmful results here were caused by any impurity or any error in compounding, packaging, or storage. The drug was exactly what it purported to be.

Innovar was approved by the Food and Drug Administration on January 31, 1968. That approval covers the official package inserts which include warnings as to adverse reactions and recommended counter measures. The "labeling" of the package inserts in the case of prescription drugs is revised from time to time as new

information becomes available. In the case of Innovar, the first revision after the initial approval in 1968 was in 1973. There is specific evidence which stands uncontradicted that the adverse reactions of respiratory depression, muscle rigidity, and hypotension were all known ever since Innovar has been studied. All the material and information in connection with reported adverse reactions, both prior to and after February 2, 1971, was forwarded to the Food and Drug Administration. The evidence wholly fails to establish that any knowledge or relevant information which the defendant had as to Innovar was not fully disclosed to the Food and Drug Administration.

Some courts have found that under such circumstances a prescription drug is, as a matter of law, a reasonably safe product. In Lewis v. Baker, Richardson-Merrell, Inc., 243 Ore. 317, 413 P. 2d 400, the Oregon Supreme Court held that under similar facts a drug properly tested, labeled with appropriate warnings, approved by the Food and Drug Administration, and marketed properly under federal regulation is, as a matter of law, a reasonably safe product. See, also, Leibowitz v. Ortho Pharmaceutical Corp., 224 Pa. Super. 418, 307 A. 2d 449. While such cases have subsequently been modified with respect to warnings, the underlying principle remains valid. See McEwen v. Ortho Pharmaceutical Corp., 270 Ore. 375, 528 P. 2d 522.

While approval by the Food and Drug Administration is not necessarily conclusive, its determinations, based upon the opinions and judgment of its own experts, should not be subject to challenge in a product liability case simply because some other experts may differ in their opinions as to whether a particular drug is reasonably safe, unless there is some proof of fraud or nondisclosure of relevant information by the manufacturer at the time of obtaining or retaining such federal approval.

In this case there is no essential conflict as to the

facts and the evidence. There is a difference of opinion among expert witnesses as to whether those facts establish that Innovar is or is not a defective and unreasonably dangerous drug. That issue was presented to the Food and Drug Administration in 1968. Its determination is persuasive and controlling in the absence of evidence that the determination was based upon inaccurate, incomplete, misleading, or fraudulent information. An unavoidably unsafe drug which has been approved for marketing by the United States Food and Drug Administration, properly prepared, compounded, packaged, and distributed, and accompanied by proper approved directions and warnings, as a matter of law, is not defective nor unreasonably dangerous, in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with such federal approval or later revisions thereof. Under the facts disclosed by the evidence here, the District Court was correct in refusing to submit the theory of strict liability to the jury.

Plaintiffs assert that the District Court erred in refusing to submit the causes of action to the jury under the theory of either express or implied warranties. The evidence here stands uncontradicted that the anesthesiologist did not rely upon any warranties made by the defendant, either express or implied. He was fully aware of each and all the adverse reactions covered by the warnings, as well as being aware of counter measures. He specifically testified that there was no information or warning in the 1968 or 1973 package insert that he did not know at the time of Mrs. McDaniel's surgery in 1971. No warranty, express or implied, became part of the basis of the bargain. Under such circumstances, there was no error in refusing to submit the issues of express or implied warranty to the jury. See, Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P. 2d 829; Ball v. Mallinkrodt Chemical Works, 53 Tenn. App. 218, 381 S. W. 2d 563, 19 A. L. R. 3d 813. That conclusion is also

reinforced by the record as to warnings. "Where there is proper warning, a manufacturer of a prescription drug cannot be held liable either on a breach of warranty or strict liability in tort theory." Leibowitz v. Ortho Pharmaceutical Corp., *supra.*

The plaintiffs contend that the District Court erred in refusing to give an instruction that: "You are instructed that the defendant, * * * in manufacturing and marketing its drugs is required not only to be skillful but also exceedingly cautious and prudent in view of the consequences that may attend the least inattention on its part. The highest degree of care known among practical men must be used by it to prevent injury from the use of their compounds and it is held to a special degree of responsibility corresponding with its superior knowledge and is generally held liable for the slightest negligence."

Plaintiffs charged the defendant here with negligence in failing to give adequate warning to the medical profession of the potential dangers inherent in the use of Innovar. No other grounds or specifications of negligence were submitted to the jury. The court instructed the jury that the defendant had the duty to give adequate warnings to the medical profession of the potential dangers inherent in its product which were known to the defendant or which, in the exercise of reasonable and ordinary care, could have been discovered by the defendant before February 2, 1971; and that "adequate warnings" meant that the warnings must convey fair and adequate notice of the possible dangers of using or even misusing the drug Innovar. The court also instructed that "ordinary care" is that amount or degree of care which ordinary prudence and a proper regard for one's safety and the safety of others would require under the circumstances shown in the evidence, and that "negligence" is the doing of some act under the circumstances surrounding the incident involved which a man of ordinary prudence would not have done, or the

failure to do some act or to take some precaution which a man of ordinary prudence would have taken.

It would have been appropriate for the court to give a more specific instruction as to the degree of care required of a manufacturer of drugs, but the specific wording of the instruction requested did not properly reflect the legal principles involved and was overdrawn. The instructions given, as a whole, required the standard of reasonable and ordinary care, and that the degree of care required depended upon a proper regard for the safety of all persons under the circumstances shown by the evidence. There is nothing specifically wrong with the instructions as given, but the plaintiffs complain that under those instructions "the defendant was held only to a standard of ordinary care." Restatement, Torts 2d, section 298, page 68, deals with want of reasonable care. Comment b, headed "Care Required," states in part: "The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised. * * * The amount of attention and caution required varies with the magnitude of the harm likely to be done if care is not exercised, and with the utility of the act. * * * if the act involves a risk of death or serious bodily harm, and particularly if it is capable of causing such results to a number of persons, the highest attention and caution are required even if the act has a very considerable utility."

It would have been proper to instruct the jury that the degree of care required varies with the circumstances, and that a very high degree of care is necessary on the part of a manufacturer of drugs. It would also be proper to instruct a jury that the manufacturer and distributor of a drug such as Innovar may be held to the degree of care and skill of an expert in that particular business. The instructions requested did not fully

and accurately reflect the legal principles involved, and the instructions as a whole reasonably covered the issues of negligence. It is not error to refuse a requested instruction if the legal principles announced therein are either incorrectly stated or inapplicable to the issues involved. Krantz v. Marge's Mufflers, Inc., 184 Neb. 838, 172 N. W. 2d 624.

Plaintiffs' remaining assignments of error are without merit. The judgment of the District Court is affirmed.

AFFIRMED.

THE CAPE COMPANY, A PARTNERSHIP, APPELLEE, V. JOHN A. WIEBE, TRUSTEE, ET AL., APPELLANTS, V. KIRKHAM-MICHAEL, INC., A CORPORATION, INTERVENER-APPELLEE.
JOHN A. WIEBE, TRUSTEE, APPELLANT, V. SEARS, ROEBUCK & CO. ET AL., APPELLEES, V. KIRKHAM-MICHAEL, INC., A CORPORATION, INTERVENER-APPELLEE.

241 N. W. 2d 830

Filed May 19, 1976. No. 40379.

1. **Equity: Appeal and Error.** When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion.
2. **Equity: Appeal and Error: Trial.** Where in an equity case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
3. **Equity: Laches: Limitations of Actions.** Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked.
4. **Covenants, Conditions, and Restrictions: Easements: Encumbrances.** It is generally recognized that insofar as a covenant

against encumbrances is concerned, an easement is an encumbrance.

5. **Covenants, Conditions, and Restrictions: Encumbrances.** A covenant against encumbrances is broken when made if an encumbrance exists.
6. **Covenants, Conditions, and Restrictions: Actions: Deeds.** An action for damages, for the breach of the covenants of warranty contained in a deed conveying land, is an action upon a specialty.
7. **Limitations of Actions: Specialty: Actions.** An action on a specialty can only be brought within 5 years.
8. **Limitations of Actions: Trespass: Actions.** An action for trespass must be brought within 4 years.
9. **Covenants, Conditions, and Restrictions: Deeds: Encumbrances.** Where a covenant against encumbrances and covenants of warranty or quiet enjoyment appear in the same instrument they are separate and independent covenants and one does not embrace the other.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Thomas Marshall of Green, Marshall & Green, and Terrance A. Hogan, for appellants.

Michael F. Kinney and John C. Foxley of Cassem, Tierney, Adams & Gotch, for appellees and intervener-appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

NEWTON, J.

This is an action for an injunction to enjoin the defendant John A. Wiebe, Trustee, from interfering with an access road and utility lines serving plaintiff's property. Interests of Kirkham-Michael, Inc., and Sears, Roebuck & Co. are also in issue. Judgment was generally against the defendant and in favor of plaintiff and other parties. We affirm the judgment of the District Court.

Kirkham-Michael, Inc., hereinafter referred to as K-M, was the owner of a tract of approximately 10

acres. A Sears, Roebuck & Co. store, hereinafter referred to as Sears, was constructed on a portion of this tract which was subsequently conveyed to The Cape Company, hereinafter referred to as plaintiff. K-M desired the development of the property as a shopping center and solicited the advice and assistance of John A. Wiebe for this purpose. The balance of the 10-acre tract was subsequently conveyed to Wiebe by warranty deed. An electric power line easement ran across the premises at a point on Wiebe property adjacent to the property line. Without permission from the power company, buildings could not be placed on the easement but subterranean structures could be. In developing the property K-M placed storm and sanitary sewers and a gas line on this easement. Two paved access drives were constructed, one on plaintiff's property and one on Wiebe's property. Wiebe is interested in several enterprises and at various times dealt with K-M in the name of Wiebe Construction Company, Wiebe Enterprises, and John A. Wiebe. Wiebe Construction Company constructed the Sears building and the utilities in question were placed on the land by K-M during the period of construction.

At the outset, a statement of intent, dated March 15, 1963, was entered into between K-M and John A. Wiebe in behalf of Wiebe Construction Company. It provided, in substance, that in development of the tract Wiebe Construction Company should do all construction work and K-M should be the architect. Wiebe Construction Company further agreed to become "owner, developer and contractor" on the balance of the land. It further provided: "It is recognized that since the plans and specifications are not completed and that the contract is not drawn, good faith of both parties will be relied on in carrying out the intent of this Agreement."

After completion of the Sears building, and the installation of utilities and access driveways, in 1964, Wiebe obtained consent to construct a building under the power

line and objected that the underground utility lines interfered with his desire to construct a building connected with the Sears building. He demanded removal of the sewer and gas lines from the land then owned by him and objected to the access driveway on his land. In 1972 he constructed a fence shutting off this access road and part of the parking facilities on his property. Plaintiff brought this action to enjoin Wiebe from interfering with access or utility-line rights of the Plaintiff.

After acquiring title to the property adjacent to the Sears store, Wiebe conveyed it to the present owner John A. Wiebe, Trustee. He filed a general denial and a cross-petition praying for a determination that plaintiff had no easements on the Wiebe property; that plaintiff be enjoined from interfering with the use of his property; that plaintiff be required to relocate its gas and sewer lines; and that title be quieted. In its answer to the cross-petition of Wiebe, plaintiff alleged that the utility lines were completed prior to execution of the deeds to Wiebe and the access road was to be used jointly, that the utility lines do not prohibit the commercial development of the Wiebe property, and that the statute of limitations had run.

Intervener K-M in its petition alleged that the conveyance to plaintiff included an implied grant for utility lines and access drive which was known to Wiebe when he acquired title and he is estopped to deny the existence of the easements; and that the conveyances to Wiebe of the subservient estate included an implied reservation of the easements necessary to the enjoyment of the dominant estate. In answering the Wiebe cross-petition, K-M asserted the defenses of laches and the statute of limitations, and denied that the utility lines prevent commercial development of the Wiebe property. Wiebe for answer and by way of cross-petition to the pleading of K-M set out the covenants in his deeds, stated he gave only temporary permission to use his property for parking and access, and that their continued use, together

with the presence of the utility lines, constituted a trespass. Intervener K-M and plaintiff deny the allegations of the Wiebe answer and cross-petition.

John A. Wiebe was an experienced developer of commercial properties. It is evident that he intended to develop the tract in conjunction with the K-M development of the Sears portion of the tract. He obtained an option to purchase that portion of the tract not used by Sears on September 4, 1963. The option was exercised in December 1963 and the property conveyed in March 1964. Wiebe was active in trying to interest other commercial institutions in the property and thus secure its development. In March 1964, at the time Wiebe received title, he was aware of the construction of a paved access road across his property to U. S. Highway Nos. 73-75 constructed by K-M. K-M also caused the sewer and gas lines to be constructed on the power-line easement as building on the easement did not appear feasible. The evidence indicates that all parties contemplated that there would be joint use of access roads, parking facilities, and utility lines. In the absence of such an understanding, it is inconceivable that K-M would have gone to considerable expense to construct such facilities where located or to have conveyed to Wiebe land upon which such facilities were located. It is likewise inconceivable, considering Wiebe's active interest in the development of the property, that he was unaware of the location of these facilities. It is apparent that he was interested in the joint operation of the property and knowingly permitted the construction of these facilities at considerable expense to K-M. It is also evident that they cannot now be relocated without great damage and expense to plaintiff. In this regard we are in agreement with the judgment and findings of the trial court. As an equity case we hear it de novo but with due regard for the rule that: "When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion with-

out reference to the findings of the district court. Where in such a case the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Satterfield v. Dunne, 180 Neb. 274, 142 N. W. 2d 345. In the present case the District Judge did view the property.

From March 26, 1963, when the statement of intent was signed, to 1972, Wiebe failed to assert his rights, except for a letter written in 1964 after construction was completed. His actions, or failure to act, resulted in the construction of the disputed facilities as located and the dependency of the Sears building thereon. As heretofore mentioned, removal of the sewer and gas lines and restrictions on access and parking facilities would result in very considerable damage and harm to plaintiff. Under such circumstances we hold that Wiebe is now barred by laches from recovery in this action. "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked." Dewey v. Dewey, 163 Neb. 296, 79 N. W. 2d 578. See, also, Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106.

Furthermore, it is generally recognized that insofar as a covenant against encumbrances is concerned, an easement is an encumbrance. See, 20 Am. Jur. 2d, Covenants, Conditions, Etc., § 90, p. 653; 21 C. J. S., Covenants, § 101, p. 957. A covenant against encumbrances is broken when made if an encumbrance exists. See, 20 Am. Jur. 2d, Covenants, Conditions, Etc., § 83, p. 646; 21 C. J. S., Covenants, § 98, p. 954. It is the rule in

this state that: "An action for damages, for the breach of the covenants of warranty contained in a deed conveying land, is an action upon a specialty, within the meaning of the 10th section of the Code of Civil Procedure, and may be brought at any time within five years after the cause of action shall have accrued." Kern v. Kloke, 21 Neb. 529, 32 N. W. 574. See, also, Campbell v. Gallentine, 115 Neb. 789, 215 N. W. 111, 61 A. L. R. 1; Johnson v. Hesser, 61 Neb. 631, 85 N. W. 894. The Wiebe deeds date back to March 1964, more than 5 years before action was brought. Section 25-205, R. R. S. 1943, provides that an action on a specialty can only be brought within 5 years. An action for trespass must be brought within 4 years. See, § 25-207, R. R. S. 1943. Wiebe seeks to avoid the effect of these rules by contending that an encumbrance also comprises a breach of the covenants as to seisin and quiet enjoyment and that the statute has not run as to these covenants. To so hold where a deed contains a specific covenant against encumbrances would present an anomalous situation and defeat the existing law in this jurisdiction as set forth in the statute and the cases above cited. We hold that where a covenant against encumbrances and covenants of warranty or quiet enjoyment appear in the same instrument they are separate and independent covenants and one does not embrace the other.

In view of the foregoing, it is not necessary to consider other arguments advanced by the parties. The judgment of the District Court is affirmed.

AFFIRMED.

ARTHUR J. ZARYBNICKY ET AL., APPELLANTS, V. COUNTY OF GAGE, STATE OF NEBRASKA, APPELLEE.

241 N. W. 2d 834

Filed May 19, 1976. No. 40392.

1. **Declaratory Judgments.** A declaratory judgment action is not

a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court.

2. ———. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

3. ———. Jurisdiction should be assumed in a declaratory judgment action only where the court is satisfied that the declaration sought will be a practical help in ending the controversy or in stabilizing disputed legal relations under the facts alleged and proved.

4. ———. Ordinarily an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.

Appeal from the District Court for Gage County: WILLIAM F. COLWELL, Judge. Reversed and remanded with directions to dismiss.

Ernest A. Hubka and Joseph Ginsburg, for appellants.

Everson, Noble, Willschleger, Sutter & Fischer, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and FAHRNBRUCH and GRANT, District Judges.

CLINTON, J.

This is an action for declaratory judgment in which the plaintiffs-appellants, Zarybnicky, owners of certain real estate, seek to have determined the effect of eminent domain proceedings taken by appellee County of Gage to acquire title to a tract of real estate owned by the Zarybnickys. The Zarybnickys ask that the District Court determine that the condemner has abandoned the proceedings by having failed to comply with that part of section 76-711, R. R. S. 1943, which provides: "The condemner shall have sixty days from the date of the award of the appraisers to deposit with the county judge the amount of the award or the proceeding will be considered as abandoned." The District Court determined the proceeding had not been abandoned and

the Zarybnickys appealed. We determine for reasons we hereafter set forth that the matter should not have been determined in the declaratory judgment action and reverse and direct dismissal.

The essential facts as shown by the record are: The condemner filed its petition for appointment of appraisers with the county judge on January 31, 1974. Appraisers were duly summoned, appointed, took their oaths, and on March 18, 1974, made their return, awarding damages to the Zarybnickys in the sum of $2,400. On March 15, 1974 (the parties attach no significance to the fact the warrant is dated before the award was filed), the condemner, County of Gage, drew a warrant in the sum of $2,400, payable to the Zarybnickys and on the same day delivered the warrant to the county judge who issued a receipt therefore. Apparently neither the county judge nor any member of his staff noted that the Zarybnickys were the payees of the warrant and on March 20, 1974, or thereabouts, the county judge listed the warrant on a deposit slip and deposited it along with checks and currency in the checking account of Gage County court in the Beatrice National Bank and Trust Company. On his own records the county judge had, on March 15, 1974, opened a ledger in the matter of Gage County v. Zarybnicky and made an entry showing receipt of the sum of $2,400. On March 22, 1974, the bank remitted the warrant to the county treasurer for payment. The treasurer refused to pay the warrant because it lacked endorsement by the payees, returned the warrant to the bank, and notified it of the reason for refusal to pay. On March 22, 1974, the bank denied the county judge credit for the warrant, returned the warrant to the county, and debited the checking account of the county judge for the $2,400 it had previously credited. On March 27, 1974, a member of the staff of the county judge marked void the copy of the receipt it had issued to the county for the warrant. An attempt to recover the original of the receipt from the

county official to whom it was delivered was unsuccessful.

The County of Gage, in the meantime, took possession of the property which was the subject of the eminent domain proceedings. The record, however, does not show whether or not it constructed thereon the bridge project for which purpose it was acquiring the property.

On March 29, 1974, the warrant apparently reached the county clerk and he marked it "Cancelled 3-29-74." At the time of the issuance of the warrant and at all times thereafter the county had funds available to pay the warrant or any substitute warrant which might have been issued. On August 9, 1974, the county board of supervisors, whose members had signed the warrant, passed a motion that the "Holmesville bridge" project be abandoned and to " 'instruct the County Attorney to dismiss the condemnation proceeding.' " What, if any, action was taken pursuant to this motion the record does not show. However, since the county contests the Zarybnickys' claim in this case, it appears it is intent on finalizing the acquisition.

On April 4, 1975, the county judge filed with the county a claim for the Zarybnicky award, that claim was allowed, and a warrant payable to the county judge was issued under date of April 8, 1975. The county judge, on April 9, 1975, entered the amount thereof in the ledger in the matter of County of Gage v. Zarybnicky. The warrant was in due course paid and the county judge at all times since has had on deposit the amount of the award.

The record is completely devoid of any explanation as to why, after the warrant of March 15, 1974, was canceled on March 29, 1974, a new warrant payable to the county judge was not issued within the remaining days of the 60-day period provided by section 76-711, R. R. S. 1943.

The District Court held that the delivery to the county judge of the original warrant payable to the Zarybnickys

was in full compliance with the provisions of section 76-711, R. R. S. 1943; that the county judge acts only ministerially in eminent domain proceedings and had a duty to hold the warrant or its proceeds as a " 'deposit of . . . award' "; that the loose and incomplete use of the warrant does not void the binding effect of the deposit; and that the eminent domain proceedings had not been abandoned by the condemner.

Section 76-711, R. R. S. 1943, provides in part as follows: "The condemner shall not acquire any interest in or right to possession of the property condemned until he has deposited with the county judge for the use of the condemnee the amount of the condemnation award in effect at the time the deposit is made. The condemner shall have sixty days from the date of the award of the appraisers to deposit with the county judge the amount of the award or the proceeding will be considered as abandoned. When the amount of the award is deposited with the county judge by the condemner, the condemner will be deemed to have accepted the award, unless he gives notice of appeal from the award of the appraisers pursuant to section 76-715." Section 76-712, R. R. S. 1943, provides in part: "Upon deposit of the condemnation award the county judge shall prepare and certify under his seal of office a true copy thereof, and shall transmit the same to the register of deeds of the county where any real estate or interest therein is condemned . . . ." Section 76-713, R. R. S. 1943, provides: "The register of deeds shall record and index the certified copy of the condemnation award in the same manner as is provided for the recording of deeds in this state. The county clerk shall file a copy of the same when only personal property is concerned in the same manner as is provided for the filing of chattel mortgages. Such recording and filing shall have like force and effect as the recording of deeds or filing of chattel mortgages." Section 76-714, R. R. S. 1943, provides: "The interest in the property acquired by the condemner shall be such

title, easement, right-of-way, or use as is expressly specified in or necessarily contemplated by the law granting to the condemner the right to exercise the power of eminent domain. The condemner shall not dispossess the condemnee until the condemner is ready to devote the property to a public use, and such title or interest as the condemner seeks to acquire shall not be complete until the property is put to the public use for which taken."

Except as indicated by our previous recital of the evidence, the record does not show whether the provisions of the above statutes have been complied with.

We have said that a declaratory judgment action "is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications *or proper proceedings already pending in a court.*" (Emphasis supplied.) Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483. Section 25-21,154, R. R. S. 1943, provides: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." See, also, Arlington Oil Co. v. Hall, 130 Neb. 674, 266 N. W. 583; Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N. W. 2d 619; Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447. In Custer Public Power Dist. v. Loup River Public Power Dist., *supra,* we said: " 'Jurisdiction should be assumed only where the court is satisfied that . . . the declaration sought will be a practical help in ending the controversy or in stabilizing disputed legal relations under the facts alleged and proved,' " quoting from Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104. In Scudder v. County of Buffalo, *supra,* we said: "Ordinarily an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law."

In this case the Zarybnickys have not demonstrated

on the record that the declaration they seek will be a practical help in ending the controversy. It appears there is a pending eminent domain proceeding in which may be determined the issue of whether the county's "deposit" complied with the requirements of section 76-711, R. R. S. 1943, and if it did not comply, there may be determined in that action what the effect thereof shall be under all the material facts.

An appeal to the District Court from the award of the appraisers appointed by the county court contemplates the filing of pleadings and the framing of issues in a judicial proceeding in the District Court. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591. Whatever defensive issues the condemnees have may be there raised and if established their effect determined under all the material facts. See Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc., 191 Neb. 663, 217 N. W. 2d 184.

If the contemplated improvements have been made by the condemner pursuant to deficient eminent domain proceedings, then it may be, depending upon the facts, that the condemnees are required to rely upon their remedy at law for damages. Meyer v. City of Alma, 117 Neb. 511, 221 N. W. 438. Under other facts it may be that the condemner will have to commence eminent domain proceedings anew, which it apparently may do, since section 76-711, R. R. S. 1943, provides that after abandonment new proceedings may be begun where more than 2 years have elapsed from the date of the abandonment. The record indicates that 2 years have elapsed in this case.

It thus appears that whatever the facts may be the condemnees' rights can be determined in the eminent domain proceeding now pending. Any declaration of rights in this case, in what amounts to a collateral attack on a particular facet of the existing eminent domain proceeding, would be a mere exercise in futility and would not with certainty resolve the controversy.

The District Court should have declined to make the declaration and left the matter for determination in the eminent domain proceeding.

Each party shall pay his own costs.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

GERARD A. MARCOTTE, APPELLANT, V. CITY OF OMAHA, A METROPOLITAN CITY, ET AL., APPELLEES.

241 N. W. 2d 838

Filed May 19, 1976. No. 40454.

1. **Judgments: Time.** A judgment or order is rendered by an inferior tribunal within the meaning of section 25-1931, R. R. S. 1943, when the decision is announced under the law and the facts.
2. **Judgments: Appeal and Error: Time: Pleadings.** Section 25-1931, R. R. S. 1943, requires that the petition in error be filed in the District Court within 1 calendar month from the rendition of the judgment or the making of the final order complained of.
3. **Judgments: Appeal and Error: Pleadings.** Under the provision of section 25-1905, R. R. S. 1943, the petitioner in error must file with his petition a certified transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified. The filing of such transcript is jurisdictional unless failure to file is without fault on the part of the petitioner and is caused solely by failure of the public official required by law to furnish such transcript to perform his public duty.
4. **Evidence: Appeal and Error: Records: Pleadings.** The filing of a bill of exceptions containing the evidence, as distinguished from the transcript, is not jurisdictional, but offering of a bill of exceptions is necessary at some point if the appellate court is to consider errors which require a review of the evidence that was received by the tribunal from which the appeal is taken.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

Herbert M. Fitle and James E. Fellows, for appellees.

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

CLINTON, J.

This action by the plaintiff Marcotte, an employee of the City of Omaha, originated before the personnel board of the City of Omaha, where Marcotte challenged his suspension and pending dismissal by the city's forestry division. After an adverse decision by the personnel board, Marcotte sought review by the District Court for Douglas County by petition in error under the provisions of section 25-1901, R. S. Supp., 1974, and sections 25-1903, 25-1905, and 25-1931, R. R. S. 1943. The appellee City of Omaha demurred and the petition in error was dismissed as being untimely filed. The basis of the dismissal was that the petition in error was not filed "within one calendar month after the rendition of the judgment or making of the final order complained of" as required by section 25-1931, R. R. S. 1943. The question on appeal here is whether the action of the District Court was correct. Unless overruled by us in this case, our opinion in Brown v. City of Omaha, 179 Neb. 224, 137 N. W. 2d 814, controls and requires affirmance.

In Brown v. City of Omaha, *supra,* in a situation virtually identical to the factual situation here presented, we held that a judgment or order is "rendered" by an inferior tribunal within the meaning of section 25-1931, R. R. S. 1943, when the decision is announced upon the law and the facts, and that the transmittal of the order to the parties is not an integral part of the judicial act.

The pertinent facts in this case are: (1) On January 30, 1975, the personnel board held its hearing and, in the presence of Marcotte and his attorney, orally an-

nounced its decision. (2) On February 10 or 11, 1975, the personnel board reduced its order to writing. (3) On March 7, 1975, Marcotte filed his petition in error in the District Court, accompanied by certified copies of papers showing the lodging of the appeal by Marcotte with the personnel board and of the order of the personnel board.

As noted, section 25-1931, R. R. S. 1943, requires that the petition in error be filed in the District Court within 1 calendar month from the rendition of judgment or making of the final order complained of. Section 25-1905, R. R. S. 1943, requires the plaintiff in error to file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified. This latter filing had been held numerous times by this court to be jurisdictional unless excused for some reason.

Marcotte requests that we overrule Brown v. City of Omaha, *supra,* and advances two arguments for his position: First, that a section 25-1931, R. R. S. 1943, error proceeding should be treated in the same manner as appeals from the District Court to this court under section 25-1912, R. R. S. 1943. For the purposes of the latter appeal we have held that a judgment is "rendered" when it is entered on the trial docket. See, § 25-1301, R. R. S. 1943; Fritch v. Fritch, 191 Neb. 29, 213 N. W. 2d 445. Second, that since a transcript is jurisdictional in error proceedings (see § 25-1905, R. R. S. 1943; Schmitt v. City of Omaha, 191 Neb. 608, 217 N. W. 2d 86), the court should apply a rule developed in earlier case law to the effect that where the filing of a transcript with the petition in error is jurisdictional a judgment is not rendered until it is entered on the record. Bickel v. Dutcher, 35 Neb. 761, 53 N. W. 663.

The second argument would be persuasive were this a matter of first impression. Several considerations argue against changing the determination made by Brown v. City of Omaha, *supra.* First, certainty and

stability in procedure are desirable, at least so far as jurisdictional requirements are concerned. Second, section 25-1301 (2), R. R. S. 1943, upon which Marcotte relies, pertains literally only to courts and not to administrative tribunals exercising judicial powers. Third, while the requirement of section 25-1905, R. R. S. 1943, requiring that "a transcript of the proceedings containing the final judgment or order" be filed with the petition in error is jurisdictional, the inability of a petitioner in error, who has timely filed his petition to obtain and file the transcript, occasioned solely by the failure of the public official charged with responsibility for furnishing the transcript to perform his public duty, does not defeat the jurisdiction of the appellate court. Republican Valley R.R. Co. v. McPherson, 12 Neb. 480, 11 N. W. 739; National Supply Co. v. Chicago & N. W. Ry. Co., 108 Neb. 326, 187 N. W. 917; Larson v. Wegner, 120 Neb. 449, 233 N. W. 253 (deciding when filing of transcript on appeal from the District Court to the Supreme Court was a jurisdictional requirement); Harte v. Gallagher, 186 Neb. 141, 181 N. W. 2d 251.

The record here suggests no reason which would excuse the failure of the timely filing of the petition in error, nor indeed the timely filing of a transcript containing the order appealed from. The parties concede that the order of the personnel board was reduced to writing on February 10 or 11, 1975. No reason appears in the record indicating that a certified copy was then unobtainable. The record does suggest that on February 20, 1975, counsel for Marcotte requested from the personnel board a "transcript of the hearing" and was advised that a "transcript of the testimony" would not be available until April or May 1975. The record does not show a specific request for a certified copy of the order of the personnel board at that time or any other time previous to the expiration of the 1 month period, nor that if such a request had been made the certified transcript could not have been obtained.

It is the filing of the certified copy of the judgment or order which is jurisdictional. National Supply Co. v. Chicago & N. W. Ry. Co., *supra;* Casler v. Nordgren, 55 Neb. 669, 76 N. W. 524 (decided when filing of a transcript on appeal from the District Court to the Supreme Court was jurisdictional); McDonald v. Rentfrow, 171 Neb. 479, 106 N. W. 2d 682; From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441; Lanc v. Douglas County Welfare Administration, 189 Neb. 651, 204 N. W. 2d 387. If the certified copy includes the judgment, jurisdiction is conferred on the appellate court and the transcript may be later supplemented. National Supply Co. v. Chicago & N. W. Ry. Co., *supra.* The filing of a bill of exceptions containing the evidence, as distinguished from the transcript, is not jurisdictional, but offering of a bill of exceptions is necessary at some point if the appellate court is to consider errors which require a review of the evidence that was received by the tribunal from which the appeal is taken. Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58; Dlouhy v. City of Fremont, 175 Neb. 115, 120 N. W. 2d 590. Although the pertinent syllabus in the latter case is somewhat ambiguous, a reading of the body of the opinion clearly indicates that the court was not saying that the filing of a certified copy of the bill of exceptions with the petition in error was jurisdictional.

Having failed to file his petition in error and certified copy of the transcript containing the judgment within 1 month from the date of the order complained of, appellant failed to meet the jurisdictional requirements of section 25-1931, R. R. S. 1943, and the District Court acquired no jurisdiction. The order of the District Court dismissing the appellant's petition in error was correct.

AFFIRMED.

DEE VALDER, APPELLEE AND CROSS-APPELLANT, V. SARAH K. WALLIS ET AL., APPELLANTS AND CROSS-APPELLEES.

242 N. W. 2d 112

Filed May 26, 1976. No. 40201.

1. **Waters: Words and Phrases.** Avulsion is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream.
2. **Waters: Boundaries: Constitutional Law: Statutes.** Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law. The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the Constitution or statutes of Nebraska or the Constitution of the United States.
3. **Waters: Boundaries.** Where a river changes its main channel, not by slowly excavating and gradually passing over the intervening space to a new position, but changes it by flowing around intervening land, as by gradually, during many years, deepening a smaller channel which was on the other side of an island until it becomes the main channel, the boundary which was fixed as the original main channel remains, under such conditions, in that original channel.
4. **Waters: Boundaries: Adverse Possession.** Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.
5. **Waters: Boundaries.** Where the accretion commences with the shore of an island and afterwards extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact.
6. ———: ———. Under Nebraska law, titles to riparian lands run to the thread of the contiguous stream.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Robert C. Fisk of Finlayson, McKie & Fisk and Joseph R. Moore, for appellants.

Robert G. Scoville of Ryan, Scoville & Uhlir, and David S. Lathrop of Lathrop, Albracht & Dolan, for appellee.

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

NEWTON, J.

This is an action to quiet title to accretion lands formed by the Missouri River. At the time of the Iowa-Nebraska Boundary Compact of 1943 the land was in Nebraska. By virtue of a shift in the bed of the river, the land, although on the Nebraska side of the boundary line, is on the Iowa side of the river. The defendants own land in Iowa adjoining the property in dispute and claim ownership by adverse possession and accretion. The court decreed a division of the land in accordance with an existing river chute. Defendants appeal. We affirm the judgment of the District Court.

The law of Iowa regarding accretion lands has not been pleaded nor proved and our decision herein will be based on the laws of Nebraska.

The following facts appear to be clearly established by the evidence. In the early 1940's the Missouri River abutted the land of defendants in the State of Iowa. In the ensuing years the river moved westward and crossed to the Nebraska side of the state line fixed by the Iowa-Nebraska Boundary Compact of 1943. See Appendix, Vol. 2A, R. R. S. 1943. In moving westward it left an island protected by dikes constructed by the United States Army Corps of Engineers on the original Nebraska bank. Accretion formed downstream from this original island and dike and a substantial chute was left on the Iowa side of the island. Additional accretion formed on the Iowa bank to the east of this chute. The land in dispute comprises a part of the large island

which formed below the original dike and the small island. The chute carried a substantial volume of water sufficient for a 58-foot work boat to navigate it until dikes were constructed across it in the early months of 1961. Although defendants base their claim on adverse possession by reason of pasturing the island prior to 1961 and so testified, the evidence clearly establishes that the island was unfenced and not pastured prior to that time. This action was commenced in July 1970. Defendants have not established their claim to the island by reason of adverse possession.

The land in dispute is in Burt County, Nebraska, although on the present Iowa side of the river. Plaintiff seeks also to claim the land lying between the chute and the original Iowa bank as accretion to the original small island formed by avulsion. It is therefore apparent that in addition to the defendants' claim of adverse possession, we have conflicting accretion claims as defendants also assert that the land is accretion to their Iowa property. The evidence clearly and without contradiction establishes that defendants did obtain title to the land east of the chute by adverse possession. Have they established title by accretion to the land west of the chute which formed as part of the island? This presents a question of law.

" 'Avulsion' is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream." 78 Am. Jur. 2d, Waters, § 406, p. 852. See, also, Ziemba v. Zeller, 165 Neb. 419, 86 N. W. 2d 190; Mercurio v. Duncan, 131 Neb. 767, 269 N. W. 901.

In the present instance we have such a change. The river cut around the small island protected by the dikes above mentioned. This island remained a part of the property of the individual who owned it prior to the change in the riverbed. This is the general rule in cases of avulsion to which Nebraska subscribes. It was held, on rehearing, in Kinkead v. Turgeon, 74 Neb. 580, 109

N. W. 744: "Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of the civil law. * * *

"The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the constitution or statutes of Nebraska or the constitution of the United States."

Again, in State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782, it was held: "Where a river changes its main channel, not by slowly excavating and gradually passing over the intervening space to a new position, but changes it by flowing around intervening land, as by gradually, during many years, deepening a smaller channel which was on the other side of an island until it becomes the main channel, the boundary which was fixed as the original main channel remains, under such conditions, in that original channel."

The evidence here will not sustain a finding that plaintiff's predecessors in title still owned, after the change in the riverbed, to the thread of the original stream but clearly establishes retention of ownership of the original island. As to that portion of the land east of the island lying in the original streambed, defendants, as noted, have acquired title by adverse possession.

Accretion has formed on the Iowa bank and also on the island. These accretions were separated by the chute mentioned above. In such instances the law, pertaining to the rival claims, is well established in this state. We have held: "Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would

otherwise belong." Hartwig v. Berggren, 179 Neb. 718, 140 N. W. 2d 22.

In Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618, this court ruled: "Where the accretion commences with the shore of an island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact." See, also, Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57; Roll v. Martin, 164 Neb. 133, 82 N. W. 2d 34.

Under Nebraska law, titles to riparian lands run to the thread of the contiguous stream. See, Oliver v. Thomas, 173 Neb. 36, 112 N. W. 2d 525; Nebraska v. Iowa, 406 U. S. 117, 92 S. Ct. 1379, 31 L. Ed. 2d 733.

In the present case the contiguous stream between the accretion lands on the Iowa bank and on the island is the chute which separates them. It is therefore apparent that the District Court was correct in designating the boundary line as the thread of the chute.

The judgment of the District Court is affirmed.

AFFIRMED.

ROBERT J. BRADY, APPELLANT, V. BOARD OF TRUSTEES OF THE NEBRASKA STATE COLLEGES, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

242 N. W. 2d 616

Filed May 26, 1976. No. 40331.

1. **Colleges and Universities: Contracts.** Where a tenured college faculty member is employed using annual reappointment letters or forms which do not set forth in full the terms and conditions of employment, the employment policies, rules, and regulations of the college become a part of the employment contract between the college and the faculty member.
2. **Colleges and Universities: Contracts: Due Process.** A tenured professor has a sufficient property interest in continued em-

ployment to entitle him to the protection of procedural due process.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded.

Healey, Healey, Brown & Wieland, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate, Kevin C. Berens, and William A. Harding, for appellee.

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

McCOWN, J.

The plaintiff, a tenured associate professor of history at Wayne State College, was dismissed without a hearing in June 1973, after the college budget for the 1973-74 school year had been reduced by the Legislature. This action is for damages and for declaratory relief as a result of the termination of his employment. The District Court found that plaintiff was entitled to procedural due process before termination of his tenured employment. The trial court, however, dismissed plaintiff's petition upon the ground that procedural due process had been available to plaintiff under a grievance procedure in a collective bargaining agreement, but that plaintiff had missed a time limit in that procedure and was therefore bound by the resulting dismissal on procedural grounds.

The plaintiff, Robert J. Brady, was first employed as an assistant professor of history at Wayne State College in August of 1967. The plaintiff's employment was extended for the 1968-69 school year and the 1969-70 term, including the summer session of 1970. For the school year 1970-71, the plaintiff requested and was granted a leave of absence for additional work on his Ph.D. He was offered and accepted reappointment for the year 1971-72, and was promoted to associate professor. Due to the condition of funds, Brady was not offered appointment for the summer of 1972. He was again reap-

pointed for the 1972-73 school year, with tenure, at a salary of $10,400.

Brady's contract of employment specifically included the college bylaws, policies, and practices relating to academic tenure, and faculty dismissal procedures. The tenure provisions of the bylaws provided that tenure may be acquired after 4 probationary years. Section 7 of the bylaws provides that dismissal of a faculty member with tenure must be initiated by the president or other administrative officer, who must hold a personal conference with the faculty member to discuss the anticipated action. If the problem is not resolved in the first step, the president is to present a formal statement of reasons for termination and provide the faculty member with a date for a formal hearing by a faculty committee. The full formal faculty committee hearing includes right to counsel, presentation of evidence, witnesses, and affidavits, and requires recording and a transcript of the hearing. The faculty committee makes its recommendation to the president, but regardless of that recommendation, a hearing may be requested before the governing board of the college by either the president or the faculty member facing termination. That hearing is also a formal hearing and the decision of the governing board is final. At no time did Brady ever have a hearing, nor was he ever notified of his termination or prospective termination until after the college board took official action to terminate his appointment on June 16, 1973.

On February 21, 1973, the president of the college wrote Brady: "You are hereby offered reappointment in your present assignment for 1973-1974. Salary statements may be made only after the legislature has acted on our budget request." On March 10, 1973, the interim president of the college wrote Brady: "Due to the condition of funds, it is not possible to offer extension of appointment for the third term or summer session of 1973."

By letter dated June 18, 1973, the interim president informed Brady that because of the level of legislative appropriations, he would not be offered reappointment for the 1973-74 academic year. The letter advised him that his termination was based upon "financial exigency." In that letter the interim president advised Brady that, by appointment, he would discuss the conditions under which Brady's termination was made and under which Brady was selected as one of the people to be terminated; and that he would be pleased to give Brady any assistance possible in helping him find employment. Brady was in Oregon when he received the notice of termination.

On June 30, 1973, Brady wrote to the Chairman of the Department of Social Sciences attempting to initiate a grievance procedure provided for in a collective bargaining agreement between the board and the Higher Education Association of Nebraska. He was not a member of the association, but was entitled to the benefit of the bargaining agreement. He set out as the basis for his grievance that his tenure status had been violated and that the college had not dismissed him in accordance with the provisions of the bylaws, which were a part of his contract. On July 6, 1973, the Chairman of the Department of Social Sciences denied Brady's grievance. On July 10, 1973, Brady wrote to the Dean of Arts and Sciences for the college, again calling attention to the two grounds for his complaint. On July 16, 1973, the dean wrote a letter to Brady in Oregon advising him that his termination was based upon financial exigency and denied his grievance. On August 3, 1973, Brady wrote to Dr. Wills, the Acting Vice President for Academic Affairs, and complained that the earlier denials of his grievance had relied upon "financial exigency" but had ignored his specific requests. On August 13, 1973, Dr. Wills advised Brady that his August 3rd appeal had been carefully reviewed and that Dr. Wills had determined that the grievance was denied "for a number of

reasons." Dr. Wills first asserted that Brady's appeal was out of time because it was after July 26, 1973. Second, that Brady had not enumerated any specific provisions of the bylaws or the collective bargaining agreement which had been violated. Third, that under the bylaws, tenure ceases when the position in question no longer exists, and because his position was eliminated due to lack of funds, his tenure status ceased at the time his position was eliminated. Fourth, Dr. Wills asserted that the notice provisions of the bylaws applied only to probationary employees and was not applicable to Brady. On August 20, 1973, Brady appealed to the Chairman of the Faculty Senate, and on August 24, 1973, the appeal was rejected "on procedural grounds" that he had not appealed the grievance to Dr. Wills within 10 days after the July 16th letter denying his grievance.

The legislative appropriation for the college in the spring of 1973 provided for approximately 80 full-time equivalent faculty members where there had been approximately 99 full-time equivalent faculty members in the 1972-73 year. Because of authorized terminations for other reasons, only seven faculty members were recommended for involuntary termination. Three of those were in the history department. When Brady was terminated, one untenured member was retained in the history department and another untenured person, the former president of the college, was added to the history faculty at a salary higher than other members of the history department. Brady's position was not eliminated but Brady was. Others, including an untenured person, taught his former courses in the 1973-74 school year. It is uncontested that Brady was a good teacher and that no termination for cause could be justified.

There can be no serious question but that the bylaws of the governing body with respect to termination and conditions of employment became a part of the employment contract between the college and Brady. At the time of the offer and acceptance of initial appointment

in 1967, Brady was advised in writing that the offer and acceptance of appointment at Wayne constituted a contract honoring the policies and practices set forth in the faculty handbook, which was furnished to him at that time.

Courts have generally held that where a college faculty member is employed using annual reappointment forms which do not set forth in full the terms and conditions of employment, the employment policies, rules, and regulations of the college become a part of the employment contract between the college and the faculty member. See Rehor v. Case Western Reserve University, 43 Ohio St. 2d 224, 331 N. E. 2d 416, cert. den. 423 U. S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 390. In American Assn. of University Professors v. Bloomfield College, 129 N. J. Super. 249, 322 A. 2d 846, affirmed 136 N. J. Super. 442, 346 A. 2d 615, the court noted: "The legal basis of plaintiff's claim of tenure is to be found in the Faculty Handbook of the college * * *. This document forms an essential part of the contractual terms governing the relationship between the college and the faculty." See, also, Zimmerman v. Minot State College, 198 N. W. 2d 108 (N. D.); Collins v. Parsons College, 203 N. W. 2d 594 (Iowa); Greene v. Howard University, 412 F. 2d 1128.

The defendant seeks to avoid the contractual obligation on the ground that the bylaws provide: "Tenure ceases when the position in question no longer exists." The contention is unsupportable on the facts here.

The defendant also contends that the action of the Legislature in reducing appropriations made it impossible to perform its contractual commitments to Brady. This is obviously inaccurate. The reduction in funds simply made it financially impossible to pay the salaries under seven faculty contracts. It did not make it impossible to pay Brady any more than it made it impossible to pay any one of the more than 100 other faculty contracts. In any event, the reduction in funds could not

and did not in any way make it impossible for defendant to perform its contractual obligations to give Brady notice and hearing prior to termination. A tenured professor has a sufficient property interest in continued employment to entitle him to the protection of procedural due process. Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548; Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570.

The trial court quite properly found that Brady was entitled to the notice and hearing required by procedural due process. The District Court, however, found that the HEAN collective bargaining agreement afforded plaintiff procedural due process, and that since he attempted to utilize it, he is bound by the dismissal which resulted for purely procedural reasons. The trial court in the case before us also found that the termination here was for lack of funds and was justified, and relied upon factual findings of financial exigency and administrative necessity made in the case of Levitt v. Board of Trustees of Nebraska State Colleges, 376 F. Supp. 945. That case dealt with the same legislative reduction in appropriations and the method of faculty reduction taken at Peru State College.

In that regard it should be noted that Judge Urbom's memorandum on the motion for preliminary injunction entered in the Levitt case on September 5, 1973, granted the motion for preliminary injunction on the ground that procedural due process required it, and did so after specifically considering the provisions of the collective bargaining agreement involved here. After the granting of that injunction, the plaintiffs in the Levitt case were then given a hearing before the board of trustees, and following the hearing were again terminated. The ultimate opinion in Levitt resulted. Judge Urbom specifically stated in his memorandum of September 5, 1973: "No reason appears for any need by the college for a termination prior to an evidentiary hearing before the Board. Nothing prevented, as far as the evidence shows,

the Board of Trustees' offering the plaintiffs a hearing, either before the decision to terminate, or after the decision to terminate but before the teaching duties were to begin in the fall."

The defendant contends, and the trial court accepted the contention, that because Brady began a grievance procedure under the HEAN collective bargaining agreement, he waived his contractual rights, and also waived his constitutional rights to procedural due process. We find no case cited, nor have we been able to find any, which will support such a conclusion. The HEAN grievance procedure itself required the college representative to meet with Brady and discuss the matter at issue fully with him at each step of the appeal. It also required that any grievance initiated by a tenured faculty member which involved dismissal or nonreappointment required a hearing procedure in step 4. Those provisions were simply ignored by the defendant.

There is no evidence in the record to support the dismissal of the appeal as out of time except an assumption as to the time of receipt of a letter, and then the computation of time is based on an erroneous interpretation of the bargaining agreement by reference to other provisions which are inapplicable.

The plaintiff was deprived of his right to notice and hearing required to be granted to him before he could be deprived of his rights. The termination was ineffective to terminate his teaching contract. That contract therefore continued on the same terms for the 1973-74 contract year, but we find no practical justification for an indefinite extension. His salary for the previous year was $10,400. There had been no agreement as to salary for the following year. Under such circumstances, the measure of damages is the amount of his salary for the last effective year of his contract, $10,400, less the amount which he earned, or with reasonable diligence could have earned, from other employment during the 1973-74 contract renewal period. See,

Schlueter v. School Dist. No. 42, 168 Neb. 443, 96 N. W. 2d 203; Annotation, Elements and Measure of Damages in Action by Schoolteacher for Wrongful Discharge, 22 A. L. R. 3d 1047. Interest on the net judgment should run from the end of the 1973-74 contract year.

The judgment of the District Court is reversed and the cause remanded to the District Court for determination of damages, including interest and costs.

REVERSED AND REMANDED.

SPENCER, J., dissenting.

I respectfully dissent. Where, as here, an individual avails himself of the benefits of a collective bargaining agreement, he may not reject the terms of that agreement. Arnett v. Kennedy (1974), 416 U. S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15.

Brady was terminated for sufficient cause: The lack of funds. As stated in Levitt v. Board of Trustees of Nebraska State Colleges, 376 F. Supp. 945: "* * * where lack of funds necessitated releasing a sizeable number of the faculty, certainly it was peculiarly within the province of the school administration to determine which teachers should be released, and which retained."

Working under the premise that with the limited funds available as complete an academic program as possible should be maintained, Wayne State College made a reasonable decision to terminate Brady, based upon a comparison of his academic preparation with other members of the history department. On the record, I would sustain the judgment of the District Judge. He found the procedure for a hearing set out in the bylaws did not have to be precisely followed so long as procedural due process was provided. He also found that Brady, having utilized the grievance and arbitration procedure, was bound by the decision.

NEWTON, J., joins in this dissent.

JULIUS E. SMITH, APPELLEE, V. LAWRENCE BIXBY, APPELLANT.

242 N. W. 2d 115

Filed May 26, 1976. No. 40332.

1. **Adverse Possession: Easements: Evidence: Trial.** Where the evidence establishes the open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. In such a case the owners of the servient estate have the burden of showing that the use was permissive.
2. **Adverse Possession: Highways: Time.** To establish a road or highway by prescription, there must be use by the general public under a claim of right adverse to the owner of the land of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land.
3. **Adverse Possession: Easements.** The extent and nature of an easement is determined from the use made of the property during the prescriptive period.
4. **Adverse Possession: Easements: Highways.** The width of a public highway acquired by prescription must be determined as a question of fact by the character and extent of the use.
5. ———: ———: ———. If the public has acquired the right to a highway by prescription the right is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel.

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

Edmund Hollstein, for appellant.

Albert W. Crites of Crites, Shaffer & Slavik, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

This is an action to enjoin the defendant from obstructing or blocking a road running through the de-

fendant's property in the unincorporated Village of Ellsworth, Sheridan County, Nebraska, and for damages for an assault and destruction of personal property by defendant. The decree of the District Court as modified declared the existing road to be a public road; restrained and enjoined the defendant from blocking or barricading the road or interfering in any way with its use; and awarded plaintiff judgment of $662.37 for damages resulting from the assault on plaintiff and destruction of his personal property. The defendant has appealed.

The defendant, Lawrence Bixby, is the owner of Block 1 in Ellsworth, Nebraska, a small unincorporated village located in Sheridan County, Nebraska. Defendant acquired the property sometime between 1947 and 1952. The trail road in dispute here entered Block 1 near the southeast corner and ran generally northwestward through the block. A bowling alley is located on the west side of the road in the northerly portion of the block, and the defendant's house and garage are located across the road on the east side. The road has been there since the early 1900's, and has been used continuously by the plaintiff and by the public to travel to and from the Village of Ellsworth to points north and northwest of the village. At one time it was a freight road. In the 1920's it was used as a mail route. In general, it was the main road until State Highway No. 27 was constructed and oil strips were put in around Ellsworth in the early 1950's. Since that time the plaintiff and another ranch family who own ranch property northwest of the village have been the principal persons who continue to use the road. The plaintiff has used the road since 1945 to travel to and from his ranch, and to haul cattle, hay, and supplies. The road was not regularly maintained by Sheridan County, although its road crews had done some work and grading on it at least once in the early 1970's. In recent years the plaintiff Smith and LeRoy Louden, who both own ranches northwest of the village, have done most of the mainte-

nance work on the road. The road is the only way plaintiff can get to his ranch without going through someone else's pasture.

There was no interference by anyone with the use of the road until 1974. In May 1974, the defendant decided to close the road because the winds had been especially strong and sand from the road would blow onto his lawn and around his home. He parked a truck on the east side of the road and placed logs across the traveled part of the road. For a while the plaintiff and Louden went around the logs and occasionally used other ways to get to their property. After talking to a lawyer, the plaintiff and Louden took a tractor and feed sled, picked up the logs from the road, pulled a post out of the middle of the road, and started to put some hay on the road to help prevent erosion. At that point the defendant came out with a shotgun, threatened the plaintiff, fired his shotgun and hit and destroyed the rear tire on plaintiff's tractor. This lawsuit followed. The court granted a temporary injunction pending trial.

After trial, the District Court declared the road to be a public road established by prescription. The court, however, granted the defendant an option to accept the existing road or to construct a new road 20 feet in width which would cross Block 1 in a more westerly direction and leave it on the west boundary line at a point approximately 200 feet south of the northwest corner of the block. The court then ordered that whichever option the defendant selected, that road would be the public road, and the court enjoined and restrained the defendant from blocking or barricading it, and from interfering in any way with its maintenance or use. The court also awarded plaintiff judgment for $662.37 as damages resulting from the assault on plaintiff and the destruction of his personal property.

Following the filing and argument of a motion to vacate and modify, the District Court modified its original decree by voiding and deleting the option and elec-

tion to construct a new road. The court declared the existing road to be the only public road over and through Block 1, found and fixed the width of the right-of-way at 20 feet wide, 10 feet on either side of the centerline, and directed that a surveyor accurately establish the centerline and file the plat in the office of the county clerk, with a copy of the decree. The permanent injunction was affirmed as to the existing road, and the award of damages and all other provisions of the original decree were continued in full force and effect.

The defendant contends that the use of the road was permissive only and therefore the public never acquired any rights to the road. There is simply no evidence in the record, aside from defendant's own testimony, that will support that contention. No witness who testified as to the use of the roadway had ever asked permission from anyone, nor was there any evidence of any kind that anyone had ever objected to the use of the road before the incidents involved here. It might well be said that the evidence in this case established a prescriptive public use and the existence of an easement for a public road before the defendant became the owner of his property.

Where the evidence establishes the open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. In such a case the owners of the servient estate, in order to avoid the acquisition of an easement by prescription, have the burden of rebutting the prescriptive right by showing that the use was permissive. See Hopkins v. Hill, 160 Neb. 29, 68 N. W. 2d 678. In the case before us, the defendant's evidence is wholly insufficient to establish permissive use or to rebut the evidence that the use of the road was adverse and under claim of right.

To establish a road or highway by prescription, there must be use by the general public under a claim of right adverse to the owner of the land of some particular or

defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Where the use of an easement has been adverse, notorious, and uninterrupted for the statutory period, it will be presumed to have been under a claim of right. The owner of the servient tenements is charged with knowledge of such use and acquiescence in it is implied. Dunnick v. Stockgrowers Bank of Marmouth, 191 Neb. 370, 215 N. W. 2d 93. See, also, Scoville v. Fisher, 181 Neb. 496, 149 N. W. 2d 339.

The defendant contends that even though the public may have used the road for the requisite period of time to establish a prescriptive right, nevertheless, it had been abandoned as a public road for more than 10 years because the regular users of the road are now reduced to the plaintiff and Louden and their families, and irregularly by persons interested in traveling to and from their ranches. The defendant cites no authority, nor do we find any, to support the contention that when only a few members of the public use a road regularly, the road may be deemed abandoned. Neither is there any authority to support the proposition that public rights acquired by prescription are lost or abandoned because of a substantial reduction in the number of members of the public who continue to make use of the rights previously acquired.

Some issues have been raised as to the width of the right-of-way determined by the trial court, and the extent of the prescriptive easement for road purposes. In State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535, this court said: "The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. * * * If the

public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel." In this case the trial court saw and heard the witnesses and the evidence supports the trial court's determination of the width of the road.

The defendant also contends that the amount of damages is excessive to the extent it exceeds $162.37, which was the value of the tractor tire destroyed. The evidence, however, also establishes without contradiction an assault on the plaintiff with a shotgun. The judgment for damages includes $500 for that assault and the evidence supports the judgment.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY M. BRAASCH, APPELLANT.

242 N. W. 2d 119

Filed May 26, 1976. No. 40360.

Criminal Law: Sentences. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Affirmed.

Stephen A. Scherr, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

McCOWN, J.

The defendant, Terry M. Braasch, was originally charged with first degree murder. As the result of a plea bargain, the charge was reduced to second degree murder and the defendant pleaded guilty to that charge. He was sentenced to life imprisonment. The sole question on this appeal is whether the sentence is excessive.

The defendant was born February 21, 1948, in Hastings, Nebraska, and lived there all his life. He was graduated from Hastings High School in 1966. In November of 1968, he went to work at a machine shop, where he worked as a machinist until the time of the murder except for a brief period in 1974. During the period of his employment at the machine shop there was considerable friction between the defendant and his shop foreman, Loren Bolte. Defendant resented Bolte and felt that Bolte was edging him out of his job. For several days prior to March 13, 1975, the defendant had thought about killing Bolte and how to do it. On the evening of March 13, 1975, the defendant put a 12-gauge shotgun and three shells in his pickup. The next morning he drove to work, arriving about 7:45 a.m. He put one shell in the shotgun, the other two in his pocket, and went into the shop with the gun. Bolte was the only person there. Defendant told Bolte he intended to shoot him. Bolte started to run and the defendant shot him in the upper back. Bolte fell and dragged himself a few feet across the floor. The defendant ejected the spent shotgun shell, reloaded the shotgun, walked closer to Bolte, and shot him in the head. Bolte died immediately. The defendant then walked to his truck, drove to the police station, and turned himself in.

The defendant was 27 years old, married, and the father of an infant son. An examination by a psychiatrist found no mental disorder, nor any evidence of neurosis or psychosis. The presentence investigation re-

port was essentially good. The only prior offenses were minor traffic violations.

The defendant contends that his previous good record warranted and required the imposition of less than a life sentence. His previous good record, however, cannot erase the fact that the crime here was cold, calculated, premeditated, violent murder, and the defendant was not even remorseful about that murder. The facts would justify a conviction for first degree murder and the minimum penalty for that crime is life imprisonment. The penalty for second degree murder is imprisonment for not less than 10 years or for life. There was no abuse of discretion here.

A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Blankenship, 195 Neb. 329, 237 N. W. 2d 868.

AFFIRMED.

JEROME F. SOSSO, APPELLEE, v. MARY M. SOSSO, APPELLANT.
242 N. W. 2d 621

Filed May 26, 1976. No. 40411.

1. **Divorce: Statutes: Jurisdiction.** Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.
2. **Parent and Child: Statutes: Jurisdiction.** Under the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded.

Jean J. Jungers, for appellant.

William J. Lindsay and Bennett G. Hornstein, for appellee.

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

NEWTON, J.

This is a divorce action. The court terminated parental rights as to two minor children of the parties after dissolving their marriage. Mary M. Sosso, mother of the children and appellant, challenges the order terminating parental rights. She asserts that parental rights to children cannot be terminated in a divorce proceeding; that proper notice of a hearing on termination was not given; that the children should have been represented by an attorney; and that the evidence does not sustain the judgment. We reverse the order terminating parental rights to the children.

The primary question is the jurisdiction of the District Court to terminate parental rights in a divorce action. "Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." Detter v. Erpelding, 176 Neb. 600, 126 N. W. 2d 827. The only authority conferred on the District Court to deal with children in a divorce suit is found in section 42-364, R. S. Supp., 1974. It provides: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing." A reading of the entire statute makes it obvious that the authority of the court is limited to provisions for children which will remain subject to change. No final disposition of the children such as an order terminating parental rights is contemplated.

Under the Nebraska statutes a termination of parental rights can only be decreed by a juvenile court in a pro-

ceeding brought for that purpose. See § 43-209, R. S. Supp., 1974.

In view of the foregoing, it is not necessary to consider appellant's other assignments of error. That portion of the judgment of the District Court purporting to terminate parental rights to the children of the parties is reversed and the cause is remanded for further proceedings.

It appears that in some instances District Judges have terminated parental rights in divorce cases. With that in mind, we wish to make it clear that the rule herein laid down, except as to this case, shall be prospective in nature and fully effective as of June 1, 1976.

REVERSED AND REMANDED.

SPENCER, J., participating on briefs.

SPENCER, J., dissenting.

I respectfully dissent herein. I disagree with the holding in the majority opinion that under our statute a termination of parental rights can only be decreed by a Juvenile Court in a proceeding brought for that purpose.

I feel that section 42-364, R. S. Supp., 1974, is sufficiently broad to invest the District Court with authority to terminate parental rights upon proper notice. The statute reads: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, * * *."

This is stronger language than was included in the statute before it was changed in 1972. The language then was: "* * * the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain." This language came into our law in 1867 (R. S. 1867, p. 130), and remained unchanged until 1972. This was long before there was a Juvenile Court Act. Over the years, the District Court under this provision has exercised the

power to terminate parental rights in divorce cases when this was found to be necessary. So far as I have been able to determine, this right has never been challenged. The challenge in this case was directed to the fact that it was done without due notice to the parties, raising a constitutional issue. The opinion of the majority, however, has, in my judgment erroneously, decided that the District Court has never had power to terminate parental rights, even with notice.

It is necessary for the District Court to have broad powers in the treatment and disposition of all matters relating to minor children, to permit the court to carry out its duties and functions in the dissolution of marriages. This has been the attitude of the court historically. Under the opinion in this case, we are depriving the District Court of the power to terminate parental rights and requiring that a new action for that purpose be filed in the Juvenile Court. After this case, I am afraid that the District Court can no longer fully protect the interests of minor children in marriage dissolutions. It will be necessary that some further action be taken in Juvenile Court. This could result in inaction and the introduction of the attitude and policies of another court, whereas the District Court would have primary jurisdiction and responsibility in the matter.

It should be borne in mind that Juvenile Courts were created in the first instance to provide for the special treatment of juveniles who were either guilty of misconduct or in need of supervision and discipline with possible institutional treatment. My reading of the Juvenile Court statute convinces me that it is still concerned with these original objectives, and that it was not intended to supplement the action of the divorce courts in marriage dissolution cases.

WHITE, C. J., and BRODKEY, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. MELVIN TWEEDY, APPELLANT.

242 N. W. 2d 626

Filed May 26, 1976. No. 40421.

1. **Criminal Law: Sentences.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
2. ———: ———. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.

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

Willis G. Yoesel, for appellant.

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

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

SPENCER, J.

Defendant, Melvin Tweedy, pled guilty to unlawfully escaping from legal custody. He was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. This sentence runs consecutively to another sentence imposed by the same court on the same date for auto theft.

Defendant urges two assignments of error. (1) The excessiveness of the sentence by making it consecutive rather than concurrent with another sentence imposed on the defendant. (2) The failure to allow defendant full credit for time spent in custody previous to sentencing.

On July 12, 1975, defendant escaped from legal custody in the Saunders County jail while awaiting the disposition of three felony charges. Defendant, with two other individuals, forced a lock on the jail door, fled custody, and by means of two stolen automobiles left

the state. He was arrested in Alamogordo, New Mexico, returned to Wahoo, Nebraska, and charged with feloniously escaping custody.

On August 13, 1975, defendant pled guilty to escape from legal custody. The proceedings fully complied with the ABA Standards Relating to Guilty Pleas, as prescribed by State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763. On September 15, 1975, defendant was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. He was given credit for the time he spent in custody in the county jail from August 13, 1975, when he entered his guilty plea, to the date of sentencing.

A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. We have consistently held that it is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. Gochenour (1975), 193 Neb. 855, 230 N. W. 2d 90. Defendant was given a minimal sentence on the escape charge. To have made it concurrent to the sentence on the charge for which he was being held at the time of his escape would mean defendant would escape punishment for this offense. Deterrence is a factor which certainly must receive serious consideration in imposing sentence in cases of this type. There was no abuse of discretion.

Defendant's second assignment, that the court failed to allow him full credit for time served while awaiting sentencing in the Saunders County jail, is patently frivolous. He was allowed credit for all time in custody after his arraignment on August 13, 1975. He was given no credit for any time spent in the county jail previous to that time. It is this refusal that defendant challenges.

Section 83-1,106(1), R. S. Supp., 1974, the statute in question, grants a broad discretion to the trial court on the credit to be given for jail time. It provides that the sentencing judge may consider prior time spent in cus-

tody as a result of conduct on which the charge is based. Credit was allowed for the time defendant was awaiting sentencing pending the preparation of the presentence report and the illness of the presiding judge. Defendant received a minimum sentence for the offense. There is no merit to either of defendant's assignments.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN TWEEDY, APPELLANT.

242 N. W. 2d 627

Filed May 26, 1976. No. 40422.

1. **Criminal Law: Sentences.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
2. ———: ———. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion.

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

Willis G. Yoesel, for appellant.

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

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

SPENCER, J.

Defendant, Melvin Tweedy, pled guilty to unlawfully stealing an automobile. He was sentenced to a term of not less than 2 years nor more than 5 years in the Nebraska Penal and Correctional Complex. This sentence runs consecutively to a 1-year sentence imposed by the same court on the same date for escape from custody.

Defendant alleges the sentence is unduly excessive; should have been concurrent with the other sentence; and he should have been allowed full credit for the time served in the Saunders County jail while awaiting sentencing. We affirm.

Defendant feloniously stole a Dodge pickup on June 18, 1975. He was arrested and charged with the theft on July 9, 1975. Along with two other individuals he forced a lock on the jail door, fled custody, and by means of two other stolen automobiles left the state. He was arrested in Alamogordo, New Mexico, and returned to Wahoo, Nebraska.

On August 13, 1975, defendant entered a plea of guilty to feloniously stealing an automobile, the charge on which he was confined when he escaped custody. The arraignment proceedings fully complied with the ABA Standards Relating to Guilty Pleas as prescribed by State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763. Defendant was sentenced on September 15, 1975, on this offense and on one for escape from custody.

Defendant urges the sentence is unduly excessive. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Wade (1975), 193 Neb. 365, 227 N. W. 2d 400. The penalty provided by section 28-522, R. R. S. 1943, for stealing an automobile, is not less than 1 nor more than 10 years. Defendant was originally charged with two counts of auto theft, but as a result of a plea bargain one of the counts was dropped, along with a felony check charge. Defendant has had several past contacts with the authorities, including one for auto theft. The presentence report indicates defendant stole at least two cars to effect his escape from Nebraska when he broke from jail on this charge. On defendant's record, he received a minimum sentence herein.

Defendant argues the trial court erred in directing his sentence be served consecutively to the one imposed for breaking custody. There is no merit to this claim. In

State v. Rodman (1974), 192 Neb. 403, 222 N. W. 2d 109, we stated: "It was within the discretion of the District Court to direct that sentences be served consecutively." The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Nokes (1975), 192 Neb. 844, 224 N. W. 2d 776. The action of the trial judge in directing the sentences be served consecutively was not an abuse of discretion.

Defendant further argues the court failed to allow him full credit for the time served while awaiting sentence in the county jail. There is no merit to this contention. Credit for time spent in custody is obtained in accordance with the provisions of section 83-1,106(1), R. S. Supp., 1974: "Credit against the maximum term and any minimum terms *may be given* to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Division of Corrections." (Italics supplied.)

It is evident this statute gives the sentencing judge wide discretion in determining the extent to which such credit will be given in a particular case. The record in the escape from custody charge against the defendant shows that the trial judge gave the defendant credit for all time spent in custody subsequent to the entry of his plea therein. No abuse of discretion is shown in the record. The sentence was in all respects proper and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALBERT TWEEDY, APPELLANT.

242 N. W. 2d 629

Filed May 26, 1976. No. 40423.

1. **Criminal Law: Sentences.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
2. ———: ———. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion.

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

Willis G. Yoesel, for appellant.

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

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

SPENCER, J.

Defendant, Albert Tweedy, pled guilty to unlawfully escaping from legal custody. He was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. This sentence runs consecutively to another sentence imposed by the same court on the same day for auto theft.

The issues raised by the defendant are: (1) Excessiveness of the sentence by making it consecutive rather than concurrent; and (2) failure to allow him full credit for time spent in custody previous to sentencing. We affirm.

This is a companion case to State v. Melvin Tweedy (40421), *ante* p. 246, 242 N. W. 2d 626. Defendant is a cousin of Melvin Tweedy. Both Melvin and defendant were being held in the Saunders County jail for auto theft when they escaped from custody. Defendant was arrested in New Mexico, returned to Wahoo, Nebraska, and charged with feloniously escaping custody.

On August 13, 1975, defendant pled guilty to escape from legal custody. Defendant, who was 16 years of age, was represented by counsel. His parents and guardian had been notified of the charges against him. The proceedings fully complied with the ABA Standards Relating to Guilty Pleas, as prescribed by State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763. On September 15, 1975, defendant was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. He was given credit for the time he spent in custody in the county jail from August 13, 1975, when he entered his guilty plea, to the date of sentencing.

A sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of discretion. On the record the sentence herein would be considered a minimal one. It is within the discretion of the District Court to direct that sentences be served consecutively. State v. Rodman (1974), 192 Neb. 403, 222 N. W. 2d 109. Our law is well settled. The action of the District Court in directing that sentences be served consecutively will not be disturbed on appeal unless the record shows an abuse of discretion. To have made defendant's sentence concurrent to the one imposed for auto theft would have permitted defendant to avoid punishment on this charge. As we said in State v. Melvin Tweedy (40421), *ante* p. 246, 242 N. W. 2d 626: "Deterrence is a factor which certainly must receive serious consideration in imposing sentences in cases of this type." There was no abuse of discretion in imposing a consecutive sentence.

Defendant's second assignment is patently frivolous. He was allowed credit for all time in custody after his arraignment on August 13, 1975. He was given no credit for the period from July 9 to July 12 when he escaped custody, or for the period after he was returned from Alamogordo, New Mexico, to August 13. Section 83-1,106(1), R. S. Supp., 1974, which is set out in State v. Melvin Tweedy (40422), *ante* p. 248, 242 N. W. 2d 627,

grants a broad discretion to the trial court on the credit to be given for prior time spent in custody as a result of conduct on which the charge is based. There was no abuse of discretion on the part of the trial judge in refusing to consider time spent in custody previous to the entry of the guilty plea.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALBERT TWEEDY, APPELLANT.

242 N. W. 2d 631

Filed May 26, 1976. No. 40424.

Criminal Law: Sentences. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

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

Willis G. Yoesel, for appellant.

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

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

SPENCER, J.

Defendant, Albert Tweedy, pled guilty to unlawfully stealing an automobile. He was sentenced to a term of not less than 2 nor more than 5 years in the Nebraska Penal and Correctional Complex. This sentence runs consecutively to a 1-year sentence imposed by the same court on the same day for escape from custody. Three issues were argued in this appeal. (1) The sentence is unduly excessive. (2) It runs consecutively rather than concurrently with another sentence imposed the same

day. (3) It fails to allow the defendant full credit for time spent in custody previous to sentencing. We affirm.

Defendant was involved in the theft of two cars on June 18, 1975. He was arrested and charged on July 9, 1975. On July 12, 1975, with two other individuals he forced a lock on the jail door, fled custody, and by means of two other stolen automobiles left the state. He was arrested in Alamogordo, New Mexico, and returned to Wahoo, Nebraska.

On August 13, 1975, defendant entered a plea of guilty to feloniously stealing an automobile, one of the charges on which he was confined when he escaped custody. Defendant, who was only 16 years of age, was represented by counsel. His parents and guardian had been notified of the charges against him. The arraignment procedure fully complied with the ABA Standards Relating to Guilty Pleas as prescribed by State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763. Defendant was sentenced on this offense and on one for escaping from custody on September 15, 1975.

This case is a companion one to State v. Melvin Tweedy (40422), *ante* p. 248, 242 N. W. 2d 627. What we said there is controlling herein.

We do not agree with the defendant that the sentence is unduly excessive. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Wade (1975), 193 Neb. 365, 227 N. W. 2d 400. The penalty provided by section 28-522, R. R. S. 1943, for stealing an automobile is not less than 1 nor more than 10 years.

Defendant was originally charged with two counts of auto theft, but as a result of a plea bargain one other charge was dropped. While defendant has no previous felony convictions, he had been confined in the Boys' Training School at Kearney. His offenses among other things included a check charge, joyriding, and escape. In addition to another count for auto theft, which was

dropped as a result of a plea bargain herein, the defendant was involved in the theft of two other automobiles to effect his escape. On defendant's record the sentence herein could not possibly be said to be excessive.

Defendant argues the trial court erred in directing his sentence be served consecutively to the one imposed for breaking custody. There is no merit in that claim. What we said in the escape from custody case, State v. Albert Tweedy (40423), *ante* p. 251, 242 N. W. 2d 629, is applicable herein.

Defendant's third assignment is the failure of the court to allow him full credit for the time served while awaiting sentence in the county jail. This situation has also been fully set out in the other case and needs no further comment here.

We find no merit in any of the defendant's assignments. The sentence was in all respects proper and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID WENZEL, APPELLANT.

242 N. W. 2d 120

Filed May 26, 1976. No. 40427.

1. **Criminal Law: Informants: Discovery.** No fixed rule with respect to the disclosure of the name of an informant is justifiable. The problem is one that calls for balancing all public interest in protecting the flow of information against the individual's right to prepare his defense.
2. **Criminal Law: Informants: Discovery: Trial.** Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the public significance of the informer's testimony, and other relevant factors.
3. ———: ———: ———: ———. Ordinarily, if the informer's identity is either known by the defendant or else disclosed

through the testimony of other witnesses, no prejudice results from nondisclosure.

4. ———: ———: ———: ———. This State is committed to the dogma that in balancing the interests of the State against that of the accused, the burden of proof is on the defendant to show need for the disclosure.

5. ———: ———: ———: ———. Disclosure of the identity of an informer is a matter of judicial discretion.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Bruce G. Mason of Ross & O'Connor, for appellant.

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

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

SPENCER, J.

Defendant, David Wenzel, was convicted of the sale of controlled substances on each of three counts. He was sentenced to a term of 1 to 2 years in the Nebraska Penal and Correctional Complex on each count, the sentences to run concurrently. The only issue involved in this appeal is: Was it reversible error for the trial court to refuse to require an undercover officer to disclose the name of an informant upon request by the defendant at trial. We affirm.

A female undercover officer of the Omaha vice and narcotic division went to the Heet Lounge in Omaha with an informant who introduced her to the defendant whom she had never met. After the introduction she engaged defendant in conversation, inquiring of him if he had coke (cocaine) and some P.C.P. (phencylidine). At the time of this conversation the informant was a few feet away. It was the officer's testimony that the informant could not hear the conversation because the music was so loud.

The officer testified defendant said he could supply

the drug and asked if she had $80. She said "Yes." The defendant then told her that he owed someone the money and that she should give it to another person who was working at the Heet Lounge. This person was pointed out to her. The officer walked over to him and asked if he knew the defendant and if she was to give him some money. He said "Yes." She gave him the money.

After she gave this third person the money, she was directed by the defendant to a hallway off the main dancing room of the lounge. She went to the hallway and proceeded up the staircase where she turned around and saw the defendant toss an empty cigarette package on the ledge. The defendant pointed to it and she nodded. The package contained two small packets of a white powder which she picked up, left the lounge, and turned the packet over to the property room of the Omaha police department.

The police officer testified that her next contact with the defendant was approximately 1 to 2 weeks later. At this conversation, defendant told her that he could get her some more cocaine. She made contact with him on one or two other occasions. On one of these occasions, she was told to meet defendant at the Heet Lounge on February 1, 1975.

On February 1, 1975, when she saw the defendant enter the Heet Lounge, she followed him into a room where the employees punch in and out for work. After defendant punched in, she asked him if he had the cocaine. He said "Yes," and took out of a pocket an empty cigarette package containing cocaine, which he gave to her and she gave him the $80.

The informant did not see the drug transaction. He did walk out with her when she left the lounge after the first purchase but did not accompany her to the station. On the second occasion, she was entirely alone.

When the undercover officer was asked the name of her informant, she refused to give it. Defendant's coun-

sel then asked her if it was not Caradori, who was in the Iowa Penitentiary, and she refused to answer.

Two other undercover officers were working the lounge at the time of the first transaction and were providing cover for her. One of them on rebuttal testified he saw her in conversation with the defendant. On being asked the name of the party she was with on that occasion, he gave the name "Scott Caradori."

Defendant, citing Roviaro v. United States (1957), 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639, argues that the District Court committed reversible error in not requiring the witness to disclose the identity of the informant. Defendant argues the informant was present at the occurrence of the alleged crime and might be a material witness as to whether the accused knowingly delivered the controlled substances.

The record does not establish what defendant attempts to read into it. The record is undisputed the informant introduced the undercover officer to the defendant. The record is also undisputed the informant was not present when the drugs were delivered to the undercover agent. The record is also clear the only participation of the informant was the introduction of the undercover agent as "Sandy." He was a few feet from her at the time she visited with defendant. The record is also undisputed the place was noisy on that occasion, and to be able to hear one needed to have his ear very close to the person talking. On the second occasion, the informant was not with the undercover agent.

In Roviaro, the Supreme Court of the United States said: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible signifi-

cance of the informer's testimony, and other relevant factors."

We agree, where a witness is an active participant or sees the delivery of the drugs, disclosure may be material to the defense. Here, however, neither of those elements were present.

The situation we have is analogous to the one in United States v. Russ, 362 F. 2d 843 (2d Cir., 1966). It was a narcotics prosecution. The informer merely introduced the government agent to the defendant. The informer did not participate in the sale or witness its consummation. There, Judge Kaufman, writing for the Court of Appeals, affirmed the trial court's refusal to require the government to identify the informer.

While the undercover officer refused to disclose the name of her informant, and the court did not require her to do so, the defendant was aware of the name and the whereabouts of the informant. On cross-examination, the undercover agent was asked if the informant's name was Caradori, who is in the Iowa Penitentiary now. Subsequently, one of the State's witnesses was asked who was with the undercover agent on the first occasion and he replied, "Scott Caradori."

From the cross-examination, it is evident the defendant well knew the name of the informant. Consequently, even if the informant's identity was material to the defense, the refusal to make the disclosure would not be prejudicial. In United States v. Barnes, 486 F. 2d 776, (8th Cir., 1973), Judge Lay, writing for the court, said: "In some instances no prejudice results if the informant's identity was either known by the defendant or else disclosed through the testimony of other witnesses. See, e.g., Churder v. United States, 387 F. 2d 825 (8th Cir. 1968); Smith v. United States, 273 F. 2d 462 (10th Cir. 1959), cert. denied, 363 U. S. 846, 80 S. Ct. 1619, 4 L. Ed. 2d 1729 (1960); * * *."

Defendant now contends the informer's identity was necessary to his defense but he made no such showing

in the record. The rule is well established that a defendant who requests disclosure must make a sufficient showing that disclosure is required. Our position is well expressed in United States v. Alvarez, 472 F. 2d 111 (9th Cir., 1973): "At the outset, we must recognize that no hard and fast rule can be patterned with reference to disclosure of the name of an informer. The trial judge must balance the public interest in protecting the flow of information against the individual's right to prepare his defense. The answer depends upon the particular facts in each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Roviaro v. United States, 353 U. S. 53, 62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). In applying this rule to our facts, we emphasize that this circuit is firmly committed to the dogma that in balancing the interest of the government against that of the accused, the burden of proof is on the defendant to show need for the disclosure."

We reiterate, all the informant did in the present case was to introduce the undercover agent to the defendant. It is undisputed he was not present at the consummation of the transaction. The disclosure of the name of the informant was within the discretion of the trial judge. What was said in United States v. Waters, 461 F. 2d 248 (10th Cir., 1972), is pertinent herein: "Appellant Robins additionally contends the informer's identity was necessary to his defense in seeking evidence relating to the veracity of the coparticipant who testified against him. Speculation as to possible assistance in the defense of a case which would be afforded by disclosure of the informer's identity is not a sufficient basis for requiring that disclosure. Disclosure of the identity of an informer is a matter of judicial discretion. We cannot conclude the trial court's decision was an abuse of that discretion requiring reversal."

It is undisputed the informant was in no way in-

volved in the second drug transaction. Defendant's sole defense rested upon his denial that the transaction took place. The defendant was convicted on the charge of unlawful delivery of controlled substance in each of three counts. He was given a minimal sentence of not less than 1 nor more than 2 years, and the three sentences run concurrently.

On the record, we cannot conclude the trial court's decision was an abuse of discretion. We affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JONATHAN FEAGIN, APPELLANT.

242 N. W. 2d 124

Filed May 26, 1976. No. 40474.

Criminal Law: Guilty Plea: Waiver. A plea of guilty waives all defenses to the charge whether procedural, statutory, or constitutional.

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

Clyde A. Christian of Shrout, Christian, Krieger, Nestle & Palagi, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

BOSLAUGH, J.

The defendant was charged with third offense driving while under the influence of alcoholic liquor. Upon a plea of guilty he was sentenced to imprisonment for 1 year. He has appealed and contends the trial court erred in considering the prior convictions alleged in the

information and in considering an arrest that occurred several weeks before sentencing.

The information alleged the offense was committed on November 11, 1974, and that the defendant had been convicted of the same offense on September 13, 1968, and June 4, 1971. The plea of guilty eliminated the necessity of proof of the prior convictions or that the defendant had been represented by counsel or had knowingly and intelligently waived his right to counsel at the time of those convictions.

A plea of guilty waives all defenses to the charge whether procedural, statutory, or constitutional. State v. Nokes, 192 Neb. 844, 224 N. W. 2d 776.

The defendant's guilty plea was accepted on May 2, 1975. All constitutional requirements pertaining to the arraignment were complied with and the defendant does not contend otherwise. Following the arraignment the case was continued for a presentence investigation.

The defendant appeared in court for sentencing on June 10, 1975. At the request of the defendant the case was again continued so that the defendant could assist in establishing a boxing program at one of the recreation centers.

On August 12, 1975, the defendant again appeared in court for sentencing. He was at that time a patient in the chemical dependency unit at the Lincoln General Hospital. The case was again continued so that the defendant could complete the course of treatment.

The defendant again appeared for sentencing on September 30, 1975. At this hearing there was some discussion concerning an arrest for drunkenness that had occurred within the last week or two. The defendant denied that he had been drinking at the time of the arrest and stated that he was assaulted by 3 men after he had taken a tranquilizer pill. The trial court continued the hearing for the purpose of ascertaining the facts concerning the arrest.

Sentence was imposed on October 7, 1975. The trial

court stated that he had obtained an additional report from the probation officer and had obtained the police reports concerning the arrest. The defendant again denied that he had been drinking at the time of the arrest but produced no other evidence concerning it. The trial court stated that the police officer had said that the defendant admitted he had been drinking. The defendant was then sentenced to imprisonment for 1 year.

There is nothing in the record to support the defendant's contention that the trial court should not have considered the circumstances of the arrest that occurred prior to the September 30, 1975, hearing. It had some bearing on whether the defendant should be considered for probation.

The presentence report is not before us, but the record contains references to the defendant's lengthy arrest record. The sentence which was imposed is the minimum prescribed for the offense. § 39-669.07, R. R. S. 1943. The record as a whole shows no abuse of discretion by the trial court. The judgment of the District Court is affirmed.

AFFIRMED.

FARMLAND SERVICE COOP., INC., A COOPERATIVE CORPORATION, APPELLANT, V. ROBERT JACK ET AL., APPELLEES.

242 N. W. 2d 624

Filed May 26, 1976. No. 40572.

1. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different from that which was claimed due. The acceptance by the claimant of the substituted performance in full satisfaction of the claim discharges the indebtedness.
2. ———: ———. An executed compromise settlement of a good faith controversy is an accord and satisfaction.

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

Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Stewart & Stewart, for appellees.

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

BOSLAUGH, J.

This is an action for damages for breach of contracts to sell corn. The plaintiff is a cooperative company which is engaged in the marketing of grain and operates an elevator at Gothenburg, Nebraska. The defendants operate farms in Frontier County, Nebraska.

On May 1, 1973, the defendants agreed to sell 40,000 bushels of No. 2 grade yellow corn to the plaintiff at $1.45 per bushel for delivery between May 1, 1973, and August 31, 1973. On May 2, 1973, the defendants agreed to sell an additional 40,000 bushels of No. 2 grade yellow corn to the plaintiff on the same terms.

During May and June of 1973, the defendants delivered approximately 17,000 bushels of corn to the plaintiff. Late in June the defendants notified the plaintiff they would not deliver any more corn under their contracts. The defendants stated they had received bad advice from the plaintiff's elevator manager and the contract price was too cheap. The contracts had been made orally and there was no memorandum of any kind signed by the defendants.

On June 26, 1973, there was a meeting at the office of the plaintiff's attorney. The elevator manager and the defendants were present together with the plaintiff's attorney and the defendants' attorney. The defendants offered to deliver the balance of the corn due under the first contract if the plaintiff would agree to a cancellation of the second contract. The plaintiff's attorney requested time to research the legal questions involved.

On June 28, 1973, the elevator manager wrote a letter to the defendants, on the letterhead of the plaintiff's attorney, stating as follows: "The Gothenburg Co-Op elevator will haul 23,000 bushels of your corn for $1.45 a bushel less freight charges from June 29th through the month of July." At the bottom of the letter there was a blank line for the signature of the defendants to acknowledge they had received the letter. Willard Jack acknowledged receipt of the letter and returned a signed copy to the plaintiff.

The defendants delivered an additional 23,000 bushels of corn to the plaintiff in July. On October 9, 1973, the general manager of the plaintiff wrote to the defendants and demanded performance of the second contract. The defendants refused to perform the second contract.

The trial court found there had been an accord and satisfaction between the parties and sustained the defendants' motion for a summary judgment. The plaintiff has appealed.

An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different from that which was claimed due. The acceptance by the claimant of the substituted performance in full satisfaction of the claim discharges the indebtedness. United States v. Aetna Cas. & Sur. Co., 480 F. 2d 1095. An executed compromise settlement of a good faith controversy is an accord and satisfaction. Olson v. Farnsworth, 97 Neb. 407, 150 N. W. 260.

The evidence before the trial court in this case showed that the defendants had agreed to sell 80,000 bushels of corn to the plaintiff but a dispute arose after 17,000 bushels had been delivered. At the conference on June 26, 1973, the defendants offered to deliver an additional 23,000 bushels to the plaintiff in full satisfaction of both contracts. The elevator manager claimed that he did not accept the offer on that date, but it is undisputed that the letter stating the plaintiff would haul 23,000

bushels of the defendants' corn at the contract price from June 29 through the month of July and signed by the elevator manager was sent to the defendants several days later. This letter was an acceptance of the defendants' offer made on June 26, 1973. The offer and acceptance followed by performance of the agreement constituted an accord and satisfaction.

The plaintiff suggests there was no consideration for the agreement. The settlement of the dispute between the parties was a sufficient consideration for the agreement. Furthermore, a modification of a sales contract may be made without consideration under the Uniform Commercial Code. § 2-209, U. C. C.

The record in this case shows there was no genuine issue as to any material fact and the defendants were entitled to judgment as a matter of law. The defendant's motion for summary judgment was properly sustained.

The judgment of the District Court is affirmed.

AFFIRMED.

SEWARD COUNTY BOARD OF COMMISSIONERS ET AL., APPELLANTS, V. CITY OF SEWARD, NEBRASKA, A MUNICIPAL CORPORATION ET AL., APPELLEES.

242 N. W. 2d 849

Filed June 2, 1976. No. 40292.

1. **Airports and Landing Fields: Eminent Domain: Zoning.** The propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations. Zoning permitting a contemplated use is not a condition precedent to a taking.
2. **Airports and Landing Fields: Municipal Corporations: Zoning.** Section 18-1716, R. R. S. 1943, was designed to eliminate overlapping in municipal extraterritorial zoning.
3. **Airports and Landing Fields: Eminent Domain: Zoning.** The power of eminent domain is inherently superior to the exercise

of the zoning power, and the grant of eminent domain power to a governmental unit renders the unit immune from zoning regulation.

4. **Airports and Landing Fields: Municipal Corporations: Zoning.** Although the governmental proprietary distinction may be a useful device for limiting governmental tort immunity, it is not appropriate for the resolution of zoning conflicts.
5. **Airports and Landing Fields: Property: Eminent Domain.** Under sections 25-2501 to 25-2506, R. S. Supp., 1974, the uniform procedure for acquiring private property for public use act, the hearing is not a hearing to justify the taking itself, but is in the nature of a "town meeting" to explain the taking and to inform landowners of their procedural rights.

Appeal from the District Court for Seward County: HOWARD V. KANOUFF, Judge. Affirmed.

Curtis Evans, and Bryce Bartu of Blevens, Bartu, Blevens & Jacobs, for appellants.

Thomas E. Johnson of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees.

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

BRODKEY, J.

This is a consolidated appeal from a decree entered by the District Court for Seward County, Nebraska, on July 2, 1975, dismissing the petitions in three separate actions previously consolidated for trial. We affirm.

The historical background of this litigation is as follows. The City of Seward has, for many years, endeavored to establish a municipal airport. Prior efforts have apparently been unsuccessful. See Bruns v. City of Seward, 186 Neb. 658, 185 N. W. 2d 853 (1971). The City of Seward, however, has persevered in its efforts to obtain an airport. In furtherance of that purpose, on September 27, 1974, it instituted eminent domain proceedings in the county court of Seward County, Nebraska, in an action entitled City of Seward, Nebraska, for and on behalf of the Seward Airport Authority, condemners,

v. Edward W. Brinkmeyer, Jr., and Lucille Brinkmeyer, husband and wife; Norman Luebbe and Naomi Luebbe, husband and wife, et al., condemnees. The condemnees were all owners of real estate, or interests therein, comprising the site of the proposed airport. Under the statutes of this state, municipalities, including cities, and airport authorities created by such cities, are authorized to acquire property for the purpose of establishing, constructing, and enlarging airports; and, for that purpose are granted powers of condemnation. See, §§ 3-201 to 3-204, 3-503, and 3-504, R. R. S. 1943. See, also, § 3-504, R. S. Supp., 1975.

In the condemnation proceeding the appraisers appointed by the county court took their oath of office; inspected the respective properties involved; heard the interested parties on the question of valuation and damages; and, on May 12, 1975, filed their returns as to the value of the property of each of the condemnees, including the Brinkmeyers and the Luebbes, who on May 14, 1975, filed notice of appeal to the District Court for Seward County.

The record discloses, however, that in October 1974, shortly after the commencement of the condemnation proceedings in county court on September 27, 1974, but prior to the award of the appraisers, the Seward County Board of Commissioners, under the authority contained in section 23-114.05, R. R. S. 1943, filed an action in equity in the District Court for Seward County for the purpose of compelling enforcement of its county zoning regulations. It claimed these zoning regulations would be violated by the use of the property in question for airport purposes, and prayed that the City of Seward and the Seward Airport Authority be restrained and enjoined from proceeding in any manner with regard to the proposed airport project. At the same time, the Brinkmeyers and the Luebbes filed separate actions in the District Court praying for the same relief. These are the three actions to which we previously referred

as being consolidated for trial on Jaunary 6, 1975. The temporary restraining orders, entered on October 31, 1974, against the defendants-appellees, were dissolved on April 7, 1975. The defendants-appellees thereafter filed their respective answers, and the consolidated cases were tried on the merits on April 21, 1975. The court entered its decree on July 2, 1975, finding in favor of the defendants and dismissing all the petitions. The Seward County Board of Commissioners, the Brinkmeyers, and the Luebbes then perfected their consolidated appeal to this court.

It is conceded that the tract of land involved in this action lies outside the zoning jurisdiction of the City of Seward. On September 4, 1973, the Seward County Board of Commissioners, upon recommendation of the Seward County planning commission, adopted by resolution county zoning regulations, which incorporated a comprehensive development plan and a zoning map for Seward County. Prior to the adoption of the county zoning regulations, Norman Luebbe appeared before the Seward County planning commission, and requested and received commercial and residential zoning use designations for the Luebbe property. The Brinkmeyers also requested and received residential zoning use designation for 20 acres of their property. At the time of the commencement of the eminent domain proceedings in the county court, an airport was a permitted conditional use in an agricultural area, but was not a permitted conditional use in a residential area. During the pendency of the proceedings, the county zoning ordinance was amended on April 15, 1975, by repealing the section that permitted airports as a conditional use in an agricultural area, and substituting the provision that an airport was a principal use permitted in the C-1 commercial district. No request was made by the defendants-appellees for a modification of the provisions of the ordinance. There is no question that under the terms of the county zoning ordinance, as it presently

exists, the construction of the airport on the land in question would not be permitted.

Appellants in their brief list seven assignments of error which they claim require reversal of the District Court's judgment. Only three of these require discussion. They contend that the court erred: (1) In finding that the City of Seward and the Seward Airport Authority were not subject to the Seward County zoning regulations; (2) in finding that zoning was not a condition precedent to the exercise of eminent domain; and (3) in finding that the City of Seward and the Seward Airport Authority had complied with sections 25-2501 to 25-2506, R. S. Supp., 1974. Appellants concede in their brief and oral argument that the basic question to be determined is whether the City of Seward and the Seward Airport Authority in exercising their statutory powers to establish an airport in an area outside the city's corporate limits are subject to the zoning regulations of the county. While we shall discuss that issue in this opinion, we first wish to comment on appellants' claim that the finding of the District Court that zoning is not a condition precedent to the exercise of the power of eminent domain was erroneous. Appellants contend that the Seward Airport Authority may not take any land except that which has been zoned to permit an airport, and it has to be so zoned before it may be taken.

The general rule is that the propriety of a taking of property by eminent domain is not defeated by the fact that the purpose for which the property is taken is a use prohibited by the zoning regulations. 101 C. J. S., Zoning, § 137, p. 896. In West v. Housing Authority of City of Atlanta, 211 Ga. 133, 84 S. E. 2d 30 (1954), the court held that despite a statutory provision that the Atlanta Housing Authority was amenable to zoning ordinances, the authority's compliance with ordinances and regulations was not a condition precedent to its condemning private property. In Sellors v. Town of Concord, 329 Mass. 259, 107 N. E. 2d 784 (1952), the

court was faced with a similar problem, and in its opinion stated: "That a possibility exists that the land may not be devoted to the proposed uses cannot be denied. But in the absence of evidence that the town cannot reasonably expect to achieve its public purposes, we cannot deny its right to take land by eminent domain. Obviously in the carrying out of the projects contemplated by the town many steps must be taken, and they cannot all be taken at once. The town would hardly be in a position to ask the board of appeals for permission to use the land for municipal purposes before it had acquired the land. It would have to appropriate funds for the construction of the proposed buildings. And, conceivably, it might have to borrow money and issue bonds for this purpose. Very likely the services of an architect would be required and authority to employ him would be necessary. Perhaps building permits would also be required. It is possible, therefore, that the proposed buildings might never be built because of the failure of the town to obtain or grant authority with respect to one or more of these matters. But it would be unreasonable to hold that the town could not exercise the power of eminent domain until all steps necessary to the carrying out of the projects had been taken. See State v. Centralia-Chehalis Electric Railway & Power Co., 42 Wash. 632, 638." See, also, Tift v. Atlantic Coast Line R.R. Co., 161 Ga. 432, 131 S. E. 46 (1925). Therefore, even if the City of Seward and the Seward Airport Authority were subject to and bound by the zoning requirements of Seward County, which prohibit the establishment of the airport in question on the land sought to be acquired, the lack of proper zoning for the airport would not justify interference by Seward County in the efforts of the City and its Airport Authority to acquire the land in question.

We now address ourselves to the problem of whether the City of Seward and the Seward Airport Authority are subject to the zoning regulations of Seward County. We first consider appellants' contention that section 18-1716,

R. R. S. 1943, governs the situation. That section was added to the Nebraska statutes in 1967 by L.B. 521, Laws 1967, c. 75, § 6, p. 245, and provides as follows: "Any regulation of any municipality pertaining to any area outside of its corporate limits shall be subject to any lawful and existing regulation of another municipality pertaining to that same area; Provided, that any area annexed by any municipality shall be subject to the ordinances of such municipality after such annexation." Appellants contend that since their zoning regulation was "first-in-time," it is controlling. We do not agree that the above section is applicable. We note that under the municipal planning statutes of this state, it is specifically provided that: "Municipality or municipal includes or relates to cities of the first and second class and villages." § 18-1301, R. R. S. 1943. This section does not mention counties, which have their own statutory zoning authority from the Legislature. More importantly, however, a study of the legislative history of L.B. 521 indicates it was intended to apply to and clarify the existing situation where two cities have overlapping zoning control and also control across county lines. There is nothing to indicate that it was intended to be applicable to situations similar to that in this case where a county is attempting to enforce its zoning regulations upon a city within its own borders. Airports are not mentioned and the section is clearly an attempt to eliminate the possibility of overlapping in municipal extraterritorial zoning and subdivision jurisdiction which existed in some areas of Nebraska at the time L.B. 521 was enacted. In this case the Seward Airport Authority is not attempting to exercise zoning jurisdiction but is attempting to exercise its statutory powers of eminent domain. We hold that section 18-1716, R. R. S. 1943, is not applicable to this litigation.

We have held that a county in this state is not a municipal corporation but is a quasi-corporation, governmental in character, charged with objects of necessary

local administration and in that capacity acts as an agent of the state. State ex rel. Johnson v. County of Gage, 154 Neb. 822, 49 N. W. 2d 672 (1951); Frickel v. Lancaster County, 115 Neb. 506, 213 N. W. 826 (1927). It does not possess the double governmental and private character that cities do. State ex rel. City of Omaha v. Board of County Commissioners of Douglas County, 109 Neb. 35, 189 N. W. 639 (1922). As an agent of the state, the county, of course, is subject to the plenary powers of the state. The state, in furtherance of its overriding interest in the promotion of aviation, has given considerable power to the Department of Aeronautics and the Aeronautics Commission, which is given the specific duty of designating the locations and sites of airports. § 3-104(2), R. R. S. 1943. All proposed airports must be licensed by the Department of Aeronautics to insure compliance with safety standards. § 3-133, R. R. S. 1943. The Department of Aeronautics approves airport sites only if they conform to safety standards set by the department. § 3-128(3), R. R. S. 1943. Among the stated purposes of the Department of Aeronautics is the promotion of aeronautical safety, cooperation in effecting uniformity of laws in the states, the promotion of a statewide system of airports, and the establishment of uniform regulations. § 3-102, R. R. S. 1943. Section 3-107, R. R. S. 1943, specifically provides: "The department shall have general supervision over aeronautics within this state. It is empowered and directed to encourage, foster and assist in the development of aeronautics in this state and encourage the establishment of airports and other air navigation facilities; * * *." In addition, the Aeronautics Commission also supervises and directs the allocation of state and federal funds to be spent for the construction or maintenance of airports. § 3-104(1), R. R. S. 1943. We do not pass upon the question of whether the powers granted to the Department of Aeronautics are sufficient to clearly indicate an intention on the part of the state to preempt the field,

although a strong argument could be made to that effect, but merely point them out to demonstrate the strong interest of the state in promoting aviation within the state. Seward County should not be able to thwart this state objective through the medium of its zoning authority which was derived from the state itself.

It has frequently been stated that the power of eminent domain is inherently superior to the exercise of the zoning power, and that the grant of eminent domain power to a governmental unit renders the unit immune from zoning regulation. See 84 Harv. L. Rev., 869, 874.

In State of Missouri ex rel. Askew v. Kopp, 330 S. W. 2d 882 (Mo., 1960), the court stated the rule to be that the grant of the power of eminent domain to a public body desiring to utilize land for a purpose prohibited by a local zoning ordinance renders the zoning ordinance inapplicable. As examples the court stated: "Thus it has been held that a city could erect a fire station in an area of the city zoned for residences, apartments and churches, Mayor of Savannah v. Collins, 1954, 211 Ga. 191, 84 S. E. 2d 454; a housing authority could condemn for a multiple-residence housing project in an area zoned for single-family residential use (notwithstanding the statute expressly made the housing authority amenable to local zoning laws), West v. Housing Authority of Atlanta, 1954, 211 Ga. 133, 84 S. E. 2d 30; a county could build an airport in an area of a village in spite of a village zoning ordinance prohibiting the use of the property for an airport, State ex rel. Helsel v. Board of County Commissioners, 1948, 149 Ohio St. 583, 79 N. E. 2d 911; a turnpike commission could establish a turnpike through territory zoned against turnpike use, State ex rel. Ohio Turnpike Commission v. Allen, 1952, 158 Ohio St. 168, 107 N. E. 2d 345, certiorari denied Balduff v. Turnpike Commission, 344 U. S. 865, 73 S. Ct. 107, 97 L. Ed. 671; and cities could establish airports without regard to township zoning regulations prohibiting the same. Aviation Services v. Board of Adjustment, 1956,

20 N. J. 275, 119 A. 2d 761; In re Petition of City of Detroit, 1944, 308 Mich. 480, 14 N. W. 2d 140." We agree with the rule enunciated above.

Of particular interest is Aviation Services, Inc. v. Board of Adjustment of the Township of Hanover, 20 N. J. 275, 119 A. 2d 761 (1956), where the Supreme Court of New Jersey held that even though the municipality's airport was located within the boundaries of a nearby township, the township zoning ordinance was inapplicable to such airport.

Also, in In re Petition of City of Detroit (airport site), 308 Mich. 480, 14 N. W. 2d 140 (1944), the Supreme Court of Michigan found a township zoning regulation unenforceable against a city planning an airport because of a statute giving the city the power to construct, acquire, or operate landing fields either within or without the city limits. See, also, State ex rel. Helsel v. Board of County Commissioners of Cuyahoga County, 79 N. E. 2d 698 (Ohio Com. Pl., 1947).

It is true that there are jurisdictions where the applicability of zoning regulations has turned upon the distinction between the governmental or proprietary character of the function involved. Appellants argue that a municipality operating a municipal airport is engaged in a proprietary function as distinguished from a governmental function. They cite as authority Braisier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235 (1958), and Obitz v. Airport Authority of the City of Red Cloud, 181 Neb. 410, 149 N. W. 2d 105 (1967). Neither of the above cases involved the application of zoning ordinances. Brasier involved the imposition of tort liability and Obitz involved the question of the right to tax. The distinction between governmental and proprietary functions has in the past been useful in restraining the ancient concept of municipal tort immunity, not because of any logic in the distinction, but rather because sound policy dictated that governmental immunity should not envelop the many activities which the government pursues to meet

the needs of the citizens. State of Missiouri ex rel. Askew v. Kopp, *supra*. We agree with a number of commentators that although the distinction may be useful as a device for limiting the effect of governmental immunity from tort liability, it is not appropriate for the resolution of zoning conflicts. Annotation, 59 A. L. R. 3d, 1244, 1255. We decline to apply the "governmental proprietary" test to this case.

Finally, we note there are a few jurisdictions which employ a "balancing-of-public-interests" test to determine the applicability of zoning regulations in similar situations. Orange County v. City of Apopka, 299 So. 2d 652 (Fla. App., 1974); Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N. W. 2d 426 (1972). We believe that while such a rule may have its merits and advantages, it also has its disadvantages because of lack of guidelines for its operation and increased difficulties of application.

In City of Heath v. Licking County Regional Airport Authority, 237 N. E. 2d 173 (Ohio Com. Pl., 1967), the court quoted from the opinion of Chief Justice Cardozo of the Court of Appeals of New York in the case of Hesse v. Rath, 249 N. Y. 436, 164 N. E. 2d 342, as follows: "Aviation is to-day an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."

Finally, we have also examined appellants' contention that the trial court erred in finding that the City of Seward and the Seward Airport Authority had complied with sections 25-2501 to 25-2506, R. S. Supp., 1974, which

is the uniform procedure for acquiring private property for public use act. We find that contention to be without merit. That act does not require that the necessity for the project be established by evidence at the public hearing. Legislative history of the act makes it clear that the hearing provided for is in the nature of a "town meeting" hearing at which time interested parties are permitted to attend; and the reasons for the taking, and their rights as to their property, are explained to them, particularly with reference to their right to negotiate for a sales price; or, failing in that area, the right of the agency to institute eminent domain proceedings in court. It was anticipated that the procedure provided would result in a decrease in the amount of litigation. The record reveals that the hearing had in the instant case was adequate to comply with the requirements of the statute.

In its decree, the trial court found that the City of Seward and the Seward Airport Authority were not subject to the Seward County zoning regulations and that, in any event, the zoning to allow the contemplated use was not a condition precedent to the exercise of eminent domain; and the court further found that the defendants had complied with the requirements of section 25-2504, R. S. Supp., 1974. We agree completely with the conclusions of the trial court, and therefore affirm its judgment.

AFFIRMED.

L. S. CORNETT, DOING BUSINESS AS CORNETT REAL ESTATE CO., APPELLANT, V. LEONARD NATHAN ET AL., APPELLEES.
242 N. W. 2d 855

Filed June 2, 1976. No. 40355.

Brokers: Property: Contracts: Sales: Fees. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled

to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed.

Robert H. Petersen of Krause, Inserra, Petersen & Burkhard, for appellant.

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

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

This is an action for the collection of a real estate commission allegedly due the plaintiff, a real estate broker, from the defendants. The District Court granted summary judgment to the defendants. We affirm the judgment of the District Court.

The plaintiff, a licensed real estate broker, entered into a listing agreement with the defendants, who desired to sell certain realty. The defendants promised to pay the plaintiff a 7 percent commission for his services, and the defendants listed their property for $349,700. The plaintiff presented the defendants with a potential buyer who offered the defendants $251,680 for the property. The defendants accepted the offer and entered into a purchase agreement which, among other things, provided that in the event the buyer failed to complete the sale, the $5,000 in earnest money was to be considered liquidated damages. The purchase agreement also provided that the plaintiff would get a commission of $17,617.60. After the signing of the purchase agreement, but before the sale was consummated, the buyer refused to honor the purchase agreement because he was financially unable to do so. The defendants' property was not sold, but the plaintiff still demanded his $17,617.60

commission. This placed the defendants in the position where they were entitled to only $5,000 in damages from the buyer, but owed the plaintiff over $17,000 in commission. Thus, the defendants would lose over $12,000 and still be in the same position as they were before the plaintiff presented the buyer.

Both the plaintiff and the defendants moved for summary judgment, and the District Court granted the defendants' motion. The District Court held that it was not the intent of the defendants when they signed the listing agreement and the purchase agreement to be bound to pay a commission if the sale was never consummated.

The thrust of the plaintiff's contention is that a real estate broker is entitled to his commission under the purchase agreement, such as is present in this case, at the moment that the seller and the buyer, procured by the broker, enter into a purchase agreement, regardless of whether the sale is ever consummated.

This court has consistently held that a broker has not earned his commission unless he produces a buyer who is ready, able, and willing to buy on terms satisfactory to the seller. In Wisnieski v. Coufal, 188 Neb. 200, 195 N. W. 2d 750, we said: "A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him." In Huston Co. v. Mooney, 190 Neb. 242, 207 N. W. 2d 525, this court said: "Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed."

The precise question in the case is whether a purchaser who signs a purchase agreement and later backs out because of financial inability to consummate the pur-

chase can be said to be a purchaser who is ready, able, and willing to buy. In this case, it is undisputed that the buyer was financially *unable* to consummate the sale. We fail to see how it can be argued that the broker produced a buyer who was "ready" and "able" to buy when he was financially unable to pay or consummate the sale at the agreed performance date of the contract to purchase. Although our holdings are clear in Wisnieski v. Coufal, *supra,* and Huston Co. v. Mooney, *supra,* we reexamine briefly the considerations behind those holdings. Looking to the intent of the parties in a common listing agreement, such as this is, it is clear that sellers of real estate expect to pay a commission only if the sale is completed. The very essence of the intent of the parties and the reason for the payment of substantial commission fees is the difficult task of the real estate broker producing not just a person who will sign a contract on hopes and expectation, but one who is able to pay, ready to pay, and willing to pay. Almost without exception, the only source capable of paying the commission is the proceeds from the sale of the property. A holding which would require sellers of real estate to be liable for a commission when the broker's purchaser is unable to perform would not only be contrary to the intent of the parties, as we have held, but would throw agreements for commissions on sales of real property open to confusion and possible abuse.

The position advocated by the plaintiff broker would place an almost impossible burden on the seller. The broker is employed because of his peculiar expertise. The rule advocated by the plaintiff would not only place the difficult task of determining the financial ability of the buyer on the seller, but would require that such an investigation be made prior to the time that he entered into the purchase agreement. It would require the seller to perform a function which is probably the most important reason for obligating himself to pay the broker a substantial commission fee. We

point out further that many real estate transactions, as was the transaction in this case, are made between distant parties who never actually meet face-to-face. To require a seller to check the financial status of a potential buyer who might live thousands of miles away would be totally unrealistic. In a jurisprudential sense, the only realistic answer is to place this burden and the risk involved on the broker who is hired for this specific purpose, as we have held in Wisnieski v. Coufal, *supra,* and in Huston Co. v. Mooney, *supra.*

No previous Nebraska cases deal with the precise fact situation in the case at hand. However, in cases which are directly on point, courts in other jurisdictions have come to the same conclusion as we have. In Ellsworth Dobbs, Inc. v. Johnson, 50 N. J. 528, 236 A. 2d 843 (1967), the New Jersey Supreme Court held that when a prospective buyer is financially unable to complete a purchase agreement, the broker is not entitled to his commission. "When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. If the contract is not consummated because of lack of financial ability of the buyer to perform * * *, there is no right to commission against the seller." See, also, Taylor Real Estate & Ins. Co. v. Greene, 274 Ala. 694, 151 So. 2d 397. The New Jersey Supreme Court even went so far as to say that a provision in a listing agreement to the contrary would be "so contrary to common fairness, as to require a court to condemn it as unconscionable."

The plaintiff cites several Nebraska cases to back up his contentions. They are distinguishable on the facts.

In Felthauser v. Greeble, 100 Neb. 652, 160 N. W. 983, the broker produced a buyer, but on terms different

than originally desired by the seller. The seller did accept the buyer's terms and the sale was consummated. The court held that the broker was entitled to his commission because the seller accepted the terms of the buyer. But the case is not on point. In Felthauser v. Greeble, *supra,* there was no issue of the buyer backing out of the contract. In Lincoln Realty Co. v. Garden City Land & Immigration Co., 94 Neb. 346, 143 N. W. 230, the seller apparently refused to consummate the sale, and the court held that the broker had earned his commission. These facts obviously are not the facts we are faced with today. Although Felthauser v. Greeble, *supra,* and Lincoln Realty Co. v. Garden City Land & Immigration Co., *supra,* are distinguishable on the facts, there is some language which might lead to a conclusion different from the one reached today. Therefore, any language in those cases which is contrary to this decision is disapproved.

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

AFFIRMED.

CITY OF GRAND ISLAND, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. COUNTY OF HALL, STATE OF NEBRASKA, A BODY POLITIC AND CORPORATE, APPELLANT.

242 N. W. 2d 858

Filed June 2, 1976. No. 40377.

1. **Statutes: Courts.** Where the language of a statute is plain, direct, and unambiguous, no interpretation is needed to ascertain its meaning and this court is without authority to change the language.
2. ———: ———. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.
3. **Statutes: Courts: Legislature.** An interpretation of a statute which has the effect of repealing or nullifying another statute

will not be adopted by this court unless such interpretation is made necessary by the evident intent of the Legislature.

4. **Legislature: Powers: Taxation: Political Subdivisions.** The Legislature is clothed with full power and control over the disposition of revenue derived from taxation by political subdivisions of the state, subject only to constitutional restrictions.
5. **Counties: Legislature: Powers.** The number, nature, and duration of the powers conferred upon a county rest in the absolute discretion of the state.

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

Sam Grimminger, for appellant.

Earl D. Ahlschwede, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

This is a declaratory judgment action by the City of Grand Island, Nebraska, to determine the amount to be paid by the city for keeping city prisoners in the jail of the defendant, Hall County, Nebraska. The District Court determined that the defendant county can only charge the city $3.50 per prisoner per day, and entered judgment accordingly. Hall County has appealed.

The facts are virtually all stipulated. Grand Island is a city of the first class and does not operate a jail in which to house city prisoners. City prisoners are therefore confined in the Hall County jail under statutory authorization. Section 16-252, R. R. S. 1943, provides: "Any city of the first class shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of said city, but it shall be liable to the county for the cost of keeping such prisoners in such amounts as are provided by sections 33-117 and 33-117.01 for boarding prisioners other than state prisoners."

Section 33-117, R. S. Supp., 1974, provides in part:

"(1) The several sheriffs shall charge and collect fees as follows: * * * for guarding prisoners when it is actually necessary, four dollars per day, to be paid by the county; where there are prisoners confined in the county jail, three dollars shall be allowed the sheriff as jailer; for boarding prisoners, other than state prisoners, three dollars and fifty cents per day, in all counties where there is an average of less than fifty prisoners per day, * * * and ninety cents per day where there is an average of more than fifty such prisoners per day; and provided further, the fees for committing, guarding, confining, and the boarding of prisoners, other than state prisoners, in counties having a population of more than two hundred thousand inhabitants shall be governed by section 33-117.01.

"(2) The sheriff * * * shall pay all fees earned to the county treasurer, who shall credit same to the general fund of the county."

Section 33-117.01, R. R. S. 1943, applicable to counties having a population of over 200,000, provides in part: "The county sheriff shall have full charge and control of the quarters and service, and shall prepare and furnish all meals and provide all washing, fuel, lights and clothing for prisoners at actual cost to the county, * * * subject to the right of the county to be paid by the city for city prisoners at actual cost to the county."

It is stipulated that $8.50 per day per prisoner is the reasonable cost of keeping city prisoners in the county jail.

The trial court determined that under section 16-252, R. R. S. 1943, the city has the right to house prisoners in the county jail and the county can only charge the city the amount authorized by section 33-117, R. S. Supp., 1974, which is $3.50 per day, and entered judgment accordingly.

The county contends that it may charge a reasonable amount over and above the $3.50 per day up to the extent of the actual cost of holding and maintaining such

prisoners, including all direct or indirect costs. It also contends that if the cited statutes are construed to restrict the charge to the city to $3.50 per day, the statutes deprive the county of property without due process and discriminate between taxpayers of the county and taxpayers of the city.

The county's position rests upon the basic contention that sections 16-252, R. R. S. 1943, and 33-117, R. S. Supp., 1974, are ambiguous and irrational, and that a literal construction would lead to absurdity, hardship, or injustice. The county argues that it should be presumed that the Legislature could not have intended that the county be required to keep city prisoners for an amount less than the total reasonable amount of all costs and expenses which enter into the furnishing of such jail services. The argument here is that the Legislature must have inadvertently failed to express that intent with respect to prisoners of first or second class cities in smaller counties because it did express that intent with respect to state prisoners and with respect to city prisoners in counties of more than 200,000 population and also provided for contractual payments for primary class cities and joint city-county jails in other statutes. The difference in treatment is apparent, but that difference must be presumed to be intentional rather than inadvertent.

Section 16-252, R. R. S. 1943, is unambiguous. It provides that the city shall be liable to the county for "the cost of *keeping* such prisoners in such amounts as are provided by sections 33-117 * * * for *boarding* prisoners other than state prisoners." (Emphasis ours.) Where there is an average of less than 50 prisoners a day in the county jail, section 33-117, R. S. Supp., 1974, provides for only one amount as the fee for boarding prisoners and that is $3.50 per day. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning and this court cannot read a meaning into a statute which is unrelated by

legislative language, nor can it read plain, direct, and unambiguous language out of a statute. Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N. W. 2d 752. Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language. State v. Gallegos, 193 Neb. 651, 228 N. W. 2d 615.

The county also argues that the enactment of L.B. 676, Laws 1969, c. 67, p. 383, of the 1969 Legislature amending sections 15-264 and 47-306, R. R. S. 1943, constituted a repeal by implication of section 16-252, R. R. S. 1943. The 1969 legislative enactment amended section 15-264 dealing with primary cities and section 47-306 dealing with joint county and city jails by removing provisions granting a primary city the right to use the county jail, and substituted provisions granting the right to contract with the county, or, in the case of a primary class city, the right to contract for keeping prisoners with any other governmental subdivision or agency, local, state, or federal.

L.B. 676 of the 1969 Legislature specifically repealed former sections 15-264 and 47-306. It made no mention whatever of section 16-252, nor of section 17-566, which apply to first and second class cities respectively. Both of these sections grant the right to use county jails in identical language. Even if the language of amended section 15-264 could be applied to a first class city, it would still not be in conflict with the provisions of section 16-252. Under such circumstances it cannot be said that the Legislature intended, or even contemplated, repeal of any other statute by implication.

A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. Repeals by implication are not favored and a construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature.

State ex rel. Rohrs v. Harris, 100 Neb. 745, 161 N. W. 253.

In the absence of evidence of clear legislative intent, a court should not give an interpretation to a statute which has the effect of nullifying another statute. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn., 191 Neb. 1, 213 N. W. 2d 443.

The county asserts that such a construction of the statutes is unconstitutional because it discriminates against the county and its taxpayers by indirectly requiring the county to perform city functions at less than cost. The same arguments claiming violation of due process and equal protection were raised in the case of State ex rel. City of Omaha v. Board of County Commissioners, 109 Neb. 35, 189 N. W. 639. That case involved a legislative act compelling the county to furnish offices for use by the municipal court of the City of Omaha. In that case this court held that such an enactment did not violate any constitutional provisions, and we said: "A county, 'being a mere instrumentality of the state for the convenient administration of government, is at all times, both as to its powers and its rights, subject to legislative control. * * *.' * * * The revenues of the county do not become the property of the county in the sense of private ownership, and the legislature has authority to prescribe the division and apportionment of money, raised by county taxation, between the county and a city within its limits. * * * The state has invested the legislature with complete sovereign power, except so far as restricted by constitutional limitations. The question of the extent of legislative power is determined alone by these limitations."

The same principles were expressed by this court in Dwyer v. Omaha-Douglas Public Building Commission 188 Neb. 30, 195 N. W. 2d 236. In that case we quoted with approval language from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151: " 'Mu-

nicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. * * * the number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. * * * The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.' " See, also, Obitz v. Airport Authority of the City of Red Cloud, 181 Neb. 410, 149 N. W. 2d 105.

The Legislature is clothed with full power and control over the disposition of revenue derived from taxation, including that raised by political subdivisions of the state under authority of the state, subject only to constitutional restrictions. No constitutional restrictions inhibited or impeded the action of the Legislature here.

The county asks this court to rewrite a legislative enactment upon the ground that the legislation is unreasonable and inappropriate. Due process does not authorize courts to hold statutes unconstitutional simply because the court believes the Legislature may have acted unwisely. The wisdom or utility of legislation is for determination by the Legislature and not by this court.

The judgment of the District Court is affirmed.

AFFIRMED.

JANICE MAE KING, APPELLEE, v. WAYNE IVAN KING, APPELLANT.

242 N. W. 2d 632

Filed June 2, 1976. No. 40383.

1. **Divorce: Parent and Child: Judgments: Infants.** The judgment of the trial court as to visitation privileges of a parent with an infant child is subject to revision by that court upon proper showing, or by this court de novo upon the record.
2. ———: ———: ———: ———. In cases involving determination of rights of visitation, as well as child custody, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of visitation or custody, will not be disturbed on appeal unless there is a clear abuse of discretion, or the findings are contrary to the evidence.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

William E. Pfeiffer of Spielhagen, Spielhagen & Pfeiffer, for appellant.

Richard E. Gee, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and BRODKEY, JJ., and RICHLING, District Judge.

RICHLING, District Judge.

The marriage of the parties hereto was dissolved by a decree signed and entered on February 13, 1974. The decree granted custody of the minor child, Leslie Lynn King, born on August 16, 1971, to the mother-appellee with right of visitation in the father-appellant. From the record, it appears that the court was cognizant of the fact that the appellee did reside with the child in Grand Island, Nebraska, and that the appellant would be residing elsewhere. The decree provided that the visitation occur only within the immediate vicinity of Grand Island. Since the dissolution of the marriage, the appellant has resided in Omaha, Nebraska, and has continued to exercise his rights of visitation by going to Grand Island or its immediate environs.

On July 15, 1975, the appellant filed an application praying for modification as to custody and visitation privileges. He requested that he be allowed to visit his daughter overnight on his regular visitation weekend, and to have the custody of her during the summer months with no territorial restrictions other than the State of Nebraska.

The application was denied. Appeal was taken to this court. We affirm the judgment of the District Court.

On de novo review the evidence before the trial court has been carefully examined.

It is well established that the judgment of the trial court as to the visitation privileges of a parent with an infant child is never final, and is subject to review at any time in the light of changing conditions. Matson v. Matson, 175 Neb. 60, 120 N. W. 2d 364.

However, this Court has held in Passmore v. Passmore, 144 Neb. 775, 14 N. W. 2d 670, that: "In determining the conditions under which a parent may visit the child of divorced parties, the age, health and best interest of the child are to be considered, as is also the convenience of the parent having custody.

"The judgment of the trial court as to the visitation privileges of a parent with an infant child is subject to revision by that court upon proper showing."

Hearing on the appellant's application for modification was had on August 26, 1975.

It appears from the record that the trial court was of the opinion that even though the child was approximately 18 months older than she was at the time of the decree, the child was still of such tender years that the original provisions for visitation should not now be modified.

In addition there was not such change of circumstances as would dictate to this court that it find there was such an abuse of discretion by the trial court as to warrant a reversal.

The judgment of the District Court is affirmed, and

the appellee is awarded the sum of $200 for the services of her attorneys in this court plus costs.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFERY B. KEEN, APPELLANT.

242 N. W. 2d 863

Filed June 2, 1976. No. 40459.

1. **Criminal Law: Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
2. **Criminal Law: Sentences: Probation and Parole.** An order or sentence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion.

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

John A. Wolf of Cronin, Shamberg & Wolf, for appellant.

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

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

The appellant, Jeffery B. Keen, pleaded guilty to a charge of assault with intent to inflict great bodily injury. The District Court accepted his plea, and, after considering a presentence report, sentenced Keen to the Nebraska Department of Corrections for a period of 3 to 5 years. Keen claims the sentence was excessive, challenging the length of the sentence and the fact that probation was not granted.

A sentence imposed within the statutory limits will not

be disturbed on appeal unless there appears to be an abuse of discretion. State v. Carr, 194 Neb. 485, 233 N. W. 2d 773 (1975); State v. Glouser, 193 Neb. 186, 226 N. W. 2d 134 (1975). Likewise, an order or sentence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion. State v. Swails, 195 Neb. 406, 238 N. W. 2d 246 (1976).

The record indicates that Keen got off work around 5:30 p.m. and went to a local bar where he stayed until 10 or 11 p.m. when, admittedly drunk, he left and began walking home. Between the bar and his residence he encountered a 58-year-old woman who was walking to the post office to mail a letter. Keen pulled her into an alley, ripped her clothing, and threatened to cut her throat if she screamed. The victim said that Keen started hitting her with his fists and squeezing her arms and breasts. She suffered lacerations, multiple bruises, a blackened eye, and severe swelling of the right side of her face.

Appellant was a 19-year-old high school graduate with no previous felony record at the time of the beating. He had a minor driving offense from 1973 on his record and had been adjudged a neglected child by the county court of Howard County nearly 2 years earlier. Keen was, at the time of the incident and sentencing, living with a woman whom he has since married and is supporting. When the assault occurred, his future wife was 4 months pregnant, and since the sentencing she has had the baby. Keen claims to recall little of the incident, but says he does remember that he hit the woman only once. His wife saw the incident which occurred behind their residence and frightened Keen away when she shouted at him. Later that evening when she attempted to speak with Keen about the assault, he slapped her and threatened her father and 7-year-old child by a previous marriage.

Keen contends that because he has a job, was a first

offender, has dependents who will suffer from his imprisonment and may be unlikely to engage in additional criminal activity, the trial court should have granted probation. The trial judge found in his denial of motions for a new trial and a reduction in sentence that probation would depreciate the seriousness of the offense or promote disrespect for the law. See § 29-2260(2)(c), R. S. Supp., 1974.

Keen was originally charged with assault with intent to commit rape. The complaint was amended to charge assault with intent to inflict great bodily injury for which the possible penalty is 1 to 20 years. § 28-413, R. S. Supp., 1974. The seriousness of the offense and the violence with which it was committed are appropriate factors to consider in denying or granting probation. State v. Swails, *supra*. Photographs of the victim after the assault indicate that the assault was brutal and the effects of the beating were serious. The record shows no abuse of discretion and the decision of the trial court as to sentence term and imprisonment is affirmed.

AFFIRMED.

FRANK RONALD KIBBON ET AL., APPELLANTS, V. THE SCHOOL DISTRICT OF OMAHA, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

242 N. W. 2d 634

Filed June 2, 1976. No. 40482.

1. **Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict.
2. **Statutes: Time.** Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication.

3. **Statutes: Schools and School Districts.** Section 79-1254.02, R. S. Supp., 1975, is not applicable to a Class V school district.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellants.

Alex M. Clarke and David M. Pedersen of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee.

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

BOSLAUGH, J.

The plaintiffs were employed as probationary teachers by the defendant, the School District of Omaha, a Class V district, during the 1974-75 school year. On March 26, 1975, the plaintiffs were notified they had not been reelected for the following year. The plaintiffs each requested a specification of the reasons why they were not being reemployed and a hearing before the board of education to determine if just cause existed for the termination of their employment. The board of education denied their requests.

This action was brought to obtain a declaratory judgment declaring the action of the school district in terminating the employment of the plaintiffs void and in violation of their rights under section 79-1254.02, R. S. Supp., 1975. The trial court originally found in favor of the plaintiffs but later sustained a motion for new trial and dismissed the action. The plaintiffs appeal.

There is no issue of fact in this case. The parties are in agreement that the sole issue is whether section 79-1254.02, R. S. Supp., 1975, is applicable to a Class V school district such as the defendant.

In 1943, the Legislature enacted a law providing a system of tenure for teachers in schools in cities having a population of 40,000 inhabitants or more. Laws

1943, c. 202, p. 673. That act, as amended, is now found in sections 79-1255 to 79-1262, R. R. S. 1943, and is applicable to Class IV and Class V school districts. Section 79-1256 provides that all teachers upon first employment shall be classified as probationary teachers. During the probationary period the school board may or may not renew the annual contract of a probationary teacher as the board shall see fit. The defendant contends that section 79-1256 was applicable to the contracts of the plaintiffs and the board of education was authorized to terminate the employment of the plaintiffs without a hearing or finding of just cause.

The plaintiffs contend that section 79-1254.02, R. S. Supp., 1975, was the applicable statute. Section 79-1254.02 is an "instant tenure" type law that contains no provision for a probationary period for newly hired teachers. If the plaintiffs' contention is correct the Legislature has abolished probationary teachers in Class IV and V school districts and all teachers in those districts now have tenure from the time of their first employment. The importance of this question is apparent because approximately 45 percent of the teachers employed annually by the defendant from 1972 to 1975 were classified as probationary teachers.

Section 79-1254.02, when first enacted as section 1 of L.B. 422 by the 1973 Legislature, provided as follows: "The contracts of the teaching staff employed by the governing board of any state technical community college, educational service unit, or any educational program administered by the State Department of Education, the Department of Public Institutions, or any political subdivision of the state, shall require the sanction of a majority of the members of such governing board. Each such contract shall be deemed renewed and in force and effect until a majority of the board votes, sixty days before the close of the contract period, to amend or terminate the contract. The secretary of the board shall notify each teacher in writing at least ninety

days before the close of the contract period of any conditions of unsatisfactory performance or a reduction in teaching staff that the board considers may be cause to either amend or terminate the contract for the ensuing year. Any teacher so notified shall have the right to file within five days of receipt of such notice a written request with the board for a hearing before the board. Upon receipt of such request, the board shall order the hearing to be held within ten days, and shall give written notice of the time and place of the hearing to the teacher. At the hearing, evidence shall be presented in support of the reasons given for considering amendment or termination of the contract, and the teacher shall be permitted to produce evidence related thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing."

Section 2 of L.B. 422, now section 79-1254.03, provided the act should be construed as a minimum standard and not a repeal of any other law providing additional contract rights.

The introducer's statement of purpose stated that L.B. 422 provided a due process procedure for the amendment or termination of teaching contracts for all state public schools except those governed by the Board of Regents; the Board of Trustees of the State Colleges; and the public elementary and secondary school districts. It further stated that the bill would result in the same contract relation for Voc-Tech and ESU personnel as then in effect for elementary and secondary school personnel.

As introduced, the bill excepted the Board of Regents, the Board of Trustees of State Colleges, and Class I, II, III, and VI school districts. In committee an amendment was proposed which excluded teachers covered by section 79-1254 and sections 79-1255 through 79-1262, R. R. S. 1943. This amendment would have excluded teachers in all school districts, Class I through VI.

Later, a further amendment was proposed which struck the language referring to teachers excepted from the bill's operation and inserted language to state positively the institutions to which the bill would apply. This later amendment was adopted by the Legislature on April 12, 1973, and the bill was enacted in that form. The committee statement which accompanied the bill stated that it would establish due process procedures for termination of teacher contracts for all teachers not currently provided for, but especially of the Vocational-Technical Community Colleges and educational service units. It further stated that the bill, as amended, stated positively what the bill would include rather than what it would exclude.

Section 79-1254.02 was amended twice by the 1975 Legislature. L.B. 82, effective February 26, 1975, made important changes in section 79-1254 which is applicable to Class I, II, III, and VI school districts. It established a system of tenure for school districts of those classes somewhat similar to the system established by sections 79-1255 through 79-1262 for Class IV and V districts. It supplemented the 1971 amendment to section 79-1254 which was considered in Schultz v. School Dist. of Dorchester, 192 Neb. 492, 222 N. W. 2d 578, and Schultz v. School Dist. of Dorchester, 367 F. Supp. 467.

L.B. 82 also amended section 79-1254.02 by adding the requirement of just cause for the amendment or termination of contracts. There was no change in the language of section 79-1254.02 which affected its applicability to elementary and secondary school districts.

L.B. 493, effective April 14, 1975, further amended section 79-1254.02 by inserting a specific provision excepting Class I, II, III, or VI school districts from its operation. The board of education of the defendant had voted on March 17, 1975, to terminate the plaintiffs' contracts, and had notified the plaintiffs on April 9, 1975, that their requests for hearings were denied. Thus, the amendment became effective after the action of the

board, which is the subject of this action, had taken place.

L.B. 493, as originally introduced, related to attendance reports by teachers in Class I districts. The amendment to section 79-1254.02 was offered as a floor amendment after L.B. 493 had been returned to select file for a specific amendment on March 26, 1975. The explanation for the amendment, made at the time, related to the 90-day notice provision in section 79-1254.02.

The plaintiffs contend that section 79-1254.02 is applicable to the defendant because the defendant is a political subdivision and the statute applies to the contracts of the teaching staff employed by the governing board of any state technical community college, educational service unit, or any educational program administered by the State Department of Education, the Department of Institutions, "or any political subdivision of the state." The plaintiffs also rely on Chase v. Board of Trustees of Nebraska State Colleges, 194 Neb. 688, 235 N. W. 2d 223, in which section 79-1254.02, R. S. Supp., 1974, was held applicable to Chadron State College. The opinion in that case stated there was no ambiguity in the language of the statute and no room for construction.

The problem involved in this case was not presented in Chase v. Board of Trustees of Nebraska State Colleges, *supra*. There was no separate statutory system of tenure specially applicable to the state colleges. Here there is a statutory system of tenure, applicable only to Class IV and V school districts that has been in effect since 1943. Each of these laws, section 79-1254.02 and section 79-1256, standing alone, appear to be applicable. Since they are in conflict they present a question of statutory construction to determine which law is applicable and controlling.

It is a well-established rule that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes

so far as there is a conflict. Houser v. School Dist. of South Sioux City, 189 Neb. 323, 202 N. W. 2d 621. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860.

Section 79-1254.02 is a general law applying to the contracts of the teaching staff employed by the governing board of any state technical community college, educational service unit, or any educational program administered by the State Department of Education, the Department of Institutions, or any political subdivision of the state. Section 79-1256 is a special law that is applicable only to Class IV and V school districts. Section 79-1254.02, being the general law, is not applicable to the defendant.

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

AFFIRMED.

FATHER FLANAGAN'S BOYS' HOME, APPELLEE, V. MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS.

242 N. W. 2d 637

Filed June 2, 1976. No. 40590.

1. **Eminent Domain: Constitutional Law.** The power of eminent domain is an attribute of sovereignty which exists independently of constitutional provision. Constitutional provisions relating to the power of eminent domain are limitations on the exercise of the power as distinguished from a grant.
2. ———: ———. The constitutional limitations upon the exercise of the power of eminent domain are that the use must be public, just compensation must be paid, and due process of law observed. Within these limits, the state acting through

the department or agency authorized to exercise the power, may proceed at will.

3. **Eminent Domain.** The power of eminent domain includes the discretion to determine the necessity of exercising the power and the location of the site to be taken.
4. **Eminent Domain: Courts.** Generally the discretion involved in the exercise of the power is not subject to judicial review unless the taking is fraudulent, in bad faith, or an abuse of discretion; the taking is for a private purpose; or an excessive amount of property is sought to be condemned.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded with directions.

Malcolm D. Young and Joan Sacks-Wilner, for appellants.

Kutak, Rock, Cohen, Campbell, Garfinkle & Woodward, for appellee.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and Randall E. Sims, for amicus curiae.

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

BOSLAUGH, J.

This is an action by Father Flanagan's Boys' Home to enjoin the defendant school district from condemning a 40-acre tract of land owned by the plaintiff. The trial court permanently enjoined the defendant from prosecuting condemnation proceedings against the land. The defendant appeals.

The defendant is a public school district, School District No. 17 of Douglas County, Nebraska, and is known as the Millard School District. It covers approximately 35 square miles of territory in Douglas and Sarpy Counties. The northern area of the district is bounded generally by Blondo Street, 132nd Street, West Center Road, and 168th Street. It had 8,133 students enrolled

in its schools in 1975 and its estimated enrollment in 1979 will exceed 13,000.

In 1975 the defendant's board of education determined that it was necessary to construct a new senior high school in the northern area of the district. The board selected the site owned by the plaintiff which is on the northwest corner of 144th and Pacific Streets and is near the geographical center of the northern area of the school district. The defendant was unable to purchase the tract from the plaintiff, so on October 6, 1975, the board adopted a resolution to condemn the property. A petition for the appointment of appraisers was filed on October 21, 1975. This action was filed on November 13, 1975. The other defendants are the members of the defendant's Board of Education and the appraisers appointed by the county judge.

The plaintiff alleged that the land which the defendant district wants to condemn is an integral and necessary part of the agricultural training program which the plaintiff conducts in the schools which it operates; that if the defendant were allowed to condemn the plaintiff's property it would establish a priority of public education over private in contravention of the constitutional rights of the minor students enrolled in its schools; that condemnation of the property is not authorized by law because the property is already being used for the public benefit through the education of minor children; and the condemnation was not authorized because the defendant has no present or reasonably forseeable future need for the property for use as a public school.

The trial court found there was a present need for a high school in the northern area of the district and the defendant had shown a substantial interest or need for the property in question. The trial court further found that the defendant had failed to show there was not a "reasonable alternate means of accomplishment." This

latter finding gives rise to the principal issue on this appeal.

The plaintiff is a private, nondenominational, charitable, educational institution which serves as a home and school for orphaned, indigent, and otherwise underprivileged boys. The services it performs in this area are known over the entire world. The plaintiff has a present enrollment of approximately 350 boys.

Father Flanagan's Boys' Home chose a rural location for the home in order to give the boys a rural environment as a part of the educational process. In addition to the formal vocational agricultural program, many of the boys do farm work voluntarily or for disciplinary reasons.

The plaintiff owns and operates 950 to 1,000 acres of agricultural property and employs 7 persons full time for this purpose. In addition to farming the land the plaintiff has a dairy and feeding operation. The milk from the dairy operation and surplus crops are sold on the commercial market.

There are no buildings located on the 40-acre tract which the defendant seeks to condemn although the dairy and the farm headquarter buildings are located on the northern portion of the same section of land. The 40-acre tract has been used for row crops since the plaintiff has owned it.

The power of eminent domain is an attribute of sovereignty which exists independently of constitutional provision. Constitutional provisions relating to the power of eminent domain are limitations on the exercise of the power as distinguished from a grant. May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

The constitutional limitations upon the exercise of the power of eminent domain are that the use must be public, just compensation must be paid, and due process of law observed. Within these limits, the state, acting through the department or agency authorized to exercise the power, may proceed at will.

The legislative authority for the defendant's right to exercise the power of eminent domain is found in section 79-4,107, R. R. S. 1943. The only legislative restriction on the exercise of this power is that a school site must not exceed 50 acres and public parks and county or district fairgrounds may not be condemned. § 79-4,114, R. S. Supp., 1974.

The power of eminent domain includes the discretion to determine the necessity of exercising the power and the location of the site to be taken. Hammer v. Department of Roads, 175 Neb. 178, 120 N. W. 2d 909; May v. City of Kearney, *supra*. Generally the discretion involved in the exercise of the power is not subject to judicial review unless the taking is fraudulent, in bad faith, or an abuse of discretion; the taking is for a private purpose; or an excessive amount of property is sought to be condemned. May v. City of Kearney, *supra*. As a general rule property used for religious purposes or for private school purposes is subject to condemnation for public use. 26 Am. Jur. 2d, Eminent Domain, § 78, p. 736; 29A C. J. S., Eminent Domain, § 65, p. 311.

The decision of the trial court appears to have been based primarily upon two Colorado cases cited by the plaintiff, Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P. 2d 1250, and Order of Friars, Etc. v. Denver Urban Renewal Authority, 186 Colo. 367, 527 P. 2d 804.

In the Pillar of Fire case the Urban Renewal Authority sought to condemn a church which had been the founding place for the Pillar of Fire religion. In the Order of Friars case the Urban Renewal Authority sought to condemn the parking lot of a church that had been designated an historical landmark. In these cases the Colorado court emphasized the unique nature of the property sought to be condemned and held that the Urban Renewal Authority could not proceed with condemnation proceedings in the absence of a showing that

there was a substantial public interest that could not be accomplished "through any other reasonable means."

It is unnecessary in this case to decide whether the rule adopted by the Colorado court in the Pillar of Fire case is valid in this state because such a rule is not applicable to the facts in this case. There is nothing unique about the 40-acre tract of farmland owned by the plaintiff which is involved in this case. The loss of this property will not interfere substantially in any way with the operation of the plaintiff's school program. The plaintiff will have more than 900 acres of agricultural land remaining after the taking and there is nothing in the record to suggest that this remaining land will not be adequate for school purposes.

The judgment of the District Court is reversed and the cause remanded with directions to vacate the injunction and dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

DELORES R. PETERSON, APPELLANT, V. HAROLD E. DEPREZ, JR., APPELLEE.

242 N. W. 2d 641

Filed June 9, 1976. No. 40243.

Motor Vehicles: Negligence. A motor vehicle operator on the right and approaching an intersection at about the same time as a vehicle on the intersecting road to the left does not have an absolute right to proceed regardless of the circumstances. The statutory right-of-way rule, if it is to be effective, must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with the underlying purpose of the rules which is to prevent collisions.

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

Nelson, Harding, Marchetti, Leonard & Tate and Alan L. Plessman, for appellant.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellee.

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

CLINTON, J.

This is an action to recover damages for personal injury and property damage arising from a collision of two motor vehicles at the intersection of two county roads in York County. The trial judge submitted to the jury issues of the defendant's negligence and the plaintiff's contributory negligence. The jury found for the defendant, judgment was entered on the verdict, and motion for new trial was overruled. The plaintiff appeals, assigning as error the refusal of the trial court to grant her motion for a directed verdict on the issue of liability.

The plaintiff's position is founded on the fact that she had the directional right-of-way and the claim that she was in an undisputedly favored position, and that the defendant failed to see her car and was therefore guilty of negligence as a matter of law. Even if her position is accepted arguendo, it completely overlooks the issue of her own possible contributory negligence. We conclude, after carefully examining the record, that that issue was appropriately submitted to the jury and that the trial judge did not err in denying her motion for a directed verdict on the issue of liability.

We briefly review the evidence. The intersection in question is not protected by any traffic signs or lights. Plaintiff was traveling north. Defendant was traveling east. Both roads were unpaved. At the time of the accident it was daylight, cloudy, and the roads were dry. A farm field to the west and south of the intersection was somewhat elevated above the roads and on the date of the collision, June 16, 1972, about 25 east-west rows

of milo were growing at the north end of the field. South of the milo were rows of corn which were about "knee high." In addition, there were plum thickets located on the south side of the east-west road and on the west side of the north-south road. These thickets terminated about 109 feet and 143 feet, respectively, from the southwest corner of the intersection. The extent to which these various obstructions of view affected the ability of the two parties to observe the approach of the other is vague in the extreme, but suffice it to say that the evidence would permit the jury to find that the views of both were obstructed until within a few feet of the intersection. In any event, neither party saw the other until it was too late to avoid the collision. The pickup of the defendant struck the car of the plaintiff near the left front door. The plaintiff attempted to avoid the collision by turning right. The defendant attempted to avoid the collision by turning left.

The defendant testified that he looked to his right when about a half-mile from the intersection and observed no vehicle approaching. He also looked to the north and saw a car (later determined to be driven by a Mrs. Cash) coming south on the north-south road. As he got closer to the intersection the Cash car stopped at the intersection with its directional turn light blinking for a left turn. When the defendant was about 10 to 25 feet from the intersection he saw the plaintiff's car. He hit his brakes but could not stop. He was traveling slowly, about 10 or 15 miles an hour, when he observed the plaintiff's automobile.

The plaintiff testified that she was familiar with the intersection and had passed through it almost daily for 7 or 8 years. She observed the approach of the Cash car and noted that the directional signal was blinking for a left turn. She had been proceeding at 15 to 25 miles per hour, but slowed down. She looked east and west but saw no cars on the intersection road. She testified that the plum thickets might have obstructed her

view. When the Cash car stopped at the intersection, the plaintiff was just a few feet from the south line of the intersection. She then looked west and saw no cars and then "speeded up" to about 15 miles per hour to proceed through the intersection. She was in the intersection when she saw the defendant's vehicle for the first time. She later said she saw the defendant a couple of seconds before the collision. The plaintiff's husband who was a passenger in her car testified that the defendant told him after the accident, "he never absolutely looked." Defendant denied this admission.

Mrs. Cash testified that she stopped about 10 feet from the intersection. She saw the plaintiff's car coming from the south about a city block away. She looked west and saw the defendant's vehicle about the same distance away. She could not estimate the speed of the two vehicles either absolutely or relatively. She realized there was going to be a collision when both cars were about "Ten feet from the intersection."

From the foregoing summary of the evidence the jury could properly conclude that the plaintiff was negligent in either failing to look at an opportune time, or, having looked, in failing to see the other vehicle which, at least in the last few feet in her approach to the intersection, must have been in plain sight. The court did not err in denying the plaintiff's motion for a directed verdict. There was at least a jury question on the issue of the plaintiff's contributory negligence.

In Hodgson v. Gladem, 187 Neb. 736, 193 N. W. 2d 779, which involved a factually similar situation, namely, an intersection not protected by traffic controls and with the view of both drivers obstructed, we affirmed the action of the District Court in directing a verdict against the plaintiff and said: "The court has never held that the driver on the right, on approaching an intersection at about the same time as the one on the left, has an absolute right to proceed regardless of the circumstances. The statutory right-of-way rule, if it is to be effective,

must be accompanied by an observance by both parties of the rules applicable to the exercise of due care and in particular the duty to keep a lookout and make effective observations at a time when such observations can have an effect consonant with underlying purpose of the rules." The only substantial difference between the evidence in that case and in this is that here both vehicles were traveling much more slowly and both probably could have stopped had timely observation been made.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN GUY, APPELLANT.
242 N. W. 2d 864

Filed June 9, 1976. No. 40325.

1. **Constitutional Law.** The right to free speech under the First Amendment to the Constitution of the United States is not unlimited and unqualified but may be reasonably restricted in the public interest.
2. **Constitutional Law: Criminal Law.** The resort to epithets or personal abuse is not a communication of information or opinion safeguarded by the Constitution and the punishment thereof as a criminal act raises no question under the Constitution.
3. **Constitutional Law: Disturbance of Meetings: Ordinances.** Any conduct contrary to the normal presentation of business which disturbs or interrupts the orderly progress of the proceedings of a city council is a disturbance; an ordinance prohibiting such conduct is not unconstitutionally vague.
4. **Criminal Law: Customs and Usages: Ordinances.** A custom or usage of failing to enforce a statute by prosecution is not a defense to a prosecution finally brought.

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

Frank B. Morrison and Joseph Bataillon, for appellant.

Herbert M. Fitle, Gary P. Bucchino, Richard M. Jones, and George A. Sutera, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

The appellant was tried in the municipal court of Omaha, Nebraska, upon a complaint charging that on January 7, 1975, appellant did purposely or knowingly disturb or disrupt a meeting which was not held in violation of law, contrary to Omaha municipal ordinance No. 25.67.010. He was found guilty and sentenced to pay a fine and costs. Upon appeal to the District Court for Douglas County, Nebraska, the judgment was affirmed and this appeal followed. We affirm the judgment.

Evidence was taken only at the trial in the municipal court and the transcript thereof shows little conflict except as to conclusions which were drawn from different viewpoints. The following summary of the facts is supported by the transcript: The Omaha city council met in regular session at 2 p.m. on January 7, 1975, with an agenda including the consideration of an application for rezoning; appellant, who describes himself as a politician representing the interests of his community, has appeared regularly at meetings of the council during the past 17 years and knew the procedures therein; he sought permission to speak against the proposal and was granted 10 minutes for the purpose; after two proponents of the proposal had spoken, appellant proceeded to the lectern and microphone; and, after he had spoken for some time, he made remarks about the proponents, abusing them personally and resorting to epithets. Thereupon the following occurred in such close order as to be almost simultaneous: Councilman Taylor moved that the appellant be declared out of order; Councilman Miller seconded the motion and called for a roll call vote; President Cunningham told the appellant to cease and desist from that type of attack; appellant, feeling that his rights were being abridged, spoke more loudly, pre-

venting the roll call of the vote upon the motion; President Cunningham ordered the appellant to leave the microphone and when the appellant refused to do so, he sent the police officer who acted as sergeant-at-arms to return the appellant to his seat; after some struggle and resistance by the appellant, this was accomplished; the period of interruption was about 10 minutes, during which no business was transacted by the council aside from the difficult matter of restoring order. This was not the first time the appellant had been removed forcibly from the lectern and microphone, but it was the first time that any charges had been filed against him.

The appellant contends that ordinance No. 25.67.010 is overbroad and constitutes an unconstitutional restriction on the First Amendment right of free speech. We recognize, of course, that the appellant does have that right. It was not an unlimited and unqualified right but could be made subject to reasonable restrictions when necessary to safeguard the public interest. Resort to epithets or personal abuse is not in any proper sense the communication of information or opinion safeguarded by the Constitution and *its punishment as a criminal act raises no question under the Constitution.* 16 C. J. S., Constitutional Law, § 213(5), p. 1102 et seq., and cases cited. When the complaint and the record are examined, it becomes evident that the appellant was not being prosecuted for the use of words but rather for his disruptive and disturbing conduct following the use of his words. So long as he spoke upon the question under consideration, no point of order was raised against him; this was done only after he departed from proper and protected discussion. When the appellant raised his voice, refused to heed the presiding officer, prevented the taking of a vote, and resisted the sergeant-at-arms, this course of action taken in its totality was not merely speech but was conduct properly weighed and considered in the light of its possible violation of the above ordinance. If the council was not permitted to take steps

necessary to maintain order and to keep speakers within the limits of propriety and relevancy by terminating speeches, its proceedings would degenerate into bedlam and confusion and its work could be brought to a complete halt. The appellant's First Amendment right to free speech is not an issue and the ordinance did not restrict it in any way.

Next, the appellant contends that the ordinance is unconstitutionally vague. Since this ordinance does not involve First Amendment rights, the challenge thereon on the ground of vagueness must be examined in the light of the facts at hand. United States v. Mazurie, 419 U. S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706; United States v. National Dairy Products Corp., 372 U. S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561. The appellant argues that the ordinance is being enforced against speech. As previously shown, the ordinance is being applied to and enforced against conduct. The same issue was considered in State v. McNair, 178 Neb. 763, 135 N. W. 2d 463, in which during the course of a comprehensive analysis of a similar ordinance, the court said: "The offense of disturbing a public meeting was recognized by the common law as a misdemeanor. Certain like provisions have been enacted into our statutes. The ordinance in question is a general regulation for all types of meetings. What constitutes a disturbance of a lawful assembly is not susceptible to specific definition, but must depend to some extent upon the nature and character of the particular assemblage. However, while it may be difficult to specifically define beforehand, there is no problem in determining what constitutes a disturbance in a given case. In the instance of a city council, we hold that any conduct contrary to the normal presentation of business which disturbs or interrupts the orderly progress of the proceeding is a disturbance." This reasoning applies with equal force to this case. The ordinance is sufficiently specific to provide notice of what is and is not legal.

Next, the appellant contends that since prosecutions had not previously been brought against persons, including the appellant, who had indulged in disturbing conduct, such usage should be a defense for him. The rule is that a custom or usage repugnant to the provisions of a statute will not prevail against the provisions of the statute. Bolln v. State, 51 Neb. 581, 71 N. W. 444; Shambaugh v. City Bank of Elm Creek, 118 Neb. 817, 226 N. W. 460. It is immaterial how many previous violations might have been overlooked or condoned; no defense is created thereby to a prosecution duly filed.

Finally, it is argued that the evidence is insufficient to support a finding of guilty, especially as to appellant's purpose or knowledge in connection with his conduct. We have previously shown that his conduct was clearly proved by the evidence to have been disruptive and disturbing. If the appellant is given the benefit of the doubt and is not deemed to have known that the personal abuse and epithets were improper, nevertheless the statements were intentional; he knew that a motion to declare him out of order had been made and he received an admonition from the chair; and he struggled against removal and return to his place. The appellant's own statements make it clear that he was protesting and resisting as emphatically as possible against what he considered to be an infringement of his rights. His purpose and knowledge were clear and it cannot be said that the evidence was insufficient.

No error being shown, the order of the trial court is affirmed.

AFFIRMED.

DOROTHY M. MARCO, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF LAWRENCE S. MARCO, DECEASED, AND DOROTHY M. MARCO, INDIVIDUALLY, APPELLEES, V. JERRY A. MARCO ET AL., APPELLANTS.

JIM MARCO, APPELLANT, V. DOROTHY M. MARCO, APPELLEE.

JERRY A. MARCO, APPELLANT, V. DOROTHY M. MARCO, APPELLEE.

242 N. W. 2d 867

Filed June 9, 1976. Nos. 40385, 40386, 40387.

1. **Equity: Trial: Motions, Rules, and Orders.** In an action in equity, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reasonably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled.
2. **Equity: Trial: Motions, Rules, and Orders: Dismissal.** In an action in equity, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case.
3. **Equity: Trial: Dismissal.** Where it appears that a dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial.
4. **Equity: Trusts: Fraud.** Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. If one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title and so obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of

the offending party and convert him into a trustee of the legal title.

5. **Property: Husband and Wife: Joint Tenancy: Gifts.** When a husband and wife take title to property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable.

Appeals from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

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

Peter E. Marchetti of Nelson, Harding, Marchetti, Leonard & Tate and Jeffrey W. Meyers of Frost, Meyers & Hosford, for appellee.

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

CLINTON, J.

Three separate actions are before us on this appeal. These actions were consolidated for trial in the District Court and for argument here. The petition in No. 40385 was filed on February 28, 1974, and the plaintiff in that action, Dorothy M. Marco, individually and as executrix of the estate of Lawrence S. Marco, deceased, asked to have the defendants, Jerry A. Marco and Jim S. Marco, restrained and enjoined from coming upon a business premises referred to as A-1 Auto Parts, from interfering with her management of the business, from imposing any restraint upon the liberty of the plaintiff, and from coming upon a certain premises which is her home. In that action the defendants counterclaimed, asking to have a constructive trust declared in certain real property of which Dorothy Marco is holder of the legal title as surviving joint tenant of Lawrence S. Marco, her husband and father of the defendants Jerry A. Marco and Jim S. Marco, who are the plaintiff's stepsons. Four tracts of land are involved in the above

counterclaim and we will hereafter refer to them collectively as A-1 Auto Parts real estate or property.

In No. 40386, filed on April 8, 1975, Jim Marco was plaintiff and Dorothy Marco was defendant. Jim Marco there asks to have a constructive trust declared as to certain property, the address of which is 7401 Sarpy Avenue and which we will hereafter refer to as "Jim's house." In No. 40387, also filed on April 8, 1975, Jerry Marco is plaintiff and Dorothy Marco is defendant. Jerry Marco there asks to have a constructive trust declared in certain real property, the addresses of which are 7202 and 7204 South 25th Street and which we will hereafter refer to as "Jerry's house and building." Previous to trial the court permitted Jerry and Jim to amend their petitions in Nos. 40386 and 40387 to include the property described in their counterclaim in No. 40385, to wit, the A-1 Auto Parts property.

The evidence in cases No. 40386 and No. 40387 and on the counterclaim in No. 40385 was heard first and, at the close of the presentation of evidence by Jerry and Jim in those cases, Dorothy moved for a dismissal on the ground that the evidence was insufficient to establish a constructive trust. The trial judge granted the motion and dismissed the petitions and counterclaim of Jerry and Jim. It is the propriety of this action of the trial court which is before us on appeal. The only assignment of error relates to that proposition.

Following the granting of the motion to dismiss, Dorothy presented the evidence on her petition in No. 40385. The trial court granted the injunction for which she prayed. Jim and Jerry have not appealed from that ruling.

In our review of the cases before us we are guided by the following principles of adjective law: "In an equity suit, when the defendant moves for a dismissal of the plaintiff's action at the close of plaintiff's evidence he thereby admits plaintiff's evidence to be true, together with every inference which fairly and reason-

ably may be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and plaintiff has made a prima facie case, the motion to dismiss should be overruled. . . . In an equity suit, a motion to dismiss at the conclusion of the plaintiff's evidence affords a proper means of determining the sufficiency of the plaintiff's evidence to make a prima facie case. . . . Where it appears that such dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial." Paul v McGahan, 152 Neb. 578, 42 N. W. 2d 172. In the above case we said that the case comes to this court for trial de novo subject to the foregoing rules. We must, therefore, determine, as a question of law, whether the evidence is sufficient to support a judgment for Jerry and Jim.

The applicable principles of substantive law are found in the same case: "Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." Paul v. McGahan, *supra.*

We must accordingly first summarize the pertinent

allegations of the pleadings by which Jim and Jerry state their causes of action and then review their evidence and examine the possible reasonable inferences therefrom. We treat their pleadings collectively since the general allegations relied upon to establish constructive trust are essentially the same in each case. We mention especially at the end of this summary of the pleadings the allegations peculiar to the individual cases.

The petitions allege: At various times between 1967 and 1971 Dorothy and Lawrence acquired title to the A-1 Auto Parts real estate; for about 20 years before the death of Lawrence, Jim and Jerry worked for their father in the business of A-1 Auto Parts; they were not paid regular salaries; their uncompensated labors were the source by which the real estate upon which the A-1 Auto Parts business is conducted was obtained; the plaintiffs at all times reposed great trust and confidence in their father and believed their father would deal justly with them; their father told them repeatedly "that it was his intention that the real estate . . . should pass to . . . [Jim and Jerry on his death] in consideration of . . . services performed [by Jim and Jerry] in connection with . . . A-1 Auto Parts"; except for the contributions made by Jim's and Jerry's services, all contributions to the acquisition of the property were paid by Lawrence, and Dorothy contributed nothing; Dorothy was a grantee of the property solely as a matter of convenience; Lawrence desired the property be conveyed by Dorothy to Jim and Jerry after his death and he had the same desire with reference to the business itself; a relationship of trust and confidence existed between Lawrence and Dorothy; Lawrence believed Dorothy would comply with his wishes and he would not have permitted Dorothy to be a grantee if he had known she would not; Dorothy acquired her title to the property by abuse of a confidential relationship; she holds the property as constructive trustee; and she refuses to convey

the same to Jim and Jerry although they have demanded that she do so.

In addition, it is alleged the property referred to as Jim's house was acquired by Dorothy and Lawrence on September 5, 1967; Jim inhabited that premises as his residence and erected improvements thereon; and the improvements were made in reliance on the intention of Lawrence to convey the property to Jim.

The property referred to as Jerry's house and building was acquired on June 26, 1971, by Dorothy and Lawrence as joint tenants with right of survivorship; Jerry inhabited a residence thereon and erected substantial improvements; and the improvements were made by Jerry in reliance on Lawrence' intention that the property be conveyed to him.

We now turn to a review of the evidence. In so doing we bear in mind that the motion of Dorothy to dismiss admits the truth of the evidence presented by Jim and Jerry and all the reasonable inferences therefrom. Certain background information is undisputed. A good deal of the testimony by the witnesses is ambiguous, vague, and in the form of conclusions with foundation lacking. This is particularly true with respect to the times when certain conversations are said to have occurred. We will necessarily for the most part summarize this evidence in a conclusionary way, while recognizing that we must concede its truth and the truth of any reasonable inferences therefrom.

Viewed in this light the question for our determination is whether the evidence supports the reasonable conclusion that Dorothy obtained title to the real estate in question by abuse of a confidential relationship under such circumstances that she ought not, according to the rules of equity and good conscience, hold and enjoy the benefits thereof, but should be held to be a constructive trustee of title for the benefit of Jim and Jerry.

The record discloses that Mary Marco, the first wife of Lawrence and the mother of Jerry and Jim, died when

Jim, the youngest, was 18 months of age. Jerry was 2 years older. After his mother's death, Jim lived with and was raised by a grandfather. Jerry apparently continued to make his home with his father. Lawrence married Dorothy in 1946 while Jerry was very young. Lawrence and Dorothy had 12 children, 11 of whom were still living at the time of trial and the youngest of whom was 2 years of age when Lawrence died suddenly in October of 1973.

Jerry, when he was about 12 years of age, began to work for his father in an automobile service station which the father operated. Jim began to do the same type of work shortly thereafter. As an adjunct to the service station business, the father ran a junk car operation. Jerry learned to cut up junkers with a torch. This was in about 1952. Jerry quit school in the twelfth grade. Jim quit school in about the eighth grade.

In 1959 or 1960 the business known as A-1 Auto Parts began as an outgrowth of the junk car business. It consisted apparently of the purchase of old automobiles and the salvage and sale of parts therefrom. In this business Jim ran the office and Jerry the salvage of parts. Lawrence, the father, at least in the later years, did the hauling.

While the two boys were minors neither got a regular salary although apparently they were furnished with a living, money for incidentals, and the use of an auto or automobiles.

When Jerry was about 21 years of age he married and he began to draw a salary of $60 per week. A year later he moved to an existing basement residence located on the same real estate on which "Jerry's house and building" were later constructed. In 1964 he bought a store building and moved it to the above premises. At that time the property was not owned by Dorothy and Lawrence, but apparently was held by lease. Using the building which he had purchased, Jerry began the construction of his house on the leased premises and

finished it in about 1969. He testified that the cost was about $8,000. This real estate was purchased by Lawrence and Dorothy in 1971 for $18,000. They took title as joint tenants with right of survivorship. In 1972 and thereafter Jerry constructed at 7204 South 25th Street, on the same tract of real estate above described, what has been referred to as Jerry's building. The cost was about $12,000. The evidence supports the conclusion that Jerry furnished the money for all these improvements although his father cosigned with him for money borrowed at a bank. At no time did Jerry pay real estate taxes on the land or rental therefor. Insurance on the property was paid from the A-1 Auto Parts business account. One witness testified that on one occasion Lawrence stated he had given Jim and Jerry the property on which "Jerry's building" was located.

Jerry continued to work for A-1 Auto Parts until his father's death. His wages at that time were $115 per week. After Lawrence died Dorothy contemplated raising the salary to $175, but a dispute over the estate of Lawrence occurred and Jerry was fired. Before the firing occurred and after Lawrence' death, Dorothy told Jerry that she would leave the real estate where the house and building were located to him when she died.

Jerry has, since the death of his father, filed a mechanic and materialman's lien for the materials and labor he furnished in the above construction. The lien claimed for the house is $18,500 and the claim for the building is $27,000. Jim joined in this lien. Jerry has also filed a claim against the estate, apparently for the same items.

Jim worked in A-1 Auto Parts from about 12 years of age until some time in 1969. When he reached 21, he began receiving take-home pay of $41.25. He married at age 26 at which time his wages were raised to $80 per week. After some time off in 1969 for reasons of health, Jim began the A-1 Auto Sales business across the street from A-1 Auto Parts. The real estate on

which that business is located was, at the time of Lawrence' death, owned by Lawrence and Dorothy as joint tenants. The record does not disclose the date of acquisition.

Jim started living at 7401 Sarpy Avenue in 1966. The house located on the premises was in a state of disrepair. Jerry's grandfather had lived there beginning in 1916. The land belonged to the railroad and was leased from it. Jim made improvements with his own funds and labor on the property for over a period of 6 or 7 years, spending about $6,000. These improvements began before Dorothy and Lawrence acquired title to this property from Dorothy's parents in 1971.

Jerry and Jim testified that income from A-1 Auto Parts was used to acquire all the real estate in question.

Jim and Jerry have joined in filing a mechanic and materialman's lien in the amount of $18,000 for the improvements made on the real estate on which "Jim's house" is located and have filed a claim against the estate of Lawrence for the same amount.

When Lawrence died he had a will in which he left everything to Dorothy. Although the date of the execution of the will is not shown by the evidence, it appears to have been before any of the real estate in question was acquired. Shortly before his death, Lawrence mentioned to a close friend and confidant that he did have a will. This will has been admitted to probate.

Jim and Jerry testified that they were told by their father that they would get the A-1 Auto Parts property and their own houses and building when he died. Both Jim and Jerry knew before their father's death that Dorothy's name was on some of the real estate, but they did not know how much. They expected to be protected in "their stuff." They stated that their father told them that he did not deed the property to them because if they should be divorced their wives were likely to get the property.

Jim and Jerry at first claimed to be part owners of

A-1 Auto Parts, but have since apparently abandoned that position. The income from the A-1 Auto Parts business and all other property was reported on the income returns of Lawrence and Dorothy. Lawrence and Dorothy were listed as the owners of the trade-name "A-1 Auto Parts" on a registration certificate executed in November 1959. In a renewal of this trade-name on June 11, 1969, Lawrence and Dorothy are listed as the applicants. The application describes the general nature of the business as new and used auto parts, used cars sold, and dismantling of same. The verification on the renewal was executed by Dorothy and Lawrence before Jerry A. Marco as a notary public. Jim paid no real estate taxes or rent on the property which he claims. Insurance thereon was paid by A-1 Auto Parts income. Witnesses testified that Lawrence had told them that Jim and Jerry were each owners of a one-third interest in the A-1 Auto Parts business.

Jerry still occupies his home. Jim still occupies his house and also continues to carry on the A-1 Auto Sales business on the property owned by Dorothy.

Jerry and Jim, through testimony of a friend of their father, introduced statements made by their father before his death. The time these statements were made is uncertain: "Like from about '60 to the time he died." The first conversation was "Probably back in the 50's. . . . They [the boys] was little then." Statements of Lawrence relating to the boys and A-1 Auto Parts were also introduced by the same witness in the following language: "Well, everything he would say was about the business would be 'me and the boys. The boys, I mean they're the ones that helped me and got going to where I'm at today.' . . . Mr. Marco said that he believed that Jerry ought to have an opportunity to have another business, whatever he wanted to put in that building, like Jimmy did putting a garage up across the street from A-1 Auto Parts, which is A-1 Service, selling cars. And he didn't blame the boys for trying to expand

and get something else besides A-1 Auto Parts. Q. What, if anything was said about . . . anything. A. Well, that was Jerry's home and Jimmy's home. . . . Well, Jimmy remodeled his and Jerry moved a building from over on 60th and 'L' Street, which was a beer joint at one time, when they made the big 'Y' there, and put a building on it and did all the improvements in it. So it was his home, according to Mr. Marco. And Mrs. Marco felt the same way."

Testimony was adduced as to a conversation between Dorothy, Jim, and Jerry which took place after Lawrence' death. The purpose of the testimony apparently was to show that Dorothy had made admissions against her interest. The substance of the conversation apparently was that Dorothy indicated her willingness to deed to Jim the real estate on which his house sits and to Jerry the real estate on which his house and building are located if the two would relinquish their claims to the A-1 Auto Parts business and real estate and the A-1 Auto Sales real estate which at that time they seemed to be claiming. Jim and Jerry apparently were then unwilling to relinquish their claims on this other property. This part of the conversation can only be construed as an offer to compromise a disputed claim. It certainly cannot by itself be reasonably construed as an admission by Dorothy of facts which would make her a constructive trustee.

Jim also testified as follows: "Q. Did you have any conversation with her about your house as to any interest she might have in it? A. It always was to be mine. With her, yes. There was really no question. Q. What about the Sales? A. And that was to be mine, there was no question. Q. But there was a discussion on the Auto Parts, wasn't there? A. Well, he wanted the rest of the kids to come in, too, with us, a share of it. Q. Well, wasn't she going to participate in it? A. Yeah. Well, the feeling was that there was a third there for — We was to work it and the third, other third, was to

provide for the other kids." This testimony is ambiguous in the extreme, but as we read it de novo, the answers taken together seem not to be admissions by Dorothy but a restatement of previous claims which Jim had made.

Part of the underpinning of the claims of Jerry and Jim is their assertion of contributions to the cost of acquisition of the real estate in question by reason of their services to A-1 Auto Parts for which they have not been compensated. As previously indicated, they also seem to have originally asserted that they were part owners of A-1 Auto Parts and thus it was their income that was used in part to acquire the real estate. The evidence does not make a prima facie case supporting these claims. During their minority their services and any income therefrom belonged as a matter of law to their father. Thereafter, they were paid regularly. There is no evidence of any agreement, direct or by implication, that they received less pay than they otherwise would have in consideration of being compensated later in some other way. The claim that they were part owners of A-1 Auto Parts supported only by testimony as to statements made by Lawrence is not legally supportable when considered with their own contradictory evidence. During most of the period of their services, to wit, from about 1952 to 1967, the A-1 Auto Parts real estate was merely leased; and there could not have been during that time any agreement that the services rendered were in consideration of a promise to convey property not then owned and the acquisition of which, so far as the record shows, was not even then contemplated. The same is true with reference to the other two tracts of real estate involved on this appeal.

There is little evidence in the record as to circumstances surrounding the drafting and execution of the deeds by which Lawrence and Dorothy acquired title as joint tenants. In addition to the two properties here involved, there was much other real property acquired

by Lawrence and Dorothy and title taken in the same fashion. None of the deeds are in evidence. The witnesses were permitted to testify, or it is simply conceded, that the various properties were so acquired and held. The only direct testimony as to circumstances of acquisition comes from the seller of the 4 ½-acre tract on which "Jerry's house and building" are located. The substance of that witness' testimony was that a purchase agreement was drawn. He could not remember whether or not Dorothy was a party to the purchase agreement. However, he was instructed, apparently by Lawrence, that the deed was to be made to Lawrence and Dorothy as joint tenants and this was done. At the time the decision was made Lawrence and Dorothy were apparently together in a trailer house, the location of which the record does not show. The seller seemingly waited outside the door while the decision to purchase was being made by Lawrence and Dorothy.

When a husband and wife take title to property as joint tenants, even though one pays all the consideration therefor a gift is presumed to be made by the spouse furnishing the consideration to the other who did not. This presumption is rebuttable. Hoover v. Haller, 146 Neb. 697, 21 N. W. 2d 450; McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543. That presumption is not rebutted by the evidence here, even assuming its truth and the reasonable inferences therefrom.

The record is completely devoid of any evidence, direct or by inference, to show that Dorothy was named as a grantee in the deeds through some abuse of a confidential relationship. When the deed of 1967 was made, Dorothy and Lawrence had been married for more than 20 years. They then had a large family. At least one child was born after that time. When the deed of 1971 was made they had been married about 26 years. It was at about that time their youngest child was born. Eighteen thousand dollars was paid for the last-mentioned acquisition and the evidence is completely de-

void of anything which would support an inference that any of this money was Jerry's. There is no evidence in the record whatever as to the circumstances surrounding the acquisition of the property acquired from Dorothy's parents and on which "Jim's house" is located.

The evidence therefore does not establish prima facie that Dorothy obtained title by virtue of a confidential relationship, under such circumstances that she ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits of title to the property in question. Under the circumstances shown, equity need not raise a trust by construction upon the legal title to the real estate in question.

Lawrence may well have intended, and we must accept on the basis of the record, that he did orally express his intention that Jerry was to have his home and building and Jim his home, but this alone is not enough to raise a constructive trust in the real estate. If it were, then no deed and no will would be secure. There is nothing in the record to show that such intention was communicated to Dorothy or that she took title with some agreement with reference thereto. We, of course, do not pass on matters not before us in this case. If the two sons are entitled to some relief, it is not in the form of requiring Dorothy to convey to Jerry the legal title to the 4½ acres of land on which his "house and building" are located, nor by requiring Dorothy to convey to Jim the 10 lots on which "his house" is located and to the two of them a two-thirds interest in the A-1 Auto Parts real estate.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN D. SCHLEIS, APPELLANT.

243 N. W. 2d 50

Filed June 9, 1976. No. 40393.

Criminal Law: Sentences: Probation and Parole. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion.

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

Toney J. Redman, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

The defendant, after pleading nolo contendere, was convicted of conspiring to possess amphetamines with the intent to deliver, in violation of section 28-4,129, R. S. Supp., 1974. The District Court sentenced the defendant to 1 year in the Nebraska Penal and Correctional Complex. The defendant's sole contention on appeal is that the sentence is excessive. The defendant believes that he should have been granted probation. We affirm the judgment and sentence of the District Court.

In State v. Swails, 195 Neb. 406, 238 N. W. 2d 246, we said: "This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion."

The presentence investigation indicates that the defendant has a long involvement in drug traffic. By his own admission, he became involved in the drug business in about June 1974. He met another drug dealer and became involved "heavily" in selling amphetamines. By

his own admission, he became involved in a deal in which his partner went to California to purchase drugs, and the amount of money involved in this deal was around $10,000. He states that at that time he "quit being the middle man or small." He borrowed about $1,200 from a friend in order to pursue the business. He admits that in August 1974 he got "busted" for a sale of drugs. He states subsequent to August 1974 that he and his roommates became brokers and would bring in the drugs and pass them on to big dealers or distributors. He made three trips to California himself for the purchase of drugs. The record reveals that on one of these transactions, probably the one just mentioned, he was arrested and the case was disposed of by his pleading guilty to a reduced charge. We observe that as a part of the plea bargain in the present case a charge of possession of drugs with intent to deliver was dismissed.

Considering the nature of the offense, and the indicated persistence in the same conduct, there does not appear any abuse of discretion by the District Court in imposing the sentence that it did and denying probation.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

CHRIS PETERSON, APPELLANT, V. MELVIN PETERSON, APPELLEE.

243 N. W. 2d 51

Filed June 9, 1976. No. 40404.

1. **Divorce: Parent and Child: Infants.** Custody and visitation of a minor child shall be determined on the basis of the child's best interests.
2. ———: ———: ———. In cases involving determinations of child custody, the findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal if the findings are in conformity with the pertinent statutes, are not a clear abuse of discretion, or are not clearly against the weight of the evidence.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Cunningham, Blackburn, Von Seggern & Livingston, for appellant.

Richard L. Huber, for appellee.

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

RICHLING, District Judge.

The appellant's petition in the District Court prayed for dissolution of the marriage, custody of the minor child with support therefore, temporary and permanent alimony, and an equitable division of the property of the parties hereto. The decree dissolved the marriage, made provision for the division of the property, both real and personal, awarded the appellant alimony in the sum of $2,000, and awarded custody of the minor child to the appellee with rights of visitation in the appellant. Appeal was taken from that provision of the decree awarding custody of the child to the appellee. We affirm.

The appellant's childless first marriage was terminated by divorce. The first marriage of the appellee was terminated by the death of his wife. This left him with the custody of a surviving daughter, who at the time of these proceedings was 10 years of age.

The parties hereto were married on December 1, 1972, and a son was born on December 23, 1973.

During the first marriage of the appellee he and his family had resided at York, Nebraska, and he still resided there at the time of the marriage of the parties hereto. After the marriage they purchased an acreage at York, upon which their home was located.

Prior to the appellant's filing her petition for dissolution, the parties had separated and the appellant had moved to Grand Island. The appellee continued to live at York. In fact, the appellee filed a petition for dissolution at York, which was subsequently dismissed

when it was determined that the District Court for Hall County, Nebraska, had acquired jurisdiction by the appellant having already filed her petition in that court.

The appellee's mother lived on the same acreage with the appellee in a double wide trailer next door to the appellee's home and took care of his daughter until the appellee returned from work. Testimony disclosed also that, in addition, if needed, the babysitter which the parties had used for their son was still available for the same purpose for the appellee if he were awarded custody.

The trial court noted that: "* * * the father's home offered the more stable situation. * * * The father apparently was pretty successful in caring for his other child. * * * It appears to me the child's best interests are being with the father. This doesn't say the mother is unfit."

The evidence described the appellant's home in Grand Island and the plans she had for the care of the child.

Section 42-364, R. S. Supp., 1974, provides, so far as material herein, as follows: "Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing.

"(1) In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children which shall include but not be limited to:

"(a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing; * * *

"(2) In determining with which of the parents the children, or any of them, shall remain, the court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other."

We stated in Young v. Young, 195 Neb. 163, 237 N. W.

2d 135: "When viewing these cases from a cold record, the decision of the trial judge is peculiarly entitled to respect. He saw all the parties and witnesses. He was in closer touch with the situation than this court can be from a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial judge is entitled to great weight in determining the best interests of children in custody proceedings. While the trial court did not find that either party was unfit to have the custody of the children, he did place them in the custody of Daymon. From a review of the record, we cannot say that he abused his discretion in this respect."

Young v. Young, *supra*, cited with approval Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111, which, in addition to enumerating factors to be considered in the award of custody, also held: "In evaluating the general concept of the best interests and welfare of the children it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial."

In Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89, we held: "In cases involving determinations of child custody, the findings of the trial court both as to an evaluation of the evidence and as to the matter of custody will not be disturbed on appeal unless there is a clear abuse of discretion * * * or it is clearly against the weight of the evidence."

Upon full de novo consideration of all the evidence in this case we conclude that the judgment of the trial court in finding that it was for the best interests of the child that his custody be awarded to the father-appellee was in accord with the pertinent statutes, was not contrary to the evidence, was not unreasonable, was not an abuse of discretion, and should be affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CURTIS FOSTER, APPELLANT.

242 N. W. 2d 876

Filed June 9, 1976. No. 40410.

1. **Criminal Law: Controlled Substances: Evidence: Trial.** Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession.
2. ———: ———: ———: ———. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance.
3. **Criminal Law: Aiders and Abettors.** Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed.
4. **Trial: Judgments.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
5. **Criminal Law: Verdicts: Evidence.** In criminal cases, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.
6. **Juries: Jurors: Constitutional Law.** Section 25-1601, R. S. Supp., 1974, excluding 19 and 20 year olds from petit and grand jury service does not violate constitutional due process guarantees, as those who are 19 and 20 years old do not comprise a cognizable class.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

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

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

Heard before WHITE, C. J., SPENCER, MCCOWN,

NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

A grand jury for Douglas County, Nebraska, returned an indictment against the defendant, Curtis Foster, charging that he "did unlawfully and knowingly or intentionally possess with the intent to distribute, deliver, or dispense a controlled substance, to wit: "Heroin." On February 6, 1975, he was arraigned and plead not guilty. Trial was had to the court on May 15, 1975, defendant having waived a jury trial; and the court convicted Foster of the offense. On September 16, 1975, the court sentenced him to imprisonment in the Nebraska Penal and Correctional Complex for a period of 5 years. He has now appealed his conviction to this court. We affirm.

In his appeal, Foster alleges only two grounds which he claims require reversal of his case. He first alleges that there was insufficient evidence to support the findings and judgment of the trial court; and, secondly, that he was deprived of due process of law by the failure of the court to sustain his motion to quash his indictment which he claims was invalid because Nebraska's method of grand jury selection systematically excluded 19 and 20 year old voters from service.

We discuss these assignments of error in the order in which appellant has presented them. An undercover narcotics officer, Charles Cramer, testified that on the nights of December 3 and 5, 1974, he made heroin purchases at Foster's home in Omaha, Nebraska, from one Cecil Bradshaw, an old army friend of Fosters, who at that time was living with Foster and his wife. Although the testimony presented at the trial was conflicting, the agent, Officer Cramer, testified that on December 3, he and Bradshaw went to the Foster residence, arriving at approximately 9:30 p.m. The house was locked, and the two waited outside until Curtis Foster and his wife,

Claudette, and his brother, Irwin Foster, returned home. Cramer testified that he sat down in the livingroom, while Curtis and Irwin went into Bradshaw's room, a bedroom located at the southwest corner of the house. Bradshaw asked Cramer what he wanted to buy, then went into the southwest bedroom, and returned with a packet containing a substance that was later analyzed and determined to be heroin. On December 5, Bradshaw and Cramer again went to Foster's house; and, according to the officer, Curtis Foster talked to him in the livingroom, while Bradshaw went into the southwest bedroom. Bradshaw returned approximately 10 minutes later carrying a plate with yellow powder on it and asked Cramer to follow him into the basement. In the basement, Cramer rejected the powder, indicating he wanted "the same stuff" he had purchased on December 3. They returned upstairs, and Cramer testified that he then told Curtis Foster that "this wasn't the same stuff I bought last time and I didn't want it." Cramer testified that Foster replied, "There is a mixup. I will straighten it out," and that Foster then followed Bradshaw into the southwest bedroom. Curtis Foster returned alone; and, according to Cramer, a conversation ensued concerning various "cutting agents." Bradshaw then came out of the hallway and asked Cramer to return to the basement with him. He did so, and a sale of a substance, later found to be heroin, was completed.

Irwin Foster, the brother of Curtis, denied being in Bradshaw's room on either occasion and claimed that he was in his own bedroom located next to Bradshaw's on the south side of the house. Curtis Foster denied having any knowledge of Bradshaw's activities in dealing with drugs. He testified that on December 3, he and his wife, and his brother, had just returned from shopping when they admitted Bradshaw and Cramer into the house, that he went into his own room in the northwest corner of the house to put some parcels away, returned

to the livingroom, and then went back to his room to change his clothes. He said he was not in Bradshaw's room that evening. Both Curtis Foster and his wife denied the conversation about cutting agents testified to by Cramer.

Foster contends that the evidence is insufficient to show that he had "possession" of the controlled substance, or that he had the requisite intent to deliver.

The rule is that evidence the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. State v. Shimp, 190 Neb. 137, 206 N. W. 2d 627 (1973); State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187 (1967). Although the evidence is clearly sufficient to establish that Bradshaw had actual possession of the drugs in question, there does not appear to be any direct evidence that Foster was ever in actual possession of the drugs. His possession, if at all, was constructive possession. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Morford, 192 Neb. 412, 222 N. W. 2d 117 (1974); State v. Faircloth, *supra*; State v. Shimp, *supra*.

In the instant case, there is evidence that Cecil Bradshaw was staying in Curtis Foster's house and occupied the southwest bedroom. According to the testimony of Officer Cramer, Foster was present with Bradshaw while Bradshaw prepared to bring the drugs to Cramer. There is evidence from which the court could conclude that Foster had sufficient control or dominion over the heroin to be able to assist Officer Cramer in obtaining an exchange of the unsatisfactory heroin for other heroin that was acceptable, and that he did so. There was also sufficient evidence in the record from which the court might well have found that Bradshaw did not have exclusive control over the heroin, although it was appar-

ently kept in his bedroom; and that Foster, in whose home the drugs were kept, had more than a passive relationship with those drugs.

Foster contends that there was insufficient evidence of an intent to deliver. We disagree. The evidence reveals that Foster was a party to Bradshaw's delivery preparations; and that he and Bradshaw went to the southwest bedroom to exchange the heroin, immediately after Foster's statement to Cramer, "There is a mixup. I will straighten it out." Foster's conduct at that time is relevant and referable to an intent on his part to deliver the heroin to Cramer, which occurred shortly thereafter.

Moreover, it appears that the evidence adduced was ample to establish under section 28-201, R. R. S. 1943, that Foster aided and abetted Bradshaw in his sale and delivery of the drugs to Cramer. Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that the accused wishes to bring about, in furtherance of a common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. State v. Alvarez, 189 Neb. 276, 202 N. W. 2d 600 (1972). Foster's conduct satisfies the above criteria, and that being so, under section 28-201, R. R. S. 1943, he "may be prosecuted and punished as if he were the principal offender." We are unable to ascertain from the record in this case whether Cecil Bradshaw was charged or convicted for his activities arising out of the facts of this case; and, if so, for what offense. In any event, this would not foreclose the prosecution and conviction of Foster as an aider and abettor under section 28-201, R. R. S. 1943. The law is well established under that section that the conviction of the principal is not necessary for conviction of an aider and abettor, and that, in fact, it is not even necessary that the identity of the principal be established. State v. Alcorn, 187 Neb. 854, 194 N. W. 2d

798 (1972); Pigman v. United States, 407 F. 2d 237 (8th Cir., 1969).

In this case, the trier of fact was the court, rather than a jury. We have held that where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Siefford v. Housing Authority, 192 Neb. 643, 223 N. W. 2d 816 (1974); First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N. W. 2d 115 (1973). This court has adopted the rule in criminal cases that the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650 (1976); State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589 (1975). There was "substantial evidence, taking the view most favorable to the State" to support the verdict of the court in this case.

We now consider Foster's claim that the trial court erred in failing to quash the indictment against him because the indictment was returned by a grand jury which, he asserts, was composed in a manner prohibited by the due process clause of the Fourteenth Amendment to the Constitution of the United States. As late as 1969, the statutes of Nebraska required that a grand or petit juror must be over the age of 25 years and under the age of 70 years. § 25-1601, R. R. S. 1943. In 1969 the Legislature amended the language of that section to provide that such jurors must be over the age of 21 years and under the age of 70 years. § 25-1601, R. S. Supp., 1974. That minimum age requirement has been in effect from 1969 until the present date. In support of his position, appellant points out that under section 38-101, R. R. S. 1943, all persons under 19 years of age are declared to be minors. This provision of the statute is contained in the article dealing with guardianship of minors. This provision has been

changed from time to time. See, for example, § 38-101, R. S. Supp., 1969.

Appellant argues that the present statutes permitting only individuals above the age of 21 to serve on grand or petit juries amounts to a deliberate and systematic exclusion of an entire class of 19 and 20 year old voters, depriving him of his right to due process of law and rendering the indictment returned by that grand jury void. The law is well established that the systematic exclusion of a class of persons from jury service is unconstitutional. Peters v. Kiff, 407 U. S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972). In Peters, which involved the exclusion of negroes from jury service, the court pointed out that the Sixth Amendment guarantee of a jury in criminal prosecutions comprehends a fair possibility for obtaining a representative cross-section of the community on the jury and stated: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." The same rule was applied in Taylor v. State of Lousiana, 419 U. S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), which involved the exclusion of women from jury service. By analogy, appellant argues that in Nebraska the exclusion of the 19 and 20 year old age group from jury service is likewise unconstitutional. To determine the validity of appellant's claim, it is first necessary to determine whether the 19 and 20 year old individuals comprise a "well-defined class of citizens" or a "cognizable group"; and, if so, whether the class was arbitrarily excluded from jury service.

It has been held that for purposes of jury challenges, a group to be "cognizable" must have a definite composition, must have members who share common attitudes or ideas or experience, and must have a community of interest which cannot be adequately protected by the rest of the populace. United States v. Guzman, 337 F. Supp.

140 (S.D.N.Y., 1972), affirmed, 468 F. 2d 1245 (2d Cir., 1972), cert. den. 410 U. S. 937, 93 S. Ct. 1937, 35 L. Ed. 2d 602 (1973). See, also, United States v. Test, 399 F. Supp. 683 (Colo., 1975); Test v. United States, 420 U. S. 28, 95 S. Ct. 749, 42 L. Ed. 2d 786 (1975). Similar criteria have been applied to various age groups on several occasions by federal courts. In every instance, except one which involved the exclusion of persons between the ages of 21 and 34 [United States v. Butera, 420 F. 2d 564 (1st Cir., 1970)], the courts have found that the specified age groups were not a cognizable class. See, e.g., United States v. Lewis, 472 F. 2d 252 (3d Cir., 1973); United States v. Geelan, 509 F. 2d 737 (8th Cir., 1974); United States v. Duncan, 456 F. 2d 1401 (9th Cir., 1972); United States v. Guzman, *supra*. The above cases, with the exception of United States v. Butera, *supra*, involved a statutory exclusion from jury duty of persons between 18 and 20 years of age. The United States Supreme Court has recently alluded to the question of whether "the young" are an identifiable group, but has not resolved the issue. Hamling v. United States, 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

As pointed out by the court in United States v. Guzman, 337 F. Supp. 140: "Among any age group there will be vast variations in attitudes, viewpoints, and experiences. The fact that two persons are the same age does not necessarily give them a community of interest. And although we hear much talk of the 'generation gap,' it is impossible to define that gap with any precision, as the defendant has tried to do." Our conclusion is that the 19 and 20 year olds excluded from jury service in Nebraska do not constitute a cognizable class of "the young" and their interests and attitudes are adequately represented by the 21 year olds and other young people who are permitted to serve. Nor do we believe that the exclusion of those 19 and 20 years of age is arbitrary. Many in that age group undoubtedly attend college or other schools, making jury service in-

convenient. Moreover, a higher level of maturity or education may arguably result from setting the age minimum at 21 years of age. Nor is the lower minimum voting age of 18 years any indication of discrimination or exclusion, as different qualities may be required for voting than for jury service. See United States v. Duncan, *supra*. We conclude, therefore, that the exclusion of the 19 and 20 year old group from service on juries does not render the Nebraska jury selection procedure unconstitutional, nor did it deprive appellant of his constitutional right to due process of law. The court was correct in overruling the motion to quash the indictment.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILL H. JEFFERSON, JR., APPELLANT.

242 N. W. 2d 881

Filed June 9, 1976. No. 40413.

1. **Constitutional Law: Probable Cause: Stop and Check: Criminal Law.** The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.
2. **Criminal Law: Searches and Seizures.** In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard: Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate?
3. **Criminal Law: Searches and Seizures: Trial.** Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

4. **Criminal Law: Searches and Seizures: Probable Cause.** The standard for determining probable cause for search and seizure is practical and not technical.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

NEWTON, J.

This is an appeal from a robbery conviction. The defendant, who was 22 years of age at the time, and his 15-year-old brother Tommy Lee Williams followed the victim's automobile for some distance and into the parking lot of the Keystone Pharmacy in Omaha, Nebraska. The victim was there assaulted and her white purse stolen. The only assignment of error is the refusal of the court to suppress evidence regarding the purse. Two questions are presented. Were the officers justified in stopping defendant's automobile and was the seizure of the purse legally authorized? We affirm the judgment of the District Court.

The robbery occurred after dark in a restricted curfew area which had sustained extensive damage from a recent tornado. Two police detectives patrolling the area saw the defendant's automobile leave the Keystone Pharmacy parking lot with its lights off, without stopping for traffic, and proceed west for a block or two where it made an illegal U-turn and then proceeded east. It could have crossed and proceeded east directly in front of the parking lot. The defendant's automobile caught up with the officer's automobile at a stoplight. The defendant and Williams were both convicted felons and defendant was known to one of the officers. De-

fendant was operating the automobile on in-transit tags. The officers knew that defendant and his brother did not reside in the restricted area. They also observed that the passenger Williams appeared to be examining something in his lap. The officers became suspicious and stopped defendant's automobile to check out its occupants. The two men lied to the officers regarding where they had been or came from. The officers had seen the defendant's automobile in the area of the Keystone Pharmacy and knew the statements were false. While one of the officers was talking to the defendant, the officer, through the open door on the passenger's side, observed white leather straps protruding from under the front seat. On bending over he ascertained that the straps were part of a lady's white leather purse. The officer picked up the purse and asked the defendant who it belonged to. Defendant said it was his sister's but did not know her name. The officer examined the purse for identification. It was then ascertained by radio that a robbery had occurred at the Keystone Pharmacy and that the victim's name agreed with the name on identification cards found in the purse. There is additional conclusive evidence of guilt but it is not material on the questions in issue.

Was the stop of defendant's automobile justified? " 'The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. * * *.' " State v. Brown, 195 Neb. 321, 237 N. W. 2d 861. See, also, Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612. Under all the facts, we conclude that the stop was legally reasonable and valid.

Was the seizure and search of the purse constitutionally justified? The purse was in the plain view of the officer and was discovered inadvertently while the officer was talking with the defendant. A review of the factors motivating the actions of the officers discloses probable cause to believe the purse had been stolen. When first observed the defendant and Williams were apparently in a hurry to get away from the Keystone Pharmacy parking lot. They did not wait for traffic to clear so that they could cross the westbound lane and proceed east. Instead, they darted out into the westbound lane and made an illegal U-turn. They were in a restricted curfew area damaged by a recent tornado and subject to possible looting, apparently with no reason for their presence there. Defendant was known to one of the officers to be a felon and denied having been in the vicinity of the pharmacy. Williams was seen examining something in his lap and when stopped, the purse was found pushed under the seat, not on a seat where it would normally be placed if there was no reason to conceal it. The defendant claimed it was his sister's but professed not to know her name and within a couple of minutes it was definitely found to be a stolen purse. The entire sequence of events constituted one continuous, related transaction. There were exigent circumstances attendant as is normally the case where vehicles moving on public thoroughfares are concerned. As indicated in Adams v. Williams, *supra,* the suspicious circumstances demanded investigation by conscientious officers.

It is often impossible for a police officer to *know* that property discovered has been stolen. In arriving at that conclusion he can judge only on the facts as he knows them. "In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard: Would the facts available to the officer at the moment of the search or the seizure warrant a man of reason-

able caution in the belief that the action taken was appropriate? * * *

"Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." State v. Dillwood, 183 Neb. 360, 160 N. W. 2d 195. See, also, Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564. The standard for determining probable cause for search and seizure is practical and not technical. See State v. Dillwood, *supra*.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWIN A. LEE, APPELLANT.

243 N. W. 2d 53

Filed June 9, 1976. No. 40416.

1. **Trial: Witnesses: Evidence.** Where a witness is called for the purpose of impeaching a witness on the trial, the evidence of such witness is not admissible unless a foundation for such impeachment has been laid by calling the attention of the witness to be impeached to the alleged inconsistent acts or statements, and giving him an opportunity to state whether or not he performed such acts or made such statements.
2. ———: ———: ———. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated.
3. **Trial: Evidence.** The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Reversed and remanded for a new trial.

Murphy, Pedersen & Piccolo and LeRoy Anderson, for appellant.

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

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

NEWTON, J.

The defendant appeals from his conviction of assault with intent to inflict great bodily injury. Assignments of error deal with the alleged improper admission of impeachment testimony and of a failure to prove an intent to inflict great bodily injury. We reverse the judgment of the District Court.

The evidence reflects that on the night in question the complaining witness, Frank Torres, and Domingo Reyes were riding around and drinking. They stopped at a filling station where Regan Lee worked, got some gas, and Domingo Reyes struck Regan in the face. Later that evening Regan Lee met his brother Ronny Lee, Kent Rutter, Steve Hirsh, and the defendant, who is not related to Regan or Ronny Lee. Due to the incident at the filling station, they set out to find Frank Torres and Domingo Reyes and late that night, they met them at a Dairy Queen. Some argument ensued between the defendant and Torres, and between Reyes and the other boys. Torres was knocked down by the defendant. The defendant said he used his fist and afterwards got a heavy steel bar and struck Torres on the chest; also, that cuts on Torres' head were received when his head struck an automobile door as he fell. The State's evidence indicates that the cuts on Torres' head resulted when he was twice struck on the head with the steel bar. There were two cuts, each requiring four stitches.

The evidence was quite conflicting and defendant maintained he acted in self-defense. Ronny Lee testified that he did not see either blow struck but saw Torres as he was falling. After the fracas several of them went to the defendant's apartment. Ronny Lee stated that he

stayed at the defendant's apartment that night and never left until the next day. The State, without having questioned Ronny Lee in regard thereto and over objection, introduced a witness who testified that he saw Ronny Lee and Kent Rutter in his donut shop after 2 a.m. following the incident in question and both said that the defendant had "smacked" Torres in the head with a pipe. Kent Rutter was not called as a witness. The court did not instruct the jury that this evidence was admitted for impeachment purposes only.

"Where a witness is called for the purpose of impeaching a witness on the trial, the evidence of such witness is not admissible unless a foundation for such impeachment has been laid by calling the attention of the witness to be impeached to the alleged inconsistent acts or statements, and giving him an opportunity to state whether or not he performed such acts or made such statements. * * *

"The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated." State v. Witmer, 174 Neb. 449, 118 N. W. 2d 510. See, also, State v. Gundlach, 192 Neb. 692, 224 N. W. 2d 167.

The admission of the impeaching evidence was obviously error. The State asserts it was error without prejudice. We cannot agree. Both Ronny Lee and Kent Rutter were present at the fight. These hearsay statements indicated that Ronny Lee and Kent Rutter had seen Torres struck with the steel bar or knew that to be the case, yet Ronny Lee denied seeing any blow struck and Kent Rutter was not called as a witness. The statements made by Ronny and Kent were not necessarily contradictory of Ronny's testimony as he may have heard this although he did not witness it. It is doubtful that it was proper impeachment evidence under the existing circumstances and in the absence of a cautionary instruction, it was likely considered by the

jury as evidence of guilt. In view of the conflicting evidence, we are prone to believe that this evidence could well have affected the verdict. "The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict." Witte v. Lisle, 184 Neb. 742, 171 N. W. 2d 781.

In regard to defendant's second assignment of error, we note that defendant does not deny that he assaulted Torres. If he used a heavy steel bar in doing so it was for the jury to determine whether he had the intent necessary to constitute an assault with intent to inflict a great bodily injury.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

LOUIS POFAHL, APPELLEE, V. BLANCHE V. POFAHL, APPELLANT.

243 N. W. 2d 55

Filed June 9, 1976. No. 40425.

1. **Judgments: Time.** A District Court may vacate or modify its own judgments after the term at which they were entered for, among other things, mistake, neglect, or omission of the clerk and a proceeding to vacate on this ground may be brought within 3 years.
2. **Judgments: Pretermissions.** Section 25-2003, R. R. S. 1943, states that the proper proceeding to correct omissions of the clerk is by motion and notice.
3. **Judgments.** A District Court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered.
4. ———. After the term, section 25-2001, R. R. S. 1943, governs the vacation or modification of judgments.
5. **Judgments: Notice.** Normally the proceedings required in section 25-2003, R. R. S. 1943, must be followed notwithstanding judgment was entered without prior notice to the parties or opportunity for a hearing, or that the purpose of section 25-1301.01, R. S. Supp., 1974, has been defeated by the failure

of the clerk to give the required notice of the entry of judgment.

6. **Judgments: Pretermissions: New Trial: Appeal and Error.** A failure of the clerk to comply with section 25-1301.01, R. S. Supp., 1974, will not defeat a party's right to move for a new trial or appeal, but such failure does not render the judgment void.
7. **Judgments: Time.** After the term at which it is entered expires, a failure to move for the vacation of a judgment within the time required by statute ordinarily deprives the District Court of authority to reopen or vacate the judgment.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded with directions to dismiss.

Mohummed Sadden and Joe Cosgrove, for appellant.

Kirby, Duggan & McConnell, for appellee.

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

NEWTON, J.

This is a divorce proceeding which appears to have been dismissed by the District Court without a hearing and without notice of the entry of the judgment of dismissal. The District Court set aside the judgment of dismissal and granted further relief. We reverse the judgment of the District Court.

The only issue is the finality of the judgment of dismissal. The petition was filed on February 17, 1971, and the issues made up as of May 20, 1971. A motion for temporary alimony and suit money was filed on October 29, 1971. No action thereon appears. An order to show cause entered on September 13, 1972, appears on the docket but its nature is not disclosed. Apparently in response to this order the plaintiff filed a showing that his cause was meritorious on September 21, 1972. As of February 20, 1973, the docket reveals an entry "Case dismissed." This apparently was for want of prosecution and is necessarily without prejudice. On May 13,

1974, the defendant's attorney wrote to the District Judge requesting that a date for trial be fixed. There were no further proceedings had in the case until September 4, 1975, when the plaintiff filed an application for an order directing the defendant, in compliance with an antenuptial agreement, to sign papers required for a loan. The defendant filed a special appearance relying on the finality of the order of dismissal. The court vacated the order of dismissal entered on February 20, 1973, and directed the defendant to execute the loan papers as requested by plaintiff.

The record fails to disclose that any notice of the contemplated dismissal was given prior to its entry or the grounds therefor although a show cause order of some nature was entered September 13, 1972. No journal entry appears. The clerk of the District Court failed to mail notice of the judgment of dismissal as required by section 25-1301.01, R. S. Supp., 1974, and it appears that the parties were not aware of the action taken as late as May 13, 1974, and presumably until after plaintiff's application was filed on September 4, 1975.

No application was filed requesting that the judgment be vacated and the court appears to have taken this step on its own motion. Section 25-2001, R. R. S. 1943, provides that a District Court may vacate or modify its own judgments after the term at which they were entered for, among other things, mistake, neglect, or omission of the clerk. Under section 25-2008, R. R. S. 1943, a proceeding to vacate on this ground may be brought within 3 years. Section 25-2003, R. R. S. 1943, states that the proper proceeding to correct omissions of the clerk is by motion and notice. We have held that a court has inherent power, on its own motion, to vacate a judgment within the term at which it was rendered. See Fanning v. Richards, 193 Neb. 431, 227 N. W. 2d 595. Also, that after the term section 25-2001, R. R. S. 1943, governs the vacation or modification of judgments. See State v. Byrd, 186 Neb. 330, 183 N. W. 2d 234. It is evi-

dent that normally the proceedings required in section 25-2003, R. R. S. 1943, must be followed notwithstanding judgment was entered without prior notice to the parties or opportunity for a hearing, or that the purpose of section 25-1301.01, R. S. Supp., 1974, has been defeated by the failure of the clerk to give the required notice of the entry of judgment. We have held that the right of a party to move for a new trial or to appeal cannot ordinarily be defeated in this manner. See, Crete Mills v. Stevens, 120 Neb. 794, 235 N. W. 453; Simmons v. Lincoln, 176 Neb. 71, 125 N. W. 2d 63. This does not render the judgment invalid but simply preserves the right to challenge it by motion or appeal.

This case was on the District Court docket for 2 years before its dismissal for want of prosecution. Furthermore, plaintiff's attorney was evidently cognizant that the case would be dismissed as a "Showing" was filed on September 21, 1972, indicating he had a meritorious cause of action, would file further pleadings, and complete discovery without delay. These steps do not appear to have been taken prior to entry of the dismissal on February 20, 1973. Nothing further was done until the application was filed on September 4, 1975. Plaintiff was apprised of the former dismissal when defendant's special appearance was filed on September 9, 1975, and he still had time, within the 3-year statutory period, to move for vacation of the judgment. He did not do so and, in the absence of compliance with section 25-2003, R. R. S. 1943, or the filing of a petition in equity, the court was without authority to vacate the judgment. This record is devoid of any motion or other pleading bringing the question of vacation of the judgment before the District Court.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss the plaintiff's application.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

RAY L. HOWARD, APPELLANT, V. PEGGY JEAN HOWARD, APPELLEE.

242 N. W. 2d 884

Filed June 9, 1976. No. 40429.

1. **Judgments.** The sole and only scope and purpose of a nunc pro tunc order or decree is to make the record speak the truth, not to change or amend it.
2. **Divorce: Alimony: Judgments.** Section 42-365, R. S. Supp., 1974, provides orders for alimony may be modified or revoked for good cause shown.
3. **Divorce: Alimony: Property.** A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement.
4. ———: ———: ———. There are situations where retirement income must be considered in providing for the care and maintenance of the divorced wife. In those situations, it is considered as a source for the payment of alimony, not as a part of a property settlement.
5. **Divorce: Alimony.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed in part, and in part reversed.

Carnazzo & Nanfito, for appellant.

Thomas R. Wolff, for appellee.

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

SPENCER, J.

Ray L. Howard, hereinafter referred to as Ray, appeals from the denial of his motion to vacate or modify a default divorce decree entered April 24, 1975. On June 13, 1975, on motion of Peggy Jean Howard, hereinafter referred to as Peggy, the decree was modified by a nunc pro tunc order of which petitioner had no notice. On

August 7, 1975, Ray filed a motion to vacate or modify. Two issues are presented. (1) The validity of the nunc pro tunc order. (2) Whether the decree should be vacated or modified. We reverse in part.

At the time of the marriage, Ray was a Second Lieutenant in the military service. He remained in the service until his voluntary retirement on July 31, 1967. At that time, he was a Major but was permitted to retire at his highest temporary rank, which was Lieutenant Colonel. He had 21 years in the service at the time of his retirement. His primary source of income since retirement and at the time of this action was his retirement income. At the time of the hearing it amounted to $876.71 gross. He had a net of $744 after deductions for taxes and insurance of $132.

The parties adopted two children, Richard Allen Howard, born March 15, 1959, and Jane Anne Howard, born January 19, 1967. Their custody was awarded to Peggy and that determination is not contested here.

Ray, who had not been a pilot in the Air Force, obtained a private commercial and instructor's license to fly small aircraft after his discharge. Thereafter, he bought a Cessna airplane and began an instruction and charter flight business.

Between 1964 and 1968, Peggy, who had 2 years of college, attended night classes until she had achieved 30 credit hours of accounting. She then passed the Nebraska Certified Public Accountants examination. She has worked as an accountant since 1968. At the time of the trial, her earnings were in excess of $900 per month gross.

In February 1974, Ray filed a petition for dissolution of the marriage in the District Court for Sarpy County where the parties lived. They remained in the same household until October 1974, when Ray moved out under court order. On advice of counsel, after the action had been on file for 10 months without the filing of a responsive pleading, Ray dismissed it without prejudice.

At the time of the dismissal, Ray was living in Douglas County. He subsequently filed a petition for dissolution in Douglas County. This is the action which went to decree. At a hearing on temporary support on January 9, 1975, Ray was ordered to pay $500 per month child support and $350 temporary attorneys' fees. He was brought before the court on a contempt citation on February 7, 1975, when the child support payments were not made.

The case was set for trial on April 21, 1975. In the interim, Ray had moved to Arkansas, and on March 25, 1975, filed another action for divorce in Van Buren County, Arkansas. This action was dismissed because he had failed to satisfy a 90-day residence requirement under Arkansas law. On April 17, 1975, Ray's counsel appeared and requested that he be permitted to withdraw because he had been discharged by letter. He asked that Ray be granted a continuance of the trial set for April 21. Counsel was permitted to withdraw. The court then extended the trial date until April 24, 1975. Ray was so notified.

On April 24, 1975, Ray was defaulted and evidence was adduced on behalf of Peggy. The court granted the dissolution and thereafter entered a decree. The decree ordered Ray to pay $250 per month for the support of each child during that child's minority, or a total of $500 per month. The residence of the parties, in which there was a substantial equity, was awarded to Peggy, subject to encumbrances. The personal property in the possession of each party was awarded to that party. The court ordered that control of the childrens' savings account, which the parties had been accumulating for their college educations, be turned over to Peggy, together with the life insurance policies on Ray's life. It was further ordered that Ray's life insurance policies name the children as irrevocable beneficiaries and that he submit to a physical examination for the purpose of allowing Peggy to further insure his life.

A 1966 Cessna airplane, which had been purchased for $7,000, on which there was an encumbrance of approximately $4,000, was awarded to Ray.

Peggy had no idea of Ray's income but testified that for a period in 1974 he deposited over $15,000 into his checking account from his charter flying and instruction business. This amount was gross. She had no idea of his expenses but felt that they were very low. The only other evidence adduced was that Ray netted $300 to $400 per month from the business.

The decree made a further finding that Ray had spent approximately 19 years in the military service while married to Peggy, or 90 percent of the time during which his military pension accrued. It further found that he was receiving approximately $876 per month and that he should pay to Peggy the sum of $350 per month as alimony until the earliest of the following dates: (1) The death of either party; or (2) 5 years after the remarriage of Peggy.

Peggy's counsel had developed the fact that Ray's major asset was his retirement income. He argued 90 percent of it was accumulated during the time of the marriage. Peggy asked the court for a portion of this pension as a part of her property settlement. She requested one-half of the percentage of the pension accumulated during the time of the marriage. Subsequent to this evidence, the court asked the following question: "Now, as I get your position, Mr. Wolff, you want a percentage of this pension awarded to Mrs. Howard, in effect, as a division of the property? MR. WOLFF: That's correct, Your Honor. We think it is the major asset of the marriage, and it was accumulated for their benefit." The court then developed the fact that Mrs. Howard was 46 years of age and her husband was 50, with a life expectancy of 23.63 years. From the record, it is evident the court accepted Peggy's premise in the allowance of $350 a month to her until Ray's death or 5 years after her remarriage.

In the original decree of April 24, 1975, paragraph 16 is as follows: "That Thomas R. Wolff, attorney for the Respondent, has expended a considerable amount of time and costs in this action, the previously filed action in Sarpy County, Nebraska, as well as the defense of the subsequent action which had been filed in Van Buren County, Arkansas, and for this service on behalf of the Respondent, said attorney should receive the amount of $4,000.00 as fees and taxable Court costs."

The last paragraph of the decreedal portion of the decree is as follows: "IT IS FURTHER ORDERED that Petitioner shall pay to Thomas R. Wolff, attorney for the Respondent, the sum of $4,000.00 as attorney fees and taxable Court costs, the same to be in addition to the amount heretofore awarded as temporary attorney's fees."

On June 12, 1975, Peggy, by her attorney, filed an application to nunc pro tunc the decree previously entered. That application, so far as material herein, reads: "a) That the last paragraph of said Decree allowing attorney fees to Thomas R. Wolff be eliminated and the $4,000.00 awarded therein be awarded to the Respondent as alimony/property division set forth in the Decree and thus the Decree should read . . . . '6. That Petitioner and Respondent have been married for twenty-six years during which time Petitioner spent approximately nineteen years in the military service. That Petitioner spent 7,699 days in the military service during which he was married to the Respondent for 6,926 of said days or 90% of the time during which the pension accrued. The Petitioner is receiving at this time approximately $876.00 per month from said pension and he will receive this for the remainder of his life. That Petitioner should pay to Respondent the sum of $350.00 per month as alimony until the earliest of the foregoing dates:

1) The Death of either party.
2) Five (5) years after remarriage.

"That in addition thereto, Petitioner shall pay to Respondent the sum of $4,000.00 as alimony/property settlement to help maintain Respondent on her attorney fees.'

"That the order clause should read on Page 4, of said Decree as follows:

" 'IT IS FURTHER ORDERED that Petitioner shall pay Respondent as alimony, the sum of $350.00 per month, said sum to remain due each month hereafter until further order of the Court, until the death of either party or until five (5) years after Respondent remarries. Petitioner is hereby ordered to pay, in addition to all other sums hereunder, the sum of Four Thousand Dollars ($4,000.00) as alimony/property settlement to be paid to Respondent on payment of attorney fees.' "

This application was filed June 12, 1975. A decree nunc pro tunc was entered the next day, June 13, 1975, without notice to Ray, who then was residing in Arkansas. The decree was nunc pro tunced to include the exact language set out above in the application.

We first consider the decree nunc pro tunc. It is obvious it is a nullity. Section 25-910, R. R. S., 1943, provides where notice of a motion is required, and it is in this instance, it shall be served a reasonable time before hearing. This was not done. However, there is another reason why the action is a nullity. It was not appropriate herein. The sole and only scope and purpose of a nunc pro tunc order or decree is to make the record speak the truth, not to change or amend it. We held in O'Grady v. Volcheck (1947), 148 Neb. 431, 27 N. W. 2d 689: "The purpose of a nunc pro tunc order is not to correct, change, or modify affirmative action previously taken by the court." It is evident the sole purpose of this nunc pro tunc order was to modify the decree to permit the plaintiff and her attorney to resort to garnishment against Ray's retirement income in an attempt to collect the attorney's fee.

We next consider the question whether the decree should be vacated. We are in full agreement with the trial court. Ray's conduct in permitting the default herein and otherwise militates against the vacation of the decree. It may be unfortunate for him, but he had his opportunity for his day in court. He has shown no cause why the decree should be vacated.

On modification, a more serious question is presented. Section 42-365, R. S. Supp., 1974, is as follows: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Reasonable security for payment may be required by the court. Unless amounts have accrued prior to the date of service of process on a petition to modify, *orders for alimony may be modified or revoked for good cause shown,* but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." (Emphasis added.)

Section 42-365, R. S. Supp., 1974, provides orders for alimony may be modified or revoked for good cause shown. It is obvious from the record Peggy's attorney and the trial court were proceeding on the wrong premise in considering Ray's pension as a joint fund for the benefit of both parties. A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not

ordinarily subject to division as part of a property settlement. It is obvious the allowance of $350 a month for Peggy, to continue until Ray's death or 5 years after Peggy's remarriage, while called alimony, was premised on this theory. There are situations where retirement income must be considered in providing for the care and maintenance of the divorced wife. In those situations, it is considered as a source for the payment of alimony, not as a part of a property settlement. Such a situation is found in Albrecht v. Albrecht (1973), 190 Neb. 392, 208 N. W. 2d 669. The present case, however, is not one of them.

On the record, Peggy received the major share of the accumulated property. The Cessna aircraft, which was set off to Ray had a minimal equity. It eventually was assigned over for the balance due. At the time of the modification hearing, Ray was unemployed. He was unable to fly or teach because of a sinus condition. The record does not disclose whether this was a temporary or permanent condition, but that point is not material on the question now before us. On the record, he was dependent upon his pension which was not available to him because of the garnishment issued in an attempt to collect the attorney fee under the nunc pro tunc order. The evidence is undisputed, Ray had made his child support payments through April 15, or until garnishment tied up his pension checks.

While we do not modify the child support allowance, it is evident the court did not consider the mother's ability in fixing the allowance. We held in Kockrow v. Kockrow (1974), 191 Neb. 657, 217 N. W. 2d 89: "In the matter of child support while the father had the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties." The record does support the inference that Ray was willing to contribute $250 per month for the support of each child.

The record indicates by the time of the decree Peggy's gross income had grown to more than $900 per month and was still rising. She was given the equity in the home and all furnishings in the house except certain guns, stereo, and radio equipment which had been taken by Ray. The alimony order entered was arbitrary, unreasonable, and confiscatory. It is very apparent that the decree not only takes his entire pension but actually exceeds the net amount of the pension considering deductions for income tax.

Our law is clear. "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment." Albrecht v. Albrecht (1973), 190 Neb. 392, 208 N. W. 2d 669.

We conclude good cause was shown for modifying the order for alimony. We determine that the alimony payments provided in the decree should terminate with the April 1976 installment. No further alimony shall be due or payable after April 30, 1976.

For the reasons stated, the nunc pro tunc order of June 13, 1975, is vacated and held for naught. The judgment of the trial court denying the vacation of the divorce decree is affirmed. The judgment of the trial court denying the modification of the decree is reversed as to the alimony allowance, which is to terminate on and after April 30, 1976. In all other respects, the judgment is affirmed. Court costs and attorney's fees herein are taxed to the party incurring the same.

AFFIRMED IN PART, AND IN PART REVERSED.

KAY PALMER, DOING BUSINESS AS PALMER CONSTRUCTION COMPANY, APPELLEE, V. KENNETH R. DORN ET AL., APPELLANTS.

243 N. W. 2d 57

Filed June 9, 1976. No. 40489.

1. **Trial: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong.
2. **Trial: Judgments: Evidence.** In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it.
3. **Architects: Contracts: Costs.** An architect or engineer may breach his contract for architectural services by underestimating the construction costs of a proposed structure. The rule to be applied is that the cost of construction must reasonably approach that stated in the estimate unless the owner orders changes which increase the cost of construction.
4. ———: ———: ———. It is ordinarily for a jury to say whether the actual cost is within a reasonable range of the estimated cost unless the excess is so great that the court can deal with it as a matter of law.

Appeal from the District Court for Douglas County: JOHN E. CLARKE, Judge. Affirmed.

Erickson, Sederstrom, Johnson & Fortune, for appellants.

James R. Welsh and G. Michael Kealhofer of Reidmann & Welsh, for appellee.

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

CLINTON, J.

This is an action by a construction contractor to recover on an oral contract to construct a residence on the basis of cost and a 15 percent fee. The defendant owner claims forfeiture of the commission by the contractor

because the cost exceeded the estimate. The owner also counterclaimed, asking that the contractor be required to pay for carpeting for which a supplier had filed a materialman's lien against the premises. The owner further alleged defective workmanship and damages on account thereof in the amount of $1,500, and sought to recover the sum of $895 for expenses in connection with removal and reconstruction of a portion of a driveway made necessary by county requirements of a culvert under the driveway and which the owner claims the contractor should have caused to be installed before the driveway was laid. A jury was waived, and the trial judge rendered judgment for the contractor in the sum of $3,642.07 and dismissed the counterclaims.

The evidence shows that the estimate of cost was made by the contractor based upon plans furnished by the owner and specifications prepared by the contractor. In this case the contractor furnished some of the services normally provided by an architect or engineer.

Every aspect of the case, to wit, the exact nature of the agreement and extent of items included therein; whether changes and additions were requested and authorized by the owner during construction resulting in increased cost; whether the contractor or owner was to pay for the carpeting in question; the existence and extent of alleged defects; and whether driveway construction was made necessary by the owner's refusal to permit the culvert to be placed when the driveway was constructed, or by the contractor's neglect; turns wholly upon conflicting evidence and the determination of the credibility of witnesses.

We do not try law actions de novo on appeal. We have carefully read the record. No useful purpose would be served by recital or summary of the evidence. The evidence permitted the court to find as it did.

No question of law is before us to decide. Whether the cost reasonably approached the estimate depended upon first determining disputed fact questions as to the

terms of the contract and changes or additions. Those facts were for trial court determination and cannot be dealt with by us as a matter of law. See Durand Associates, Inc. v. Guardian Inv. Co., *infra*.

The applicable rules are: "The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong. . . . In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it." Henkle & Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N. W. 2d 772. "An architect or engineer may breach his contract for architectural services by underestimating the construction costs of a proposed structure. . . . The rule to be applied is that the cost of construction must reasonably approach that stated in the estimate unless the owner orders changes which increase the cost of construction. . . . It is ordinarily for a jury to say whether the actual cost is within a reasonable range of the estimated cost unless the excess is so great that the court can deal with it as a matter of law." Durand Associates, Inc. v. Guardian Inv. Co., 186 Neb. 349, 183 N. W. 2d 246.

AFFIRMED.

IN RE ASSESSMENT OF TAXES BY BOONE COUNTY IN THE FISCAL YEAR OF 1973-1974.

LEO T. CORCORAN ET AL., APPELLANTS AND CROSS-APPELLEES, V. THE BOONE COUNTY BOARD OF EQUALIZATION, APPELLEE AND CROSS-APPELLANT, SCHOOL DISTRICT OF THE CITY OF ST. EDWARD, COUNTY OF BOONE, STATE OF NEBRASKA, INTERVENER-APPELLEE AND CROSS-APPELLANT.

243 N. W. 2d 60

Filed June 9, 1976. No. 40494.

1. **Taxation: Schools and School Districts: Statutes.** Sections 79-801 and 79-801.02, R. R. S. 1943, have no applicability to a transfer pursuant to section 79-402, R. R. S. 1943. Section 79-801.02 is specifically limited to the provisions of section 79-801.
2. **Taxation: Schools and School Districts: Trial.** The burden of proof is upon the taxpayer to show that a school levy was, in fact, excessive.

Appeal from the District Court for Boone County: C. THOMAS WHITE, Judge. Reversed and remanded with directions.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellants.

Larry D. Bird of Brower, Treadway & Bird, for appellee and intervener-appellee.

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

SPENCER, J.

The sole question involved herein is whether section 79-801.02, R. R. S. 1943, is applicable to school district boundary changes under section 79-402, R. R. S. 1943. The trial court held it was. We disagree and reverse.

On June 15, 1971, the Boone County school superintendent determined that School District No. 11 should be dissolved and the land therein attached to the School District of the City of St. Edward, hereinafter referred to as School District No. 17. Leo T. Corcoran and Ray-

mond E. Swanson, hereinafter referred to as taxpayers, prosecuted an appeal from that action. On July 6, 1973, the District Court for Boone County, pursuant to a stipulation, sustained the action of the school superintendent dissolving School District No. 11, and attaching the land therein to School District No. 17.

On August 29, 1973, the Boone County board of equalization adopted a mill levy of 49.60 for operation, and 8.92 for bond retirement. Taxpayers appealed that action to the District Court, contending, because section 79-801.02, R. R. S. 1943, applied, the consolidation of the two schools for tax purposes could not be effective until June 15, 1974. Section 79-801.02 reads as follows: "Whenever an existing school district, or a part thereof, is merged into a Class III school district *under the provisions of section 79-801,* such merger shall be effective on June 15 of the year following the first full school year after such merger." (Emphasis added.)

Section 79-801, R. R. S. 1943, reads as follows: "The territory embraced within the corporate limits of each incorporated city or village in the State of Nebraska, *together with such additional territory and additions to such city or village as may be added thereto, as declared by ordinances to be boundaries of such city or village, having a population of more than one thousand and not more than fifty thousand inhabitants, including such adjacent territory as now is or hereafter may be attached for school purposes, shall constitute a school district of the third class* and be known by the name of The School District of (name of city or village), in the county of (name of county), in the State of Nebraska. As such in that name, the district shall be a body corporate and possess all the usual powers of a corporation for public purposes, and in that name and style may sue and be sued, purchase, hold, and sell such personal and real estate, and control such obligations as are authorized by law. The title to all school buildings or other property, real or personal, owned by any school

district within the corporate limits of any city or village, shall, upon the organization of the district, vest immediately in the new district; and the board of education of the new district shall have exclusive control of the same for all purposes herein contemplated; Provided, that where the territory annexed by a change of boundaries of such city has been part of a Class III, IV, or V school district for more than one year prior thereto, having been annexed by petition, a merger of the area annexed with the Class III school district shall not become effective unless a majority of the board of education of such Class III, IV, or V district within ninety days after the effective date of the city annexation ordinance shall vote in favor of the merger." (Emphasis added.)

Section 79-801 and 79-801.02, R. R. S. 1943, have no applicability to a transfer pursuant to section 79-402, R. R. S. 1943. Section 79-801.02 is specifically limited to the provisions of section 79-801. An examination of that section, as well as its legislative history, indicates the only type of merger specifically mentioned in the section is a merger by adding territory to a Class III school district as a result of annexation of land by a city. While School District No. 17 is a Class III school, we do not have merger by annexation in the present case.

Apparently the trial court accepted taxpayers' argument that the language "including such adjacent territory as now or hereafter may be attached for school purposes" contemplates section 79-402 boundary changes as being mergers under section 79-801, and subject to section 79-801.02. We disagree. If that construction was the intention, the language should have so specified. The quoted language merely clarifies the territory to be considered when determining the population of the district, and, as such, modifies the immediately preceding phrases. Without going into detail, suffice it to say there are other methods than those contemplated by sections

79-402 and 79-801 by which land may be added to a Class III school district. See §§ 79-403, 79-407, 79-426.02, and 79-426.18, R. R. S. 1943.

Boundary changes of School District No. 11 and School District No. 17 took place by petition under section 79-402, R. R. S. 1943. A copy of the decree of the District Court is made a part of the petition on appeal. So far as material herein, it reads: "2. That the petition of electors of School District No. 11 of Boone County, Nebraska, is sufficient to effect a transfer of said school district to School District No. 17 of Boone County, Nebraska. That all the requirements under Section 79-402 for a merger of school districts have been complied with."

Section 79-402, R. R. S. 1943, provides, so far as material herein: "The county superintendent shall, within fifteen days, advertise and hold a hearing to determine the validity and sufficiency of the petitions. *Upon determination,* as a result of the hearing, that sufficient valid signatures are contained in the respective petitions, the county superintendent shall proceed to effect the changes in district boundary lines as set forth in the petition; * * *." (Emphasis added.)

Section 79-402, R. R. S. 1943, provides the boundaries are to be changed upon determination by the county superintendent. This determination was made June 15, 1971. The District Court on appeal affirmed this determination in a decree signed July 6, 1973. The record would indicate taxpayers approved the entry of the decree. In any event, no appeal was taken and the decree is final. The only question presented is its effective date for the 1973-74 school year tax levy. The change was effective at least when the District Judge affirmed the determination of the county superintendent on July 6, 1973. The tax levy was made August 29, 1973, almost 2 months subsequent to the affirmance of the determination of the county superintendent. The tax levy was effective for the 1973-74 school year.

From the result we reach, there is no need to consider taxpayers' arguments on the tax levy. Even if we had not reached the conclusion that taxpayers' original premise was wrong, we would find taxpayers had not carried their burden of proof on the levy issue. The burden of proof is upon the taxpayer to show that a school levy was, in fact, excessive. Mann v. Wayne County Board of Equalization (1971), 186 Neb. 752, 186 N. W. 2d 729.

We find for The Boone County Board of Equalization and The School District of the City of St. Edward on their cross-appeal. The judgment of the District Court is reversed. The cause is remanded with directions to reinstate the tax levy made by the board of equalization on August 29, 1973, to dismiss taxpayers' petition, and to tax all costs to taxpayers.

REVERSED AND REMANDED WITH DIRECTIONS.

SCHOOL DISTRICT OF GERING, IN THE COUNTY OF SCOTTS BLUFF, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE, V. DONALD C. STANNARD ET AL., APPELLEES, IMPLEADED WITH SCHOOL DISTRICT NO. 8 OF SCOTTS BLUFF COUNTY, APPELLANT, CHARLES A. GEIL, INTERVENER-APPELLEE, LOCKWOOD CORPORATION, A DELEWARE CORPORATION, INTERVENER-APPELLANT.

242 N. W. 2d 889

Filed June 9, 1976. No. 40495.

1. **Appeal and Error: New Trial.** A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different.
2. **Evidence.** The burden of showing the material and substantial difference in the facts is upon the party who asserts the difference.
3. **Actions: Intervention: Judgments.** Ordinarily, an intervener takes the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the

action or the informalities or defects in the proceedings between the original parties.

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

Van Steenberg, Brower, Chaloupka & Mullin, for appellant.

C. F. Fitzke, and John W. Low and David R. Johnson of Dawson, Nagel, Sherman & Howard, for intervener-appellant.

Wright & Simmons, for appellee School Dist. of Gering.

W. H. Kirwin, for appellees Stannard et al.

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

WHITE, C. J.

This is the second appearance of this case before this court. The case began when the plaintiff, School District of Gering, brought an action seeking a declaratory judgment that the transfer of an industrial tract from the plaintiff to the defendant, School District No. 8, was void, and further seeking an accounting of and payment of school taxes levied and collected on the tract in question. One Charles A. Geil, a legal voter and taxpayer of the plaintiff school district, sought to intervene. The District Court denied Geil's motion to intervene and sustained demurrers to the plaintiff's amended petition. The plaintiff School District of Gering and intervener Geil then appealed to this court.

In School Dist. of Gering, v. Stannard, 193 Neb. 624, 228 N. W. 2d 600 (1975), we held that the District Court correctly sustained a demurrer to the plaintiff's cause of action seeking an accounting of and payment of school taxes. We further held that the District Court erred in sustaining a demurrer to plaintiff's cause of action seeking to have the transfer of the industrial tract declared *void,* finding on the basis of the facts as pleaded

that the transfer was violative of section 79-1108, R. R. S. 1943, which stated: "No transfer of property from an accredited school district to a nonaccredited school district of any class shall be permitted." Lastly, we held that the District Court erred in denying the intervention of Geil. The case was remanded to the District Court for proceedings in conformity with the court's opinion. A motion for rehearing by the defendant School District No. 8 was denied and mandate issued.

Thereafter in the District Court, the defendant School District No. 8 filed its answer to the plaintiff's amended petition. The plaintiff and intervener Geil then filed a motion for summary judgment. Prior to the date set for the hearing on this motion, Lockwood Corporation, a Delaware corporation which has a business facility located within the industrial tract, filed a petition of intervention. Lockwood's petition was responded to by the plaintiff and intervener Geil with a document entitled, "Special Appearance, Demurrer, and Answer to Petition of Lockwood Corporation to Intervene as a Defendant." A hearing was held by the District Court on the motion for summary judgment and the motion for special appearance and demurrer to Lockwood's petition. The District Court found that the position of Lockwood and School District No. 8 had already been decided adversely by this court; that there was no genuine issue as to any material fact; and that the plaintiff School District of Gering and intervener Geil were entitled to judgment as a matter of law. Having so determined, the District Court sustained the demurrer to Lockwood's petition of intervention and dismissed it. Both School District No. 8 and Lockwood Corporation appeal from these rulings. We affirm the judgment of the District Court.

Alleged as error are the District Court's dismissal of Lockwood's petition; finding that there was no genuine issue as to any material fact; and holding that the plain-

tiff and intervener Geil were entitled to a judgment as a matter of law.

The defendant School District No. 8 raised the defense of estoppel in its answer to the plaintiff's amended petition. Lockwood Corporation sought to intervene in this case in order to assert estoppel against the plaintiff. School District No. 8 and Lockwood cite the following facts as reasons for applying the doctrine of estoppel to this case: (1) School District No. 8 has become dependent upon the industrial tract to finance its education program; (2) Lockwood and other business entities were induced to locate in the industrial tract by the actions and representations of various public officials in connection with the transfer; (3) the transfer of the industrial tract has resulted in its development and the industrial tract has greatly increased in value as a result of the transfer; (4) as a result of the development of the industrial tract the School District of Gering has benefited; and (5) the School District of Gering and intervener Geil were active participants in the transfer proceedings.

The question of estoppel was raised in this court on the previous appeal by the defendant School District No. 8. The plaintiff's amended petition, which was before the court on the previous appeal, included, by way of attachments, several of the facts now alleged to give rise to an estoppel, including the active participation of the School District of Gering and intervener Geil in the transfer proceedings and that the purpose of the transfer was to give a much lower tax levy to proposed industrial concerns thereby inducing them to locate in and develop the industrial tract. This court held: "Defendants assert that plaintiff is estopped from attacking the action of the county superintendent and argue in their brief that this rests upon plaintiff's acquiescence of the change in boundaries for something over 6 years. We find and determine that the time involved between the superintendent's action and the institution of these

proceedings is insufficient to invoke any such doctrine. Nor are we directed to any allegations in the amended petition that would give rise to the imposition of estoppel on other grounds." School Dist. of Gering v. Stannard, *supra*.

A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different. The burden of showing the material and substantial difference in the facts is upon the party who asserts the difference. Weber v. Southwest Nebraska Dairy Suppliers, Inc., 190 Neb. 389, 208 N. W. 2d 667 (1973); Landmesser v. Ahlberg, 184 Neb. 182, 166 N. W. 2d 124 (1969); Muller Enterprises, Inc. v. Samuel Gerber Adv. Agency, Inc., 182 Neb. 261, 153 N. W. 2d 920 (1967).

The question of estoppel was raised and settled in this case on the previous appeal. That holding is res judicata and the law of the case. The question of estoppel cannot be asserted or argued again even though the theory and rationale in support of the doctrine have been expanded beyond what was previously presented to this court. There is no suggestion that there has been a material or substantial change in the basic facts of this case since the first appeal.

Furthermore, following our first decision in this case a motion for rehearing was filed by defendant School District No. 8, raising the question of estoppel. The court denied the motion for rehearing. Questions raised by motion for rehearing are adjudicated by a ruling on that motion and cannot again be litigated in a subsequent trial. Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599 (1942).

The issue of estoppel has been previously considered by this court and rejected. The issue of estoppel cannot be further raised by defendant School District No. 8, nor can it be raised or asserted by Lockwood Corporation. An intervener takes the suit as he finds it. In

Essay v. Essay, 180 Neb. 47, 141 N. W. 2d 436 (1966), we held: "Ordinarily an intervener must take the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or the informalities or defects in the proceedings between the original parties." See, also, Gilbert v. First National Bank, 154 Neb. 404, 48 N. W. 2d 401 (1951); Drainage Dist. No. 1 v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 2d 582 (1941). The issue of estoppel having been decided by this court on the previous appeal, the District Court was correct in sustaining the motion for summary judgment by plaintiff School District of Gering and intervener Geil.

Finally, appellant Lockwood urges that the District Court erred in sustaining the demurrer to its petition in intervention. A close inspection of the record reveals that Lockwood was in fact allowed to intervene and participate in the proceedings. Lockwood's petition, after stating facts by which it claimed an interest in the proceedings, raised several affirmative defenses based on estoppel. The District Court, in dismissing Lockwood's petition, in effect dismissed it on its merits. In light of what we have said above, there was no error in so dismissing Lockwood's petition.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD LYNCH, APPELLANT.

243 N. W. 2d 62

Filed June 16, 1976. No. 40401.

1. **Evidence: Trial.** Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.

2. **Attorney and Client: Privileged Communications.** Communications between client and attorney made in the presence of others do not constitute privileged communications.
3. **Evidence: Trial.** The trial court's determination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion.
4. **Instructions: Trial.** When the general charge fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining.
5. **Criminal Law: Sentences: Probation and Parole.** Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the determination of the trial court will not be disturbed on appeal.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Meister & Morrison, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

MCCOWN, J.

The defendant was charged with driving while intoxicated; refusing to submit to a blood, breath, or urine test; resisting police officers in the execution of their duties; and assaulting a police officer. The defendant was tried and found guilty on all four counts by a jury in the county court of Scotts Bluff County. He was sentenced to probation for a period of 1 year on count I, fined $100 and costs, and his regular license suspended. He was granted a probationary driver's license to permit driving for work and probation activities, required to attend a defensive driving course and alcohol abuse course, and assessed rehabilitation fees of $100. The court did not impose a separate penalty on count II. Defendant was sentenced to 30 days in the county

jail on count III, and 30 days on count IV, the sentences to run concurrently. He was granted work release. On appeal to the District Court that judgment and sentence was affirmed.

On February 24, 1975, the defendant, a contractor, was driving his automobile in the City of Scottsbluff, Nebraska, shortly after 9 p.m. A police officer, who knew the defendant and knew his car, followed him for several blocks and observed erratic driving, particularly in making turns. When the defendant parked his car in front of a house in a residential area, the police officer stopped his cruiser behind the defendant's car after calling on the radio for assistance. The officer identified himself to the defendant and asked for his driver's license. The defendant, who had gotten out of his car, was unsteady on his feet, had a minor speech slur, and the officer could smell alcohol. By this time another police officer had arrived and the defendant was asked to take some on-the-spot sobriety tests. The police officers testified that the defendant attempted to perform the tests but was unsteady and had problems in doing so. The officers testified that in their opinions the defendant was intoxicated.

The officers told the defendant he was under arrest. The defendant became argumentative, threatened one of the officers, and backed them up onto the lawn. A brief struggle followed and the officers subdued and handcuffed the defendant and took him to the police station. As the defendant got out of the cruiser at the police station, he swore at the officers and kicked a police lieutenant in the leg. The defendant was taken into the station to be booked. Unknown to him, a tape recorder was turned on in the booking area. The police advised the defendant of his rights and of the consequences of refusal to take the intoxication tests, and the defendant repeatedly refused to take any tests.

The jury found the defendant guilty and he was sentenced.

Defendant's primary assignment of error centers on the admission into evidence of the tape recording made at the police station. He asserts that there was insufficient foundation for the admission of the tape recording; that portions of it violated the attorney-client privilege; and that portions of it were incompetent, irrelevant, and immaterial. The principal foundation for the defendant's argument is that his own abusive, profane, and obscene language was prejudicial to him, even though other portions of the recording might have been admissible.

Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid. State v. Myers, 190 Neb. 146, 206 N. W. 2d 851. In the case before us Officer Kinsey identified the tape; testified that it accurately reflected all the conversations and sounds in the booking area of the police station at the time the defendant was booked; and that there were no deletions or changes. After objection by the defendant on the ground of insufficient foundation, the court excused the jury and had the tape played. The witness testified again that it accurately reflected the conversations and sounds of the booking of the defendant; and that there were no deletions or changes from what he heard on that night He also testified that he could identify each voice on the tape, and also testified as to which individuals performed certain actions that were referred to on the tape. Following extensive cross-examination on foundation outside the presence of the jury, the court overruled the objection and received the tape into evidence and permitted it to be played to the jury. The foundation was clearly sufficient and was even more extensive than that approved in State v. Myers, *supra*. The tape recording here was simply verbatim corroboration of conversations and sounds which could have been testified to by any one of several police officers present.

It was also direct evidence of a refusal to take sobriety tests which was the essence of one of the offenses with which the defendant was charged.

Defendant also contends that because the tape included the defendant's side of a telephone conversation with his attorney it was a violation of the attorney-client privilege. The defendant's end of the conversation was carried on in the presence of the police officers and no part of the attorney's conversation is included. In any event, it has long been the rule that communications between client and attorney made in the presence of others do not constitute privileged communications. State v. Spidell, 194 Neb. 494, 233 N. W. 2d 900.

The defendant contends that some of his obscenities and profanities were irrelevant and immaterial and should have been excluded. That language was an integral part of the conversations of the defendant and the conversations were generally relevant on one or more of the issues involved. The trial court is certainly not required to protect the defendant from his own unfortunate choice of language. The use of profane or obscene language in an otherwise admissible statement or conversation does not destroy the nature and meaning of the statement nor make it inadmissible. Determination of admissibility of physical evidence generally rests within the sound discretion of the trial court. The trial court's determination of the admissibility of physical evidence will not be overturned except for a clear abuse of discretion. State v. Torrence, 192 Neb. 720, 224 N. W. 2d 177. There was no abuse of discretion here.

The defendant also complains that the jury was not instructed on the meaning of resistance. The instructions given fairly presented the case to the jury and the defendant did not submit any requested instructions. A party who desires an instruction on some particular question should request it. When the general charge fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular

phase of the case unless a proper instruction has been requested by the party complaining. State v. Ford, 186 Neb. 109, 180 N. W. 2d 922.

The defendant complains that he should not have received a jail sentence with work release but, instead, should have been granted probation. Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed on appeal. State v. Milligan, 195 Neb. 493, 238 N. W. 2d 906. There was no abuse of discretion here.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANCES WRIGHT, APPELLANT.

243 N. W. 2d 66

Filed June 16, 1976. No. 40493.

1. **Juries: Jurors: Constitutional Law.** The Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible.
2. **Juries: Jurors: Constitutional Law: Criminal Law.** A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn.
3. **Instructions: Trial.** It is not error to refuse an instruction on an issue which is not supported by the evidence.
4. **Criminal Law: Sentences.** A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

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

Judy L. Raetz, for appellant.

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

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

MCCOWN, J.

The defendant, Frances Wright, was charged with assault and battery in the county court of Dawes County, Nebraska. A jury found her guilty and she was sentenced to 30 days in jail. On appeal the District Court affirmed the conviction and sentence.

Frances Wright, the defendant, and Karilyn Cook were both students at Chadron State College and lived in the same dormitory. On the evening of March 20, 1975, both girls were drinking in the same bar, but with different groups. Sometime before midnight they met again at another club. Sometime later, when the two girls were in a restroom, the defendant seized Karilyn by her hair and accused her of spreading gossip about the defendant. The defendant struck Karilyn across the face and shouted at her, but Karilyn was rescued by another girl. When Karilyn and her escort started to leave the club, the defendant again "grabbed" Karilyn and they tumbled to the ground together. Karilyn's escort intervened and drove Karilyn back to the dormitory. They were talking in the car when the defendant arrived at the dormitory. The defendant asked Karilyn to get out of the car. Karilyn refused and tried to shut the car door but the defendant dragged her out of the car onto the ground and proceeded to strike her around the head and face, and, when others intervened, kicked Karilyn in the shoulder or face. Karilyn had a bloody nose and bruises and contusions around the head and face. She was taken to the hospital where she remained for more than 24 hours.

The defendant first contends that the trial court erred in overruling defendant's motion to dismiss the jury panel on the ground that it was selected in a manner which systematically excluded Indians, and, in particular, because the selection of jurors was made from voter

registration lists which exclude Indians because they are not registered to vote in as great a proportion as are other identifiable groups of the population generally. The defendant's arguments attack the constitutionality of the Nebraska system of jury selection by voter registration lists.

The defendant is an Indian, but aside from that fact there is no evidence in the record of the makeup of the jury panel; nor the number of Indians in Dawes County, Nebraska; nor the number of those Indians registered to vote. Neither is there any evidence that Indians constitute an identifiable group in Dawes County, Nebraska, nor that they were in any way excluded from jury service. For all practical purposes, defendant's arguments constitute an evidentially unsupported attack on the Nebraska system of selecting jurors by the use of voter registration lists. This court has already held that the Nebraska system of selecting jurors by the use of voter registration lists is constitutionally permissible. State v. Casados, 188 Neb. 91, 195 N. W. 2d 210.

In that case we also held that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. See, also, United States v. Freeman, 514 F. 2d 171 (8th Cir., 1975).

The defendant also contends that the trial court erred in refusing to give an instruction on self-defense requested by the defendant. The defendant relies upon the rule that it is the duty of the court, upon request, to instruct the jury on the defendant's theory of the case if there is evidence to support it. That rule is undisputed but in this case we can find no evidence to support such an instruction. The defendant's repeated offensive attacks cannot be transformed into self-defense by simply adopting the semantic solution of calling them that. It is not error to refuse an instruction on an issue which

is not supported by the evidence. State v. Temple, 193 Neb. 89, 225 N. W. 2d 422.

Finally, the defendant contends that the sentence of 30 days in jail was excessive. Section 28-411, R. S. Supp., 1974, authorizes imprisonment in the county jail "not exceeding six months" on the charge involved here. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Braasch, *ante* p. 240, 242 N. W. 2d 119. There was no abuse of discretion here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH FITZGERALD, APPELLANT.

243 N. W. 2d 68

Filed June 16, 1976. No. 40510.

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

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

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

CLINTON, J.

Defendant pled guilty to a charge of burglary and was sentenced to a term of 2 to 4 years in the Nebraska Penal and Correctional Complex with credit being given for time spent in the county jail while awaiting trial.

On this appeal it is claimed that he should have been placed on probation and that in any event the sentence imposed is excessive.

Defendant is age 19. At an early age he was abandoned by his parents. He lived mostly in foster homes

until age 16 when he quit school to make his own way. At the time of the commission of the offense to which he pled guilty, he was serving a period of 18 months probation on another burglary charge and on six counts of contributing to the delinquency of minors. Before being placed on probation he underwent an extensive examination and evaluation at the Regional Center, which recommended that he be placed on probation. In that case the trial judge followed this recommendation.

The burglary charge to which he pled guilty in this case was one of a series of burglaries in which he was involved during a short period of time. Previously he had been employed as a cook and was discharged by his employer because of his inability to get along with other employees and refusal to follow company policy.

We have carefully read the arraignment and sentencing proceedings, as well as the presentence investigation. We conclude, as did the trial judge, that another term of probation is not justified. We also conclude that the sentence imposed is not excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD F. GOODLOE, APPELLANT.

243 N. W. 2d 69

Filed June 16, 1976. No. 40566.

1. **Criminal Law: Evidence.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Chilling Right to Appeal.** An unsuccessful attempt to chill a right to appeal is harmless error.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed.

James A. Nanfito of Nanfito & Nanfito, for appellant.

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

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

NEWTON, J.

The defendant, on trial to the court, was convicted of driving a motor vehicle while under the influence of alcoholic liquor and refusing to submit to tests under the Implied Consent Law. Trial was in the county court and appeal taken to the District Court. The District Court also found the defendant guilty and imposed sentence. We affirm the judgment of the District Court.

Defendant challenges the sufficiency of the evidence to sustain the conviction and asserts the county court attempted to "chill" his right to appeal.

The evidence submitted by the State indicates that the defendant was observed to be driving erratically, was stopped in a restaurant parking lot, observed to be intoxicated, and, when a crowd gathered, he was driven to another parking lot adjacent to a highway where he was examined and questioned further. The Implied Consent Law, its requirements, and the consequences of failing to comply with it were explained to him. He refused to take a urine or blood test and subjected the officers to verbal abuse. In the opinion of the officers, he was intoxicated. The evidence is sufficient. "In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence." State v. Grooms, 192 Neb. 851, 224 N. W. 2d 781.

After the hearing in the county court, the county judge indicated a finding of guilty and inquired if defendant intended to appeal. It was made clear that if defendant were to forego his right to appeal, he would

be held guilty on only one of the two charges, but if he intended to appeal, he would be sentenced on both charges. This was an attempted bargaining as to the right of appeal and is conduct which tends to chill that right. Such conduct is beyond the power of the court and entirely improper. In this instance there is no prejudicial error as the defendant did appeal, had a trial de novo in the District Court, and was there resentenced. The error was harmless. See § 29-2308, R. R. S. 1943.

The judgment of the District Court is affirmed.

AFFIRMED.

DOROTHY M. SNYDER, APPELLEE, V. JESS SNYDER, APPELLANT.
243 N. W. 2d 159

Filed June 23, 1976. No. 40323.

1. **Divorce: Contracts: Property.** In an action for dissolution of marriage, agreements between husband and wife, not made in connection with the separation of the parties or the dissolution of their marriage, are not binding on the court.
2. **Divorce: Property: Alimony.** In an action for dissolution of marriage, the court has the power to consider all property accumulated by the joint efforts of both the husband and wife, and to adjust their property rights, no matter how such property is legally titled as between the parties.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed as modified.

Yost, Schafersman, Yost & Lamme, for appellant.

Roy I. Anderson, for appellee.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and FAHRNBRUCH and GRANT, District Judges.

GRANT, District Judge.

This is an action for dissolution of marriage. The District Court found the marriage to be irretrievably broken, dissolved the marriage, and divided the real

and personal property of the parties. The respondent-husband has appealed. The sole issue on appeal is the division of property.

Dorothy and Jess Snyder were married in Nebraska in 1938 and have resided in Nebraska since. The two children born of the marriage are adults and self-supporting. After their marriage, the parties moved to a home owned by respondent. The husband had purchased this property for $3,000, with funds accumulated before the marriage and petitioner contributed her earnings before the marriage toward the purchase of furnishings for the two-bedroom home. Petitioner-wife taught school between 1945 and 1947, and during other years up to 1951, worked with respondent on their acreage and in other endeavors in buying, repairing, renting, and ultimately selling older houses. The parties pooled their money and labor in these endeavors.

In about 1951, the parties moved to a home in Fremont and petitioner testified she began to care for small children in the marital home, getting a license for a day care center in 1955. Her work in this area has continued to the present time. The parties' income tax returns show that no returnable income from the nursery school operation was generated until 1959, when it is shown that $586 gross income came from that source. Between 1961 and 1969 (omitting 1968, for which year no return was submitted in evidence), the joint income tax returns disclose total net income from the nursery school operation to be approximately $4,979. During the same period, from the same records, respondent's taxable wages totalled $14,138. Additionally, the parties had income from interest, dividends, rentals, and sales of property.

From 1970 through 1974, the parties filed separate income tax returns. During that 5-year period, petitioner's return showed a total net income for the nursery school operation of $10,647, of which $7,161 was earned in 1974. During the same period, respondent's

wages are shown to be $10,909. Each reported other income from interest, dividends, and rentals, but this additional income came from property accumulated from their joint endeavors during the marriage.

The financial history of the parties during this 37-year marriage discloses that the parties accumulated property of a value of $180,185 by each working throughout the marriage and each contributing his separate earnings to a whole. At the time of their marriage, respondent contributed a $3,000 house and petitioner contributed money, in an unknown amount, to fully furnish the house. Petitioner inherited nothing during the marriage. Respondent inherited a one-half interest in a Merrick County farm from his mother in 1944 and this was sold in 1945 for $4,000. The evidence further shows the petitioner was age 62 and in good health at the time of trial, and that she is qualified to maintain herself as shown by the fact that in 1974 she netted over $7,000 from the operation of the nursery school. Respondent is also aged 62, and suffers from a heart condition.

Of the total property accumulated of $180,185, the trial court awarded assets of some $134,403 in value to petitioner, and awarded assets of $45,782 to respondent.

This proceeding is tried de novo in this court on the issues presented on appeal. Barnes v. Barnes, 192 Neb. 295, 220 N. W. 2d 22. As stated in Hanisch v. Hanisch, 195 Neb. 204, 237 N. W. 2d 407: "The rules for determining alimony or division of property in an action for dissolution of marriage provides no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable."

There is no reason apparent to this court as to the disparity in the amount of property awarded to each of the parties except the contention of petitioner set forth in her brief that "a contract made between a husband

and wife in dissolution of marriage for division of property will be respected by the court as presumably fair, valid, just and equitable." Petitioner's position is that the parties themselves decided on a property division some 4 years before the proceeding in question and that such agreement should be enforced by the court. In this connection, the record shows that in 1971, petitioner sued respondent for divorce. The parties then reconciled, and, after the reconciliation, "divided" certain property they owned. Petitioner, for example took sole title to the family residence, where she maintained her day care center, valued at $32,000; while respondent took sole title to a commercial building in Fremont worth $8,000 and to a one-half interest in land in Washington County worth $6,000. Each party also had other investments in his or her own name, and owned certain stocks and bonds in joint tenancy.

In support of her position that this agreement between the parties at the time of their reconciliation should be controlling in this dissolution of marriage proceeding 4 years later, petitioner cites Clatterbaugh v. Clatterbaugh, 182 Neb. 160, 153 N. W. 2d 749, decided in 1967 before the present dissolution of marriage law became effective. That case held that a contract between husband and wife for division of their property after and in consequence of their permanent separation will be respected by the courts as presumably fair. Similarly, section 42-366, R. R. S. 1943, of the current dissolution of marriage law, is concerned with written property settlements by persons "attendant upon their separation or the dissolution of their marriage." The agreement in this case, whatever it may precisely have been, was "attendant" upon a reconciliation of the parties. To give binding effect to such an agreement during a dissolution proceeding 4 years later would operate to discourage reconciliation attempts. Agreements between husband and wife concerning the disposition of their property, not made in connection with the separation of

the parties or the dissolution of their marriage, are not binding upon the courts during a later dissolution proceeding, as not being within the intendment of section 42-366, R. R. S. 1943.

Once it has been determined that there is no property settlement agreement between the parties binding on the court, the court, in determining an appropriate division of property between husband and wife, has power to consider all the property accumulated by the joint efforts of both parties and to adjust their respective property rights. In Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108, this court made the rule set out in Bartunek v. Bartunek, 109 Neb. 437, 191 N. W. 671, applicable to the current no fault divorce law. The Bartunek case states: "* * * the district court has power to consider all the property accumulated by the joint efforts of both husband and wife, and to adjust their respective property rights. By the voluntary conveyance of the home farm to the wife without consideration except love and affection, she has become vested with the legal title to the major portion of the joint accumulation; but the court will look behind this and decree according to the equities of the situation." Examination of the record in this case indicates no accumulation of particular assets by the sole efforts of either party, but rather a joint effort over 37 years, with various ups and downs, and various good and bad investments, resulting in a total net accumulation, all of which must be considered in dividing the marital assets no matter how the property is titled at the time of the dissolution.

Accordingly, we find that the decree dividing the property of the parties should be amended to award the following property to respondent rather than petitioner: (1) Nebraska State Savings & Loan, No. A 38091 ($1,000). (2) United States savings bonds, L78029520E, M76202713E, L47064737E ($1,100). (3) Investors Stock Fund of 173.8 shares ($2,676.52). (4) Note and mortgage of Roger Meirhenry ($6,185.12). (5) In-

vestors Stock Funds, Inc., 1,055 shares ($16,247). (6) Note and mortgage from Fred Snyder ($3,500). (7) Note and mortgage from Richard Snyder ($10,000).

The judgment of the District Court, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN BOLDEN, APPELLANT.

243 N. W. 2d 162

Filed June 23, 1976. No. 40450.

1. **Trial: Plea In Abatement: Evidence.** Any error in the ruling on a plea in abatement alleging that the evidence at the preliminary hearing was insufficient to support a finding of probable cause is cured if the evidence at the trial is sufficient to sustain a finding of guilty.
2. **Criminal Law: Trial: Evidence.** An identification based in part upon photographs of the defendant shown to the victim of the crime is not objectionable because the officer stated at the time the photographs included a photograph of a suspect.
3. **Trial: Instructions.** The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given.

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

Fred J. Swihart, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

BOSLAUGH, J.

The defendant appeals from a sentence to 4 years imprisonment for robbery. His assignments of error relate to the evidence at the preliminary hearing, his

identification by the prosecuting witness, and a requested instruction which was refused.

The defendant contends the trial court erred in overruling his plea in abatement challenging the sufficiency of the evidence at the preliminary hearing to support a finding of probable cause. We have recently held that any error in such a ruling is cured if the evidence at the trial is sufficient to sustain a finding of guilty. State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610.

The State produced evidence that Joseph Hartnett, a clerk in Lee Sittler's Off-Sale Beer Store, was robbed at gunpoint at about 5:30 p.m. on March 5, 1975. The beer store is located near the intersection of Van Dorn Street and Southwest 6th Street in Lancaster County, Nebraska. The robber was a black man approximately 5 feet 10 inches tall and weighing about 160 pounds. He was wearing a red mask across his face, a light green jacket, and a brown hat at the time of the robbery. A customer coming into the beer store just after the robbery saw a black man about 5 feet 10 inches tall and wearing a light colored jacket run across the parking lot and in front of a car on Van Dorn Street and then south on Southwest 6th Street. At about the same time another witness saw a black man, wearing an army jacket and running south on Southwest 6th Street, get into a blue Volkswagen automobile, which turned around and then proceeded south on Southwest 6th Street at a high rate of speed.

At about 5:40 p.m. on the same date, a deputy sheriff was at 5430 Limestone Road, in Lancaster County, attempting to make service of some papers in a civil action. He observed a blue Volkswagen automobile occupied by two black males drive in the driveway at 5431 Limestone Road.

The residence at 5431 Limestone Road was occupied by Marcia Carroll and Bruce Robinson, a black man. The defendant and his wife were staying at this address on March 5, 1975. The residence was placed under sur-

veillance by the sheriff's office that evening. When the defendant was observed leaving the property he was followed and apprehended on State Highway No. 2 near 84th Street. He was taken to the sheriff's office, photographed and questioned, and then released.

On March 8, 1975, a number of checks stolen in the robbery were found in trash that had been picked up at 5431 Limestone Road. The checks had been torn into small pieces and placed in a plastic bag with other trash.

Bruce Robinson testified that he was driving the blue Volkswagen automobile owned by Marcia Carroll on March 5, 1975. Sometime after 4:30 p.m. he stopped near Lee Sittler's Off-Sale Beer Store and the defendant got out of the automobile. According to Robinson, the defendant said he was going to get some beer and cigarettes. Robinson returned about 10 minutes later and picked up the defendant, who had been running, at a point about a block south of the beer store. The defendant had some cigarettes but no beer.

Another witness testified that he played cards with the defendant at 5431 Limestone Road on March 5, 1975. The defendant had a small revolver in his possession on March 5, 1975, and stated that "He wanted to make some money" by "Robbing something or somebody." A prisoner who was in jail with the defendant testified the defendant said he had robbed a liquor store while carrying a weapon and wearing a red mask. He further testified the defendant said he had given his friend some checks stolen in the robbery to be disposed of.

The defendant was arrested at Hannibal, Missouri, on March 11, 1975. A pair of children's red leotards with the legs tied together was found in the trunk of the defendant's automobile at the time of his arrest. The defendant testified the leotards was not the mask used in the robbery.

There is other evidence which tended to connect the defendant with the robbery but it is unnecessary to sum-

marize it here. Joseph Hartnett identified the defendant as the robber. The evidence considered as a whole was clearly sufficient to support a finding of guilty beyond a reasonable doubt.

The defendant's principal assignment of error relates to the identification testimony of Hartnett. When the defendant was taken to the sheriff's office on March 5, 1975, the police were unable to arrange for a lineup, so the defendant was photographed. Two photographs of the defendant together with four file photographs or mug shots of two other black men were shown to Hartnett that night. He was unable to identify the defendant from these photographs.

About 6 days later Hartnett was shown photographs of three black men wearing a red mask. Hartnett identified the defendant from one of these photographs. Hartnett made a positive identification of the defendant at the trial.

At the time Hartnett was shown the photographs of the defendant and two other men wearing masks, the officer stated that "one of them was a suspect." Hartnett testified that "this information" given him by the officer helped Hartnett make the identification at the trial. The officer also stated that the photographs shown to Hartnett on the night of the robbery had included photographs of the same man.

The defendant contends the pretrial identification by Hartnett was the result of procedures which were unnecessarily suggestive and conducive to a substantial likelihood of irreparable misidentification. See Neil v. Biggers, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401. As a result, the defendant contends the identification testimony by Hartnett should have been excluded.

The objection focuses on the statement by the officer that one of the men in the photographs shown to Hartnett was a suspect. We do not believe this made the testimony of Hartnett inadmissible. When photographs are shown to a victim by the police after a crime it is

implicit that one or more of the photographs are pictures of persons whom the police believe may have committed the offense. McClain v. State, 44 Ark. 33, 444 S. W. 2d 99; Drewry v. Commonwealth, 213 Va. 186, 191 S. E. 2d 178. The officer did not in any way suggest which photograph or photographs were of the suspect or give any indication why the person in the photograph was suspected of having committed the robbery. We believe the evidence went to credibility and the objection to Hartnett's testimony was properly overruled. State v. Tramble, 187 Neb. 488, 191 N. W. 2d 822.

The last assignment of error relates to a requested instruction. The defendant submitted an instruction which stated the defendant contended "he was framed by persons and circumstances" and if the evidence created a reasonable doubt as to any element of the offense it was the duty of the jury to return a verdict of not guilty. The instruction was not given.

The trial court did instruct on the presumption of innocence, the burden of proof, reasonable doubt, the scrutiny to be made of the testimony of an accomplice and eyewitness identification testimony, and the circumstantial evidence rule. These instructions were adequate and covered the same matters as the instruction requested by the defendant. The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904.

The judgment of the District Court is affirmed.

AFFIRMED.

ROBERT R. LEE ET AL., APPELLANTS, V. ALYCE BRODBECK, A SINGLE WOMAN, DOING BUSINESS AS ACTION AGENCY, APPELLEE.

243 N. W. 2d 331

Filed June 30, 1976. No. 40301.

1. **Pleadings: Demurrer.** A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover.
2. **Vendor and Purchaser: Fraud.** Representations of fair market value of farm land made to a buyer who is himself a farmer and who has examined the land in the absence of the seller have been held not to constitute actionable fraud.
3. ———: ———. A representation must concern a known, existing fact and cannot be a mere promise to be performed in the future.
4. **Brokers: Principal and Agent: Fraud.** A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency, including statements made without knowledge or known to be false, is guilty of fraud and bad faith.
5. **Pleadings.** The purpose of pleadings is to frame the issues upon which the case is to be tried and to advise the adversary what he is called upon to meet.
6. **Pleadings: Demurrer: Limitations of Actions: Fraud.** If facts pleaded in a petition are sufficient to plead an excuse to the operation of the statute limiting actions based on fraud, a general demurrer will be defeated.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded.

G. J. Beal of Beal & Jensen, for appellants.

Murphy, Pedersen & Piccolo and LeRoy Anderson, for appellee.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and MURPHY and COADY, District Judges.

COADY, District Judge.

The plaintiffs, Robert R. Lee and Myrna I. Lee, hus-

band and wife, sued the defendant, Alyce Brodbeck, who was a real estate broker doing business in and around North Platte under the name and style of Action Agency. The defendant filed a general demurrer in response to plaintiffs' petition which was sustained by the trial court. Within the time provided by the trial court, plaintiffs filed a second and amended petition to which defendant again filed a written general demurrer. Upon hearing, the trial court again sustained the demurrer and dismissed plaintiffs' action. Plaintiffs appeal.

A general demurrer tests the substantive legal rights of the parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from the facts which are pleaded. A petition is sufficient if from the statement of facts set forth therein the law entitles the plaintiff to recover. Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717 (1956).

Plaintiffs are residents of Sheridan County, Nebraska. On or about April 29, 1968, Mr. Lee inherited a 336-acre farm from his father. After the father's death, plaintiffs maintained and operated the farm which was in Chase County free and clear of liens and encumbrances.

Mr. Lee contacted the defendant in the spring of 1969 and was told that Mr. Frimann's farm was for sale. Late in May 1969, Mr. Lee and Alyce Brodbeck went to inspect the Frimann farm which consisted of 455 acres in Sheridan County and 640 acres of pasture in Dawes County. The defendant, at the time, was acting as Mr. Frimann's agent.

Plaintiffs were inexperienced in matters of buying and selling real estate, including the financing thereof. When they expressed an interest in the Frimann land, defendant told them they could borrow on their Chase County farm and use the proceeds to make a downpayment. She also told them that she would have no difficulty in selling their farm and that it would not be difficult to sell it for $63,000. On June 27, 1969, some agreement to purchase the Frimann farm was made and

plaintiffs deposited $1,104.05 with defendant as earnest money. On or about September 9, 1969, plaintiffs accompanied defendant to the North Platte State Bank where plaintiffs executed a "short term" note and mortgage for $25,000 after being assured again that there would be no problem in selling the Chase County farm for $63,000. At about the same time, plaintiffs listed their Chase County farm with defendant for sale.

Mr. Lee, as buyer, signed a written agreement with Mr. Frimann, as seller, and the Guardian State Bank of Alliance, as escrow agent, to purchase the Frimann farm. The contract, dated December 15, 1969, provided that the purchase price was $133,000 payable by a downpayment of $37,570 with the balance due in yearly installments beginning December 1, 1970. The contract indicated that the downpayment would consist of $1,104.05 earnest money and $25,000 loan proceeds in the possession of defendant plus an additional $11,465.95 to be paid by plaintiffs on or about March 1, 1970. In addition, the contract provided that Frimann would deposit a good and sufficient warranty deed with the escrow agent and assure plaintiffs fee simple title free and clear of all liens and encumbrances except certain stated encumbrances not pertinent to this appeal. The seller was to provide the buyer with an abstract of title for approval 14 days before closing on March 1, 1970.

On March 4, 1970, the defendant loaned plaintiffs $11,465.95 so that the total downpayment called for in the contract could be made. Sometime thereafter, the North Platte State Bank foreclosed on the Chase County farm and on June 12, 1972, the District Court for said county confirmed the sale thereof to defendant for the approximate sum of $34,000. Mr. Frimann foreclosed thereafter on the farm located in Sheridan and Dawes Counties and the Dawes County portion was sold off. Finally, the First National Bank in Hay Springs foreclosed and sold out plaintiff's personalty.

The allegations set forth herein have been treated as

facts and are summarized from the amended petition since the allegations therein consist of 15 typewritten and legal size pages. It should be pointed out that the petition makes no complaint about the purchase price of the Frimann farm. It should also be pointed out that the value of the Chase County farm was fixed by the apparent failure of plaintiffs to appeal the District Court's confirmation of the foreclosure sale. Because the sale price equals the fair market value, plaintiffs have pleaded no damages caused by negligence in the sale of the Chase County farm. The allegations concerning the alleged area of high hail incidence and the discovery of a construction lien on the Frimann farm are immaterial. Hail, or the incidence thereof, is not connected to plaintiffs' complaints and damages in any way. Plaintiffs had a contractual remedy in regard to unpaid liens and the reasonable inference is that such liens were accounted for in the foreclosure action initiated by Mr. Frimann. After searching the contents of the amended petition, we find no cause of action on the theory of negligence but do find a cause of action pleaded on the theory of fraud. The defendant cites a 1969 opinion, Transportation Equipment Rentals, Inc. v. Mauk, 184 Neb. 309, 167 N. W. 2d 183, as setting forth the elements of fraud and we find that each and every element therein mentioned is well pleaded in the amended petition.

Plaintiffs allege that the defendant promised and assured them that there would be no difficulty in selling the Chase County farm for $63,000. In most circumstances, such a statement might well be thought of as a mere expression of opinion. Representations of fair market value of farm land made to a buyer who is himself a farmer and who has examined the land in the absence of the seller have been held not to constitute actionable fraud. Kucera v. Pellan, 132 Neb. 739, 273 N. W. 10 (1937). A representation must concern a known, existing fact and cannot be a mere promise to

be performed in the future. Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542 (1960).

Anyone who makes an extensive study of the laws in America concerning the art of selling or puffing, as it is often known, may be led to believe that by tradition, one person may never rely on a small lie made by another in certain business transactions. However, we think it clear that there is not any question about this fact situation. A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency is guilty of fraud and bad faith. Gillespie v. State Real Estate Commission, 172 Neb. 308, 109 N. W. 2d 305 (1961). Where the pleadings indicate that such statements were made by the plaintiffs' agent at or about the time that plaintiffs' property was listed with the agent to induce or facilitate the sale of property belonging to another principal, we have no difficulty in finding that such statements may be representations of a known, existing fact and that the agent has a duty to disclose that such statements are made without knowledge or are known to be false.

The defendant argues that plaintiffs' pleading is subject to a statute of limitations and has outlawed. An action for negligence must be brought within 4 years and an action for fraud must be brought within 4 years after the discovery of the fraud. § 25-207, R. R. S. 1943. An action for relief on the ground of fraud must be commenced within 4 years after the discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made. Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N. W. 2d 327 (1941). To avoid the statute of limitations for fraud, plaintiff must plead and prove the impediments to an earlier prosecution of the claim,

all facts which relate to or explain the failure to prosecute, and when he first obtained knowledge of the fraud. Reed v. Barnes, 113 Neb. 414, 203 N. W. 567 (1925). So far as we know, our court has indicated many times that one must plead facts indicating an excuse for avoiding the fraud limitations but has not directly so held on a general demurrer to a petition.

Plaintiffs set forth in their amended petition that they did not discover the fraud until the sale of the Chase County farm was confirmed by the court on June 12, 1972. Their pleading and theory is that they were lulled into a false sense of security when defendant loaned plaintiffs the money to complete the downpayment on March 4, 1970. The purpose of pleadings is to frame the issues upon which the case is to be tried and to advise the adversary what he is called upon to meet. Johnson v. Ruhl, *supra*. We do not suggest that plaintiffs will have a case left once they are forced to plead or acknowledge the date upon which they were served notice of the Chase County foreclosure, to plead or acknowledge the date of the actual sale in said action, to plead or acknowledge what the petition drafter meant by a "short term loan," or to plead or acknowledge other facts which defendant may be able to raise. We find that the allegations contained in the petition are sufficient to defeat a general demurrer to a cause of action grounded in the law of fraud.

REVERSED AND REMANDED.

THE DELAY FIRST NATIONAL BANK & TRUST COMPANY, APPELLEE, V. JACOBSON APPLIANCE COMPANY, ALSO KNOWN AS JACOBSON APPLIANCE CO., ET AL., APPELLANTS.

243 N. W. 2d 745

Filed June 30, 1976. No. 40341.

1. **Uniform Commercial Code: Notice: Sales.** Compliance with the Uniform Commercial Code for notification as to the dis-

position of collateral is a condition precedent to a secured creditor's right to recover a deficiency.

2. ———: ———: ———. An oral communication of notice of either public or private sale is not the method provided by the Uniform Commercial Code.
3. ———: ———: ———. The requirement of a written notice eliminates all possibility of dispute as to whether notice was actually given and establishes what notice was given.
4. **Uniform Commercial Code: Notice: Sales: Time.** To constitute reasonable notice of a private sale, the notice should be sent in such time that the debtor would have a minimum of 3 business days to arrange to protect his interests.
5. **Uniform Commercial Code: Notice: Sales.** A creditor who uses a private sale form for public sales violates section 9-504(3), U. C. C.
6. **Uniform Commercial Code: Sales.** Under the Uniform Commercial Code the adequacy or insufficiency of the price for which collateral is sold at private sale after default and repossession is one of the "terms" of the sale, and is relevant, along with other issues, in determining whether the sale was commercially reasonable.
7. ———: ———. Where a creditor disposes of collateral in several transactions, if he wishes a deficiency judgment he must comply with the law in each transaction.
8. ———: ———. Section 9-502(2), U. C. C., requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Reversed and remanded with directions.

Jerrold L. Strasheim of Venteicher & Strasheim, and Lyle Winkle of Winkle & Winkle, for appellants.

Deutsch & Hagen, for appellee.

Heard before WHITE, C. J., SPENCER, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

SPENCER, J.

The DeLay First National Bank & Trust Company, plaintiff and appellee, hereinafter referred to as bank, recovered a deficiency judgment against defendant-appellant, Jacobson Appliance Company, a corporation,

hereinafter referred to as defendant, and the guarantor of its obligation to the bank, Victor Jacobson, who will be referred to as Jacobson. We discuss only three of the many issues raised. (1) Was proper notice of sale given to defendants? (2) Did bank's procedures meet the test of commercial reasonableness? (3) Was there sufficient evidence to submit defendants' counterclaim to the jury? We reverse.

Defendant, which was in the retail appliance trade, was organized in 1948 by Victor Jacobson, who was its sole stockholder and chief executive officer. Prior to 1969, bank and defendant entered a floor-plan financing scheme. Bank would advance funds directly to the appliance manufacturer or distributor for appliances shipped to defendant. Defendant would give bank a list by serial number of the items so purchased. Bank noted these on a trust receipt document signed by defendant, giving bank a security interest in the items. When these items were resold, the amount financed was to be remitted to bank.

On occasion, bank would conduct a floor check of defendant's showroom to determine whether remittances had been received for all items sold. A check late in 1972 revealed defendant had not remitted for approximately $6,000 in merchandise. Defendant borrowed $10,000 from the bank, paid the amount due on the floor-plan financing, and used the balance for operating expenses. This loan was evidenced by a document styled "Installment Note and Security Agreement." It was secured by giving bank an interest in "all new & used appliances, parts, accessories, all machinery, equipment, furniture, fixtures, inventory accounts and contracts receivable now owed or hereafter acquired and proceeds." This all-inclusive language gave bank an interest in all the defendant's inventory not covered by the floor plan.

After this loan, bank began monthly floor checks of defendant's showroom. At each check the list would be turned over to the defendant for reconciliation. On

some occasions bank had posted a remittance against the wrong item. On others, the floor check had missed items in the store or in the warehouse or building annex. When the reconciliation was complete, defendant would write a check to bank for any items not located or for which remittance had not been made.

In April of 1973, because of a contemplated trip to Ireland, Jacobson added the name of an employee, Lori Grosbeck, to the signature card for defendant's checking account. Before leaving, Jacobson left with Mrs. Grosbeck a list of instructions leaving her in charge of the store during his absence. She was also given specific instructions concerning what checks she could write while he was in Ireland.

Jacobson returned from Ireland early in May 1973. The latter part of May, Jacobson met with a General Electric representative and bank personnel to discuss current problems. Because the service work for the store was behind and because things were generally in confusion, Jacobson closed the store for a short period to straighten things out and to allow the employees a vacation.

The store was reopened June 4, 1973. Bank requested a floor check and one was made. Seventy items were discovered missing. Bank records indicated $14,942.59 had been loaned against these items. Representatives of bank were unable to reconcile the list with defendant.

On June 13, Jacobson was hospitalized in a psychiatric ward in Council Bluffs, Iowa, after an incident of alleged misconduct. Before leaving for the hospital, Jacobson told Lori Grosbeck, "Take care of it just like you have for me before."

After learning of Jacobson's hospitalization, bank made another floor check and confirmed the earlier shortage. A bank representative conferred with Mrs. Grosbeck and demanded payment. After allowing Mrs. Grosbeck to write the weekly payroll checks, defendant's bank account was closed out by applying the balance on de-

fendant's loan. Over $5,000 was credited on the $10,000 operating loan. Bank took possession of the records on defendant's accounts receivable. It had a local transportation company pick up all property covered by its security instruments. By June 22, the store was empty except for certain items claimed by another creditor.

Bank then proceeded to liquidate the inventory and accounts receivable of defendant. It contacted General Electric with whom defendant had an agreement to take back all crated merchandise at 90 percent of invoice price, less freight. The General Electric items were returned and bank was paid $6,066 for them. Bank made arrangements with a local appliance store to handle the new, uncrated, unfloor-planned appliances at 20 percent of retail and the floor-planned items at 80 percent of the floor-planned amount. Most of the appliances had retail tags on them. Where there were none, the retail price was determined and marked on the appliance.

This is an action to recover a deficiency judgment, after the sale or disposition of the property taken by bank under its security instruments. It is controlled by the rule enunciated in Bank of Gering v. Glover (1974), 192 Neb. 575, 223 N. W. 2d 56. We there said: "Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency."

Section 9-504(3), U. C. C., provides: "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time*

and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale." (Emphasis added.)

Both defendant and Jacobson, its guarantor, are debtors within the meaning of section 9-504(3), U. C. C. Our first consideration in construing section 9-504 is to consider the reason for the notice provision. Obviously, it is intended for the benefit and protection of the debtor. If he is given notice, he will have at least an opportunity to protect his interests by redemption, finding prospective purchasers for the property, or otherwise. Even if it might be determined he could not have protected his interest, the law requires he be given the opportunity.

What we said in Bank of Gering v. Glover, *supra,* is pertinent herein: "The language of subsection (3) of section 9-504, U. C. C.: '* * * reasonable notification of the time after which any private sale or other intended disposition is to be made *shall* be sent by the secured party to the debtor,' (italics added) would presume a mandatory obligation. We have heretofore held that unless the context indicates otherwise, the use of the word 'shall' purports a mandatory obligation. See Anderson v. Carlson (1961), 171 Neb. 741, 107 N. W. 2d 535, in which we pointed out section 49-802, R. R. S. 1943, provides: 'Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter shall

be as follows: (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed.' "

Inherent in our holding in Bank of Gering v. Glover, *supra,* is the rule that the burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. There were five separate dispositions of the property seized which come within the notice requirement. They are separately discussed.

The crated merchandise was shipped to General Electric July 20, 1973. It is undisputed that no prior notice was given to Jacobson, and the sufficiency of the notice given to defendant is questionable. Bank's representative testified he orally visited with Mrs. Grosbeck about it. Bank introduced exhibit 22 to show Mrs. Grosbeck's authority. It reads as follows: "XII Bill is to wait on customers. Lori takes the overflow. *Knock when office door is closed. XIII Lori & Bill Attn. Vic - Lori - Bill. Anything that is on order after 4 weeks offer to loan them a similar one to use until theirs arrives. XIV Lori & Willard You are in charge when I am gone. Please work out your service problems together. Thanks Vic XVI Lori — Please hand Bill a dust cloth on Tues. & Wed. and help him dust. Have him work with you. Thanks — Vic Duplicate of #XIII — Sorry! Ha! Ha!"

Whether Mrs. Grosbeck was an agent of defendant for the purpose of receiving notice we need not decide because there is no evidence to establish any agency relationship on her part for Jacobson. Assuming, however, a viable agency relationship, an oral communication of notice of either public or private sale is not the method provided by the Uniform Commercial Code. The wording in the statute is: "Reasonable notification * * * shall be sent." The word "send" is defined in section 1-201 (38), U. C. C., as follows: " 'Send' in connection with any writing or notice means to deposit in

the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending." The requirement of a written notice eliminates all possibility of dispute as to whether a notice was actually given. It also establishes what notice was given.

On the sale of used merchandise to Larry Greenaugh for $540, the following letter, dated September 11, 1973, was sent to Jacobson at Columbus:

"Dear Mr. Jacobson:

"We have a bid of $540.00 for the following used merchandise:

"10 used televisions

"1 40″ range

"2 washers

"2 dryers

"3 portable vacuam (sic) cleaners

"1 central vacuam (sic)

"It is set that these items will be sold Saturday, September 15, 1973 at 12:00 O'Clock P.M. If you are interested, please contact us prior to that date.

"Thank you.

"Yours Truly,

"Leo A. Moschenross

"Vice-President."

It is to be noted the letter was dated September 11, 1973, advising the items would be sold September 15. Assuming prompt delivery, which is questionable on a letter mailed from Norfolk to Columbus, at best there would be less than a 3-day notice. Whether this is reasonable notice may be subject to question. In Prairie Vista, Inc. v. Casella (1973), 12 Ill. App. 3d 34, 297

N. E. 2d 385, an Illinois appellate court held that a notice mailed on April 7, for a private sale of collateral to be held on April 10, failed to give reasonable notice of sale. To constitute reasonable notice of a private sale, the notice should be sent in such time that the debtors would have a minimum of 3 business days to arrange to protect their interests.

On the sale of the three washers and three dryers to Doug Speidel, the record is devoid of any evidence of notice to either defendant or to Jacobson.

A significant portion of the merchandise was delivered to Brehmers Music & Appliance, a local appliance dealer. It was sold by Brehmers to the public. Brehmers received a 20 percent commission on the sales for its services. The only notice on this sale was by letter dated August 10, 1973, to Vic Jacobson at Columbus. It is as follows:

"Dear Mr. Jacobson:

"We are enclosing a copy of all floor plan notes showing which items have not been paid. We have received a bid of 80% of the original invoice price for the items still here.

"The other merchandise will be sold for the best price possible. The commission cost for these sales will be 20% of the purchase price.

"These items will be sold August 20, 1973 at 12:00. If we do not hear from you it will be assumed you have no interest in this matter.

"Thank you.

"Sincerely,

"Leo A. Moschenross

"Ass't Vice-President."

We have a question as to whether this is a notice of a private sale or a public one. The first paragraph would indicate that the bank was talking about a private sale for 80 percent of the invoice price. The second paragraph talks about other merchandise which will be sold for the best price possible. It gives the commission

cost for these sales which could be for a public sale. The third paragraph gives the time of the sale, but does not specify a place of sale.

Section 9-504(3), U. C. C., provides that the disposition of collateral may be made by public or private proceedings, and may be made by way of one or more contracts. The sale may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition, including the method, manner, time, place, and terms must be commercially reasonable.

In the case of a private sale, the notice need only state the time after which the collateral is to be sold. In the case of a public sale, however, it must state the time and place at which the sale will occur. The construction we put on the notice is that it described both a private and a public sale.

Actually, the items referred to in the first paragraph were sold to Brehmers at private sale for 80 percent of the invoice price. The other items were not sold, however, on August 20, 1973. Rather, they were turned over to Brehmers for sale to the public for a 20 percent commission. On August 24, Brehmers Music & Appliance advertised a 1-day sale of this merchandise to the public for Sunday, August 26, on a local parking lot. We agree with defendant that a creditor who uses a private sale form for public sales violates section 9-504(3), U.C.C. White & Summers, Uniform Commercial Code, Hornbook Series, § 26-10, p. 986. We do not agree, however, that the sale to the public for a set price was in effect a public sale.

The bank presented no evidence that it acted in a commercially reasonable manner in the actual terms of the sale. The notice set out above indicated that the sale price would be 80 percent of the original invoice price. However, in fact, the bank sold the merchandise for 80 percent of the floor-plan billing price, which was only 90 percent of the original invoice price. This then was a private sale for less than the noticed bid. We do

not discuss the questions raised as to the adequacy of the price for which some of the collateral was sold. In this regard, we call attention to the rule enunciated in First Nat. Bank of Bellevue v. Rose (1972), 188 Neb. 362, 196 N. W. 2d 507: "Under the Uniform Commercial Code, the adequacy or insufficiency of the price for which collateral is sold at private sale after default and repossession is one of the 'terms' of the sale, and is relevant along with other issues, in determining whether the sale was commercially reasonable."

Subsequent to the return of the crated merchandise to General Electric, bank sold five Admiral TV sets to Tri-State Distributing Company. No notice of this sale was given to either the defendant or Jacobson.

On balance, bank either provided no notice or questionable notice to either Jacobson or the defendant. Failure to give notice is an absolute bar to the recovery of a deficiency. As we said in Bank of Gering v. Glover (1974), 192 Neb. 575, 223 N. W. 2d 56: "If the creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law he cannot secure a deficiency judgment."

The problem herein is that there was more than one sale, some of which can be upheld. We believe the intent of the Uniform Commercial Code would appear to mandate that the entire disposition of collateral by the secured party be viewed as one transaction, and that every aspect of that transaction be in accord with the requirements of the Uniform Commercial Code. To adopt any other rule would place upon the court the sometimes impossible and time-consuming task of attempting to determine the amount of recoverable deficiency as well as the amount of unrecoverable deficiency.

What we said in Bank of Gering v. Glover, *supra,* is pertinent herein: "The creditor is given several options in disposing of collateral and very minimal formal requirements. The burden on the secured creditor is to

comply with the law. The act is framed in his interest. It is not onerous to require him to give notice of the time and place of sale. In some instances it will be to the creditor's advantage to do so. On the other hand, to permit him to proceed otherwise does place an onerous burden on the debtor."

We adhere to the position we adopted in Bank of Gering v. Glover, *supra*. The right to a deficiency judgment depends on compliance with the statutory requirements. We now hold that if a creditor wishes a deficiency judgment he must comply with the law in each transaction. While this rule may seem harsh, we are persuaded by the fact that the burden is on the secured creditor to comply with the law. The act is framed in his interest. It is not onerous to require him to observe the provisions of the law.

Previous to the removal of the inventory from the defendant's place of business, bank took possession of the records on all of defendant's accounts receivable. Section 9-502 (2), U. C. C., requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable. The record would indicate that bank did not attempt to collect all the accounts. It sent two letters on some of them, and thereafter took no further action on any of the accounts receivable.

The burden was on bank to prove that it undertook to collect from defendant's debtors in a commercially reasonable manner. Defendant argues that the record indicates bank made little or no effort to realize on the accounts receivable. Defendant further argues that this lack of effort on the part of bank resulted in a substantial decrease in the value of the accounts. We agree there is insufficient evidence in the record to sustain bank's burden of proof on this issue.

Plaintiff failed to sustain its burden of proving sufficient notice to permit the entry of a deficiency judgment against defendant and Jacobson. The motion for

a directed verdict on the issue of liability for a deficiency judgment should have been sustained.

Both defendants argue that it was error for the trial court to dismiss the counterclaim. The question as we see it is whether the evidence would support the submission of the counterclaim to the jury on defamation, tortious interference with business, or unlawful conversion and set-off. On these issues, the burden of proof was on the defendants. On the defamation issue, defendants cite McLaughlin v. F. W. Woolworth Co. (1933), 125 Neb. 684, 251 N. W. 293, as follows: "As applied to libel of one in his business or occupation, it is elementary in the law of libel and slander that defamatory words falsely spoken (or written) of a party which prejudice such party in his occupation or trade are actionable per se. Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 303. Newell on Slander and Libel (4th ed.) secs. 150, 152, states these rules as to what may constitute libel per se. The law guards most carefully the credit of all merchants and traders. Any imputation on their solvency, any suggestion that they are in pecuniary difficulties, is therefore actionable; also where any language is used of merchants and tradesmen which imputes a want of credit or responsibility or insolvency, or of common honesty. To the same effect is the text in 36 C. J. 1190, 1191."

The evidence shows telephone calls to defendant's supplier to the effect that Jacobson was sick and that his financial status was less than solid. It appears that there was truth in everything stated. Jacobson was sick by his own admissions at the time the statements were made. The status of defendant's accounts at the bank and with General Electric show that defendant's financial status was shaky. The trial court was correct in refusing to submit the issue of defamation to the jury.

One of the basic elements of tortious interference with a business relationship requires an intentional interference inducing or causing a breach or termination of the

relationship or expectancy. Bank's approach to defendant's suppliers was in connection with its notice that it would no longer floor plan their merchandise for defendant. This was a proper contact and defendant adduced no evidence which would indicate otherwise.

Finally, both defendants complain of the dismissal of the counterclaim for wrongful conversion of defendant's property. The trial court held the taking of the property was not wrongful since defendant was in default on at least one of the loan obligations. It appears to us that the defendant was in default of both the floor plan and the note obligations. We agree with the trial court the taking could not be termed a wrongful conversion. The counterclaim was properly dismissed.

From the conclusions we reach herein, it is unnecessary to consider the many other alleged errors presented. We reverse the judgment and remand the cause to the District Court, with directions to dismiss the petition for a deficiency judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I dissent for several reasons. First, I cannot agree that where collateral is disposed of in a series of sales, failure to give notice of one such sale deprives the holder of the security interest of all right to a deficiency judgment and the right to rely upon a guaranty, even though all sales are conducted in a commercially reasonable manner and the lack of notice caused no loss whatever. Such a result is patently unjust and is not mandated either by the provisions of the Uniform Commercial Code or by our holding in Bank of Gering v. Glover, 192 Neb. 575, 223 N. W. 2d 56. Secondly, I find the majority opinion vague and confusing in its discussion of the differences between private and public sales. Thirdly, the opinion seems to imply that if collateral is to be sold in a series of private sales, separate notice must be given for each sale rather than the one notice which, it seems to me, the statute contemplates. Fourthly, by defining

"reasonable notification" in terms of a flat time period the court in effect amends the statute. Fifthly, the record in this case contains evidence sufficient to support a finding that all sales here involved were conducted in a commercially reasonable manner. The issue of commercial reasonableness was submitted to the jury and it found in favor of the secured party. That finding should stand.

I will briefly discuss the above objections in the order listed. The opinion imposes the ultimate in penalties against the creditor for failure to give notice of one sale, where collateral is being disposed of in a series of transactions as permitted by the code and even though notice may have been given of all other sales and all sales were held in a commercially reasonable manner. Assume, for example, that if there were a hundred large items to be sold and it was best that they be sold in a series of public sales, say in 10 lots, and notice is given of the 10 sales and all sales are commercially reasonable, however, it is then discovered that a few insignificant items are overlooked and these are sold at private sale without notice, but in a commercially reasonable manner and full value is obtained. Under the proposed rule which this case promulgates, the creditor is denied his right to a deficiency even though the debtor has not been harmed.

Lending institutions sometimes loan on insufficient collateral and in reliance on a guaranty by a responsible party. In the circumstances given in the example above, it would be unjust and ridiculous to deprive the lender of his reliance on his guaranty. The proposed rule will have a tendency to unduly restrict credit and is clearly unjust. Our holding in the Gering case does not mandate the result in this case. In the Gering case there was one sale and no notice at all.

As a reason for adopting the severe penalty the opinion says: "To adopt any other rule would place upon the court the sometimes impossible and time-consuming

task of attempting to determine the amount of recoverable deficiency as well as the amount of unrecoverable deficiency." Convenience may be a good reason for rules of procedure. The convenience of the courts is no reason at all for rules which determine the substantive rights of parties. The majority bring discredit on the court when the rule of decision is so founded.

The opinion does not clearly differentiate between public sale and private sale. Under ordinary law and under the code, public sale means sale at public auction and perhaps by sealed bids, both, of course, after the required public notice. The distinguishing characteristic of public sale is bona fide competitive bidding. White & Summers, Uniform Commercial Code, Hornbook Series, § 26-11, p. 993, Ex Parte Keller, 185 S. C. 283, 194 S. E. 15; In re Newbrough, 254 Mich. 170, 236 N. W. 233; Offredi v. Huhla, 135 Conn. 20, 60 A. 2d 779, 4 A. L. R. 2d 472; Union & Merchantile Trust Co. v. Harnwell, 158 Ark. 295, 250 S. W. 321; Katleman v. Katleman, 70 Nev. 330, 269 P. 2d 257.

There were no public sales in this case. All sales were private. The fact that Brehmer Music sold on an open lot after advertising but not by auction did not make that a public sale within the usual meaning of that term. The reference in the opinion to notice of private sale being given for a sale in fact public is mistaken.

The opinion seems to imply that if property is to be sold at private sale, then one notice before such sale to the effect that after a certain time the collateral will be sold at private sale is not sufficient. It seems to hold that there must be a special notice for each private sale. Clearly the code does not contemplate that and the opinion cites no authority for the position. The code says: "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. . . . Unless collateral is perishable or threatens to decline speedily in value or is the type cus-

tomarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor . . .." § 9-504(3), U. C. C. The statement in the opinion, "We believe the intent of the Uniform Commercial Code will appear to mandate that the entire disposition of collateral by the secured party be viewed as one transaction," just does not stand up in face of the code language.

Collateral may consist of dozens or hundreds of items. It may be best that these be sold in a group, or it may be best that they be sold individually, or in a combination. What is commercially reasonable will depend on circumstances. If a thousand items are to be sold at numerous private sales, it would be ridiculous to require some sort of notice of each sale. Ultimately the cost of sale comes out of the debtor's pocket under the provisions of the code because he is responsible for the costs of sale. Such costs should not be unnecessarily accumulated.

What the statute contemplates in private sales is one notice after which property may be sold privately with the creditor being held to the standard of commercial reasonableness in all such sales, including price.

The opinion would hold as a flat rule that three business days notice of private sale is reasonable. That period of time may or may not be reasonable, depending upon circumstances. In any event, such a flat rule is simply an amendment of the statute which provides, "reasonable notification of the time after which any private sale or other intended disposition is to be made." The Uniform Commercial Code in some states does specify a time period. Ours does not. We have no authority to amend the statute.

One of the things that is overlooked in this case is that we have a jury verdict under proper instructions.

The issue of "commercial reasonableness" was submitted to the jury. The evidence on the various sales was sufficient to submit the question. For example, on the buy-back by General Electric of crated items, this was pursuant to a prior arrangement between General Electric, Jacobson, and the bank. The evidence shows that the best price would be obtained by exercising the option under the agreement. The creditor was not damaged by this sale even though no notice was given. Lori Grosbeck, who was in charge of the business, did have notice and testified that this was the best way to do it and the method which would obtain the best price.

The record shows that the sale of five new uncrated Admiral TV sets was at full invoice price. Exhibit C, invoice No. 34989; 48:20-24; 135:22-25. The date of this sale is not shown by the record but payment of the sale was made in October. This was long after the August notice of sale. The creditor was not hurt by the absence of special notice on this sale.

There is further evidence in the record which supports the conclusion that all the other sales were in a commercially reasonable manner.

The notice of sale dated September 11, 1973, as to the items there specified was at least the equivalent of a notice that the items would be sold privately after 11:59 o'clock a.m., September 15, 1973, and was clearly sufficient as to those items.

The notice of August 10, 1973, was clearly sufficient as a notice of private sale for all merchandise sold thereafter and was the equivalent of a notice that such merchandise would be sold at private sale after 11:59 a.m., August 20, 1973.

The law under the Uniform Commercial Code is just developing in this state. This court has a unique opportunity to see that it develops in a reasonable, just, and logical fashion. I believe we have passed up such an opportunity in this case.

McCOWN, J., joins in this dissent.

ADOLPH J. JIRKA ET AL., APPELLEES, V. BERTHA M. PRIOR ET AL., APPELLEES, IMPLEADED WITH GEORGE H. PESTER ET AL., APPELLANTS.

243 N. W. 2d 754

Filed June 30, 1976. No. 40380.

1. **Summary Judgments.** Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
2. ———. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law.
3. ———. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment.
4. **Limitations of Actions: Time: Trusts.** The statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates his trust. The time when the statute of limitations commences to run must be determined upon the facts in each case.
5. **Descent and Distribution: Trusts.** A resulting trust does not end with the death of the trustee and heirs of the trustee take the property subject to the trust.
6. **Trusts.** Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made although the payment is not made in money.
7. ———. A resulting trust is raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Reversed and remanded for further proceedings.

Kennedy, Holland, DeLacy & Svoboda, for appellants.

Marks, Clare, Hopkins, Rauth & Garber, for appellees Jirka et al.

Starr & Starr, for appellees Prior et al.

Perkins, Sacks & Hannon, for appellees Hannon et al.

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

MCCOWN, J.

This appeal involves an alleged resulting trust in certain Sarpy County real estate. Appellants, George H. and Betty J. Pester, by cross-petition, claimed a one-third interest in the property against the other defendants involved in the original action to quiet title. Motion for summary judgment was filed by the appellants, George H. and Betty J. Pester. An opposing motion for summary judgment was filed by the defendants holding interests acquired through Lester V. Prior, deceased. The District Court overruled the Pester motion for summary judgment; sustained the Prior motion for summary judgment; and dismissed the Pester cross-petition with prejudice. George H. and Betty J. Pester have appealed.

In 1957 or 1958, Charles R. and Mary M. Hannan, husband and wife, and Lester V. and Bertha M. Prior, husband and wife, contracted to purchase, and later took by deed, certain farm land in Mills County, Iowa, known as Folsom Farms. On March 27, 1959, the Hannans and the Priors entered into a contract with George H. Pester under which Pester purchased an undivided one-third interest in Folsom Farms, which included about 1,212 acres of land. The purchase price of Pester's one-third interest was $100,000, payable $10,000 down, and the balance payable $3,333.33 annually, plus interest at 5 percent on the unpaid balance until fully paid. After the parties entered into this contract a corporation known as Folsom Farms, Inc., was formed in which an undivided one-third stock interest was held by the Hannans, the Priors, and the Pesters respectively. Much of the land was thereafter cleared of timber and made tillable and otherwise improved. The corporation owned certain buildings and managed the operation of the

farm. It did not own the land and the corporation was dissolved in 1966, following the sale of the Folsom Farms property.

Lester V. Prior, during his lifetime, was engaged in the real estate business in Council Bluffs, Iowa, specializing in farm management and sales. Charles R. Hannan was a banker in Council Bluffs, and George H. Pester was a physician and surgeon.

By a written offer dated January 18, 1966, the Hannans, the Priors, and Dr. Pester agreed to sell the Folsom Farms property, and the offer was duly accepted by Arlie J. and Mary L. Suhl. The agreement involved an exchange of the Folsom Farms for farm land owned by the Suhls in Sarpy County, Nebraska, known as the Bellevue Farms, plus the payment by the Suhls of a substantial amount of cash. Pursuant to the agreement, the Hannans, the Priors, and the Pesters conveyed the Folsom Farms property to the Suhls by warranty deed dated April 21, 1966. Because of tax considerations, the Suhls were directed to, and did, convey the Bellevue Farms property to Charles R. and Mary M. Hannan and Lester V. and Bertha M. Prior, the record owners of the Folsom Farms property.

Lester V. Prior made the arrangements for the sale and exchange of the properties and for the mortgages on both of them, and managed the financial affairs of Folsom Farms and Bellevue Farms until the time of his death. It was the intention of Hannan, Prior, and Pester that the same relationship with respect to the operation and ownership of the Folsom Farms property would carry over to the Bellevue Farms property, and a partnership was set up with respect to the Bellevue Farms operation. A bank account was established for the partnership, and liability insurance on the Bellevue Farms property was taken out in the name of Bellevue Farms Partnership. Lester V. Prior managed the financial affairs of the partnership until his death, and thereafter Charles R. Hannan managed the financial affairs. Part-

nership income tax returns for the Bellevue Farms were filed for each year from 1967 through 1973. Those returns all showed a one-third interest each in Charles R. Hannan, George H. Pester, and Lester V. Prior or his estate. Copies of the returns were given to each taxpayer.

Lester V. Prior died April 8, 1967. An ancillary proceeding for determination of heirship was conducted in Sarpy County, Nebraska, following his death. With respect to the Bellevue Farms the decree found that he died seized of a one-fourth interest in the Bellevue Farms property, and that his only heirs-at-law were his wife, Bertha M. Prior, and four daughters. Although Dr. Pester's name was not on the record title of the Bellevue Farms property, he was kept advised of various negotiations for sales of portions of the property and joined in the execution of a contract for sale of part of the property to Bellevue Industrial Foundation, and was also included as a grantor in an easement to the Omaha Public Power District in February of 1968.

On October 6, 1971, the Hannans and Bertha M. Prior entered into a contract for the sale of part of the Bellevue Farms property to Adolph J. Jirka and others without the knowledge or consent of the Pesters. Upon being informed of the sale by Charles R. Hannan, George H. Pester executed and recorded an affidavit in the office of the register of deeds on October 13, 1971, claiming an undivided one-third interest in the land.

On May 10, 1974, the Jirkas brought this action against all the defendants to quiet the title to the land purchased by them, subject to the payment of the purchase price as provided by the contract. By stipulation of all parties, partial summary judgment was entered directing all defendants to execute a deed to the Jirkas, and providing for the escrow of payments due on the Jirka contract, under jurisdiction of the court, pending determination of the rights of the defendants among themselves. That judgment and the Jirka contract are not

involved in this appeal. The cross-petition of the Pesters which initiated the litigation now on appeal was filed on July 5, 1974.

Dr. Pester made all payments which were demanded of him under the March 27, 1959, contract. There is also evidence that the 1959 contract was subsequently orally modified by agreement between Charles R. Hannan, Lester V. Prior, and George H. Pester so that additional payments were not needed. It is admitted that in addition to the downpayment of $10,000, Dr. Pester made payments of more than $21,000 up to and including April 28, 1964, on the original contract with the Hannans and Priors dated March 27, 1959. Dr. Pester also claims payments of more than $7,000 in 1967 and 1968. In addition, the Suhls obtained a judgment against the Hannans and Dr. Pester and the estate of Lester V. Prior, growing out of a boundary line dispute on the Folsom Farms property. The judgment was in the amount of $9,565.50, plus costs. George H. Pester and Charles R. Hannan each paid $5,000 in full satisfaction of that judgment. In another action by the Suhls against the Hannans, Dr. Pester, and the estate of Lester V. Prior, for a deficiency in the acreage of the Folsom Farms property, the Prior estate was dismissed on motion on the grounds of the statute of limitations with respect to claims against the estate. That action was also settled by Charles R. Hannan and Dr. Pester by the payment of $20,099.35 each. That amount was paid by Dr. Pester in October 1972. No contribution on these partnership obligations has been paid by the Prior estate, nor any of the heirs.

The evidence does not disclose whether any part of the cash consideration received for the Folsom Farms sale was applied or credited to Dr. Pester in any way, nor does the evidence disclose whether his distributive share of the partnership income, including capital gains income, was applied to his capital account or otherwise adjusted in distributions by the partnership.

The District Court found that the Pesters knew that they were not record owners of the Bellevue Farms on May 5, 1969; that they knew of adverse claims as to their interest on May 5, 1970; that the last admitted payment on the original contract of March 27, 1959, was made on August 24, 1967; that there was inexcusable negligence on the part of the Pesters constituting laches; and that the evidence is doubtful, uncertain, and insufficient to establish any resulting trust. The court sustained the motion for summary judgment on behalf of the Prior heirs and dismissed the cross-petition of the Pesters. This appeal followed.

It is apparent from the factual recitals already set out that virtually every critical issue in this appeal involves some dispute of some material facts. A motion for summary judgment is not a substitute for a motion for directed verdict. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Barnes v. Milligan, *ante* p. 50, 241 N. W. 2d 508. See, also, Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Hiram Scott College v. Insurance Co. of North America, 187 Neb. 290, 188 N. W. 2d 688.

The District Court's finding that laches was involved here is unsupported by the present record. The appellees contend, however, that the 4-year statute of limitations of section 25-207, R. R. S. 1943, for fraud and non-

contract injuries, applies rather that the 10-year statute of limitations for the recovery of title or possession of land under section 25-202, R. R. S. 1943. The appellees also contend that the 4-year statute began to run with the death of Lester V. Prior, or, at the latest, from March 5, 1970, when the Pesters' attorney received a letter from Mrs. Prior's attorney indicating that she might not recognize Dr. Pester's interest in the Bellevue Farms property.

The statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates his trust. The time when the statute of limitations commences to run must be determined upon the facts in each case. Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368; Windle v. Kelly, 135 Neb. 143, 280 N. W. 445. It is clear in this state that a resulting trust does not end with the death of the trustee and heirs of the trustee take the property subject to the trust. Bailey v. Dobbins, 67 Neb. 548, 93 N. W. 687; Detwiler v. Detwiler, 30 Neb. 338, 46 N. W. 624.

In the case before us there is no evidence of repudiation by any of the successors in title of Lester V. Prior, except Mrs. Prior, at any time prior to October 6, 1971. On the other hand, the Hannans, who, except for Mrs. Prior, constitute a majority of the original trustees, not only did not repudiate the Pesters' claim but fully acknowledge that claim and join in the Pesters' request for declaration of a resulting trust, subject only to accounting and payment of amounts, if any, still owing by Dr. Pester under the original Folsom Farms contract of March 27, 1959.

Income tax returns showing Dr. Pester's one-third interest continued to be filed up to and including 1973, and were certainly inconsistent with any claim of repudiation. Unless substantial new evidence be presented at the trial, the evidence is clear and convincing that there was no clear repudiation of the trust here before October 6, 1971, in any event. Under such circumstances it

is immaterial whether a 4-year or a 10-year statute of limitations applies, and it is also clear that no laches has been established.

With respect to the underlying issues involving a resulting trust, the rules in this state have been well established. Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made although the payment is not made in money. The resulting trust is raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance. Campbell v. Kirby, 195 Neb. 610, 239 N. W. 2d 792; Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899; Restatement, Trusts 2d, § 455, p. 424. In the absence of substantially new or different evidence at trial, the evidence before the court on the motion for summary judgment was clear and convincing that Dr. Pester was intended to, and did, hold an undivided one-third interest in the Bellevue Farms property under a resulting trust. Accounting or other evidence of the amount Dr. Pester has paid or should have had credited on the original contract of March 27, 1959, is incomplete and uncertain and remains to be determined.

The judgment and decree of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NATIONAL FARMERS ORGANIZATION, INC., APPELLEE, V. MCCOOK FEED AND SUPPLY COMPANY, APPELLANT.

243 N. W. 2d 335

Filed June 30, 1976. No. 40406.

1. **Uniform Commercial Code: Damages: Sales.** Under section 2-715, U. C. C., consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements or needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.
2. **Contracts: Customs and Usages: Damages: Sales.** In order to charge the seller with the particular loss it must be one that ordinarily follows the breach of the contract in the usual course of events or that reasonable men in the position of the parties would have foreseen as a probable result of the breach.
3. **Pleadings: Trial: Damages: Uniform Commercial Code.** Other than cover, on which proof is required by the Uniform Commercial Code, a litigant who asserts mitigation of damages in defense of a consequential damage action has the burden of both pleading and establishing the mitigation.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

David T. Schroeder of Padley & Dudden, and Donald W. Marshall, Jr., for appellant.

Murphy, Pederson & Piccolo, for appellee.

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

SPENCER, J.

In this contract action for the sale of 90,000 bushels of corn, the jury returned a verdict for the plaintiff on its cause of action and for the defendant on its counterclaim. The trial court sustained a motion for judgment notwithstanding the verdict on the counterclaim. It entered judgment for the plaintiff on its cause of action for the amount the parties stipulated was due, and dismissed the counterclaim. McCook Feed and Sup-

ply Company, hereinafter referred to as defendant or Johnson, appeals. We reverse.

On February 14, 1973, National Farmers Organization, hereinafter referred to as plaintiff or N.F.O., entered into two contracts for the sale by the plaintiff to the defendant of No. 2 yellow corn. One contract was for 45,000 to 50,000 bushels. The other was for 40,000 bushels. The contracts had previously been made orally by Otis Johnson, owner-operator of the defendant, and Boyd Weist, a representative of the plaintiff. The oral contracts were followed by two written sale confirmation forms dated February 14, 1973, which were prepared by the plaintiff. The sale confirmation forms provided an on-farm price for the corn of $1.48 per bushel. The corn was to be picked up by the defendant on the farm. The shipment time was listed as 2 months. The buyer was to make payment at the end of the week for grain picked up that week to the N. F. O. members' custodial account.

Plaintiff is a national collective bargaining association. It represents members in the sale of products and oversees the performance of such sales contracts in return for a check-off of 2 cents per bushel as commission and reserve against loss. The legal title to the corn, which is the subject matter of these contracts, was in the firm of Jack Brothers of Eustis, Nebraska, a farming partnership operated by Robert and Willard Jack. After an earlier deal for the Jack corn fell through, Weist entered into the contract with defendant.

McCook Feed and Supply Company is actually the business name used by Otis Johnson. At the time the contracts were made, he was in the business of buying, hauling, and selling feed; buying, hauling, and selling grain; and custom trucking of commodities for profit. He owned and operated five semi-trucks with trailers, and employed five drivers. The only corn delivered under the contracts in question was picked up by two of

the defendant's trucks on April 14, 1973. A total of 1,714 bushels of the Jack grain were loaded and hauled to Oklahoma.

The circumstances surrounding the performance dates of the contract were the object of some disagreement at the trial. The evidence indicated that the period from February 14 to April 14, 1973, was abnormally wet for the southwestern portion of Nebraska. The Jack corn was located on gravel roads several miles off the regularly traveled paved roads. Defendant's evidence was that his truck drivers periodically drove past the gravel roads leading to the Robert Jack place and found them impassable for the semi-trucks they were driving. Plaintiff's testimony was that there were many days during the contract performance time when the trucks could have reached the corn. On April 14, 1973, Robert Jack told a representative of defendant that he would not allow the delivery of any more corn after that date. There were discussions between the representatives of the plaintiff and defendant in which the defendant stated plaintiff's representatives agreed to extend the time for delivery. The jury by its verdict resolved this question in the defendant's favor.

On May 16, 1973, defendant received a written notice of cancellation of the contract from the plaintiff. The price of corn began to rise steadily during the middle of April. It reached a price of $1.76 per bushel by May 16, 1973. Plaintiff brought this action to recover for the 1,714 bushels of corn delivered to the defendant. The defendant counterclaimed, alleging breach of contract.

Defendant produced evidence of a strong resale market during April, May, and June for No. 2 corn in Kansas, Oklahoma, and Texas. Johnson stated that it was his intent to deliver the corn for resale at those places and the plaintiff was aware of this fact. He further stated that his transportation costs to transport the grain were 8.7 cents per bushel. This was his absolute

cost and was figured on the basis of an average trip of 400 miles. His mileage was computed from Eustis where the corn was to be picked up. The testimony was undisputed that defendant could get 25 percent over the Atchinson, Kansas, market price in the Oklahoma-Texas area.

Five thousand bushels of the corn in the 40,000 bushel contract could be up to 17 percent moisture at no discount. The 5,000 bushels were sold by defendant to the Lincoln Grain, Inc., of Atchinson, Kansas. The 1,714 bushels were delivered to Yukon, Oklahoma, at the direction of Lincoln Grain. Defendant was surcharged $3,577 by Lincoln Grain for nondelivery of the remaining 3,286 bushels. Johnson testified that his lost profit on this part of the contract was the difference between the sale price of $1.66 per bushel and the contract price of $1.48 per bushel, less 8.7 cents transportation costs. Daily market prices for yellow corn at the Atchinson, Kansas, market from the period February 1 to July 2, 1973, were recieved in evidence. The market price for yellow corn at Atchinson, Kansas, on May 16, the date of the written cancellation of the contracts, was $1.76. Except for May 17, when it was $.01 less, it advanced steadily to $2.03 on May 31, and $2.08 on July 2.

By stipulation of the parties, a verdict of $2,348.56 was entered for plaintiff on its petition for the price of 1,714 bushels of wet corn. The jury returned a verdict for defendant in the amount of $19,172 on the counterclaim. The trial court, holding defendant did not introduce sufficient data to enable the jury to find the amount of damages with reasonable certainty and exactness, entered judgment notwithstanding the verdict for the plaintiff.

Under the Uniform Commercial Code, there are three general approaches used in assessing a buyer's damage where the seller has failed to deliver. The first is contained in section 2-712, U. C. C., titled "Cover; buyer's procurement of substitute goods." Here, the buyer made

attempts to cover, but was not successful. He is not barred from his other remedies by this failure, so section 2-712 is not applicable.

The second approach is found in section 2-713, U. C. C. That section reads as follows: "Buyer's damages for nondelivery or repudiation. (1) Subject to the provisions of this article with respect to proof of market price (section 2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (section 2-715), but less expenses saved in consequence of the seller's breach.

"(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival."

Under section 2-713, U.C.C., the measure of damages is the difference between the market price at Eustis, Nebraska, and the contract price, less expense saved in consequence of the breach. There is no evidence on the market price in the Eustis area. The evidence on market price was adduced for the Atchinson, Kansas, and the Oklahoma and northern Texas areas. Johnson did not attempt to show contract market differential damages, but instead sought only to recover consequential loss of profits under section 2-715, U.C.C. Lost profits cannot be proved under sections 2-712 or 2-713, U.C.C., but can be shown under section 2-715, U.C.C.

The third approach, which is the one used here, is found in section 2-715, U.C.C. While it has never been used heretofore in Nebraska, consequential damages are provided by the Uniform Commercial Code. This section provides: "Buyer's incidental and consequential damages. (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable

charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

"(2) Consequential damages resulting from the seller's breach include

"(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

"(b) Injury to person or property proximately resulting from any breach of warranty."

Defendant on its counterclaim under section 2-715, U.C.C., adduced evidence that Johnson advised plaintiff as to where the corn was to be sold; that he was in the business of buying and selling grain; and that plaintiff was familiar with the nature of his business and understood he was purchasing the corn for resale in the Kansas, Oklahoma, and Texas markets. The case was tried on this theory. The jury, by its verdict, accepted defendant's theory.

To prove damages, defendant adduced evidence of its expected profit. It did this by showing there was a market at all times during the period for the corn. It adduced the price of corn at Atchinson, Kansas, for the period from February 1 to July 2, 1973. Lincoln Grain, Inc., which was reselling the corn for the defendant, was located at Atchinson, Kansas. Defendant also adduced the price over the same period for corn in the Yukon, Oklahoma, area where the corn was to be sold.

This is a case of first impression in Nebraska. White and Summers, who authored the Hornbook Series on the Uniform Commercial Code, state that most of the law regarding consequential damages can be traced back to the classic English case, Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854). They quote the rule from Hadley v. Baxendale at page 314, as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought

to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

The courts had previously adopted two approaches to the question as to how much notice the breacher must have to hold him liable for consequential damages. In one, the seller must consciously assume the risk of consequent loss in case of his breach. In the other approach it was sufficient if the seller knew of the buyer's situation.

White & Summers, Uniform Commercial Code, Hornbook Series, § 10-4, page 316, cite the second approach as the recent trend of authority, and quote Professor Corbin in the following language: "All that is necessary, in order to charge the defendant with the particular loss, is that it is one that ordinarily follows the breach of such a contract in the usual course of events, or that reasonable men in the position of the parties would have foreseen as a probable result of breach."

The code draftsmen agreed with the latter test, and stated: " 'The "tacit agreement" test for the recovery of consequential damages is rejected.' " White & Summers, Uniform Commercial Code, Hornbook Series, § 10-4, p. 316.

This is the test submitted by the court in its instructions, which were as follows: "The only damages material in this case are 'consequential damages.' Consequential damages recoverable by the buyer are those that were reasonably foreseeable from his known needs that he could not meet or minimize. Specifically, consequential damages include any loss resulting from the general or particular requirements and needs of the buyer, of which the seller had reason to know at the time of contracting, and which could not be reasonably prevented by cover or in any other way.

"The buyer must attempt to minimize consequential damages in good faith, by cover or otherwise. He must use all reasonable means at his disposal to reduce the damages and is not entitled to recover damages which he could, with reasonable effort or expense, have avoided.

"Damages are determined at the time the buyer learned of the breach. It is for you to determine from all of the evidence when such event took place."

In Gulf Chemical & Metallurgical Corp. v. Sylvan Chemical Corp. (1973), 122 N. J. Super. 499, 300 A. 2d 878, affirmed 126 N. J. Super. 261, 314 A. 2d 73 (App. Div., 1973), that court found the seller liable for the nondelivery of two installments of a sales contract. In discussing the buyer's damages, the court stated that section 2-713 could not be applied since the buyer offered no proof of market price. The court went on to say that such failure did not preclude the buyer from suing for consequential damages. That court said: "Under section 2-715, consequential damages would be allowed in this case if the breaching seller at the time of contracting had reason to know that a resale was contem-

plated. But the section does not seem to permit speculative damages, and, consequently, expected profits are not allowed by it, unless they clearly would have been earned."

In Harbor Hill Lithographing Corp. v. Dittler Bros., Inc. (1973), 348 N. Y. S. 2d 920, 76 Misc. 2d 145, the court found that proof was lacking to show section 2-713 contract market differential damages but allowed lost profits under section 2-715. The court found the seller had reason to know of a contract of resale to a third party and so held it liable for lost profits under that contract. The court stated the possibility, if not the probability, of anticipated profit from resale was reasonably within the contemplation of the parties, and that there was no showing that the profits were extravagant. The court stated: "Dittler (seller) appears to rely mainly upon pre-UCC precedent which may have been more stringent in awarding lost profits, only where the 'special circumstance' of resale and its particulars were known in advance to the defaulting seller. See, e.g. Traction v. A & O Novelties Co., 32 Misc. 2d 991, 223 N. Y. S. 2d 565. However, the Code and commentary, effective in New York since 1964, make quite clear that resale circumstances put the seller on notice of potential exposure to liability for lost resale profits. There was ample proof that Dittler (seller) 'had reason to know' of Harbor Hill's (buyer's) particular requirements in obtaining and resale of the Barnell (resale buyer) brochures."

There was sufficient evidence from which the jury could conclude the plaintiff could reasonably have forseen the defendant would sustain consequential damages by plaintiff's breach of the contract. The evidence was sufficient to permit the jury to determine whether the seller had reason to know at the time of contracting that the defendant expected to sell the corn in Oklahoma and northern Texas where a market existed. Defendant adduced evidence that no corn was available in the

area because of the steadily rising price. The jury must have accepted the defendant's explanation and have found that it used all reasonable means at its disposal to mitigate its damages by cover, as required by the Uniform Commerical Code.

Plaintiff in its brief argues there is a lack of evidence as to matters of mitigation, such as profits earned by Johnson in custom hauling with his trucks during this period. Other than cover, on which proof is required by the Uniform Commercial Code, a litigant who asserts mitigation of damages in defense of a consequential damage action, has the burden of both pleading and establishing the mitigation. Adapted from Kring v. School District (1921), 105 Neb. 864, 182 N. W. 481, and Colton v. Benes (1964), 176 Neb. 483, 126 N. W. 2d 652.

Plaintiff also raises certain questions pertaining to the parol evidence rule and the statute of frauds in its brief. There is no cross-appeal herein, and consequently no assignments of error on these points. Even if relevant, they have not been properly presented for our consideration.

The trial court entered judgment notwithstanding the verdict for the plaintiff, on the theory defendant did not introduce sufficient data to enable the jury to find the amount of damages with reasonable certainty and exactness. The evidence covered the quantity of the corn involved, its acquisition costs, and its resale price on a date to be determined by the jury. The evidence also covered the costs actually saved because the corn was not delivered. The figure was fixed at 8.7 cents per bushel, which, of course, would be deducted from the sale price on the date determined by the jury. This was sufficient data to enable the jury to find the amount of damages with reasonable certainty. The judgment rendered on the counterclaim is within the range of the evidence. The trial court was in error in entering the judgment notwithstanding the verdict.

The judgment notwithstanding the verdict is reversed and the cause is remanded to the trial court with directions to reinstate the judgment on the counterclaim.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

Under the Uniform Commercial Code the buyer's measure of damages for repudiation or nondelivery by the seller is the difference between the cost of cover and the contract price, or the difference between the market price and the contract price when the buyer learned of the breach, together with incidental and consequential damages, but less expenses saved. §§ 2-712, 2-713, U.C.C. In other words the buyer's damages are the loss of the bargain plus consequential damages, if any. Section 2-715, U.C.C., merely defines incidental and consequential damages.

To recover damages for the loss of the bargain it was incumbent upon the defendant to prove the cost of cover or the *market price at the place of tender* at the time when the buyer learned of the breach. § 2-713(2), U.C.C. The majority opinion concedes that the defendant buyer did neither.

The consequential damages which the defendant sought to recover was the *profit* the buyer would have made by resale in Kansas, Oklahoma, or Texas. A higher degree of proof is required to recover lost profits than is required for general damages. See K & R, Inc. v. Crete Storage Corp., 194 Neb. 138, 231 N. W. 2d 110. Even if it is assumed the defendant sustained consequential damages that could not have been prevented by purchase of other grain, the evidence here did not satisfy the requirements for proof of lost profits.

In my opinion the finding of the trial court that the defendant did not introduce sufficient data to enable the jury to find the amount of damages with reasonable certainty was correct. I would remand the cause for a new trial on the counterclaim on the issue of damages.

KNOEFLER HONEY FARMS, A PARTNERSHIP, APPELLEE, V. COUNTY OF SHERMAN, STATE OF NEBRASKA, BOARD OF EQUALIZATION, APPELLANT.

243 N. W. 2d 760

Filed June 30, 1976. No. 40412.

1. **Constitutional Law: Taxation: Civil Rights.** The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.
2. ———: ———: ———. The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.

Appeal from the District Court for Sherman County: S. S. SIDNER, Judge. Affirmed.

Frederick R. King, for appellant.

Robert F. Martin, for appellee.

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

McCOWN, J.

This action involves the assessment of a personal property tax by Sherman County, Nebraska, on certain colonies of honey bees brought into the State of Nebraska after January 1 but before July 1 of 1972. The progenitors of these colonies of honey bees had been previously taxed for the year 1972 in the State of California. Plaintiff, Knoefler Honey Farms, appealed to the District Court from the action of the Board of Equalization of Sherman County adding these colonies to the plaintiff's assessment. The District Court found that the assessment was illegal and directed the county assessor to remove the colonies of honey bees from the tax rolls. Sherman County has appealed.

The taxpayer, Knoefler Honey Farms, a partnership, operates honey farms for the production of honey and beeswax in the States of Nebraska and California. The taxpayer owned colonies or hives of honey bees in both states at various times. In the fall of 1971, at the end of the season in Nebraska, in accordance with its customary practice, the taxpayer retained 252 colonies of bees in Nebraska for the winter, transported approximately 800 colonies to California, and destroyed the balance of the colonies after harvesting the honey. The taxpayer reported the 252 colonies of bees for assessment in Sherman County, Nebraska, on the tax day of January 1, 1972. On March 1, 1972, the tax day in California, the taxpayer reported the 800 colonies of bees for assessment in that state, and thereafter paid the taxes due in that state for the year 1972.

A colony or hive of honey bees, for purposes here involved, consists of a queen bee and a group of living worker bees, regardless of the number of workers. The life span of the worker bees is 8 weeks, except during dormancy in the winter season. The life span of a queen bee is approximately 2 years. The queen lays approximately 1,000 eggs per day. While the bees are active, additional colonies are produced by the introduction of new queens. New queens are produced in a 2-week period from queen cells. For all practical purposes, at the end of any 8-week period of time the worker bees comprising a colony will be a completely different group of worker bees and only the queen survives.

The Nebraska colonies were dormant through the winter. Between January 1 and July 1 the number of those colonies increased by 750 additional colonies through a process of culling, dividing, and introducing new queens. In California meanwhile, the 800 colonies assessed on March 1, 1972, were divided shortly thereafter to make 4,800 colonies which were then brought to Nebraska. Of these, 1,365 were brought into Sherman County. As of July 1, 1972, the taxpayer reported to

the ASCS office that it had on hand in Sherman County as of that date 2,377 colonies of honey bees. When the assessor learned of the additional number of colonies above those reported on January 1, 2,124 colonies were added to the taxpayer's assessment as omitted property. The Sherman County Board of Equalization over taxpayer's protest, confirmed the assessment. The taxpayer appealed to the District Court and the District Court determined that the assessment of the 2,124 colonies, which represented the increase from the progenitor seed colonies previously taxed in Nebraska and California for the year 1972, was illegal, and directed the county assessor to remove the colonies from the tax rolls. Sherman County has appealed only from that part of the judgment which involves the 1,365 colonies of bees brought into Sherman County from California between January 1 and July 1, 1972.

Sherman County contends that under Nebraska statutes, where living creatures have been taxed as property in another state for the tax year involved and produce offspring, progeny, or descendants in that state which are brought into Nebraska before July 1, such increase must be added to the personal property assessment rolls in Nebraska and taxed in this state. The county relies on the provisions of section 77-1211, R. R. S. 1943. That section provides in part: "* * * when any person shall bring personal property into the state * * * after 12:01 a.m. on January 1 and prior to July 1 in any year, it shall be the duty of the owner to list and return such property for taxation that year, unless he shall show to the county assessor * * * under oath and by producing a copy of the assessment duly certified to * * * that the property has been listed for taxation for that year * * * in some other state or territory of the United States, * * *."

The county first argues that the copy of the California assessment was not duly certified as required, nor was it under oath, and, therefore, the taxpayer is not entitled

to have the property removed from the assessment. In this case exhibit 4 consisted of the California property tax statement and a canceled check of the taxpayer in payment of it. In addition, a partner of the taxpayer testified that the 800 colonies of honey bees were all the bees owned by taxpayer in California on the tax day, and that all the colonies of bees which the taxpayer brought into Nebraska were the product of those 800 colonies taxed in California.

Although there was no certified copy of the California assessment, the attorneys agreed that the assessment had been authenticated by telephone, and the county attorney advised the court that the exhibit was a true copy of the document on file in California. While the specified statutory method for proving that the property had been listed for taxation in California for that year was not literally followed, there was substantial compliance. The critical issue was whether or not the 800 colonies had been listed for taxation in California for 1972. The taxpayer had the burden of proving that issue and the evidence established that fact without contradiction.

The county's position rests on the contention that section 77-1211, R. R. S. 1943, mandates the taxation of the colonies of bees involved here. Certain evidentiary facts here are of primary importance in determining whether that statute authorizes or mandates the assessment made here. The administrator of the property tax division of the Department of Revenue of the State of Nebraska testified by deposition that it was the custom and practice in the State of Nebraska, with no exceptions that he knew of, that no livestock born within Nebraska after the 1st day of January (the tax date) is subject to assessment for tax purposes for that year. He also testified that livestock born after January 1 and brought into the state before July 1 are not assessed, and that these customs, usages, and practices have been in effect since 1922. The administrator also testified that in his opinion bees brought into Nebraska between January 1,

1972, and July 1, 1972, should be treated the same for assessment and taxation purposes as livestock. In substance, the evidence is uncontradicted that, at least when the progenitors of living creatures have been assessed for personal property taxes in Nebraska or any other state for a given tax year, their progeny or offspring, born, hatched, or brought into existence after the tax day, have not been in the past, and are not now, assessed for personal property taxation by any counties or the State of Nebraska. The Nebraska property tax manual provides that "hives of bees are to be assessed in the taxing district in which they are located on January 1 of each year."

Article VIII, section 1, Constitution of Nebraska, provides, among other things: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises * * * (except motor vehicles). * * * The Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation and may further provide for reciprocal and proportionate taxation of livestock for livestock located in this state for only part of a year."

So far as the evidence here is concerned, the plaintiff is the only taxpayer against whom Sherman County is attempting to enforce its interpretation of section 77-1211, R. R. S. 1943. Intentional and arbitrary discrimination against the property of one Nebraska taxpayer, while all other like property was systematically assessed at a much lower valuation, was held to be a violation of equal protection of the laws in Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340. The Supreme Court in that case stated again: " 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " The Supreme Court held that it was

the right of a taxpayer, whose property alone was taxed at 100 percent of its true value, to have his assessment reduced to the percentage of value at which others were taxed, even though that was a departure from the requirement of the statute.

In Township of Hillsborough v. Cromwell, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358, the Supreme Court said: "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment."

In the case before us, the evidence is clear that the assessment against the colonies of honey bees involved here was arbitrary and discriminatory, and that Sherman County's interpretation of section 77-1211, R. R. S. 1943, was not enforced against other taxpayers owning property of the same type, class, and character. We find no reasonable distinction for tangible personal property tax purposes between livestock and honey bees or other living creatures owned and used for commercial purposes.

The statutes of Nebraska, and particularly the language of section 77-1212, R. R. S. 1943, make it clear that the Legislature intended that personal property, properly assessed and held for taxes for that year in another state, and moved or brought into Nebraska before July 1, should not be assessed again for taxes for that year. Colonies of honey bees which were not in existence on January 1 which are brought into Nebraska from another state before July 1 are not subject to personal property tax assessment in Nebraska under section 77-1211, R. R. S. 1943, where their progenitors were listed and assessed for taxation for that year in another state.

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

AFFIRMED.

NEWTON, J., concurs in the result.

FRANK STETINA, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLEE.
243 N. W. 2d 341

Filed June 30, 1976. No. 40473.

1. **Insurance: Subrogation.** Generally, no right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.
2. ———: ———. An insurer may be subrogated to its insured's claim against a third party who tortuously causes the loss, but no subrogation exists against the insured or coinsured whose negligence caused the loss.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded.

M. J. Bruckner and Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, for appellant.

Healey, Healey, Brown & Wieland, for appellee.

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

WHITE, C. J.

This case involves an action to recover medical payments coverage under two policies of insurance issued by the defendant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as State Farm), to the plaintiff in the total amount of $10,000. After the plaintiff had filed his amended petition, the defendant demurred. Defendant subsequently withdrew its demurrer and filed an answer to the plaintiff's petition. The defendant then moved for summary judgment. The District Court sustained defendant's motion for summary judgment and overruled the plaintiff's motion for a new trial. The plaintiff now appeals. For the reasons stated below, we reverse the judgment of the District Court.

The facts giving rise to this case are not in dispute.

On October 20, 1973, the plaintiff's daughter, Diane Stetina, a 17-year-old high school student, was involved in an automobile accident. The car in which she was a passenger was struck by another vehicle driven by Vera Lusins. As a result of this accident, Diane was severely injured. The plaintiff, Diane's father, had incurred as of the date of filing the amended petition, about $17,800 in medical expenses.

At the time of Diane's accident, the plaintiff, Frank Stetina, had in full force and effect two policies of insurance duly issued by the defendant State Farm. Each of the two policies carried medical payments coverage in the amount of $5,000. The defendant State Farm also provided, at the time of Diane's accident, liability coverage and protection to Vera Lusins and her husband in the amount of $50,000 for bodily injury to one person.

After negotiations between the plaintiff's attorneys and James Purdy, State Farm's agent and employee, a settlement of $50,000 in satisfaction of all the claims of Diane and her parents against the Lusinses was reached. As part of this agreement, Frank Stetina, either individually as the parent of Diane or on her behalf as guardian, entered into covenant not to sue the Lusinses.

Following this settlement, medical bills incurred on behalf of Diane were presented to defendant State Farm and a demand was made for payment of the $10,000 in medical payments coverage under Frank Stetina's policies with defendant State Farm. The claim of Frank Stetina was denied by State Farm, and this suit followed.

The District Court found that the plaintiff, by entering into the covenant not to sue the Lusinses, violated the provisions of the insurance policies the plaintiff had with State Farm, and that as a result, the plaintiff's right to recover medical payments was extinguished.

The plaintiff's policies with the defendant provided that the defendant would not be liable for coverage: "2. (a) Unless as a condition precedent thereto there

shall have been full compliance with all terms of this policy."

Relevent terms of the plaintiff's policies are as follows: "3. Assistance and Cooperation of the Insured. The insured shall cooperate with the company, and upon its request, attend hearings and trials, assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such first aid to others as shall be imperative at the time of accident.

"4. Subrogation. Upon payment under this policy, * * * the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall do whatever is necessary to secure such rights and do nothing to prejudice them.

"Upon payment under coverages C and M of this policy the company shall be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights."

The defendant's position, which the District Court adopted, is that the plaintiff, by executing a covenant not to sue the Lusinses, destroyed the defendant's right of subrogation against the tort-feasor in violation of the terms of the policies, and consequently the plaintiff was precluded from recovery under the policy.

The plaintiff takes the position that the defendant possessed no right of subrogation against the tort-feasor, Mrs. Lusins, because Mrs. Lusins was the defendant's insured. Therefore, it is argued that plaintiff's execu-

tion of the covenant not to sue the Lusinses could not destroy or prejudice nonexisting subrogation rights, and thus the plaintiff did not violate any provisions of his policies with the defendant so as to be precluded from recovery under the policies.

Both sides agree that in the case where the tort-feasor is either uninsured or else insured by a different insurer, a general release, covenant not to sue, or similar agreement given to the tort-feasor by the insured destroys and prejudices the insurer's right of subrogation against the tort-feasor and consequently releases the insurer from liability to the insured. A recent Nebraska application of this rule is found in Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975). That case involved the plaintiff's attempt to recover from the insurance carrier under uninsured motorist coverage for injuries which the plaintiff sustained when a car in which she was riding was struck by one Mills, an uninsured driver. The plaintiff brought suit against Mills and judgment was entered against Mills after the plaintiff had executed a covenant not to levy on any property of Mills. Thereafter the plaintiff pursued settlement with the insurance carrier, who was willing to settle on the basis of a trust agreement providing for the company's right of action against Mills, but withdrew the settlement offer when it discovered the existence of the covenant not to levy. This court held that the execution of the covenant not to levy on the plaintiff interfered with the insurer's subrogation rights and precluded any right to seek recovery under the policy.

In Bernardini v. Home & Auto. Ins. Co., 64 Ill. App. 2d 465, 212 N. E. 2d 499 (1965), the plaintiffs sought to recover, under their policy, reasonable medical expenses incurred by them as the result of an automobile accident. Their insurance policy contained an express medical subrogation clause and a clause requiring the cooperation of the insured in relation thereto. The plain-

tiffs had settled with the tort-feasor and executed a general release in favor of the tort-feasor. The court held: "The violation by the plaintiffs of the valid subrogation clause precluded their right to recovery." See, also, DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224 (Fla. App., 1967); Foundation Reserve Ins. Co. v. Cody, 458 S. W. 2d 214 (Tex. Civ. App., 1970); Shipley v. Northwestern Mut. Ins. Co., 244 Ark. 1159, 428 S. W. 2d 268 (1968); Poynter v. Aetna Cas. & Sur. Co., 13 Mich. App. 125, 163 N. W. 2d 716 (1968).

The plaintiff seeks to escape application of the above-cited cases and principles to his case by pointing to the fact, that, in this case, the tort-feasor, Mrs. Lusins, was also insured by defendant State Farm. The defendant argues that this circumstance is a fortuitous one and should not dislodge application of the above-cited cases and principle to this case. Resolution of the question presented by the facts of this case, one of first impression in this jurisdiction, requires a review of relevant and analogous authorities.

Midwest Lumber Co. v. Dwight E. Nelson Constr. Co., 188 Neb. 308, 196 N. W. 2d 377 (1972), involved a dispute between an owner and a contractor. Under the contract between the two, the contractor was to construct several buildings on the plaintiff owner's land. The contract also provided that the owner would secure builders' risk or fire and extended insurance coverage. The owner failed to procure such insurance covering the contractor. The owner sued the contractor to recover damages alleged to have been sustained when some of the building frame blew down during construction and had to be replaced. The damage was alleged to be the result of the contractor's negligence. This court held that the owner could not recover from the contractor: "An owner who contracts to procure insurance to cover the contractor and fails to do so is the insurer of the contractor. * * * The failure of the owner to cause the contractor to be named as an insured in accordance with the intent of

the parties as is implicit in the construction contract, causes the owner to become the insurer of the contractor. * * * The rights of a subrogated insurer can rise no higher than the rights of its insured against the third party. * * * An insurer cannot recover by right of subrogation from his own insured." (Citations omitted.)

Connor v. Thompson Constr. & Development Co., 166 N. W. 2d 109 (Iowa, 1969), was a case involving a similar factual situation. In that case the Supreme Court of Iowa also held that, " '* * * an insurer cannot recover by right of subrogation from his own insured.' " *Id.* at 113.

In 44 Am. Jur. 2d, Insurance, § 1820, p. 747, it is stated: "No right of subrogation exists where the wrongdoer is also an insured under the same policy." This principle is illustrated by several cases where the tort-feasor was a named insured within the terms of the insurance policy.

Graham v. Rockman, 504 P. 2d 1351 (Alaska, 1972), involved a suit by the owner, Rockman, of an airplane against Graham, who had rented the airplane from Rockman, for damages caused by Graham's alleged negligence while the airplane was in his possession. The trial judge found in favor of Rockman. On appeal, the Supreme Court of Alaska remanded the case for further proceedings. The court had this to say concerning one of Graham's contentions on appeal: "Graham maintains that he should be regarded as an 'additional insured' under the hull insurance carried by Rockman since use by rental pilots was covered in the policy. Accordingly, the insurance carrier would not be entitled to recover from Graham the amount which it paid to Rockman. It is well settled that an insurer cannot recover by means of subrogation against its own insured."

Miller v. Kujak, 4 Wis. 2d 80, 90 N. W. 2d 137 (1958), was a case arising out of a truck-automobile collision. Miller brought suit for damages sustained when the automobile which he was driving was struck from the

rear by a truck driven by Kujak. Named as defendants in the suit were Kujak, the tort-feasor; Moore Motor Freight Lines, the lessee of the truck; Dodson, Moore's liability insurer; and the owner of the truck. The court held: "Dodson's contention, which the trial court adopted, is that he insured only Moore Motor Freight Lines, and that if and when he pays Miller's judgment against Moore and himself, he will thereby become subrogated to Moore's and Miller's rights against the tort-feasor Kujak, whose negligence caused the damage * * *.

"This contention must fail, however, for the reason that the tort-feasor Kujak was an additional insured under the insurance policy issued by Dodson, and it is settled law in this state that an insurer cannot recover by right of subrogation from his own insured." *Id.* at 86.

In Traders & General Ins. Co. v. Pacific Employers Ins. Co., 130 Cal. App. 2d 158, 278 P. 2d 493 (1955), it was held that where the conditional vendor's liability policy was not restricted in coverage to the named insured, but included users with permission, the vendor's insurer was not entitled to subrogation against the user who was involved in an accident or against the user's liability insurer.

In Pendlebury v. Western Cas. & Sur. Co., 89 Idaho 456, 406 P. 2d 129 (1965) the Supreme Court of Idaho stated: "An insurer is not entitled to recovery by way of subrogation against an alleged wrongdoer who is protected by the policy. 46 C. J. S., Insurance, § 1209b(6), p. 165. This rule appears well supported by the authorities."

Two cases have been brought to our attention by the plaintiff involving factual situations closely on point with the facts of this case. We have carefully examined these cases and find them highly relevant to our disposition of this case.

Dupre v. Vidrine, 261 So. 2d 288 (La. App., 1972), involved a suit by Dupre, a physician, for medical serv-

ices rendered to Vidrine. Vidrine in turn brought in Southern Farm Bureau Casualty Insurance Company as a third-party defendant on the ground that he had a liability policy with Southern Farm which included medical payment coverage and that, under this, Southern Farm was liable for Dr. Dupre's bill. Vidrine had been involved in an automobile accident with Guillory, who was also insured for automobile liability by Southern Farm. Vidrine had settled with Guillory and had given him a written release in settlement of all claims against him and Southern Farm. Southern Farm, the third-party defendant, contended that Vidrine's release of the tort-feasor, Guillory, and his liability insurer destroyed Southern Farm's right of subrogation against the party responsible for the damages, and thereby extinguished Southern Farm's liability to Vidrine for medical payments. In rejecting Southern Farm's position, the court first cited cases recognizing the rule governing impairment of subrogation rights discussed *supra,* in situations where the tort-feasor is either uninsured or insured by a different insurance, and then commented: "These cases are distinguished from the present matter since they involved factual situations where the insured released a third-party tort feasor and a different insurer, thus defeating the subrogation rights of the defendant insurer. In the present case, the insurer which was released is the same as the insurer whose subrogations rights were allegedly defeated and the tort feasor is an insured of this same insurer. In effect, they are saying they should be discharged from liability because they have been deprived of a right of subrogation against themselves and their own insured. We fail to see how this can in any way be prejudicial to the defendant insurer." *Id.* at 290.

In that case, precisely in point, the court therefore rejected the same defense similarly made by State Farm on the ground that there were no subrogation rights to be prejudiced. We also observe, in passing, that the

issue of prevention of double recovery by denial of medical payments in the Dupre case was rejected. In the Dupre case, Southern Farm sought review by the Supreme Court of Louisiana which was denied with the express holding that there was "no error of law" in the Louisiana Court of Appeal decision. Dupre v. Vidrine, 262 La. 312, 263 So. 2d 48.

In a case not in point on the facts, the Louisiana Court of Appeal in a subsequent 1974 decision confirmed the Dupre case and perhaps clarified it. Norris v. Allstate Ins. Co. (La. App.) 293 So. 2d 918. It specifically discussed the Dupre case and stated as follows: "Unquestionably, Southern Farm Bureau could have been deemed bound with or for Guillory for tort damages, including medical payments. Southern Farm Bureau was also responsible for the medical expenses through its contract with Vidrine. Southern Farm Bureau's position was one of dual responsibility. Two obligations arose, one in tort as the result of Guillory's negligence, one in contract as the result of the contract of insurance. Payment of one did not discharge the other. Subrogation would not have taken place on payment of one obligation, since the co-existing obligation remained viable. *Where no subrogation exists, there can be no impairment of subrogation rights.*" (Emphasis supplied.)

The event giving rise to the litigation in Home Ins. Co. v. Pinski Bros., Inc., 160 Mont. 219, 500 P. 2d 945 (1972), was a boiler explosion at a hospital. Home Insurance Company paid $135,000 to the hospital and claimed subrogation to the rights of the hospital against those allegedly responsible for the explosion, including Pinski Brothers, the mechanical contractors, and the architects. The architects tendered defense of the suit to the Home Indemnity Company, a wholly owned subsidiary of plaintiff Home Insurance Company. It was stipulated that the two were one and the same corporate entity. The architects carried a comprehensive liability policy with Home Indemnity. Home Indemnity refused tender

of the defense. The architects then hired their own defense counsel, alleged their insurance policy with Home Indemnity as a defense, and sought recovery of their attorneys' fees. The District Court gave summary judgment to Home Insurance Company against the architects on all issues of insurance coverage. On first appeal to the Supreme Court of Montana, the court held that the alleged negligence of the architects was within the coverage of the architects' comprehensive liability policy with Home Indemnity and remanded the case to the District Court for further consideration of the issues raised for summary judgment. Following the first appeal, the architects moved for summary judgment. The District Court granted the architects' motion for summary judgment and Home Insurance Company appealed. On second appeal, the Supreme Court of Montana affirmed the granting of the architects' motion for summary judgment by the District Court. Finding the language and rationale of the court pertinent, we quote from the opinion at length: "There is yet a further and perhaps more cogent reason why summary judgment for the architects on Home's complaint against them is correct. Here, it is undisputed that the architects have insurance coverage to the extent of $25,000 under their Home Indemnity comprehensive liability policy; that Home Indemnity and Home Insurance are one and the same corporate entity; that *Home as a subrogated insurer of one of its policyholders* (The Deaconess Hospital) *has sued another of its policyholders* (the architects) *whom it has insured against the very liability for which it seeks recovery in Count I of its complaint in an amount in excess of the policy limits.*

"Subrogation is an equitable right. * * * Accordingly, certain equity principles apply in determining subrogation rights: One who seeks equity must do equity, * * *. One who seeks equity must come into court with clean hands, * * *. 'No one can take advantage of his own wrong.' * * *

"*To permit the insurer to sue its own insured* for a liability covered by the insurance policy would violate these basic equity principles, *as well as violate sound public policy.* Such action, if permitted, would (1) allow the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against; (2) give judicial sanction to the breach of the insurance policy by the insurer; (3) *permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation action against its own insured;* (4) allow the insurer to take advantage of its conduct and *conflict of interest with its insured;* and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured.

"No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. 16 Couch on Insurance 2d, § 61:133; see also 46 C. J. S. Insurance § 1209(b); 16 Couch on Insurance 2d, § 61:136. This principle is succinctly stated in *Chenoweth Motor Co. v. Cotton,* 2 Ohio Misc. 123, 207 N. E. 2d 412, 413:

" '* * * it is axiomatic that [an insurance company] has no subrogation rights against the negligence of its own insured.' (Bracketed material paraphrased.)

"To allow subrogation under such circumstances would permit an insurer, in effect, to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased. 2 Richards on Insurance, § 185, states the same principle in this language:

" 'An insurer clearly may be subrogated to its insured's claim against a third party who tortuously causes the loss, but no subrogation exists against the insured or co-insured whose negligence caused the loss.'

"For the foregoing reasons, we hold summary judg-

ment in favor of the architects on Home's subrogation complaint against them is correct and is hereby affirmed." (Emphasis supplied.) *Id.* at 225, 226.

In light of the above authorities and of considerations of public policy we hold that under the circumstances of this case, the defendant State Farm had no right of subrogation against the tort-feasor, Mrs. Lusins. Since State Farm possessed no right of subrogation against Mrs. Lusins, the execution of the covenants not to sue the Lusinses by the plaintiff could not have harmed or prejudiced State Farm. "Where no subrogation exists there can be no impairment of subrogation rights." Norris v. Allstate Ins. Co., 293 So. 2d 918 (La. App., 1974). Consequently State Farm's defense to the present action based upon violation of the policy provisions dealing with subrogation and cooperation must fail. It was error to grant defendant's motion for summary judgment.

The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

DIAMOND MATCH DIVISION OF DIAMOND INTERNATIONAL CORPORATION, A CORPORATION, APPELLANT, V. ABRAHAM M. BERNSTEIN, ALSO KNOWN AS "BUD" BERNSTEIN, APPELLEE.

243 N. W. 2d 764

Filed July 7, 1976. No. 40483.

1. **Contracts: Conflict of Laws.** A general rule in this jurisdiction is that a contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens.
2. **Contracts: Injunction.** The laws of the State of New York, like those of the State of Nebraska, provide for the enforcement of reasonable contracts in restraint of trade by injunction when necessary to protect the interests of a former employer.
3. **Contracts.** A restrictive covenant will not be enforced where

the effect would be to protect plaintiff from ordinary competition rather than to protect plaintiff's business against competition by improper and unfair methods.

4. **Contracts: Restraint of Trade.** In Nebraska there are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.
5. **Contracts: Trial: Injunction: Restraint of Trade.** Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services.

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

Frost & Meyers, for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellee.

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

NEWTON, J.

In this action plaintiff prays for an order restraining defendant for a period of 2 years from accepting orders for products or services similar to those dealt in by plaintiff from any customer of plaintiff in the territory in which defendant was employed by plaintiff. Judgment was entered for defendant in the District Court. We affirm.

Plaintiff employed defendant for a period of about 6½ years as a salesman of book matches with accompanying advertising. Plaintiff also handled hundreds of other products but they were not sold by defendant. Defendant's territory comprised Nebraska, the western half of South Dakota, and about three-fourths of Iowa. At least 60 percent of the business was done through

jobbers in the area and the balance by direct sales to large banks and other institutions. The match book business is a highly competitive one with about 11 other firms in the field. It is not contended that plaintiff's customers were exclusive customers as they may well have been dealing with other firms also.

Defendant had received 2 days training in the field. He was not cognizant of any trade secrets and had only common knowledge as to jobbers, other prospective customers, and prices, which information was also available to competitors. He did know these people and who the customers were that he had dealt with successfully for plaintiff. Plaintiff's evidence indicated that it classed as customers only those it had billed during the past year, approximately 75. Business depended on the initiative and industry of the salesmen. There is a substantial turnover in salesmen.

The parties had entered into a restrictive employment agreement. Either party could terminate defendant's employment by giving notice. On termination by either party, defendant was not to solicit orders for products similar to those sold by plaintiff in his former sales territory for a period of 2 years. The agreement provided it was to be governed by the laws of the State of New York and if any provision should be held invalid, it would not affect the validity of other provisions. The evidence does not reveal where the agreement was entered into but its performance was limited to the defendant's sales territory and his residence was in Nebraska.

Defendant's employment with plaintiff was terminated on March 24, 1975. Defendant had on that date mailed a letter of resignation, effective March 28, 1975, to his district sales manager and on meeting him later that day, gave him a copy of it. Defendant's resignation was accepted on the spot and his employment terminated. Defendant is now employed by a competitor.

Plaintiff urges that we determine this case on the basis of New York law. We can see little, if any, dif-

ference between the laws of the two states regarding this field. Contracts in restraint of trade must conform to the public policy of the State of Nebraska when executed or to be performed in this state and must comply with the laws of this state. "A general rule in this jurisdiction is that a contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens." Dunlop Tire & Rubber Corp. v. Ryan, 171 Neb. 820, 108 N. W. 2d 84.

The laws of the State of New York, like those of the State of Nebraska, provide for the enforcement of reasonable contracts in restraint of trade by injunction when necessary to protect the interests of a former employer. See, Bates Chevrolet Corp. v. Haven Chevrolet, Inc., 213 N. Y. S. 2d 577, 13 App. Div. 2d 27; Personal Finance Co. v. Hynes, 130 Neb. 547, 265 N. W. 541; Securities Acceptance Corp. v. Brown, 171 Neb. 406, 106 N. W. 2d 456.

The laws of the State of New York further provide that: "Restrictive covenant will not be enforced where effect would be to protect plaintiff from ordinary competition rather than to protect plaintiff's business against competition by improper and unfair methods." Triple D & E, Inc. v. Van Buren, 339 N. Y. S. 2d 821, 72 Misc. 2d 569. See, also, Rochelle v. Amendola, 204 N. Y. S. 2d 937, 11 App. Div. 2d 786; Jaymar's, Inc. v. Schwartz, 235 N. Y. S. 2d 449, 37 Misc. 2d 314.

In Securities Acceptance Corp. v. Brown, *supra,* we have held: "There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is

not unduly harsh and oppressive on the employee. * * *

"Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services."

In the present instance there would not appear to be any objection to application of the laws of New York. It is conceded that the business of plaintiff is a highly competitive one involving numerous salesmen for other companies calling on and selling to the same set of customers; no trade secrets are involved and customer lists and prices are known to all competitors; no unusual training is required and there is a substantial turnover of salesmen; and, finally, the defendant has no unusual talents but is simply a hard worker. If defendant was not employed by a competitor, some other salesman with presumably equal ability would be. To restrict the defendant's right to such employment would work a hardship on him, would not protect plaintiff against unfair or improper competition, and apparently would not even serve to restrict its ordinary competition. As stated in Securities Acceptance Corp. v. Brown, *supra,* the burden is upon the plaintiff to establish the necessity for a restraint on the inherent right to perform personal services. We find that such necessity has not been demonstrated.

The judgment of the District Court is affirmed.

AFFIRMED.

SPENCER-O'NEILL HOUSE, INC., APPELLEE, V. DONALD E. DENBECK ET AL., APPELLANTS.

243 N. W. 2d 767

Filed July 7, 1976. No. 40512.

1. **Contracts: Intent.** Where a contract is ambiguous, the court

must determine the intent of the parties and resolve the ambiguity to give effect to that intent.

2. ———: ———. Where a contract is a typed one, writing in longhand in the contract subsequent to the typing controls the typed provisions of the contract where there is a conflict between the typed and the written portions of the instrument.

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

Magnuson & Magnuson, for appellants.

Ronald D. Olberding, for appellee.

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

SPENCER, J.

This action is to collect the taxes for January 1970 on property purchased by the plaintiff-appellee from the defendants-appellants. The action was tried to the court which rendered judgment for the plaintiff. We affirm.

Three individuals entered into a contract to buy the Town House Inn, a Best Western franchise located in O'Neill, Nebraska, with the understanding that a corporation which they intended to form and in which they would be stockholders would be the buyer. The original agreement provided for a possession date of January 1, 1970. It also provided, under the general heading "Taxes," as follows: "Sellers agree to pay the 1969 real estate and personal property taxes. Buyers agree to assume and pay before the same become delinquent, all real estate, personal property and other taxes which may be assessed and levied upon any of the assets of this business for the year 1970 and all subsequent years."

Under the heading "Covenants of the Buyers" it provided as follows: "Buyers further agree that they will pay all real estate and personal taxes to be assessed and levied on said property commencing with the year 1970 and for all subsequent years, and that they will pay the

various installments thereof before the same become delinquent."

The prospective buyers notified the defendants the contract was unacceptable because it was impossible for them to take over the motel on the first day of January. The contract was then changed by interlineation. These interlineations were initialed by all the parties. The record is not clear as to whether these interlineations were made before or after the contract was executed by all the parties. This point, however, is immaterial because the parties agree on what changes were made but disagree on the interpretation to be placed on them.

The contract was changed by providing for a possession date of February 1, 1970. The provision on taxes under the heading "Covenants of the Buyers" was changed to read: "Buyers further agree that they will pay all real estate and personal taxes to be assessed and levied on said property commencing with Feb. 1, 1970 * * *." The only change made was to substitute "Feb. 1" for the words "with the year." The other provision quoted above on taxes was not changed in any way. There are therefore two inconsistent provisions on the payment of the 1970 taxes in the contract.

This action is brought by the plaintiff-corporation as the assignee of the individuals who executed the contract as buyers. In 1971, plaintiff became aware that the 1968 and 1969 taxes were unpaid. Several demands were made on the defendants to pay the taxes for which the property had been sold on tax sale certificates. In early 1972, the plaintiff tendered a check to the county treasurer for the full amount of all delinquent taxes, including those for 1970. It was then advised that the defendants had redeemed the 1968 and 1969 tax sale certificates so the plaintiff paid the 1970 taxes. Plaintiff, through its attorney, then renewed its demand on the defendants for the payment of the January 1970 taxes.

Defendants refused to pay the January 1970 taxes,

insisting the agreement made provided only for the payment of taxes through 1969. Plaintiff contends when the possession date was changed the buyers' obligation for the payment of 1970 taxes was also changed to require defendants to pay taxes for the month of January 1970.

Defendants set out 10 assignments of error. None of them have merit. We discuss only those pertinent to this appeal.

The trial court found the contract to be ambiguous and determined the intent of the parties to be taxes should be paid by the seller until possession was delivered to the buyers. There is indeed a patent ambiguity readily apparent on the face of the instrument. Where a contract is ambiguous, the court must determine the intent of the parties and resolve the ambiguity to give effect to that intent. Knight Bros., Inc. v. State (1972), 189 Neb. 64, 199 N. W. 2d 720. The ambiguity herein can be resolved by resort to well-recognized rules of construction.

Section 25-1216, R. R. S. 1943, provides when an instrument consists partly of written and partly of printed form, the former controls the latter where the two are inconsistent.

Writings in longhand in a contract control printed portions of such contract where there is a conflict between the printed and the written portions of the instrument. Nebraska Wesleyan University v. Estate of Couch (1960), 170 Neb. 518, 103 N. W. 2d 274.

Typewriting is writing within the contemplation of the statute providing that when an instrument consists partly of written and partly of printed form, the writing controls the printed form where the two are inconsistent. Flower v. Coe (1923), 111 Neb. 296, 196 N. W. 139.

Where, however, the contract is a typed one, as in the instant case, writing in longhand in the contract subsequent to the typing controls the typed provisions of the

contract where there is a conflict between the typed and the written portions of the instrument.

There is no question the longhand writing was inserted with the consent of all participants after the contract was typed, and on the record possibly before it was fully executed. The sale was contingent upon the parties securing a Best Western franchise and getting a liquor license. The evidence is undisputed, the buyers insisted on an extension to February 1 to permit them to secure a liquor license and a manager for the business. It is apparent to us the longhand interlineations which were intended to delay the transfer of possession until February 1 were intended to make the sale effective as of that time. Defendants were liable for all expenses and received all profits to that date. We agree with the trial court, the sellers who had the benefit of possession are required to pay the taxes for the month of January 1970. The failure to change the tax provision in both places was an obvious oversight, but the intention can be readily determined from the contract itself.

Donald Denbeck, one of the defendants, testified he changed the date of possession to February 1, 1970, at the request of the buyers but that everything else in the contract was to remain the same. Defendants contend that by paying the 1970 tax in full the plaintiff interpreted the contract contrary to its present position and that interpretation should be controlling. There is no merit to this contention. Plaintiff did not pay the 1970 tax until 1972 because it could not get the defendants to pay the 1968 and 1969 taxes prior to that time. It is a matter of common knowledge a county treasurer will not accept payment of taxes for any year unless taxes for all prior years are paid. Nor will the treasurer accept a partial payment of taxes for less than one-half a year. In any event, the then attorney for the plaintiff testified that previous to payment and tender of payment he made several demands on the defendants for the payment of the January 1970 tax. This evidence

is undisputed. This fact issue, if material, was resolved against the defendants and in our judgment correctly.

Defendants further contend the court erred in assessing the interest penalty on the 1970 taxes paid by the plaintiff against them. We disagree. As set out heretofore, it was not possible for the plaintiff to pay the 1970 taxes until the defendants had paid the taxes for the previous years. The property had been purchased by some third party on tax sale certificates. When it became apparent to plaintiff that defendants were not redeeming the tax sale certificates and paying the taxes for the previous years, the plaintiff, to mitigate its damages, tendered a check for the full amount of all delinquent taxes. It was then plaintiff discovered defendants had very recently paid the prior taxes. Plaintiff immediately paid the 1970 tax.

There is no merit to any of the defendants' assignments. It is very apparent defendants were attempting to take advantage of an omission to fully interline the contract to express the intent of the parties. There is no question as to the intent of the parties at the time of the interlineation. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. AMERICAN THEATRE CORPORATION, A NEBRASKA CORPORATION, DOING BUSINESS AS PUSSY CAT THEATRE, APPELLANT.

244 N. W. 2d 56

Filed July 7, 1976. No. 40513.

1. **Criminal Law: Obscenity.** The publications involved herein are clearly embraced within the test of obscenity delineated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419.
2. **Criminal Law: Obscenity: Intent.** Where the covers of the magazines, front and back, are occupied with pictures of nude

individuals engaged in sexual acts or prominently displaying their genitals, it can hardly be said the jury could not infer knowledge of their contents by the defendant and its intent to sell obscene materials.

3. **Criminal Law: Obscenity: Intent: Words and Phrases.** By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law.
4. **Criminal Law: Obscenity: Intent: Words and Phrases: Constitutional Law.** The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Robert Eugene Smith, Gilbert H. Deitch, Michael Clutter, and Stern, Harris, Feldman, Becker & Thompson, for appellant.

Paul L. Douglas, Attorney General, Herbert M. Fitle, and Gary P. Bucchino, for appellee.

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

SPENCER, J.

Defendant-appellant appealed its conviction after a jury trial in the municipal court of Omaha of distributing obscene materials at the Pussy Cat Theatre in Omaha, Nebraska. Appeal on the record to the District Court resulted in an affirmance. Defendant now appeals to this court. We affirm.

This case involves seven counts of distributing obscene materials. Seven different publications are involved. The testimony established the alleged offenses occurred between April 7 and April 10, 1975. The publications were wrapped in clear cellophane, so that it was impossible to page through them. Their covers were open to view to prospective purchasers. Both covers in all vol-

umes depicted sexual acts as well as displaying the genitals of the persons involved.

The books have titles which in themselves may be calculated to appeal to the prurient interest. They are as follows: "Cum Crazy"; "Meat People"; "She Couldn't Believe She Ate the Whole Thing"; "Stick Together"; "Aroused Mates"; "Double Stick"; and "Mom's Taste for Cock."

"Cum Crazy" depicts acts of sexual intercourse, masturbation, fellatio, and cunnilingus.

"Meat People" contains pictures of intercourse, fellatio, and cunnilingus. The written matter is a discussion of adultery and sexual self-realization.

"She Couldn't Believe She Ate the Whole Thing" depicts masturbation, lesbian foreplay, intercourse, fellatio, and cunnilingus. The written matter contains a discussion of lesbianism, incest, and suburban "swinging."

"Stick Together" depicts various acts of homosexual masturbation, fellatio, and sodomy. The written material is a discussion of homosexual acts.

"Aroused Mates" pictures intercourse, fellatio, and cunnilingus. The text purports to be a history of fornication and adultery law, with citations from sex studies and the case law of several states.

"Double Stick" pictures acts of homosexual fellatio and sodomy. The written matter is a narrative of a homosexual Kansan who is on a visit to the west coast.

"Mom's Taste for Cock," a paperback book, contains several pictures of sexual intercourse, fellatio, and cunnilingus. The written material is an explicit narrative of a woman's sexual experiences with men, women, children, and a dog. The language is offensive. The text is obscene to the point of depravity.

In every instance the pictures have little or no connection with the text material. There is no attempt in any way to relate the pictures to the text. In most instances the pictures do not even relate to the sexual acts referred to in the text.

Defendant alleges five assignments of error. The fifth assignment is in three parts. Only two assignments are discussed in the briefs. Pursuant to our rules, we consider only those argued by the defendant in its brief. Rule 8a(3), Revised Rules of the Supreme Court, 1974.

Defendant first argues that the publications are not as a matter of applicable constitutional law obscene and are protected expression under the First and Fourteenth Amendments to the United States Constitution. We are in complete disagreement with defendant's contention.

Every one of the publications involved herein is clearly embraced within the test of obscenity delineated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. The average person applying contemporary community standards would find that each magazine taken separately appeals to the prurient interest. Each of them depicts or describes in a patently offensive way sexual conduct specifically covered by our state law as authoritatively construed.

Even a casual review of each publication is sufficient to indicate that it was not intended to promote and definitely lacks any serious literary, artistic, political, or scientific value. Actually, each of them is utterly without redeeming social value, if such a test were still necessary.

Each of the publications is embraced within one of the two suggested standards enunciated in Miller. They either contain patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or there is a patently offensive representation or description of masturbation, excretory functions, and lewd exhibition of genitals. If there is any serious literary, artistic, political, or scientific value in any of the seven publications, we are unable to find it. This, at the very least, is a minimum requirement to merit First Amendment protection. We have no hesi-

tancy in finding every one of the publications obscene as a matter of law.

Defendant's second argument is directed to an alleged insufficiency as a matter of law to establish the element of scienter, to the minimum constitutional standards enunciated in Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590.

Defendant, in support of this contention, quotes the following from Hamling v. United States, *supra*: " 'We think the "knowingly" language of 18 U. S. C. § 1461 and the instructions given by the District Court in this case satisfy the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributes, and he knew the character and nature of the materials.' "

We would add the next two sentences following the material quoted: "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U. S. C. § 1461 or by the Constitution."

Here the defendant is a corporation so the knowledge must necessarily be that of its officers and employees. The police officers testified that the materials in question were enclosed in clear plastic covers and displayed on the shelves at defendant's place of business. One could not page through the magazines but could see the covers. As suggested heretofore, these covers portrayed specific sexual acts and prominently displayed the genitals of the participants. Anyone looking at the front and back covers of the publications, particularly in light of the titles given to the publications, would be readily apprised that the contents of the magazines were obscene.

The following from State v. American Theater Corp. (1975), 193 Neb. 289, 227 N. W. 2d 390, a case involving

this same defendant, is pertinent herein: "We said in State v. Jungclaus (1964), 176 Neb. 641, 126 N. W. 2d 858: 'A seller of magazines and phonograph records is ordinarily presumed to know what he is offering for sale, although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every isolated obscene statement in the hundreds of books that he had for sale. But in a situation, as here, where the covers of the magazines, front and back, are occupied with pictures of nude women in various poses (in the instant case individuals engaged in sexual acts or prominently displaying their genitals), it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials.' Though the standard for judging obscene materials has altered somewhat since the ruling in Jungclaus, we feel that the inference with regard to the knowledge of the contents of the material found in the defendant's possession, considering its nature, the manner of its display and sale, is still a proper one."

Section 28-926.17, R. S. Supp., 1974, provides in part as follows: "(1) Any person who *knowingly* * * * (b) publishes, circulates, sells * * * or distributes or exhibits any obscene material * * * shall, upon conviction thereof, be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment." (Emphasis added.)

By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law. Section 28-926.11 (4), R. S. Supp., 1975, specifically defines the word "knowingly" to mean: "Knowingly shall mean having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or the character and content of any material, taken as a whole, described in this section, which is reasonably susceptible to examination by the defendant; * * *."

The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States, *supra,* and we have no question that it was present in this case.

A review of the facts herein is sufficient to show that the factual details have not changed since defendant's appeal in State v. American Theater Corp. (1975), 193 Neb. 289, 227 N. W. 2d 390. In fact, a review of the exhibits herein indicates that the defendant has reached new depths of depravity since that case. They are in fact the most obscene we have been called upon to review. If they are not hard-core pornography as repeatedly described by the United States Supreme Court, we are at a loss to know what pornography is. The publications are obscene whether we use the Miller test or the Roth-Memoirs test. As suggested before, even applying the pre-Miller test, they are utterly without redeeming social value.

Defendant's assignments of error are definitely without merit. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. AMERICAN THEATRE CORPORATION, A NEBRASKA CORPORATION, DOING BUSINESS AS PUSSY CAT THEATRE, APPELLANT.

244 N. W. 2d 59

Filed July 7, 1976. No. 40514.

1. **Criminal Law: Obscenity.** We find both films, "The Cunning Stunt," and "Bang Bash," to be hard-core pornography and obscene under the tests enunciated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419.
2. **Criminal Law: Obscenity: Intent: Words and Phrases.** By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law.
3. **Criminal Law: Obscenity: Intent: Words and Phrases: Constitutional Law.** The word "knowingly" as used in the Nebraska

statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590.

4. **Criminal Law: Obscenity.** The result in this case is governed by our opinion in State v. Little Art Corp. (1973), 189 Neb. 681, 204 N. W. 2d 574.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Robert Eugene Smith, Gilbert H. Deitch, Michael Clutter, and Stern, Harris, Feldman, Becker & Thompson, for appellant.

Paul L. Douglas, Attorney General, Herbert M. Fitle, and Gary P. Bucchino, for appellee.

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

SPENCER, J.

Defendant-appellant, a corporation, operates the Pussy Cat Theatre in Omaha. It was convicted in the municipal court under section 28-926.17(1), R. S. Supp., 1974, with distribution of obscene material. It appealed on the record to the District Court where the conviction was affirmed. Defendant now appeals to this court. We affirm.

The offense occurred on January 21, 1975, when members of the Omaha police department observed two motion pictures titled "The Cunning Stunt," and "Bang Bash," being exhibited at the Pussy Cat Theatre.

"Bang Bash" purports to be a film of bedroom events at a cocktail party. It depicts lesbian and heterosexual cunnilingus, fellatio, and intercourse. The scenes contain very limited dialogue. The scenes of different acts are interspersed to indicate that all the activities are taking place at the same time. The film portrays the genitals of the actors in the course of the various sexual acts as well as portraying several discharges of excretory substance.

"The Cunning Stunt" involves a thinly veiled attempt of a husband passing himself off as his twin brother. He has sexual relations with his alleged twin brother's alleged wife in his own home during the time he is supposed to be at work. His wife invites two other couples over to meet his alleged twin brother. The alleged twin brother has disappeared by the time the husband allegedly returns from work. The three couples then engage in various types of sexual activity, involving heterosexual cunnilingus, fellatio, and intercourse, as well as three-way sexual acts. One of the couples demonstrates many different sexual positions. Here again, the scenes of the different acts are interspersed to indicate that all the activities are taking place at the same time. The film contains closeups of the genital and excretory fluids of the actors in the course of the various sexual acts. The scenes contain very limited dialogue, and if there is a purpose to the film other than to appeal to prurient interests by depicting sexual activity, we are unable to find it.

Defendant alleges five assignments of error, the fifth of which is divided into three parts. However, the defendant has seen fit to argue only two assignments of error in its brief. Under our rules we consider only the assignments discussed in the brief. Rule 8a(3), Revised Rules of the Supreme Court, 1974.

Defendant first argues that the films as a matter of applicable constitutional law are not obscene and are protected expression under the First and Fourteenth Amendments to the United States Constitution. There is no merit to this contention. They are definitely obscene and are not protected expression under the United States Constitution.

Whether it was necessary, as defendant argues, or not, we have reviewed the materials. We independently find them to be obscene.

Most of the cases cited by the defendant are pre-Miller cases. Both films are clearly embraced within the test

delineated in Miller v. California (1973), 413 U. S. 15, 92 S. Ct. 2607, 37 L. Ed. 2d 419. Our own view of the films satisfies us that both of them fall within the two examples given in Miller of material which may constitutionally be found to meet the patently offensive element of those standards.

The average person applying contemporary community standards would find each of them appeals to the prurient interest. Each of them depicts in a patently offensive way sexual conduct specifically covered by our state law as authoritatively construed. They each contain patently offensive representations of ultimate sexual acts, patently offensive representations of excretory functions, and a continuously lewd exhibition of genitals. Even a casual review of the films is sufficient to indicate they were not intended to promote and definitely lack any serious literary, artistic, political, or scientific value. We have no hesitancy in finding each of them to be utterly without redeeming social value, even if such a test were still necessary.

The two films involved herein are even more sexually explicit than those heretofore reviewed by the court and found to be within the prohibition of our statute. With a very, very limited amount of dialogue they are almost exclusively devoted to explicit displays of sexual conduct of every conceivable nature and description. We find both films, "The Cunning Stunt," and "Bang Bash," to be hard-core pornography and obscene under the tests enunciated in Miller v. California, *supra*.

Defendant's second assignment of error is the evidence in the record is insufficient as a matter of law to establish the element of scienter to the minimum constitutional standards enunciated in Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590.

Section 28-926.17, R. S. Supp., 1974, so far as material herein, reads as follows: "(1) Any person who *knowingly* * * * (b) publishes, circulates, sells * * * or distributes or exhibits any obscene material * * * shall,

upon conviction thereof, be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment." (Emphasis added.)

By the use of the word "knowingly" the Legislature has made scienter a necessary element in any prosecution under the Nebraska obscenity law. Section 28-926.11 (4), R. S. Supp., 1975, specifically defines the word "knowingly" to mean: "Knowingly shall mean having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or the character and content of any material, taken as a whole, described in this section, which is reasonably susceptible to examination by the defendant; * * *."

The word "knowingly" as used in the Nebraska statutes satisfies the constitutional requirement of scienter, required by Hamling v. United States, *supra,* and we have no question that it was present in this case.

Defendant, in support of this contention, quotes the following from Hamling v. United States, *supra:* " 'We think the "knowingly" language of 18 U.S.C. § 1461 and the instructions given by the District Court in this case satisfy the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributes, and he knew the character and nature of the materials.' "

We would add the next two sentences following the material quoted: "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U. S. C. § 1461 or by the Constitution."

Here, the defendant is a corporation so the knowledge must necessarily be that of its officers and employees.

In this case, the films were being publicly shown by the defendant, and knowledge of their contents or character by the defendant's employees was inescapable. It could hardly be said that a jury could not infer knowledge of their contents by the defendant as well as an attempt to exhibit obscene films. Further, the titles to a theater operator specializing in adult films would have been particularly suggestive. A view of the films discloses they contain very little if any plot or story. They are fully occupied with scene after scene of lesbian and heterosexual cunnilingus, fellatio, and intercourse, with close-up scenes of the genitals and excretory fluids. They, in all respects, establish the element of scienter to fully comply with the constitutional standards enunciated in Hamling v. United States, *supra*.

The specific issues currently before the court have been raised and answered by this court in three separate cases. Two of them involved movies shown at the Little Art Theater, State v. Little Art Corp. (1973), 189 Neb. 681, 204 N. W. 2d 574, and State v. Little Art Corp. (1974), 192 Neb. 734, 224 N. W. 2d 183. The third one involved this same defendant, State v. American Theater Corp. (1975), 194 Neb. 84, 230 N. W. 2d 209. What we said in each of those cases is equally pertinent here. Actually, the result in this case is governed by our opinion in State v. Little Art Corp. (1973), 189 Neb. 681, 204 N. W. 2d 574. The issues are identical and there is no material difference in the evidence. The films depict what is known as hard-core pornography, and the judgment should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOWNTOWN BOOKS, INC., A NEBRASKA CORPORATION, APPELLANT.

244 N. W. 2d 63

Filed July 7, 1976. No. 40515.

1. **Criminal Law: Appeal and Error: Rules of Court.** We consider only assignments of error discussed by appellant in the brief. Rule 8a(3), Revised Rules of the Supreme Court, 1974.
2. **Criminal Law: Obscenity.** The publications involved herein are clearly embraced within the test of obscenity delineated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Robert Eugene Smith, Gilbert H. Deitch, Michael Clutter, and Stern, Harris, Feldman, Becker & Thompson, for appellant.

Paul L. Douglas, Attorney General, Herbert M. Fitle, and Gary P. Bucchino, for appellee.

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

SPENCER, J.

Defendant-appellant appealed its conviction after a jury trial in the municipal court of Omaha on all counts of distributing obscene materials. Appeal on the record to the District Court resulted in an affirmance. Defendant now appeals to this court. We affirm.

This case involves 14 counts of distributing obscene materials. Thirteen different printed publications are involved. Copies of one publication were sold to two different police officers and each sale was prosecuted as a separate offense.

The publications were purchased from the defendant during the period from April 7 to April 10, 1975. The publications were wrapped in clear cellophane so that it was impossible to leaf through them. Their covers, however, were in open view to prospective purchasers.

Both covers on 12 of the publications depicted sexual acts as well as displaying the genitals of the persons involved. The two others, which were the items sold to the two different police officers, carried the description across the front, "World's No. 1 Erotic Magazine." The front and back covers carried the notation "Entirely Full Color." This publication is titled "Playmate."

The other twelve publications which are the subject matter of this case are titled: "Easy Pieces"; "Stud Service"; "End Over End"; "Hard On"; "Fucking Trio"; "Black Hard On"; "Hot and Hung"; "Fucking Orgies"; "The Sex Family"; "Fun Loving Nympho"; "Up and Coming"; and "Enrapt Pairs."

"Playmate" pictures acts of sexual intercourse, fellatio, and cunnilingus, with overtones of a ritualistic and masochistic nature.

"Easy Pieces" depicts various acts of sexual intercourse, fellatio, and cunnilingus. Its written material contains discussion of love, liberating the single men, and sexual foreplay.

"Stud Service" pictures acts of homosexual fellatio, masturbation, and sodomy. The writing is a narrative of various homosexual experiences.

"End Over End" depicts homosexual fellatio and sodomy, and contains a narrative of a student's homosexual experiences.

"Hard On" contains pictures of masturbation, sexual intercourse, fellatio, and cunnilingus. Its written material describes techniques for sexual arousal.

"Fucking Trio" depicts acts of sexual intercourse, fellatio, and cunnilingus, with three participants. The writing discusses three-way sexual acts.

"Black Hard On" contains pictures of sexual intercourse, fellatio, and cunnilingus. The written material discusses the sexuality of black males.

"Hot and Hung" depicts various acts of masturbation, sexual intercourse, fellatio, and cunnilingus. The text

purports to be a psychological case history of a man with an affinity for prostitutes.

"Fucking Orgies" pictures acts of sexual intercourse, fellatio, and cunnilingus. The written material is a narrative of a woman's sexual experience.

"The Sex Family" depicts heterosexual intercourse, fellatio, cunnilingus, and lesbian cunnilingus. The written material discusses incest. The pictures portray obviously posed situations displaying the genitals.

"Fun Loving Nympho" depicts acts of heterosexual masturbation, intercourse, fellatio, cunnilingus, and lesbian cunnilingus. The article details techniques a woman can use to increase her sensuality and gratification from sex.

"Up and Coming" contains pictures of homosexual masturbation, fellatio, and sodomy. The written material is a narrative of a homosexual encounter.

"Enrapt Pairs" pictures acts of intercourse, fellatio, and cunnilingus. Its written material discusses sex and the single girl, adultery, and marriage.

Defendant alleges five assignments of error, the fifth of which is divided into three parts. However, it only discusses two of them in its brief. Pursuant to our rules we deem the others to be waived. We consider only assignments of error discussed by appellant in the brief. Rule 8a(3), Revised Rules of the Supreme Court, 1974.

Defendant first argues the publications as a matter of applicable constitutional law are not obscene and constitute protected expression under the First and Fourteenth Amendments to the United States Constitution. We disagree with the defendant. We find they are obscene as a matter of applicable constitutional law, and do not constitute protected expression under the Constitution.

The publications involved herein are clearly embraced within the test of obscenity delineated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. They each contain patently offensive representa-

tions or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. Each of them displays patently offensive representation or description of masturbation, excretory functions, and lewd exhibition of genitals.

Even a casual review of each publication is sufficient to indicate that they were not intended to promote, and definitely lack, any serious literary, artistic, political, or scientific value. If any such exists in any degree in any of the publications, we are unable to find it. This at the very least is a minimum requirement to merit First Amendment protection.

We determine each of the publications to be utterly without redeeming social value, if such test is deemed necessary. We have no hesitancy in finding every one of them obscene publications as a matter of law.

Defendant's second assignment of error is that the evidence in the record is insufficient as a matter of law to establish the element of scienter to the minimum constitutional standard enunciated in Hamling v. United States (1974), 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590.

This same issue of scienter was raised in State v. American Theatre Corp. (No. 40513), *ante* p. 461, 244 N. W. 2d 56, which is a companion case to this one. Both cases were argued together, and what we said in that case is pertinent and controlling herein. We refer to that case for a discussion of this assignment.

Defendant's assignments of error are definitely without merit. The judgment is affirmed.

AFFIRMED.